SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

DATE: 8/13/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (8/12/2024) you must notify the:

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

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

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

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

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

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV416863	Angelica Carr vs Hui Liu	Hearing: Order of Examination to Hui Liu by Plaintiff Angelica Carr **APPEAR.** **Note:** $10,000 Bench Warrant was stayed. The Minute Order from 7/2/2024 said Plaintiff to give notice. The court does NOT see that notice in the court file. If there is no appearance by Plaintiff's counsel, it may be taken off calendar. If Plaintiff's counsel appears, the hearing may be continued so Plaintiff may give notice.

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LINE 2	2008-1-CV-118411	National Credit Acceptance, Inc. vs D. Norman	Hearing: Order of Examination of Darren Norman aka Darren J. Norman **APPEAR**. **Note:** The clerk will administer the oath for the examination at the hearing. If there is no appearance by counsel for the moving party, it may be ordered off calendar at the hearing. **Note:** Proof of personal service on Darren Norman aka Darren J. Norman filed 5/9/2024.
LINE 3	21CV383107	Giuliani Construction and Restoration, Inc. vs Rancho Homeowners Association	Hearing: Demurrer to the Cross-Complaint of Albert Yeong by Giuliani Construction and Restoration, Inc. [**reassigned from Dept. 16**] Ctrl Click (or scroll down) on Lines 3-5 for tentative ruling. The court will prepare the order.
LINE 4	21CV383107	Giuliani Construction and Restoration, Inc. vs Rancho Homeowners Association	Motion: Withdraw as attorney by Suzanne Alves for Cross-Defendant Atlas Painting Company, Inc. [RESET FROM 07 16 24 PER JUDGE ROSEN 07 15 24 MV **reassigned from dept 16**] Unopposed and GRANTED. Moving attorney to submit **updated** order (with current hearing date, time, dept. Judge William J. Monahan) for signature by court. 5a. The order is effective upon the filing of the proof of service of this signed order upon the client.
LINE 5	21CV383107	Giuliani Construction and Restoration, Inc. vs Rancho Homeowners Association	Hearing: Motion to Strike Albert Yeong Second Amended Cross Complaint by Giuliani Construction and Restoration, Inc. Ctrl Click (or scroll down) on Lines 3-5 for tentative ruling. The court will prepare the order.
LINE 6	23CV421270	Performance First Building Services, Inc. vs FPI Management, Inc. et al	Hearing: Demurrer to the First Amended Complaint of Plaintiff Performance First Building Services, Inc. by Defendant/Cross-Complainant FPI Management, Inc. **OFF CALENDAR**. Plaintiff dismissed defendant FPI Management, Inc. from this action on 8/8/2024.

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LINE 7	23CV421270	Performance First Building Services, Inc. vs FPI Management, Inc. et al	Hearing: Motion to Strike Plaintiff's First Amended Complaint by Defendant FPI Management, Inc. [**CONTINUED FROM 7/9/2024**] **OFF CALENDAR**. Plaintiff dismissed defendant FPI Management, Inc. from this action on 8/8/2024.
LINE 8	24CV438460	Salvador Mendoza et al vs Brenda Espinoza et al	Hearing: Demurrer to Complaint by Defendant South Cal Investment Corporation Ctrl Click (or scroll down) on Line 8 for tentative ruling. The court will prepare the order.
LINE 9	24CV438460	Salvador Mendoza et al vs Brenda Espinoza et al	Motion: Compel Plaintiffs to Appear for Deposition and Produce Documents and for Sanctions by Defendant South Cal Investment Corporation Ctrl Click (or scroll down) on Line 9 for tentative ruling. The court will prepare the order.
LINE 10	1997-1-CV-764650	J. Ascencion Calderon vs Bhula M. Patel	Motion: Enforce Settlement By Plaintiffs J. Cascencion Calderon and Mabiela R. Calderon [*c/f 10/26/21, 04/05/22 and 09/13/22 & 4.4.23* **CF 6.6.23 M.O* **c/f 2/6/24 minute order**] Ctrl Click (or scroll down) on Line 10 for tentative ruling. The court will prepare the order.
LINE 11			
LINE 12			

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Calendar Line 1

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Calendar Lines 3 and 5
Case Name: *Giuliani Construction and Restoration, Inc. v. Rancho Homeowners Association, et al.*
Case No.: 21CV383107

Before the court is (1) Giuliani Construction and Restoration, Inc.'s demurrer to Albert Yeong's second amended cross-complaint; and (2) Giuliani Construction and Restoration, Inc.'s motion to strike portions of Albert Yeong's second amended cross-complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

Complaint

Plaintiff Giuliani Construction and Restoration, Inc. ("GCR") is a licensed general contractor. (Complaint, ¶1.) Defendant Rancho Homeowners Association ("HOA") is a homeowners' association comprised of eight condominium units, designated A through H, within a single building located at 95 Rancho Drive in San Jose ("Property"). (Complaint, ¶3.) Defendant Albert Yeong ("Yeong") resides at Unit F of the Property and is a member of defendant HOA. (Complaint, ¶5.)

In or about 2018, the Property suffered damage caused by a water leak. (Complaint, ¶8.) The leak originated in one of the units at the Property but damaged a substantial portion of the building. (*Id.*) In or about March 2018, defendant HOA, by and through its Chief Executive Officer Sergio Gonzalez, contracted with plaintiff GCR to repair the water damage as it related to the structure of the building but not the interior of the individual condominium units ("Project"). (Complaint, ¶¶4 and 9.) Defendant HOA made payments to plaintiff GCR through September 2020, but ceased all further payments thereafter leaving the amount of $95,000 due and owing for work performed. (Complaint, ¶10.)

Some individual owners of units at the Property entered into separate contracts with plaintiff GCR for the interior. (Complaint, ¶11.) Defendant Yeong was one such owner who contracted with plaintiff GCR for work on the interior of his unit F. (Complaint, ¶12.) More than one year after completion of the Project, defendant Yeong made allegations against plaintiff GCR for defective work. (*Id.*) However, defendant Yeong has refused and presently refuses to allow plaintiff GCR to meaningfully assess the allegations in the manner and form requested by plaintiff GCR. (*Id.*) Defendant Yeong has made statements to defendant HOA to prevent defendant HOA from making payments to plaintiff GCR. (*Id.*)

On May 27, 2021, plaintiff GCR filed a complaint against defendants HOA and Yeong asserting causes of action for:

(1) Breach of Contract [against defendant HOA]
(2) Common Counts [against defendant HOA]
(3) Quantum Meruit [against defendant HOA]
(4) Prompt Payment Penalties [against defendant HOA]
(5) Intentional Interference with Contractual Relations [against defendant Yeong]
(6) Breach of Implied Covenant of Good Faith and Fair Dealing [against defendant Yeong]

(7) Declaratory Relief [against defendant Yeong]

On August 23, 2021, defendant Yeong filed an answer to plaintiff GCR's complaint and also filed a cross-complaint against GCR asserting causes of action for:

(1) Breach of Contract

(2) Negligence

(3) Violation of Business and Professions Code §17200 et seq.

On September 8, 2021, defendant HOA filed an answer to plaintiff GCR's complaint.

On September 24, 2021, plaintiff/ cross-defendant GCR filed an answer to defendant/ cross-complainant Yeong's cross-complaint.

Yeong's First Amended Cross-Complaint

On September 6, 2023, the court issued an order, pursuant to stipulation, allowing defendant/ cross-complainant Yeong leave to file a first amended cross-complaint ("FAXC") which defendant/ cross-complainant Yeong did on September 7, 2023. Yeong's FAXC alleges in or around January 2018, a fire caused damage to the Property, including Yeong's unit. (FAXC, ¶¶7 – 8.) On or around March 29, 2018, GCR entered into a contract with HOA whereby GCR agreed to furnish labor, materials, equipment, and machinery necessary to complete demolition and reconstruction work on the Property in exchange for payment ("HOA Contract"). (FAXC, ¶9.) On or around April 9, 2018, Yeong entered into a written home improvement agreement ("Yeong Contract") with GCR whereby GCR would perform certain upgrades or additional work to the interior of Yeong's unit, beyond that performed pursuant to GCR's contract with HOA. (FAXC, ¶10 and Exh. B.) Among the renovations, GCR agreed to installation of new flooring and baseboards; kitchen countertops; laundry area reconfiguration; and installation of ceiling fans and lights. (FAXC, ¶11.)

Despite being paid on time and in full, GCR failed to properly and timely perform repairs. (FAXC, ¶¶12 - 14.) In addition to inadequately performing on the Yeong Contract, GCR failed to adequately perform on its contract with HOA. (FAXC, ¶15.) Among other things, GCR failed to property install the water heater; failed to make the walls flush with the floor; failed to properly install electrical; and the HVAC is faulty. (*Id.*) As a result of GCR's failure to adequately and timely perform repairs, Yeong has been displaced from his home for over five years. (FAXC, ¶16.) GCR has refused to address the workmanship issues and unfinished/ delayed construction. (FAXC, ¶17.).

Based on these allegations, Yeong's FAXC asserted causes of action for:

(1) Breach of Yeong Contract

(2) Breach of HOA Contract

(3) Negligence

(4) Violation of Business and Professions Code §17200 et seq.

On October 11, 2023, GCR filed an answer to Yeong's FAXC and also filed its own cross-complaint against various subcontractors asserting causes of action for:

(1) Breach of Contract

(2) Express Indemnity

(3) Equitable Indemnity

(4) Comparative Indemnity/ Fault

(5) Contribution/ Apportionment

(6) Declaratory Relief

On November 1, 2023, plaintiff GCR filed a request for dismissal, with prejudice, of defendant HOA.

On November 7, 2023, plaintiff/ cross-defendant GCR filed a motion for summary adjudication of defendant/ cross-complainant Yeong's FAXC.

In a minute order dated February 8, 2024, the court (Hon. Manoukian) granted cross-defendant GCR's motion for summary adjudication of the second and fourth causes of action of cross-complainant Yeong's FAXC.

In a minute order dated April 30, 2024, the court (Hon. Manoukian) granted cross-complainant Yeong's motion for leave to file a second amended cross-complaint ("SAXC").

Yeong's Second Amended Cross-Complaint

On May 1, 2024, Yeong filed the now operative SAXC. The SAXC still alleges that in or around January 2018, a fire caused damage to the Property, including Yeong's unit. (SAXC, ¶8.) On or around March 29, 2018, GCR entered into a contract, represented by a written work authorization, with HOA. (SAXC, ¶9[1].) Under the HOA Contract, GCR agreed to furnish labor, materials, equipment, and machinery necessary to complete demolition and reconstruction work on the units in the Property, including Yeong's unit. (*Id.*) The repairs and renovations undertaken by GCR in Yeong's unit include, but are not limited to, the HVAC, water heater, utility closet, laundry room configuration and installation of doors and appliances, ceilings, floors, walls, fireplace, door frames, electrical, insulation, and plumbing. (*Id.*)

On or around April 9, 2019, Yeong entered into the Yeong Contract with GCR under which GCR would perform certain upgrades or additional work to the interior of Yeong's unit beyond that performed pursuant to the HOA Contract. (SAXC, ¶10[2].) Among the renovations GCR agreed to undertake pursuant to the Yeong Contract were the installation of new flooring and baseboards, kitchen countertops, laundry area reconfiguration which was to include proper installation of electrical outlets and dryer exhaust vent, and installation of ceiling fans and lights. (*Id.*)

Despite being paid on time and in full, GCR failed to properly and timely perform repairs. (SAXC, ¶12.) For example, the electrical outlet in the laundry area is not installed correctly causing a hazard. (SAXC, ¶13.) Similarly, the HVAC exhaust vent for the dryer in the laundry area is not installed correctly. (*Id.*) Furthermore, due to poor workmanship, the bi-

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[1] Although the SAXC asserts that a true and correct copy of the HOA Contract is attached as exhibit A, no such exhibit is found in the SAXC filed with the court on May 1, 2024. In opposition to the instant demurrer, cross-complainant Yeong concedes the SAXC was "inadvertently filed without the foregoing exhibits," but admits the HOA Contract is the same document attached to cross-complainant Yeong's original cross-complaint and FAXC. (See page 10, lines 12 – 15 of the Opposition to Giuliani Construction and Restoration, Inc.'s Demurrer to Albert Yeong's Second Amended Cross-Complaint.)

[2] Although the SAXC asserts that a true and correct copy of the Yeong Contract is attached as exhibit B, no such exhibit is found in the SAXC filed with the court on May 1, 2024. In opposition to the instant demurrer, cross-complainant Yeong concedes the SAXC was "inadvertently filed without the foregoing exhibits," but admits the Yeong Contract is the same document attached to cross-complainant Yeong's original cross-complaint and FAXC. (See page 10, lines 12 – 15 of the Opposition to Giuliani Construction and Restoration, Inc.'s Demurrer to Albert Yeong's Second Amended Cross-Complaint.)

fold doors that are supposed to close off the laundry area cannot be installed. (*Id.*) The flooring in various locations of the unit was not installed properly. (SAXC, ¶14.)

In addition to inadequately performing on the Yeong Contract, GCR failed to adequately perform on the HOA Contract. (SAXC, ¶15.) Among other things, GCR failed to properly install the water heater, failed to make the walls flush with the floor, failed to properly install electrical, and the HVAC system is faulty. (*Id.*)

As a result of GCR's failure to adequately and timely complete repairs, Yeong has been displaced from his home for over five years. (SAXC, ¶16.) Despite Yeong's repeated efforts to resolve the issue amicably and GCR's express and implied warranty for work performed on the unit, GCR has refused to address its poor workmanship and unfinished and delayed construction. (SAXC, ¶17.)

Yeong's SAXC now alleges causes of action for:

(1) Breach of Yeong Contract

(2) Negligence

(3) Breach of Express Warranty

(4) Breach of Implied Warranty

On June 4, 2024, cross-defendant GCR filed the first motion now before the court, a demurrer to the third and fourth causes of action of cross-complainant Yeong's SAXC.

On June 18, 2024, cross-defendant GCR filed the second motion now before the court, a motion to strike portions of cross-complainant Yeong's SAXC.

On July 9, 2024, prior to a hearing on cross-defendant GCR's pending demurrer to cross-complainant Yeong's SAXC, cross-complainant Yeong filed a peremptory challenge to Hon. Shella Deen prompting reassignment of this action to Hon. William Monahan and a continuance of the hearing on the two present motions to August 13, 2024.

II. Cross-defendant GCR's demurrer to the third and fourth causes of action [breach of express warranty and breach of implied warranty] of cross-complainant Yeong's SAXC is SUSTAINED.

A. Request for judicial notice.

In support of its demurrer, cross-defendant GCR requests the court take judicial notice of (1) the FAXC in this action; (2) the court's February 8, 2024 order on plaintiff/ cross-defendant GCR's motion for summary adjudication; and (3) the court's docket in this action. In its reply brief in support of its demurrer, cross-defendant GCR requests the court take judicial notice of (4) defendant/ cross-complainant Yeong's opposition to motion for summary adjudication filed January 26, 2024; (5) defendant/ cross-complainant Yeong's statement of additional material facts in support of opposition to motion for summary adjudication filed January 26, 2024; and (6) defendant/ cross-complainant Yeong's declaration in support of opposition to plaintiff's motion for summary adjudication filed January 26, 2024. Cross-defendant GCR's requests for judicial notice are GRANTED but only insofar as the court takes judicial notice of their existence, not necessarily the truth of any matters asserted therein. Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the

court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Woodell* (1998) 17 Cal.4th 448, 455.)

B. Breach of express warranty.

In his third cause of action, cross-complainant Yeong alleges, in relevant part, "[GCR] expressly warranted that the renovations had been constructed in a skillful and workmanlike manner in accordance with industry standards, so as to be reasonably fit for its intended purpose and be free from defects. YEONG reasonably relied on this warranty and [the express warranty] found in the written Letter of Completion and Warranty … executed on January 31, 2020, [which] expressly states that a "standard one year warranty is hereby commenced for all materials and labor." (SAXC, ¶¶35 – 36.) Cross-complainant Yeong's use of the word "renovations" here is in its generally understood meaning, not as a defined term. Cross-complainant Yeong goes on to define the term "Renovations" by alleging, "Among other things, the express warranty covers the HVAC, the water heater, utility closet, laundry room configuration and installation of doors and appliances, ceilings, floors, walls, fireplace, door frames, electrical, insulation, plumbing (collectively, 'Renovations.')" (SAXC, ¶36.) The defined term, "Renovations," refers to the same repairs and renovations undertaken by GCR in Yeong's unit pursuant to the HOA Contract. (See SAXC, ¶9.)

Cross-defendant GCR demurs initially on the ground that cross-complainant Yeong has not alleged the exact terms of the warranty. "In order to plead a cause of action for breach of express warranty, ***one must allege the exact terms of the warranty***, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 142; emphasis added.) Although cross-complainant Yeong purportedly attached copies of the HOA Contract and Yeong Contract to the SAXC, cross-defendant GCR contends an express warranty is found neither in the HOA Contract nor the Yeong Contract.

Since cross-complainant Yeong admits the missing documents are the same ones found attached to his FAXC, the court looks there pursuant to GCR's request for judicial notice of the FAXC. In reviewing the HOA Contract and Yeong Contract exhibits, the court was unable to locate within the HOA Contract or the Yeong Contract the express warranty that GCR allegedly made.

In opposition, cross-complainant Yeong implicitly concedes the express warranty is not found in either the HOA Contract or the Yeong Contract, but nevertheless exists. Cross-complainant Yeong suggests the express warranty was made independently of the HOA Contract and the Yeong Contract. Specifically, cross-complainant repeats the allegation from his SAXC that "[the express warranty is] found in the written Letter of Completion and Warranty … executed on January 31, 2020, [which] expressly states that a "standard one year warranty is hereby commenced for all materials and labor." (SAXC, ¶¶36.) However, the allegations discussed above suggest two separate express warranties. "YEONG reasonably relied on this warranty (alleged at paragraph 35) ***and*** that found in the written Letter of Completion and Warranty…." Now, in opposition to the demurrer, cross-complainant Yeong apparently argues only in support of the latter.

In the court's opinion, cross-complainant Yeong's allegation (divorced from paragraph 35) that the Letter of Completion and Warranty … executed on January 31, 2020, expressly states that a "standard one year warranty is hereby commenced for all materials and labor" is not a sufficient statement of the terms of said warranty. There is no explanation of the word "standard" as contrasted with what a non-standard warranty would encompass. This allegation merely identifies the temporal scope (one year) and that it encompasses "materials and labor," but does not otherwise provide the "exact terms" of the warranty. On this basis alone, cross-defendant GCR's demurrer to cross-complainant Yeong's third cause of action for breach of express warranty has merit.

Cross-defendant GCR contends further that the breach of express warranty fails due to lack of privity. "The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale." (*All West Electronics, Inc. v. M-B-W, Inc.* (1998) 64 Cal.App.4th 717, 725.) Cross-defendant GCR views cross-complainant Yeong's third cause of action as a deliberate attempt to circumvent this court's ruling on GCR's motion for summary adjudication wherein the court concluded cross-complainant could not assert a breach of the HOA Contract on a theory that he is an intended third party beneficiary of the HOA Contract.

It is apparent to GCR and this court that through this third cause of action, cross-complainant Yeong seeks to recover by way of a warranty what the court has already said he cannot recover through breach of contract. This is apparent because the third cause of action alleges the express warranty covers the Renovations, which as noted above, refers to the same repairs and renovations undertaken by GCR in Yeong's unit pursuant to the ***HOA Contract***.(See SAXC, ¶¶9, 36, and 37.)

Yeong argues in opposition that there is privity of contract here between him and GCR based upon his allegation that the "Letter of Completion and Warranty, executed on January 31, 2020" and Yeong's assertion in his opposition that it was "provided to him by [GCR]." Cross-complainant Yeong maintains the HOA Contract and the Letter of Completion and Warranty are separate and independent agreements and while there may not be privity between cross-complainant Yeong and GCR on the HOA Contract, there is such privity between them on the Letter of Completion and Warranty.

Even if the court accepts cross-complainant Yeong's assertion that the Letter of Completion and Warranty is an agreement separate and independent of the HOA Contract, it is the court's opinion, however, that the SAXC does not adequately allege privity of the Letter of Completion and Warranty between cross-complainant Yeong and cross-defendant GCR. Cross-complainant Yeong's assertion, in his opposition to this demurrer, that the Letter of Completion and Warranty was provided to him is not an inference the court will make from the SAXC alone, particularly in light of the court's ruling on summary adjudication that cross-complainant Yeong lacks standing to assert a breach of the HOA Contract and the court's finding above that cross-complainant Yeong has not alleged the exact terms of the warranty.

Accordingly, cross-defendant GCR's demurrer to the third cause of action of cross-complainant Yeong's SAXC 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 express warranty is SUSTAINED with 10 days' leave to amend.

C. Breach of implied warranty.

Unlike the third cause of action, cross-complainant Yeong cannot rely upon an allegedly separate and independent Letter of Completion and Warranty to support his claim for breach of an implied warranty. So cross-complainant Yeong asserts that an implied warranty arose from the ***Yeong Contract*** and so privity exists with regard to this fourth cause of action. However, just as with the third cause of action, the fourth cause of action alleges an implied warranty with regard to the defined term, "Renovations," which as explained earlier encompasses only the same repairs and renovations undertaken by GCR in Yeong's unit pursuant to the ***HOA Contract***. (See SAXC, ¶¶9 and 42 – 44.) Consequently, cross-complainant Yeong cannot rely upon an implied warranty arising from the Yeong Contract to support a breach related to work performed under the HOA Contract. The balance of cross-complainant Yeong's argument in opposition reads as though cross-complainant Yeong is relitigating the summary adjudication ruling regarding intended third party beneficiary principles.

Accordingly, cross-defendant GCR's demurrer to the fourth cause of action of cross-complainant Yeong's SAXC 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 implied warranty is SUSTAINED with 10 days' leave to amend.

III. Cross-defendant GCR's motion to strike portions of cross-complainant Yeong's SAXC is GRANTED.

A. Request for judicial notice.

In its reply brief in support of its motion to strike, cross-defendant GCR requests the court take judicial notice of (1) defendant/ cross-complainant Yeong's separate statement in opposition to GCR's motion for summary adjudication filed January 26, 2024; (2) the order on plaintiff/ cross-defendant GCR's motion for summary adjudication filed February 8, 2024; and (3) the order on defendant/ cross-complainant Yeong's motion for leave to amend first amended [cross-]complaint filed April 30, 2024. Cross-defendant GCR's request for judicial notice is GRANTED but only insofar as the court takes judicial notice of their existence, not necessarily the truth of any matters asserted therein. Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Woodell* (1998) 17 Cal.4th 448, 455.)

B. Motion to strike.

Cross-defendant GCR moves to strike that portion of paragraph 30 of cross-complainant Yeong's SAXC which alleges:

> GIULIANI CONSTRUCTION likewise owed YEONG, as a third-party beneficiary, a duty of care under the of the [sic] HOA Contract to perform the repairs it was contracted to perform and to meet industry standards in doing so.

Cross-defendant GCR contends this allegation is "irrelevant, false, or improper" in light of the court's ruling on summary adjudication which determined, as a matter of law, that defendant Yeong was not a third-party beneficiary of the HOA Contract. In reviewing the court's (Hon. Manoukian) ruling with regard to summary adjudication, Judge Manoukian apparently relied upon *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 821 (*Goonewardene*) where the court wrote:

> under California's third party beneficiary doctrine, a third party—that is, an individual or entity that is not a party to a contract—may bring a breach of contract action against a party to a contract only if the third party establishes not only (1) that it is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.

Judge Manoukian reached the conclusion that the third party beneficiary doctrine did not apply to allow cross-complainant Yeong to assert a breach of contract claim against cross-defendant GCR under the HOA Contract. Judge Manoukian did not make any determination with regard to whether cross-complainant Yeong could pursue a negligence cause of action as a third party beneficiary. This is essentially the argument that Yeong makes in opposition to the motion to strike

In reply, GCR cites *Sabetian v. Exxon Mobil Corp.* (2020) 57 Cal.App.5th 1054, 1079 (*Sabetian*) for the following:

> where a plaintiff is not entitled to maintain a breach of contract action based on the third party beneficiary doctrine, "it would clearly be anomalous to impose tort liability, with its increased potential damages [citation], upon [the defendant] based upon its alleged failure to perform its obligations under its contract with plaintiff's employer."

The more pertinent discussion from *Sabetian* is found earlier where the court explained:

> "A duty running from a defendant to a plaintiff may arise from contract, even though the plaintiff and the defendant are not in privity. [Citations.] Under these circumstances, the existence of a duty is not the general rule, but may be found based on public policy considerations." [Citation omitted.] …
>
> Under the *Biakanja* and *J'Aire* balancing tests, in determining whether a duty of care arises from a contract in favor of a noncontracting party, the Supreme Court considered "[(1)] 'the extent to which the transaction was intended to affect the plaintiff,' [(2)] 'the foreseeability of harm to [him],' [(3)] 'the degree of certainty that the plaintiff suffered injury,' [(4)] 'the closeness of the connection between the defendant's conduct and the injury suffered,' [(5)] 'the moral blame attached to the defendant's conduct,' and [(6)] 'the policy of preventing future harm.'"

(*Sabetian*, *supra*, 57 Cal.App.5th at pp. 1076-1077.)

The court views the subject allegation from Yeong's SAXC (and specifically Yeong's allegation that he is a third party beneficiary) as Yeong's attempt to plead a basis (extent to which the transaction was intended to affect Yeong) for the court to find the existence of a duty under the *Biakanja/ J'Aire* balancing test. In that regard, the allegation is not "irrelevant, false, or improper." The remainder of cross-defendant GCR's argument in reply appears to be an invitation to this court to make a determination of the existence of a duty and/or the overall validity of cross-complainant Yeong's second cause of action for negligence. The court declines to do so on a motion to strike.

Accordingly, cross-defendant GCR's motion to strike portions of Yeong's SAXC is DENIED.

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Case Name: *Salvador C. Mendoza, et al. v. Brenda Espinoza, et al.*
Case No.: 24-CV-438460

Demurrer to the Complaint by Defendant South Cal Investment Corporation

Factual and Procedural Background

This is an action for fraud and breach of contract by plaintiffs Salvador C. Mendoza and Teresa De Cuevas (collectively, "Plaintiffs") against defendants Brenda Espinoza ("Espinoza"), Kurt Miller ("Miller"), Zdenka Kolarik ("Kolarik") and South Cal Investment Corporation ("South Cal") (collectively, "Defendants").

According to the complaint, Plaintiffs, husband and wife, executed a promissory note on June 16, 2008 ("Note") with Espinoza in San Jose, California. (Complaint at ¶¶ 3, 14.) The Note provided Plaintiffs with a loan in the amount of $45,000, at a rate of 36 percent interest per annum, with no monthly installment dates, no other structured payment dates, no terms, and no final payment (e.g., a balloon) date, to be found anywhere on the Note. (Id. at ¶ 15.) The Note is secured by a deed of trust that was recorded with the Santa Clara County Recorder on June 18, 2008 ("Deed of Trust"). (Id. at ¶ 17.) The Deed of Trust is recorded against Plaintiffs' real property located at 1957 Cape Horn Dr., San Jose, CA 95133-1511 ("Property"). (Id. at ¶ 18.)

On February 14, 2014, Espinoza, as beneficiary of the Note, assigned her position to Miller (the "First Assignment"). (Complaint at ¶ 19.) The First Assignment was recorded with the Santa Clara County Recorder on July 14, 2014. (Ibid.)

On October 13, 2023, Miller, as beneficiary of the Note, assigned his position to defendant South Cal (the "Second Assignment"). (Complaint at ¶ 23.) The Second Assignment was recorded with the Santa Clara County Recorder on November 16, 2023. (Ibid.)

Plaintiffs allege defendant South Cal, a California corporation, was suspended on December 24, 2015 and later on February 3, 2020. (Complaint at ¶¶ 24-25.)

Ultimately, Plaintiffs received a Notice of Trustee's Sale from Kolarik stating the Property would be sold on May 17, 2024, based upon the power of right to sell within the Deed of Trust ("Notice of Trustee's Sale"). (Complaint at ¶ 26.) The Notice of Trustee's Sale states Plaintiffs are obligated, under the Note, for an unpaid sum of $2,248,155.02. (Id. at ¶ 27.) Plaintiffs allege Defendants have been acting in concert within a conspiracy to defraud them by using the Deed of Trust to transfer title to the Property from the Plaintiffs to Defendants. (Id. at ¶ 28.)

On May 7, 2024, Plaintiffs filed a verified complaint against Defendants alleging causes of action for:

(1) Fraudulent Conspiracy to Take Property's Title [against Defendants];
(2) False Promise [against Espinoza and Miller];
(3) Breach of Contract [against Espinoza and Miller];

(4) Breach of Good Faith and Fair Dealing [against Espinoza and Miller];
(5) Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction [against Defendants].

On July 15, 2024, defendant South Cal filed the motion presently before the court, a demurrer to the complaint.[3] Plaintiffs filed written opposition which includes a request for sanctions. South Cal filed reply papers and evidentiary objections.

A case management conference is set for October 29, 2024.

Demurrer to the Complaint

Defendant South Cal argues the first cause of action is subject to demurrer for failure to state a valid claim. (Code Civ. Proc., § 430.10, subd. (e).)

South Cal's Evidentiary Objections

In reply, the court notes defendant South Cal filed evidentiary objections to the declaration and attached exhibits submitted by Plaintiffs' counsel in opposition to the demurrer. But, there is no legal basis requiring a court to rule on an evidentiary objection made in connection with a motion other than one for summary judgment or an anti-SLAPP motion. This court believes there is none and therefore declines to make any such rulings here. In any event the evidentiary objections are MOOT as they did not affect the outcome of this motion.

Legal Standard

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

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

Suspended Corporation

[3] On the same day, South Cal filed its answer admitting and denying allegations of the complaint and alleging affirmative defenses. (See Code Civ. Proc., § 430.30, subd. (c) ["A party objecting to a complaint or cross-complaint may demur and answer at the same time."].)

As a preliminary matter, the parties dispute whether Plaintiffs have named the proper defendant in this case. Plaintiffs allege the proper defendant is a party identified as "So Cal Investment Corporation," a suspended California corporation. By contrast, defendant South Cal contends that is not the correct party as South Cal is a Delaware corporation in good standing.

"[A] suspended corporation may not prosecute or defend an action in a California court." (*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1365.) "The primary purpose of statutes depriving suspended corporations of privileges enjoyed by a going concern, including the capacity to sue or defend litigation, is to motivate delinquent corporations to pay back taxes or file missing statements. [Citations.] The suspension statutes are not intended to be punitive. Once the statutory goals underlying suspension are met, no purpose is served by imposing additional penalties. [Citations.]" (*Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 512.)

A suspended corporation however can regain its corporate powers by filing all required tax returns, paying the necessary taxes, penalties or fees due, and applying to the Franchise Tax Board for a certificate of revivor. (*Tabarrejo v. Super. Ct.* (2014) 232 Cal.App.4th 849, 862.) Such reinstatement or revivor generally is without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture. (*Ibid*.) "Thus, the revival of corporate powers retroactively validates any procedural steps taken on behalf of the corporation in the prosecution or defense of a lawsuit while the corporation was under suspension." (*Ibid*.; see *Benton v. County of Napa* (1991) 226 Cal.App.3d 1485, 1491 ["The corporate defense of an action undertaken during suspension may be validated by later revival of corporate powers."].)

In opposition, Plaintiffs argue South Cal is a suspended California corporation that is evading back taxes in California by registering as a Delaware corporation. (See OPP at p. 3:11-14.) But, in reply, defendant South Cal submits Plaintiffs' discovery responses to requests for admissions where Plaintiffs admit that South Cal is a Delaware corporation. (See Weiss Decl. at ¶ 3, Exs. 1-2.) While courts generally do not consider declarations in connection with a demurrer, the court, on its own motion, takes judicial notice of these discovery responses which are inconsistent with allegations of the challenged pleading.[4] (See *Bounds v. Super. Ct.* (2014) 229 Cal.App.4th 468, 477 [court may take judicial notice of pleading party's discovery responses to the extent they contain statements which are inconsistent with allegations of the pleading before the court].) Furthermore, by responding to discovery submitted by South Cal, Plaintiffs appear to be waiving any objection based on South Cal's corporate status as South Cal is engaged in defending against the lawsuit.

Consequently, the court finds that South Cal, a Delaware corporation, is the proper party to this action and thus will consider the merits of the demurrer.

First Cause of Action: Fraudulent Conspiracy

[4] The same declaration is also before the court in the reply submitted by defendant South Cal in support of its motion to compel Plaintiffs' depositions which is also being heard with the demurrer.

The first cause of action is a claim for fraudulent conspiracy to take title to the Property. The court is not aware of any specific cause of action under California law for "fraudulent conspiracy." Nevertheless, any such claim must necessarily include elements of common law fraud and conspiracy.

"The elements of fraud are (1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance on the misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damages. [Citation.] Fraud allegations ' "involve a serious attack on character" ' and therefore are pleaded with specificity. [Citation.] General and conclusory allegations are insufficient. [Citation.] The particularity requirement demands that a plaintiff plead facts which ' " 'show how, when, where, to whom, and by what means the representations were tendered.' " ' [Citation.] Further, when a plaintiff asserts fraud against a corporation, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' [Citation.]" (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469.)

"Civil conspiracy is not an independent tort. Instead, it is 'a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.' [Citation.] The elements of a civil conspiracy are (1) the formation of a group of two or more persons who agreed to a common plan or design to commit a tortious act; (2) a wrongful act committed pursuant to the agreement; and (3) resulting damages. [Citation.]" (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 211-212.)

Here, defendant South Cal persuasively argues that the fraudulent conspiracy claim has not been adequately pled as there are no facts establishing actual or justifiable reliance. Nor has fraud been alleged with specificity as there are no specific allegations of misconduct on the part of South Cal. The demurrer is therefore sustainable on this ground but, as this is the first challenge to the pleadings, Plaintiffs will be afforded an opportunity for leave to amend. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747) [if the plaintiff has not had an opportunity to amend the pleading in response to a motion challenging the sufficiency of the allegations, leave to amend is liberally allowed as a matter of fairness, unless the pleading shows on its face that it is incapable of amendment].)

Accordingly, the demurrer to the first cause of action is SUSTAINED WITH 15 DAYS LEAVE TO AMEND for failure to state a claim.

Request for Sanctions

In opposition, Plaintiffs request sanctions in the amount of $2,500 against attorney Andrew Weiss, counsel for South Cal. (See OPP at p. 5:4-14; Law Decl. at ¶ 11.)

Plaintiffs seek sanctions in part under Code of Civil Procedure section 128.5 which provides: "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics,

made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (a).) But, such a request is procedurally improper as sanctions under section 128.5 must be accomplished by a noticed motion for consideration by the court. (See Code Civ. Proc., § 128.5, subd. (f)(1)(A) ["A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay."].) Nor do sanctions appear to be appropriate as Plaintiffs did not prevail in opposing the demurrer for reasons explained above.

In the alternative, Plaintiffs request sanctions under Code of Civil Procedure section 2023.030 which states in relevant part:

> "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both. If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., § 2023.030, subd. (a).)

The request for sanctions under this section also lacks merit as this is not a civil discovery motion but rather a challenge to the pleadings by general demurrer. And, again Plaintiffs did not prevail in opposing the demurrer as previously discussed above.

Therefore, the request for sanctions is DENIED.

Disposition

The demurrer to the first cause of action in the complaint is SUSTAINED WITH 15 DAYS LEAVE TO AMEND for failure to state a claim.

The request for sanctions is DENIED.

The court will prepare the Order.

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Calendar line 9

Case Name: *Salvador Mendoza et al vs Brenda Espinoza et al*

Case No.: 24CV438460

Motion: Compel Plaintiffs to Appear for Deposition and Produce Documents and for Sanctions by Defendant South Cal Investment Corporation

Defendant South Cal Investment Corporation, a Delaware Corporation ("Defendant")'s motion to compel plaintiffs Salvador Cuevas Mendoza ("Mendoza") and Teresa De Cuevas ("Cuevas") (collectively "Plaintiffs") to appear for their deposition and to produce documents is GRANTED. **Within 15 days of this order**, Plaintiffs shall appear for deposition by Defendants and produce all responsive documents in their possession, custody or control for Category Nos. 1 to 13 in Defendant's Amended Notices of Deposition.

Defendant's request for monetary sanctions against Plaintiffs is GRANTED. Plaintiffs shall pay Defendant monetary sanctions in the reasonable amount of $2,085.01 within 15 days of this order.

Plaintiff's request for monetary sanctions is DENIED.

Background

Defendant noticed Plaintiffs depositions for May 20, 2024. (Motion Exhibits 1 and 2.) Plaintiffs refused to appear for deposition before July 11, 2024. Defendant re-noticed Plaintiffs' depositions for July 11, 2024. (Motion Exhibits 5 and 6.) Plaintiffs again cancelled their depositions and refused to provide new deposition dates. (Motion Exhibit 7.)

Plaintiffs failed to serve any timely objection to their Amended Deposition Notices under CCP section 2024.410(a) which states:

> Any party served with a deposition notice … waives any error or irregularity unless that party promptly serves a written objection specifying that error or irregularity at least three calendar days prior to the date for which the deposition is scheduled, on the party seeking to take the deposition and any other attorney or party on whom the deposition notice was served.

Defendant filed its Motion to Compel Plaintiffs to Appear for Deposition and Produce Documents and for Sanctions. Plaintiffs retained new attorneys and now argue they do not have to appear for deposition because two different corporations, with similar names to South Cal Investment Corporation are suspended California corporations.

Plaintiffs also argue the even if they have to appear for deposition, they should not have to produce documents because Defendant's good cause argument at pages 7 through page 8 of Defendant's Motion to Compel is somehow inadequate.

Plaintiffs also argue they should not have to pay sanctions because they received inadequate notice, but their papers did not dispute the amount of the sanctions requested.

Finally, Plaintiffs seek monetary sanctions under CCP section 128.5 against Defendant's counsel Andrew Weiss in the amount of $2,500.

Defendant's Evidentiary Objections

In reply, the court notes defendant filed evidentiary objections to the declaration and attached exhibits submitted by Plaintiffs' counsel in opposition to the motion to compel. But, there is no legal basis requiring a court to rule on an evidentiary objection made in connection with a motion other than one for summary judgment or an anti-SLAPP motion. This court believes there is none and therefore declines to make any such rulings here. In any event the evidentiary objections were MOOT because they did not affect the outcome of this motion.

Defendant is not a suspended corporation

Plaintiffs claim that Defendant is a suspended California corporation that has failed to pay its back taxes. A corporation that has had its powers suspended lacks the legal capacity to defend a civil action during its suspension. (*Granny Purps, Inc. v. County of Santa Cruz* (2020) 53 Cal.App.5th 1, 10.) A suspended corporation may not prosecute or defend an action in court. (*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1957) 155 Cal.App.2d 46, 50.) Therefore, Plaintiffs assert that Defendant should be precluded from defending this lawsuit or bringing this motion. (See Opp., pp. 2-3 citing these and other cases.)

A defense based upon a suspension of corporate powers is a plea in abatement, which is "'strictly construed.'" (*Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1604 (citation omitted).) A plea in abatement must be raised at the earliest opportunity or it is waived. (Id.) Defendant appeared in the action on May 14, 2024, by filing its opposition to Plaintiffs ex parte application for a temporary restraining order. Yet Plaintiffs waited until July 30, 2024, by filing motions to quash to raise its lack of capacity defense. Plaintiffs now seek a ruling on its plea in abatement defense in their Opposition to Defendant's Demurrer and in their Opposition to this Motion to Compel, depriving Defendant of adequate notice and opportunity to oppose the claim. A reply must be filed only four court days after an opposition. (C.C.P. § 1005(b).) Further, new evidence is generally not permitted in a reply, further confirming Plaintiffs may not request relief in their Opposition. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537.)

Here the court exercises its discretion to consider the evidence presented by Defendant in its Reply on this issue. Plaintiffs admit South Cal Investment Corporation was incorporated in the State of Delaware on February 25, 2020. (Opp p. 2 and Ex. I thereto.) In response to Defendant's Request for Admission ("RFA"), set one, No. 36, Plaintiffs admitted South Cal Investment Corporation is a Delaware Corporation. (Reply Exs. 1 and 2.) Defendant is a corporation in good standing. (Reply, Ex. 3.)

Plaintiffs have *not* submitted any evidence that Defendant is *not* in good standing. Instead, Plaintiffs argue that Defendant lacks capacity to defend itself because two California corporations with similar, but *not* identical names were previously formed and suspended. (Opp., pp.3-4.)

The suspended California corporations are both named South Cal **Investments** Corporation, not South Cal **Investment** Corporation. (Dec. of Alan Law Exs. A through I.)

Plaintiffs fail to cite any statute, case, or treatise holding, or even suggesting, a foreign corporation lacks the capacity to defend itself because a California corporation with a similar name is suspended. Plaintiffs rely solely *on Casiopea Bovet, LLC v. Chiang* (2017) 12 Cal.App.5th 656. (Opp. pp. 3-4.) Plaintiffs' reliance is misplaced as that case is legally and factually distinguishable. (See Reply pp. 3-4.)

Here, the California corporations named South Cal **Investments** Corporation were never the owners of the Note or Deed of Trust that form the subject matter of Plaintiffs' Complaint. In their Complaint, Plaintiffs allege the Note and Deed of Trust were originally held by Brenda Espinoza. (Complaint ¶¶ 14 and 17 and exhibits A and B thereto.) Plaintiffs further allege the Note and Deed of Trust were assigned to Kurt Miller on February 14, 2014, who assigned the Note and Deed of Trust to South Cal **Investment** Corporation on October 13, **2023.** (Complaint ¶¶ 19 and 23 and exhibits D and F thereto.)

Plaintiffs claim the California corporations named South Cal **Investments** Corporation were suspended on December 24, 2015, and February 3, 2020. (Declaration of Alan Law ¶¶ and exhibits D and F thereto.) The assignment to South Cal **Investment** Corporation occurred eight years and three years, respectively, after the California corporations were suspended. (Complaint ¶ 23 and exhibit F thereto and Declaration of Alan Law ¶¶ 5 and 7 and Exs. D and F thereto.)

Defendant is the owner of the Note and Deed of Trust as a result of the assignment from Miller in 2023, not as an assignee of any suspended California corporation. (Complaint ¶ 23 and exhibit F thereto.) As the California corporations named South Cal **Investments** Corporation never owned the Note or Deed of Trust, their suspensions are irrelevant.

Plaintiffs also ignore the procedural requirements for suspending a foreign corporation. Before any powers, rights or privileges can be forfeited, the corporation must be given notice:

> "Forfeiture or suspension of a taxpayer's powers, rights, and privileges pursuant to Section 23301, 23301.5, or 23775 shall occur and become effective only as expressly provided in this section in conjunction with Section 21020, which requires notice prior to the suspension of a taxpayer's powers, rights, and privileges." (Rev. & Tax. Code §23302.)

Plaintiffs have not established any notice was given by the Franchise Tax Board to Defendant of any pending or proposed suspension. Plaintiffs have not even established Section 23301 applies to Defendant as Plaintiffs have not established Defendant is required to be registered in California. A foreign corporation is only required to be registered in California if it enters "into repeated and successive transactions of its business in this state, other than interstate or foreign commerce." (Corp. Code §§191 and 2100.) Further, "transacting intrastate business" does not include "(7) Creating evidences of debt or mortgages, liens or security interests on real or personal property." (Corp. Code §191.) Plaintiffs have not established Defendant has engaged in repeated transactions in California of any kind, and the Note and Deed of Trust forming the basis of Plaintiffs' Complaint are exempt from the requirements of Section 2100 of the Corporations Code as they are evidence of a debt and a mortgage.

Plaintiffs waived any objection to the notices of deposition

A party objecting to a notice of deposition must promptly serve "a written objection specifying that error or irregularity at least three calendar days prior to the date for which the deposition is scheduled." (C.C.P. §2025.410(a).) In addition to the written objection, a party may file a motion to stay the deposition. (C.C.P. §2025.410(c).) Plaintiffs failed to serve a timely objection, or any objection to Defendant's notices of deposition, thereby waiving any objections. CCP section 2024.410(a) states:

> Any party served with a deposition notice … waives any error or irregularity unless that party promptly serves a written objection specifying that error or irregularity at least three calendar days prior to the date for which the deposition is scheduled, on the party seeking to take the deposition and any other attorney or party on whom the deposition notice was served.

Instead, Plaintiffs simply claimed they or their counsel were not available to appear and refused to provide any date available for their depositions. (Motion Exhibits 3, 4 and 7.)

In their Opposition, Plaintiffs do not dispute the relevance or discoverability of any of the documents requested in Defendant's Amended Notices of Deposition. (Opp.) Instead, Plaintiffs argue Defendant fails to state facts showing good cause for production of the documents requested. (Opp. p. 4.) However, Defendant has shown good cause for the production of documents pursuant to CCP section 2025.450(b) at pages 6 to 9 of their motion based on the allegations in Plaintiffs' complaint. "[E]ven when no such supporting affidavits are filed) good cause may be found in the pleadings theretofore filed in the action." (*Greyhound Corp. v. Superior Court of Merced County* (1961) 56 Cal.2d 355, 389.)

Monetary Sanctions

CCP section 2025.450(g)(1) states:

> If a motion under subdivision (a) is granted, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of the party who noticed the deposition and against the deponent …, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

Here, Plaintiffs delayed their depositions for six weeks and then unilaterally cancelled their depositions, refusing to provide alternative dates. (Motion, Exs. 1-7; Decl. of Weiss ¶¶ 3 and 7.)

Failing to submit to an authorized method of discovery, such as a deposition, is a misuse of the discovery process. (CCP § 2023.010(d),) Failing to meet and confer in good faith to resolve a discovery dispute is also a misuse of the discovery process. (CCP § 2023(i).) Plaintiffs' refusal to appear for deposition and refusal to produce documents are abuses of the discovery process that warrant sanctions.

In their Opposition, Plaintiffs fail to offer any excuse for refusing to appear for deposition. (Opp.) At the time Defendant noticed and attempted to take Plaintiffs' depositions, and attempted to informally resolve this discovery dispute, Defendants repeatedly rejected all

proposed deposition dates claiming their attorney was unavailable, Plaintiffs were ill or Plaintiffs were unavailable. (Motion Exhibits 3, 4 and 7.) In their Opposition, Plaintiffs abandon all those excuses. Instead, Plaintiffs attempt to convince the Court that Defendant, a Delaware corporation, somehow lacks the capacity to defend itself based on the suspension of two California corporations. (Opp. p. 3 ln. 11 – p. 4 ln. 10.) That newly minted argument was never asserted by Plaintiffs as the reason they could not be deposed. (Motion Exhibits 3, 4 and 7.)

CCP section 2023.040 states:

> A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought.

Plaintiffs' objection that Defendant failed to comply with CCP section 2023.040 is OVERRULLED. Defendant clearly notified Plaintiffs that it requested monetary sanctions in the amount of $2,610.01 against Plaintiffs. (Motion pp. 3, 9-10.) Defendant combined its notice, points and authorities and support declaration and exhibits into a single document, as permitted by Rule 3.1112(c) of the California Rules of Court. Plaintiffs' opposition did not dispute the reasonableness of the hourly rate or hours expended by Defendant's counsel in prosecuting the motion to compel or the total amount of sanctions requested.

Here the court finds that the reasonable amount is 5.6 hours at $350 per hour equals $1,960 plus $60 in filing fees and $65.01 in efiling fees for a total of $2,085.01. This includes the 3.6 hours spend drafting the motion and the 2 hours reviewing the opposition and preparing the reply. A Reply was necessary based on the new issues raised in the Opposition

Plaintiff's request for monetary sanctions under CCP section 128.5 is DENIED. Plaintiffs have *not* shown that any actions or tactics were made in bad faith, that are frivolous or solely intended to cause unnecessary delay. (CCP §128.5(a).) Furthermore, sanctions may only be awarded pursuant to CCP section 128.5 only pursuant to a separate motion for sanctions. (CCP §128.5(f).) In *Palm Valley Homeowners Ass'n, Inc. v. Design MTC* sanctions were awarded only after the Court of Appeal issued a writ requiring the trial court to afford counsel "both notice an opportunity to appear and defend itself . . ." (*Palm Valley Homeowners Ass'n, Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 557.) Plaintiffs are not the prevailing party in any event.

The court will prepare the order.

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Calendar line 10
Case Name: J. Ascencion Calderon, et al. vs Bhula M. Patel, et al.
Case No.: 1997-1-CV-764650

Motion of Plaintiffs J. Ascencion Calderon and Mabiela R. Calderon ("Plaintififs) to enforce settlement/status conference.

Plaintiffs purchased certain property from defendants which is located at 1620 Story Rd., in San Jose, California. Due to massive petroleum contamination of the property defendants were required to commence the remediation of the property by order of this court.

This court continues to retain jurisdiction to enforce the settlement agreement by court order.

The matter is here for motion to enforce settlement/status conference for the parties to report on the progress of the remediation ordered by the court.

The court has reviewed the parties' joint status conference statement, and the declaration of Edward A. Kraus (Plaintiffs' counsel) filed 8/2/2024. The parties are hoping to have a meeting with DEH in August of 2024 which will inform the next steps.

Accordingly, **the court GRANTS the parties' request to continue this motion/status conference until October 31, 2024, at 9am in Dept. 3** to allow the parties the opportunity to evaluate whether defendants are complying with their obligations to remediate the property as required by the Court's order and the Order attendant to this motion to enforce.

The court instructs the parties to meet and confer and submit up to 5-page brief at least 10 calendar days prior to the next hearing detailing the progress made at meet and confer.

The court will prepare the order.

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