SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: April 25, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV412045	Juan Castro v. Rushmore Loan Management Services	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 2	23CV412045	Juan Castro v. Rushmore Loan Management Services	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 3	23CV427496	Bank of America, N.A. v. Christina M. Hernandez	Motion for judgment on the pleadings: notice is proper, and the motion is unopposed. Upon a review of the motion and the parties' pleadings, the court finds that the complaint states facts sufficient to set forth a cause of action, and the answer does not state facts sufficient to constitute a defense. The answer does not deny that defendant owes the alleged debt; instead, it focuses on defendant's financial circumstances. As a result, the motion is GRANTED. Moving party to prepare proposed order.
LINE 4	23CV421448	Wells Fargo Bank, N.A. vs Hector Lerma	Click on LINE 4 or scroll down for ruling.
LINE 5	23CV417313	Aditya Amar v. Shusen Li et al.	Click on LINE 5 or scroll down for ruling in lines 5-12.
LINE 6	23CV417313	Aditya Amar v. Shusen Li et al.	Click on LINE 5 or scroll down for ruling in lines 5-12.
LINE 7	23CV417313	Aditya Amar v. Shusen Li et al.	Click on LINE 5 or scroll down for ruling in lines 5-12.
LINE 8	23CV417313	Aditya Amar v. Shusen Li et al.	Click on LINE 5 or scroll down for ruling in lines 5-12.
LINE 9	23CV417313	Aditya Amar v. Shusen Li et al.	Click on LINE 5 or scroll down for ruling in lines 5-12.
LINE 10	23CV417313	Aditya Amar v. Shusen Li et al.	Click on LINE 5 or scroll down for ruling in lines 5-12.
LINE 11	23CV417313	Aditya Amar v. Shusen Li et al.	Click on LINE 5 or scroll down for ruling in lines 5-12.
LINE 12	23CV417313	Aditya Amar v. Shusen Li et al.	Click on LINE 5 or scroll down for ruling in lines 5-12.
LINE 13	20CV373696	Jerry Ivy, Jr. v. Jerry Ivy, Sr. et al.	Click on LINE 13 or scroll down for ruling.

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LINE #	CASE #	CASE TITLE	RULING
LINE 14	23CV411435	Ke Fang v. Ritula Malhotra	OFF CALENDAR
LINE 15	23CV411435	Ke Fang v. Ritula Malhotra	OFF CALENDAR
LINE 16	23CV412826	Stella Murphy v. Cynthia Kamp	OFF CALENDAR

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Calendar Lines 1-2
Case Name: *Juan Castro v. Rushmore Loan Management Services*
Case No.: 23CV412045

Defendant Rushmore Servicing ("Rushmore"), which has erroneously been sued as "Rushmore Loan Management Services," demurs to the complaint filed by plaintiff Juan Castro. In addition, Rushmore moves to strike the prayer for punitive damages in the complaint. Notice is proper, but the court has not received any opposition to either the demurrer or motion to strike from Castro. Having now reviewed the moving papers and the complaint, the court rules as follows:

1. Fraud Causes of Action

Although it is not entirely clear, it appears that the core allegations of Castro's complaint are fraud allegations, as set forth in the fifth cause of action ("violation of Civil Code § 1572"), sixth cause of action ("fraud"), and eighth cause of action ("intentional misrepresentation"). Castro contends that he defaulted on a home loan that was procured by fraud.

Allegations of fraud "must be pleaded with specificity rather than with '"general and conclusory allegations."'" (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*) [quoting *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184].) "The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made." (*West, supra,* 214 Cal.App.4th at p. 793 [citing *Lazar, supra,* 12 Cal.4th at p. 645].)

Castro's complaint lacks these details, particularly the "how, when, where, to whom, and by what means" of the allegedly fraudulent misrepresentations. The complaint does not plead dates with specificity, does not identify any individuals with specificity (other than vaguely referring repeatedly to "employees and/or agents of RUSHMORE LOAN MANAGEMENT SERVICES"), does not indicate how information was conveyed (or withheld), and does not include any specific locations.

As a consequence, the court SUSTAINS the demurrer to the fifth, sixth, and eighth causes of action with 20 days' leave to amend under Code of Civil Procedure section 430.10, subdivision (e).

2. Statutory Causes of Action Under the Civil Code

Castro's first cause of action alleges a violation of Civil Code section 2923.6, which prohibits a foreclosing entity from recording a notice of default or notice of trustee's sale or conducting a sale while a complete loan modification application is pending. This is apparently called "dual tracking." (Demurrer, p. 3:16-17.) Having read and re-read the complaint, the court agrees with Rushmore that the complaint is so "vague and rambling" that it is hard to ascertain the manner in which Castro alleges any violation of this statute. Rushmore correctly notes that there are "no allegations that a notice of default was recorded while a loan modification application was pending." (*Id.* at p. 3:18-19.)

Although demurrers for uncertainty are disfavored and rarely granted, the court finds that the allegations in the first cause of action here are so confusing, rambling, and filled with

minutiae of questionable relevance that the demurrer should be sustained under subdivision (f) of Code of Civil Procedure section 430.10. In any event, the first cause of action fails to allege sufficient facts to constitute a valid claim.

The court SUSTAINS the demurrer to the first cause of action with 20 days' leave to amend under Code of Civil Procedure section 430.10, subdivisions (e) and (f). In amending this cause of action, Castro must allege facts showing that he submitted a complete loan modification application (and specifying when he did so); and must allege facts showing that there was dual-tracking at the time any default or sale was recorded. (In addition, Castro must allege that the purported violations of Civil Code section 2923.6 were material in that they caused him harm.)

In addition to the first cause of action, the face page of the complaint lists a tenth cause of action for violations of Civil Code sections 2923.5 and 2924, but the body of the complaint fails to include any such cause of action. Although Rushmore's notice of demurrer includes this tenth cause of action, the court finds that there is nothing to demur to.

3. Breach of the Covenant of Good Faith and Fair Dealing

Castro's third cause of action is for a breach of the covenant of good faith and fair dealing, but the court has difficulty understanding the basis for this cause, as the complaint does not identify the contractual basis for the covenant. "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot 'be endowed with an existence independent of its contractual underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350.) Castro's complaint does not describe how he was "unfairly frustrat[ed]" by Rushmore, as it does not adequately identify the contract(s) at issue. It refers to a deed of trust and to an adjustable rate note, but does not explain how the covenant applies with respect to these documents.

The court SUSTAINS the demurrer to the third cause of action with 20 days' leave to amend under Code of Civil Procedure section 430.10, subdivision (e).

4. Unfair Competition

Castro's second cause of action under Business & Professions Code section 17200 appears to be derivative of the foregoing causes of action, and it does not specify any acts or practices that constitute unfair competition. Indeed, there appears to be some critical text missing between paragraphs 64 and 65 of the complaint, where the court would expect to find the relevant allegations. The court SUSTAINS the demurrer to the second cause of action with 20 days' leave to amend under Code of Civil Procedure section 430.10, subdivision (e)

5. Cause of Action "To Set Aside Foreclosure"

Castro's ninth cause of action is to "set aside a defective and wrongful foreclosure," but the court does not understand how this states a cause of action. The court is unfamiliar with any cause of action to "set aside" a foreclosure, and the "grab bag" of allegations in the text of this cause of action (addressing, for example, an alleged failure to record an assignment under

Civil Code section 2932.5, or an allegedly invalid notice of default) do not assist the court in finding a basis for the remedy that Castro seeks. The court SUSTAINS the demurrer to the ninth cause of action with 20 days' leave to amend under Code of Civil Procedure section 430.10, subdivision (e).

6. Declaratory Relief and Injunctive Relief

Finally, the court concludes that these causes of action (the fourth and the seventh) are entirely derivative of the other causes of action, which the court has determined to be insufficient. Accordingly, the court SUSTAINS the demurrer to these causes of action with 20 days' leave to amend.[1]

7. Motion to Strike

Because the court is sustaining the demurrer as to all of the causes of action—and in particular to the fraud causes of action, which appear to be the only causes of action that would potentially sustain a punitive damages claim—the court denies the motion to strike the punitive damages request in the prayer for relief as MOOT.

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[1] Rushmore has requested that the court take judicial notice of various deeds and other property documents recorded in the County Recorder's office, as well as PACER printouts from the Bankruptcy Court. Because consideration of these documents is unnecessary to the resolution of this demurrer and motion to strike, which are focused on the face of the pleading, the court denies the request.

Calendar Line 4
Case Name: *Wells Fargo Bank, N.A. vs Hector Lerma*
Case No.: 23CV421448

I. BACKGROUND

This is a limited civil collection action brought by plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") against defendant Hector Lerma ("Lerma"). Wells Fargo seeks to recover unpaid credit card debt from Lerma.

The original and still-operative complaint is a form complaint filed by Wells Fargo on August 22, 2023. It states six causes of action: (1) breach of written contract; (2) breach of implied-in-fact contract (based on Lerma's use of a credit card); (3) common count—money lent; (4) common count—money paid on request; (5) common count—open book account; and (6) common count—account stated.

Attached to the complaint as Exhibit A is a copy of the Visa credit card agreement upon which the first cause of action is based. (See Complaint, ¶ BC-1.) While the credit card agreement is not signed by either party, paragraph 1 states, in part: "This Agreement is a contract between Wells Fargo Bank, N.A. and each Account holder. You and any joint Account holder accept the terms of this Agreement by using or confirming your account." Paragraph 7 states: "When you use your Account or let someone else use it, you promise to pay the total amount of the Purchases, Cash Advances, and Balance Transfers, plus all interest, fees and other amounts that you may owe us."

Lerma filed an answer to the complaint on October 5, 2023. Currently before the court is Wells Fargo's motion for summary judgment, filed on December 26, 2023. Lerma filed an opposition on April 9, 2024.

II. MOTION FOR SUMMARY JUDGMENT

A. General Standards

The pleadings limit the issues presented for summary judgment, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 (*Laabs*); *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

The moving party bears the initial burden of production—to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of an opponent's claim or defense. While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 [evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party].)

The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) Accordingly, the court has not considered the "Exhibit 1" attached to Wells Fargo's lengthy reply brief or any arguments in the reply based on that new evidence.

Where a plaintiff has moved for summary judgment, it has the burden of showing that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a).) That burden can be met if the plaintiff has proved each element of the cause of action entitling it to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue as to one or more material facts exists for that cause of action or a defense thereto. (See Code Civ. Proc., § 437c, subd. (p)(1); *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965.)

B. The Basis for Wells Fargo's Motion

Wells Fargo moves for summary judgment on the basis that "there is no triable issue of material fact, or issue of liability, and therefore the moving party is entitled to summary judgment." (December 26, 2023 Notice of Motion, p. 2:2-4.) There is no request for summary adjudication in the alternative.

In its supporting memorandum, Wells Fargo argues that Lerma applied for and was sent a credit card along with a copy of the credit card agreement attached to the complaint. The terms of the agreement state that use of the credit card constitutes acceptance of the agreement. Wells Fargo further contends: "In accordance with the Customer Agreement, Defendant used the account, and made payments, charges, and incurred a balance thereon. [¶] Plaintiff sent Defendant monthly statements of the Subject Accountant each and every billing period . . . . [¶] [T]here is no record of any unresolved disputes on the account . . . . [¶] Defendant's last payment on the Subject Account was on October 6, 2022. Thereafter, no further payments were made by the Defendant, and therefore, pursuant to the terms of the Customer Agreement, Defendant was in default. The balance due on Defendant's Subject Account is $6,243.77." (Memorandum, p. 4:12-26 [internal citations omitted].)

Wells Fargo goes on to argue that the evidence it has submitted in support of the motion establishes the elements of all six of its causes of action. (See Memorandum, pp. 5:24-10:1.)

The motion is accompanied by a separate statement of undisputed material facts, as required by Code of Civil Procedure section 437c, subdivision (b)(1), and by California Rule of Court 3.1350(c).

The motion is supported by two declarations. The first is from Joshua Staebell, a Loan Workout Specialist employed by Wells Fargo. He states that as a part of his duties, he is responsible for monitoring credit card accounts, investigating and resolving customer disputes, and reviewing Wells Fargo business records for purposes of litigation. He further states that, as part of his duties, he has reviewed Lerma's records with Wells Fargo. These records show that Lerma:

> . . . applied for, and was issued, a Wells Fargo credit card account.
>
> Thereafter, Plaintiff sent Defendant a Wells Fargo Credit Card through the mail.
>
> The most recent Customer Agreement associated with the Credit Card was made available to Defendant for review and objection . . . .
>
> Pursuant to Paragraph 1 of the Credit Card Agreement, Defendant accepted the terms of the Customer [A]greement by using the credit card.
>
> Defendant's account was opened with Plaintiff on or about April 23, 2015.
>
> Pursuant to the terms of the Customer Agreement, in exchange for making charges on the credit card, or allowing others to make charges on the credit card, Defendant agreed to repay the principal amount plus any applicable interest and finance charges thereon.
>
> Defendant charged goods and services to the account, or authorized others to charge goods and services to the account, with Plaintiff and thereby incurred a balance for said charges which was stated on the monthly billing statements . . . .
>
> Every month Wells Fargo Bank, N.A.'s computer system generates a monthly billing statement that is sent to the customer. As transactions are reported, such as charges, overdraft transfers, cash advances and payments, they are recorded in Wells Fargo Bank, N.A.'s computer system which stores them, compiles the data, and keeps track of the balance on a daily basis. This data is then used to generate the statement which is sent to the customer . . . .

(Staebell Decl., ¶¶ 9-16.)

Staebell also states that "[t]here is no record of any unresolved disputes on this credit card account or any active lawsuits against Wells Fargo Bank, N.A. for unresolved disputes on this credit card account of which Plaintiff is aware. [¶] The Defendant made payments of the principal and interest on the subject account up [to] and through October 6, 2022. [¶] No further payments were made on this account after October 6, 2022, and a balance of $6,243.77 remains due and owing from Defendant to Plaintiff on the subject account." (Staebell Decl., ¶¶ 20-22.)

There are two exhibits to the Staebell declaration. Exhibit 1 is a copy of Wells Fargo's most recent customer agreement. Exhibit 2 consists of copies of all available statements of account for Lerma's credit card. (See Staebell Decl., ¶¶ 11 & 15.)

The second declaration in support of the motion is from counsel Ashley Mulhorn, who authenticates two attached exhibits (again numbered 1 and 2). Exhibit 1 is a copy of requests for admission that Wells Fargo propounded on Lerma, and Exhibit 2 is a copy of Lerma's responses. Lerma admitted three of the requests: Nos. 3, 4, and 5. Request No. 3 asked Lerma to admit that he, or those authorized by him, were the only persons to use the credit card issued to him by Wells Fargo to make charges. Request No. 4 asked Lerma to admit that he received statements from Wells Fargo for the credit card. Request No. 5 asked Lerma to admit that he never disputed the accuracy of any "monthly billing statements" sent to him by Wells Fargo. In his response to Request No. 4 Lerma claimed to "lack sufficient information" as to how often statements were received. The documents attached to the Staebell Declaration as Exhibit 2 establish that each statement covers a month-long period. Lerma also failed to qualify his response to Request No. 5, which essentially concedes that statements were received by him "monthly." Lerma is bound by these responses to requests for admissions.

C. Analysis of Wells Fargo's Motion

The court grant Wells Fargo's motion for summary judgment, as follows.

The evidence submitted by Wells Fargo is more than sufficient to meet its initial burden of establishing an absence of triable issues of material fact as to the existence and amount of the debt owed by Lerma to Wells Fargo. It is therefore sufficient to meet its burden as to each cause of action.

Lerma is unable to raise any triable issue of material fact in rebuttal. As an initial, dispositive matter, Lerma has failed to submit a responsive separate statement of material facts, which is required under Code of Civil Procedure section 437c, subdivision (b)(3), and Rule of Court 3.1350(e). On this basis alone, the court must find that Lerma has failed to dispute any of Wells Fargo's undisputed material facts. Lerma has also failed to submit any opposing evidence. While the opposition makes reference to a "Declaration of Defendant," no timely declaration was actually filed with the opposition on April 9, 2024.[2]

Moreover, the opposition brief consists almost entirely of speculative arguments about what the evidence *might* demonstrate at trial. For example, Lerma argues:

- "One should analyze the documents to see *if* the account reflects an open or a closed account. *If* the account still has credit available, or similar indicia of an

[2] The court notes that on April 22, 2024 at 2:56 p.m., Lerma filed a belated declaration in support of his opposition. This was several hours *after* Wells Fargo had already filed its reply brief. The court has not and cannot consider this exceedingly late filing. Code of Civil Procedure section 437c, subdivision (b)(2) "forbids the filing of any opposition papers less than 14 days prior to the scheduled hearing, and case law has been strict in requiring good cause to be shown before late filed [opposition] papers will be accepted" in a summary judgment proceeding. (*Hobson v. Raychem Corp*. (1999) 73 Cal.App.4th 614, 625 [disapproved on another ground in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6].)

open account, the statements can be stricken as irrelevant since account stated must be for closed accounts only." (Opposition, p. 5:20-24 [emphasis added].)

- "*If* an agreement was never offered to the defendant, then there can be no meeting of the minds or any of the other elements for establishing an enforceable contract." (Opposition, p. 7:12-13 [emphasis added].)

- "While one might know the procedure for inserting information, that witness *may* not be aware of the computer repair procedures and the safe-guards [sic] to ensure the accuracy of the data input. One *should inquire* into the specifics on each foundational requirement." (Opposition, p. 6:25-28 [emphasis added].)

Each one of these arguments, along with several others in Lerma's generic opposition brief, is speculative, irrelevant, or both.

Finally, while the opposition argues, at length, that Wells Fargo's supporting evidence is deficient, Lerma has not submitted any objections to that evidence that comply with rules 3.1352 and 3.1354 of the California Rules of Court. Contrary to what the opposition contends, the declarations submitted by Wells Fargo are sufficient to authenticate the documents attached as exhibits, and the supporting evidence is sufficient to establish both an account stated and a contract, including Lerma's acceptance of the contract and the fact that Lerma was sent and received statements of the account.

For the foregoing reasons, the motion for summary judgment is GRANTED.

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Calendar Lines 5-12
Case Name: *Aditya Amar v. Shusen Li et al.*
Case No.: 23CV417313

In this dispute over a residential lease, plaintiff Aditya Amar has named eight defendants in his complaint—Shusen Li, Artgo, Inc., Cong Li, Nianlin Li, Yiqi Ren, Zhigang Tan, Fenghua Yu, and Gogo Doe—as well as Doe defendants. Amar now brings eight nearly identical motions—one against each defendant—to compel initial responses to form interrogatories, special interrogatories, requests for admissions, and requests for production of documents.[3]

Notice is proper for these motions, but they remain unopposed: the eight defendants are represented by counsel, but they have not filed any response. In a unitary reply brief, Amar provides the following update regarding defendants' engagement in discovery: Shusen Li, Nianlin Li, Zhigang Tan, and Yiqi Ren have served verified responses; Artgo, Inc., Fenghua Yu, and Cong Li have served "affidavits" on Amar claiming that they had little to no involvement with any of the issues in this case or with Shusen Li, but they have not served written responses; and Gogo Doe has served neither an affidavit nor any written discovery responses. (See Reply & Exhibit A to the Declaration of Rya M. Nelson.)

Because Shusen Li, Nianlin Li, Zhigang Tan, and Yiqi Ren have now responded, the court denies the motions as to them. Although Amar complains that these defendants have asserted belated objections in their written responses, the adequacy of their responses is not the proper subject of these motions, which are motions to compel *initial* responses, not motions to compel further responses. Amar needs to file a *properly noticed* motion to compel further responses separately, if he wishes to obtain relief on that score.

Because Artgo, Inc., Fenghua Yu, Cong Li, and Gogo Doe have failed to serve any responses, the court grants the motions as to them and orders them to provide objection-free, verified responses within 15 days of notice of entry of this order. The service of an affidavit is not an adequate substitute for discovery responses.

Finally, because defendants failed to provide timely responses to these basic discovery requests, and because defendants have failed to provide any explanation for their conduct on these motions, the court GRANTS IN PART Amar's request for monetary sanctions. The court finds that Amar's request for $1,510 for each of eight motions—a total of $12,080—is grossly excessive for a simple series of motions with two and a half pages of unique content. Instead, the court orders that defendants and their counsel shall be jointly and severally liable for **a total of $1,450** in monetary sanctions, representing two hours at counsel's rate of $725/hour. The purpose of monetary sanctions is compensatory and not punitive.

In short, the motions are GRANTED IN PART and DENIED IN PART.

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[3] The captions of Amar's motions also refer to "an order deeming matters admitted," but no such request under Code of Civil Procedure section 2033.280, subdivision (b), appears in the notice of motion, and there is also no discussion of such relief in Amar's supporting memoranda of points and authorities. Accordingly, the court treats the motions solely as motions to compel initial responses.

Calendar Line 13
Case Name: *Jerry Ivy, Jr. v. Jerry Ivy, Sr. et al.*
Case No.: 20CV373696

Defendants Jerry Ivy, Sr., Deborah J. Ivy, and Edward Ivy ("Defendants") move for leave to amend their answer to the first amended complaint, in order to identify the specific statutes upon which their nineteenth affirmative defense ("statute of limitations") is based.[4] Plaintiff Jerry Ivy, Jr. ("Plaintiff") opposes, but because he cannot show any prejudice arising from the amendment, notwithstanding an impending trial date of July 1, 2024, the court GRANTS the motion.

As an initial matter, the court agrees with Plaintiff that this proposed amendment comes extraordinarily late in the case, long after the original trial dates of May 30, 2023 and August 14, 2023. At the same time, the court is unmoved by Plaintiff's contention that this motion is an effort to "sandbag" him. Having reviewed the file in this case, including Judge Kuhnle's November 3, 2023 order denying Defendants' motion for summary judgment, the court finds that Defendants' late amendment is not the product of a deliberate strategy "to maximize the prejudice to Ivy Jr." (Opposition, p. 2:19.) Rather, it is the consequence of carelessness, in which Defendants' failure to identify the correct statutes of limitations resulted in the denial of their motion. If anyone was "sandbagged" by Defendants' actions, it was Defendants themselves. It is also apparent to the court that the late timing of this amendment is entirely attributable to Defendants' having learned about their mistake from Judge Kuhnle at the end of 2023.

The court is persuaded that even if it allows this proposed amendment just nine weeks before trial, there is no additional discovery that will need to be taken in the case, because the parties have already conducted discovery regarding the statute of limitations issues. Plaintiff argues that the statute of limitations defense turns on the timing of his discovery of loans that Ivy Sr. allegedly concealed, and "[t]he best evidence of Defendants' fraudulent concealment of the Loans would have come from the testimony of Ivy Sr., but Defendants failed to provide timely notice of their affirmative defenses before extracting an agreement from Ivy Jr. to not pursue Ivy Sr.'s testimony." (Opposition, p. 2:23-26.) This is an insufficient showing of prejudice. The parties had already come to an agreement in November 2022 that Ivy Sr.'s health condition was such that he could no longer be expected to testify in a deposition or at a trial. Thus, even if Defendants had proposed this amendment to their answer *more than a year ago*, it would have made no difference in this case. And although Plaintiff may have been marginally "prejudiced" by his inability to take the deposition of Ivy Sr., it pales in comparison to the prejudice to Defendants from their inability to call Ivy Sr. as a witness at trial. At this point, and ever since November 2022, the only direct evidence of what Ivy Sr. allegedly told or failed to tell Ivy Jr. rests with Ivy Jr. himself.

Finally, Plaintiff argues that the proposed amendment to the answer would be "futile," but only as to the proposed addition of Georgia and Washington statutes of limitations, not the California statute of limitations. In making this argument, Plaintiff sets forth a perfunctory conflict-of-laws analysis on pages 13-15 of his opposition brief and also essentially concedes that the amendment to add Code of Civil Procedure section 343 would not necessarily be futile.

[4] The court understands that Jerry Ivy, Sr. is now deceased, as of April 6, 2024.

The court is not aware of any authority for a "partial futility" argument as a basis for opposing a motion for leave to amend and also sees no reason to resolve this conflict-of-laws question at this time. (Indeed, Plaintiff has failed to make a showing that there is even a "conflict" here. If not—and his opposition admits that "there is no relevant difference in the laws of the relevant states" (Opposition, p. 14:12)—then this "futility" argument is entirely meritless.)

The court grants the motion for leave. Defendants shall file their amended answer within 10 days of this order.

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