

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

**Department 20, Honorable Socrates Peter Manoukian, Presiding**

**Courtroom Clerk: Hien-Trang Tran-Thien**

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2320

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

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

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

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

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the  
Code of Professionalism adopted by the Santa Clara County Bar Association:

<https://www.sccba.com/code-of-professional-conduct/>

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**DATE: Tuesday, 28 November 2023**

**TIME: 9:00 A.M.**

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

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

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

Join Zoom Meeting  
<https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjJEam5xUT09>  
Meeting ID: 961 4442 7712  
Password: 017350

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

One tap mobile  
+16699006833,,961 4442 7712#

## APPEARANCES.

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

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

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

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

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

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

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

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

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

## CIVILITY.

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

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

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

## COURT REPORTERS.

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

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

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

#### PROTOCOLS DURING THE HEARINGS.

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

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

#### TROUBLESHOOTING TENTATIVE RULINGS.

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

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

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
<a href="#">LINE 1</a>	22CV404883	Imelda Jimenez vs Robert Bledsoe et al	<b>Demurrer Of Defendant Bledsoe Family Properties LLC To Plaintiff’s Second Amended Complaint.</b>  The demurrer is not opposed. The demurrer will be SUSTAINED with 10 days’ leave to amend.  NO FORMAL TENTATIVE RULING.
<a href="#">LINE 2</a>	23CV416895	Lynley Kerr Hogan vs Michael Shtein	<b>Demurrer Of Defendant Michael Shtein to Plaintiff’s Complaint For Damages 2<sup>nd</sup>, 3<sup>rd</sup>, And 6<sup>th</sup> Causes Of Action.</b>  The demurrer is SUSTAINED with 20 days leave to amend.  SEE ATTACHED TENTATIVE RULING.
<a href="#">LINE 3</a>	23CV416895	Lynley Kerr Hogan vs Michael Shtein	<b>Motion of Defendant Michael Shtein To Strike Pursuant to Code of Civil Procedure, § 425.16.</b>  The motion to strike is GRANTED.  SEE LINE #2 FOR TENTATIVE RULING.
<a href="#">LINE 4</a>	23CV413316	Wells Fargo Bank, N.A vs Thomas Weiner	<b>Motion of Plaintiff for Summary Judgment.</b>  The motion is not opposed and is GRANTED.  NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 5	20CV369234	Aubyn Miller vs Vanitha Srinivasan et al	<p><b>Motion of Defendants Integrated Tech Group And Edgar Rondez for Leave To File a Cross-Complaint.</b></p> <p>"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading Or proceeding . . . The court may likewise, in its discretion, after notice to the adverse party, allow upon such terms as may be just, an amendment to any pleading or proceeding in other particulars. . . ." (<b>Code of Civil Procedure</b>, § 473(a)(1).)</p> <p>If the parties opposing the motion believe that the proposed cross-complaint does not state a cause of action, this Court believes the better practice is to allow the amendment and hear a proper motion urging such.</p> <p>The Motion is GRANTED. The proposed cross-defendants are given 20 days leave within which to RESPOND.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 6	21CV387928	Golden Oaks Holdings, LLC vs Irene Lopez et al	<p><b>Order of Examination (to Bob John Lopez).</b></p> <p>OFF CALENDAR WITHOUT PREJUDICE.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 7	23CV411870	Raojibhai Patel vs Kelly Gomes et al	<p><b>Motion of Plaintiff for Preferential Trial Setting.</b></p> <p>The motion is not opposed. It is in good form and is GRANTED. The parties should meet and confer and agree on a trial date within four months of this hearing.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 8	23CV412728	LILA LAM vs FCA US, LLC. et al	<p><b>Motion of Defendant to Compel Arbitration and to Stay Action.</b></p> <p>The motion is not opposed and is therefore GRANTED. This section will be stayed with a dismissal review date of 05 December 2024 at 10:00 AM in this Department.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 9	23CV417008	Rancho San Antonio Retirement Housing Corporation d.b.a. The Forum At Rancho San Antonio vs Quiring General, LLC et al	<p><b>Verified Application Of Christopher B. McMahon To Appear As Counsel Pro Hac Vice.</b></p> <p>The application is GRANTED.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 10	23CV420421	Lloyd Jacob vs Tesla Motors, Inc.	<p><b>Motion of Defendant to Compel Arbitration and to Stay Action.</b></p> <p>The motion is not opposed and is therefore GRANTED. This section will be stayed with a dismissal review date of 05 December 2024 at 10:00 AM in this Department.</p> <p>SEE ATTACHED TENTATIVE RULING.</p>

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 11	2012-1-CV-237709	Razor Capital LLC vs T. Vo	<p><b>Motion Of Plaintiff to Vacate Default Judgment Against Defendant.</b></p> <p>Plaintiff seeks to vacate the judgment against defendant as plaintiff has learned that defendant was found to be the victim of fraud.</p> <p>California courts have long held that "[e]ven after judgment has been entered, the trial court has jurisdiction to vacate the judgment or dismissal under <b>Code of Civil Procedure</b> section 473 ..." (<b>Basinger v. Rogers &amp; Wells</b> (1990) 220 Cal.App.3d 16, 21.)</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 12			
LINE 13			SEE ATTACHED TENTATIVE RULING.
LINE 14			SEE ATTACHED TENTATIVE RULING.
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LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

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**Calendar Line 2**

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

**DEPARTMENT 20**

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*(For Clerk's Use Only)*

**CASE NO.: 23CV416895**

**Lynley Kerr Hogan v. Michael Shtein**

**DATE: 28 November 2023**

**TIME: 9:00 am**

**LINE NUMBER: 2 - 3**

**This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 27 November 2023. Please specify the issue to be contested when calling the Court and Counsel.**

**Orders on:**

- (1) Defendant Michael Shtein's Demurrer To Plaintiff Lynley Hogan's Complaint; and**
- (2) Defendant Michael Shtein's Special Motion To Strike (CCP §425.16).**

**I. Statement of Facts.**

Plaintiff Lynley Hogan ("Hogan") rents rooms of her Los Gatos house to guests through a company called VRBO. (Complaint, p. 3:4-6.) On 10 December 2022, plaintiff Hogan accepted a VRBO reservation request from defendant Michael Shtein ("Shtein") to rent a one-bedroom apartment in her house from 12 December 2022 to 24 December 2022. (*Id.* at p. 3:4-6.) Plaintiff Hogan and her friend cleaned the rental space in preparation for defendant Shtein's arrival. (*Id.* at p. 3:9-10.) Plaintiff Hogan took pictures of the rental space before defendant Shtein's arrived. (*Id.* at p. 3:17-18.)

On 12 December 2022, defendant Shtein arrived at the property at about 4:00 p.m., and plaintiff Hogan greeted him at the front gate. (Complaint, p. 3:19-20.) Defendant Shtein told plaintiff Hogan that he was not sick but had allergies from kittens that his wife had rescued. (*Id.* at p. 3:21-23.) Defendant Shtein said that he liked the American flags as well as the political and religious banners that plaintiff Hogan displays on her property. (*Id.* at p. 3:24-28.) Plaintiff Hogan gave defendant Shtein a tour of the apartment, and defendant Shtein said he was pleased with the condition of the rental space. (*Id.* at p. 4:1-5.)

On 13 December 2022 at approximately 7:30 a.m., VRBO customer service called plaintiff Hogan and informed her that defendant Shtein had complained about the rental space, saying that he had an allergy attack because the rental unit was dirty, dusty, and disgusting. (Complaint, p. 4:10-14.) Plaintiff Hogan's refund policy is clearly noted on VRBO. (*Id.* at p. 4:15.) Defendant Shtein requested a full refund from VRBO and plaintiff Hogan's business. (*Id.* at p. 4:17-18.) Defendant Shtein did not communicate with plaintiff Hogan or attempt to resolve the situation before he left early and contacted VRBO. (*Id.* at pp. 4:19-20, 6:6-7.)

Defendant Shtein left a one-star review on VRBO of plaintiff Hogan's apartment. (Complaint, pp. 4:22-23, 5:4-5.) Plaintiff Hogan received an insufficient funds notice from her bank. (*Id.* at p. 5:13.) Plaintiff Hogan related her side of the story to VRBO. (*Id.* at p. 5:15.) Plaintiff Hogan wrote to defendant Shtein's father to tell him what had happened. (*Id.* at p. 5:16.) Plaintiff Hogan closed down her business and the listing that reflected defendant Shtein's one-star review. (*Id.* at p. 5:17-18.)

On 10 January 2023, defendant Shtein filed a restraining order against plaintiff Hogan. (Complaint, p. 5:21-22; *Shtein v. Hogan* (Super Ct. Santa Clara County, 2023, No. 23CH011327.)



On 6 June 2023<sup>1</sup>, plaintiff Hogan, a self-represented litigant<sup>2</sup>, filed a complaint against defendant Shtein asserting causes of action for:

- (1) Defamation, Libel
- (2) Attempted Conversion
- (3) Tortious Interference
- (4) Harassment
- (5) Infliction of Emotional Distress
- (6) Hate Crime.

On 19 July 2023, plaintiff Hogan filed a request for entry of default.

On 24 July 2023, defendant Shtein filed the first motion now before the court, a demurrer to the second, third and sixth causes of action of plaintiff Hogan's complaint.

On 1 August 2023, defendant Shtein filed the second motion now before the court, a special (anti-SLAPP) motion to strike plaintiff Hogan's complaint pursuant to **Code of Civil Procedure** section 425.16.

On 24 August 2023, plaintiff Hogan filed a motion for leave to amend her complaint.

On 2 November 2023, the court issued an order, pursuant to an ex-parte application by plaintiff Hogan, setting the hearing on plaintiff Hogan's motion for leave to amend for 18 January 2024.

## II. Analysis.

### A. Defendant Shtein's demurrer to the second, third and sixth causes of action of plaintiff Hogan's complaint is SUSTAINED.

#### 1. Demurrers in General.

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

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (**Code Civ. Proc.**, §430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (**Ankeny v. Lockheed Missiles and Space Co.** (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (**Yolo County Dept. of Social Services v. Municipal Court** (1980) 107 Cal.App.3d 842, 846-847.)

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

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

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

**2. Defendant Shtein's demurrer to the second cause of action of plaintiff Hogan's complaint (attempted conversion) is SUSTAINED.**

Defendant Shtein demurs to the second cause of action on the ground that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc.*, §430.10, subd. (e)].

"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. [Citations.]" (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066 [80 Cal. Rptr. 2d 704].) The basis of a conversion action "rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action." [Citations.]" (*Ibid.*)

(*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387 (*Madatyan*); see also *CACI*, No. 2100.)

Defendant Shtein initially argues plaintiff Hogan had no right to possession of the rent because VRBO controlled it and returned it to him after he complained. However, this argument relies upon extrinsic facts asserted by defendant Shtein, which the court does not consider in ruling on a demurrer. (*Children's Television, supra*, 35 Cal.3d at pp. 213-214 ["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"].)

Defendant Shtein argues further that plaintiff Hogan's claim for conversion fails because demanding a refund does not constitute conversion. This argument asserts a failure to allege a wrongful taking sufficient to satisfy the second element of conversion. (*Madatyan, supra*, 209 Cal.App.4th at p. 1387.) The court finds merit in this argument because the complaint does not allege that there was a wrongful taking, but rather that defendant Shtein *attempted* to convert plaintiff Hogan's income but failed. (Complaint, p. 6:9-22 ["The Defendant took a direct but ineffective step toward committing conversion of Plaintiff's income and Defendant's contractual rental payment. Defendant's actions would have substantially harmed Plaintiff if Defendant had he succeeded."]) Plaintiff Hogan does not offer any argument in opposition.<sup>3</sup>

While the title of a cause of action is not controlling, the pleading must state a cause of action under some recognized legal theory to withstand demurrer. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39 (*Quelimane*)). Not only does the complaint fail to allege a wrongful taking, but it also affirmatively asserts there was *not* a wrongful taking. (See *Krug v. Meeham* (1952) 109 Cal.App.2d 274, 277 (*Krug*) ["A party is bound by an admission in his own pleadings"].) Thus, the complaint does not state facts sufficient to support a claim for conversion. Plaintiff Hogan does not attempt to explain how the pleading could be amended to sufficiently

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<sup>3</sup> Both sides submitted objections to evidence in connection with the motions before the court. The court however declines to consider the objections as they are not material to the outcomes of the motions for reasons explained below. Moreover, a court looks only at the pleading on demurrer (or matters of judicial notice) so any "evidence" offered in connection with a demurrer would be improper. (*Children's Television, supra*, 35 Cal.3d at pp. 213-214.)

state the cause of action. (See **Goodman v. Kennedy** (1976) 18 Cal.3d 335, 349 (**Goodman**) ["Plaintiff must show in what manner he can amend his complaint and that amendment will change the legal effect of his pleading."]; see also **Lawrence v. Bank of America** (1985) 163 Cal.App.3d 431, 436 ["Leave to amend should be denied where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law."])

Accordingly, the demurrer to the second cause of action 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 conversion is SUSTAINED without leave to amend.

**3. Defendant Shtein's demurrer to the third cause of action of plaintiff Hogan's complaint (tortious interference) is SUSTAINED.**

Defendant Shtein demurs to the third cause of action 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 tortious interference. California courts recognize the distinct but related torts of intentional interference with contract and intentional interference with prospective economic advantage. (**Korea Supply Co. v. Lockheed Martin Corp.** (2003) 29 Cal.4th 1134, 1157 ["the tort of interference with contract is merely a species of the broader tort of interference with prospective economic advantage"] (**Korea**).

"The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (**Pacific Gas & Electric Co. v. Bear Stearns & Co.** (1990) 50 Cal.3d 1118, 1126; see also **Korea**, *supra*, 29 Cal.4th at pp. 1157-1158.)

The broader tort of intentional interference with prospective economic advantage has slightly different elements, "usually stated as follows: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (**Korea**, *supra*, 29 Cal.4th at p. 1153.) Thus, both of these "intentional interference" torts require the complaint to allege an actual breach or disruption of the relationship with a third party.

Defendant Shtein argues the complaint fails to allege facts to support any of the required elements for intentional interference. But while the complaint does not directly allege there was a contract between plaintiff Hogan and third party VRBO, the first three elements of a claim based in contract can reasonably be implied by the allegation that "Defendant intended to cause VRBO to breach the contract with Plaintiff." (Complaint, p. 7:1.) However, though the Complaint alleges plaintiff Hogan was harmed, it fails to allege that there was either an actual breach of the contract or an actual disruption of the economic relationship. Plaintiff Hogan does not address this in her opposition.

Accordingly, the demurrer to the third cause of action 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 tortious interference is SUSTAINED with 10 days leave to amend.

**4. Defendant Shtein's demurrer to the sixth cause of action of plaintiff Hogan's complaint (hate crime) is SUSTAINED.**

Defendant Shtein demurs to the sixth cause of action on the ground that the pleading does not state facts sufficient to constitute a cause of action [**Code Civ. Proc.**, §430.10, subd. (e)]. The sixth cause of action (titled "Hate Crime") alleges the following:

The Defendant used force to injure, intimidate, interfere with, oppress Plaintiff's legally protected right or privilege.

The Defendant used intimidation in part because of the Plaintiff's religious and political beliefs.

The Defendant intended to deprive Plaintiff of exercise and enjoyment of Plaintiff's legally protected right or privilege.

(Complaint, p. 8:17-21.)

Defendant Shtein contends these allegations make no sense and do not plead any ultimate facts. Plaintiff Hogan does not address this argument in opposition, such as by directing the court to legal authority applicable in a civil proceeding. The court agrees with defendant Shtein that the sixth cause of action consists of conclusions and fails to plead facts sufficient to state a cause of action. (*Quelimane*, *supra*, 19 Cal.4th at p. 38-39 [demurrer tests whether the factual allegations of complaint state a cause of action under any legal theory]; *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872 [complaint need not allege each evidentiary fact, but must allege facts sufficient to state a cause of action]; *Krug*, *supra* 109 Cal.App.2d at p. 277 [“to withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law.”]) Further, plaintiff Hogan offers no indication how the pleading can be amended to state a valid cause of action. (*Goodman*, *supra*, 18 Cal.3d at p. 349 [“Plaintiff must show in what manner he can amend his complaint and that amendment will change the legal effect of his pleading.”])

Accordingly, the sixth cause of action is SUSTAINED without leave to amend.

**B. Defendant Shtein’s special motion to strike plaintiff Hogan’s complaint is GRANTED.**

Defendant Shtein brings his special motion to strike [*Code Civ. Proc.*, §425.16] on the grounds that the complaint (specifically, the first, fourth and fifth causes of action), arise from defendant Shtein’s exercise of free speech rights. (Mot., p. 1.)

**1. Defendant’s Objections to the Evidence.**

In connection with this motion, this Court is asked to rule on evidentiary objections. 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 this Court will decline to do so.

To the extent that plaintiff seeks to exclude portions of the transcript from evidence, the Court will not make such an evidentiary ruling in connection with a discovery motion or other routine law and motion matter. (See *People v. Morris* (1991) 53 Cal.3d 152, 188 (holding that a motion in limine is a motion brought before the trial court for the purpose of excluding evidence).)

In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, the California Supreme Court recognized that rulings must be made on evidentiary objections in summary judgment motions and on anti-SLAPP motions. That court also recognized that it has become a common practice for litigants to flood trial courts with inconsequential written evidentiary objections, without focusing on those that are critical.<sup>4</sup>

Motions must be supported by evidence, if the motion cannot stand solely on judicially noticed facts. See *Olson Prtshp v. Gaylord Plating Lab* (2d Dist. 1990) 226 Cal.App.3d 235, 242 n. 7. This evidence, including

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<sup>4</sup> “We recognize that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical. Trial courts are often faced with “innumerable objections commonly thrown up by the parties as part of the all-out artillery exchange that summary judgment has become. (citation omitted.) Indeed, the *Biljac* [*Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 141] procedure itself was designed to ease the extreme burden on trial courts when all too often litigants file blunderbuss objections to virtually every item of evidence submitted. (citations omitted); see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 248, 254 & fn. 3, [employer filed 324 pages of evidentiary objections, consisting of 764 specific objections, which the Court of Appeal characterized as the “poster child” for abusive objections].) To counter that disturbing trend, we encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count. Otherwise, they may face informal reprimands or formal sanctions for engaging in abusive practices. At the very least, at the summary judgment hearing, the parties—with the trial court’s encouragement—should specify the evidentiary objections they consider important, so that the court can focus its rulings on evidentiary matters that are critical in resolving the summary judgment motion.” (internal punctuation modified) (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532-533.)

declarations must be attached to the notice of motion, if possible, and served with the motion papers. (**Code of Civil Procedure**, §§1005(b), 1010; Cal. **Rules of Court**, rule 3.1113(j).)

## 2. The two-step procedure for anti-SLAPP motions.

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

More recently, the California Supreme Court clarified:

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

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

## 2. Step one – arising from protected activity.

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

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

In applying section 425.16, subdivision (b)(1), the mode of proceeding and the applicable analysis at the often-elusive first step have been worked out in some detail in the case law. The court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. To determine whether a cause of action arises from protected activity, we disregard its label and instead examine its gravamen by identifying the allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim., i.e., the *acts on which liability is based*; the statutory phrase [cause of action ... arising from] means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.

A claim arises from protected activity when that activity underlies or forms the basis for the claim. Critically, the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. The focus is on determining what the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning. If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute; the question is whether the protected activity is merely an incidental part of the cause of action.

(***Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*** (2020) 54 Cal.App.5th 738, 752-753; italics original; internal brackets, quotation marks and citations omitted.)

To the extent that the complaint's allegations are based on defendant Shtein's act of filing a request for restraining order, there is no question that his statements in his lawsuit are protected by the anti-SLAPP statute. "A claim for relief filed in ... court indisputably is a 'statement or writing made before a ... judicial proceeding' [Citation]." (***Navellier v. Sletten*** (2002) 29 Cal.4th 82, 90.) "The constitutional right of petition encompasses the basic act of filing litigation." (*Ibid.*; punctuation and citation omitted. See also ***Olson v. Doe*** (2022) 12 Cal.5th 669, 684—"civil complaints constitute petitioning activity protected by section 425.16.") However, whether defendant Shtein's online review is likewise protected requires a more detailed inquiry into whether it was made in a public forum and concerned an issue of public interest.

#### i. Public Forum

"A public forum is a place open to the use of the general public for purposes of assembly, communicating throughs between citizens, and discussing public questions." (***Kurwal v. Harrington, Foxx, Dubrow & Canter, LLP*** (2007) 146 Cal.App.4th 841, 846; internal quotation marks and citations omitted.) "Cases construing the term [public forum] as used in section 425.16 have noted that the term is traditionally defined as a place that is open to the public where information is freely exchanged. Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication." (***Kronemyer v. Internet Movie Database Inc.*** (2007) 150 Cal.App.4th 941, 950; internal quotation marks and citations omitted.)

"Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute. [Citations.]" (***Barret v. Rosenthal*** (2006) 40 Cal.4th 33, 41, fn. 4.) Statements published on a website that are "accessible to anyone who chooses to visit [the website] ... hardly could be more public." (***Wilbanks v. Wolk*** (2004) 121 Cal.App.4th 883, 895 (***Wilbanks***); see also ***Wong v. Jing*** (2010) 189 Cal.App.4th 1354, 1366 [it is settled that websites accessible to the public are public forums] (***Wong***).)

Here, defendant Shtein contends he posted his review of plaintiff Hogan's accommodations on a public forum because VRBO, as an online provider of lodgings similar to a hotel, is a public marketplace. (Mot., p. 5-6.) Defendant Shtein, relying upon ***Wong***, analogizes the customer reviews posted on VRBO to customer reviews posted on Yelp and Amazon. In ***Wong***, the defendants' negative Yelp review of the plaintiff dentist was found to be protected conduct sufficient to support the defendants' special motion to strike under the anti-SLAPP statute. (***Wong***, *supra*, 189 Cal.App.4th at pp. 1359, 1366.) In opposition, plaintiff Hogan asserts that VRBO reviews are not an open public forum because only paying guests can leave reviews. (Opp., pp. 5:20-21.) However, plaintiff Hogan does not dispute that anyone can *view* the reviews posted by guests on VRBO, and the complaint admits as much by alleging defendant Shtein's VRBO review defames plaintiff Hogan "by making Plaintiff look to the online world like Plaintiff provided a 'dirty, dusty, disgusting' rental and was a slum lord." (Complaint, p. 5:4-5.) Thus, the court finds that defendant Shtein meets his burden of establishing that he made in VRBO review in a public forum.

#### ii. Issue of Public Interest

Defendant Shtein further contends his review concerns an issue of public interest because it is related to housing and public accommodations. (Mot., pp. 5-6.) "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only government matters, but also private conduct that impacts a broad segment of society...." (***Tuchscher Development Enterprises, Inc. v. San Diego Unified***

**Port. Dist.** (2003) 106 Cal.App.4th 1219, 1233 [quoting and citing **Damon v. Ocean Hills Journalism Club** (2000) 85 Cal.App.4th 468, 479].) A consumer's statement about the quality of a seller's product or service, when it affects a large number of persons, "generally is viewed as information concerning a matter of public interest." (**Wilbanks**, *supra*, 121 Cal.App.4th at pp. 898-899.) An issue of public interest "need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest." (**Nygard, Inc. v. Uusi-Kerttula** (2008) 159 Cal.App.4th 1027, 1042.)

In **Rand Resources, LLC v. City of Carson** (2019) 6 Cal.5th 610 (**Rand Resources**), the California Supreme Court adopted a general definition of "public interest" that identifies three nonexclusive categories of qualifying statements. "The first is when the statement or conduct concerns a person or entity in the public eye; the second, when it involves conduct that could directly affect a large number of people beyond the direct participants"; and the third, when it involves 'a topic of widespread, public interest.'" (**Rand Resources**, *supra*, 6 Cal.5th at p. 621; internal quotation marks and citations omitted.) "In making a public interest determination, however, it is critical to identify the specific speech that is the subject of the claims in the lawsuit." (**Li v. Jin** (2022) 83 Cal.App.5th 481, 495; internal quotation marks and citations omitted.) "There must exist 'some degree of closeness between the challenged statements and the asserted public interest.'" (*Ibid.*, quoting and citing **FilmOn.com Inc. v. DoubleVerify Inc.** (2019) 7 Cal.5th 133, 150 (**FilmOn**).)

In **FilmOn**, our high court "articulated a two-step inquiry for deciding whether the activity from which a lawsuit arises falls within section 425.16(e)(4)'s protection: first, we ask what public issue or issues the challenged activity implicates, and second, we ask whether the challenged activity contributes to public discussion of any such issue." (**FilmOn**, *supra*, 7 Cal.5th at pp. 149-150.) If the answer to the second question is yes, then the protections of the anti-SLAPP statute are triggered, and the plaintiff in the underlying lawsuit must establish 'a probability' of prevailing before the action may proceed." (**Geiser v. Kuhns** (2022) 13 Cal.5th 1238, 1243 (**Geiser**).) "Only when an expressive activity, viewed in context, cannot reasonably be understood as implicating a public issue does an anti-SLAPP motion fail at **FilmOn**'s first step." (*Id.* at p. 1254.) For example, in **Geiser**, the California Supreme Court found an issue of public interest where a sidewalk protest involving a family's eviction also concerned "broader issues of unfair foreclosure and evictions." (*Id.* at p. 1255.)

Here, defendant Shtein persuasively argues that his VRBO review relates to an issue of public interest because his review offers his opinion and experience regarding the suitability of the accommodations offered by plaintiff Hogan. Further, the review more broadly discusses defendant Shtein's caution that positive reviews do not guarantee a positive experience. Thus, the review can reasonably be understood to contribute to public discussion not only of the particular accommodation rented by defendant Shtein, but also to a more general discussion regarding the substantial rent-by-owner industry. The complaint alleges the VRBO review was made to "people from all around the world looking a nice place to stay in Los Gatos." (Complaint, p. 6:1-2.) Plaintiff Hogan further suggests there is a broad audience by asserting that "many others" have moved out suddenly like defendant Shtein did, and that plaintiff Hogan intends to adjust her policies and practices accordingly. (See Plaintiff Hogan's Declaration in support of Opposition, p. 7:24-26.) In her opposition, plaintiff Hogan offers no cognizable argument or applicable authority as to why the VRBO review does not relate to an issue of public interest.

In his special motion to strike, defendant Shtein specifically challenges the complaint's first, fourth and fifth causes of action. The first cause of action for defamation (libel) identifies the VRBO review as the allegedly false statement. (Complaint, pp. 5-6.) The fourth cause of action (harassment) identifies the offending conduct to include both the VRBO review and defendant Shtein's request for restraining order. (*Id.* at p. 6.) The fifth cause of action for infliction of emotional distress does not identify the allegedly outrageous conduct. But based on the claim's reference to the general factual allegations of the complaint, it may be inferred that the cause of action relates to the VRBO review and/or the request for restraining order. (*Ibid.*)

For the reasons discussed above, the court finds that plaintiff Shtein's review on VRBO review and his request for restraining order are activities protected by **Code of Civil Procedure** section 425.16. Thus, defendant Shtein meets his burden of establishing that the complaint's first, fourth and fifth causes of action arise from activity protected under the anti-SLAPP statute.

### 3. Step two – probability of prevailing.

"[I]f a court ruling on an anti-SLAPP motion concludes the challenged cause of action arises from protected petitioning, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. To satisfy this prong, the plaintiff must state and substantiate a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (**Jarrow Formulas, Inc. v. LaMarche** (2003) 31 Cal.4th 728, 741; internal citations and punctuation omitted.) "The court does not weigh credibility or comparative strength of the evidence. The court considers defendant's evidence only to determine if it defeats plaintiff's showing as a matter of law." (**Soukup v. Law Offices of Herbert Hafif** (2006) 39 Cal.4th 260, 291 (**Soukup**)). The plaintiff must show there is admissible evidence that, if accepted as true, would be sufficient to sustain a favorable judgment. (**McGarry v. University of San Diego** (2007) 154 Cal.App.4th 97, 108.) "The showing must be made through 'competent and admissible evidence.' Thus, declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded." (**Gilbert v. Sykes** (2007) 147 Cal.App.4th 13, 26; internal citations omitted.)

The court's task is made simple here by virtue of plaintiff Hogan's failure to submit any substantive opposition or admissible evidence to support the first, fourth or fifth causes of action in her complaint. As such, defendant Shtein's special motion to strike plaintiff the complaint's first, fourth and fifth causes of action is GRANTED.

### III. Order.

Defendant Shtein's demurrer to the second cause of action of plaintiff Hogan's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [**Code Civ. Proc.**, §430.10, subd. (e)] for conversion is SUSTAINED without leave to amend.

Defendant Shtein's demurrer to the third cause of action of plaintiff Hogan's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [**Code Civ. Proc.**, §430.10, subd. (e)] for tortious interference is SUSTAINED with 10 days leave to amend.

Defendant Shtein's demurrer to the sixth cause of action of plaintiff Hogan's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [**Code Civ. Proc.**, §430.10, subd. (e)] is SUSTAINED without leave to amend.

Defendant Shtein's special motion to strike [**Code Civ. Proc.**, §425.16] the first cause of action (defamation-libel), the fourth cause of action (harassment), and the fifth cause of action (infliction of emotional distress) of the complaint is GRANTED.

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DATED:

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

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