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: February 22, 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	21CV389929	Tianqing Li v. Phillip Mummah	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 2	21CV389929	Tianqing Li v. Phillip Mummah	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 3	23CV421075	Lilen Mahat v. Toyota Motor Sales, U.S.A., Inc.	Click on LINE 3 or scroll down for ruling.
LINE 4	19CV360748	John Doe 6 v. Doe 1 et al.	Click on LINE 4 or scroll down for ruling in lines 4 and 12.
LINE 5	23CV419198	Wells Fargo Bank, N.A. v. Alejandro Cyrus	Motion to deem RFAs admitted: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. Moving party (plaintiff) to submit the proposed order.
LINE 6	21CV384630	Carleen Whittelsey v. Hopkins & Carley et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 7	21CV384630	Carleen Whittelsey v. Hopkins & Carley et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 8	21CV390082	Debt Management Partners, LLC v. Enrique Martinez	Claim of exemption: the court DENIES the claim, as judgment debtor Enrique Martinez has not met his burden of showing that the amounts to be withheld are exempt. Martinez's proposed amount to be withheld from earnings of $0 is unreasonable, given his income. (CCP § 706.123.)
LINE 9	21CV392358	Santa Clara Valley Transportation Authority v. Z Hanna LLC et al.	Click on LINE 9 or scroll down for ruling.
LINE 10	23CV412940	Milpitas Square 880 at 237, LLC v. Raymond Tang et al.	OFF CALENDAR. Motion has been withdrawn.

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LINE 11	23CV415101	Side, Inc. et al. v. Compass California II, Inc. et al.	Motion for leave to amend cross-complaint: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. Moving party (Demirlioglu) to submit the proposed order.
LINE 12	19CV360748	John Doe 6 v. Doe 1 et al.	Click on LINE 4 or scroll down for ruling in lines 4 and 12.

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Calendar Lines 1-2
Case Name: *Tianqing Li v. Phillip Mummah*
Case No.: 21CV389929

I. BACKGROUND

This is an action for declaratory relief arising out of an alleged loan agreement between plaintiff Tianqing "Cindy" Li and defendant Phillip Mummah. On December 22, 2020, Li filed a verified complaint for declaratory relief in San Mateo County Superior Court. The matter was subsequently transferred to this county, pursuant to Code of Civil Procedure section 395, subdivision (a), as Santa Clara County is where Mummah resided at the time of commencement of the action.

On April 22, 2022, Li filed the operative first amended complaint for declaratory relief ("FAC"). On September 2, 2022, Mummah concurrently filed an Answer to the FAC and a Cross-Complaint for Violation of Federal and California Fair Debt Collection Practices Acts ("FDCPA") ("cross-complaint"). The cross-complaint named Li's attorney, Scott A. Flaxman, as a cross-defendant. On May 18, 2023, the court sustained Flaxman's motion for judgment on the pleadings ("JOP motion") directed at the cross-complaint and granted Mummah 20 days' leave to amend.

On June 6, 2023, Mummah filed an amended cross-complaint ("FACC") stating a single cause of action for violations of Business and Professions Code section 17200 (the "Unfair Competition Law" or "UCL"). The FACC alleged that Flaxman's violations of the FDCPA, Rosenthal Act, State Bar Act, and California Rules of Professional Conduct all constituted the requisite "unlawful, unfair, and/or fraudulent business acts and practices" for a UCL cause of action. (FACC, ¶¶ 10-11.)

Flaxman brought a demurrer to the FACC, which this court heard on December 5, 2023. In an order issued that same day, the court rejected Flaxman's argument that the FACC was a sham pleading, overruled his demurrer on statute of limitations grounds (again), and overruled the demurrer on the ground that the litigation privilege barred the UCL claim.[1] At the same time, the court sustained the demurrer with leave to amend, based on the fact that the FACC failed to allege adequately that Flaxman was regularly engaged in the practice of debt collection through litigation. While not pled as causes of action (and therefore not themselves subject to demurrer) the alleged violations of the FDCPA and the Rosenthal were not sufficiently alleged to provide support for the UCL cause of action. The court stated: "Assuming that Mummah has a good-faith basis for pleading the ultimate fact of 'regular' debt collection, the court expects this to be a straightforward amendment and would be very surprised to see a third demurrer on the cross-complaint." (Dec. 5, 2023 order at p. 8:16-18.)

Currently before the court is that third demurrer by Flaxman to Mummah's second amended cross-complaint ("SACC"). In addition, Flaxman moves to strike portions of the SACC.

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[1] The court takes judicial notice of the December 5, 2023 order on its own motion, pursuant to Evidence Code section 452, subdivision (d), and incorporates it by reference.

II. REQUEST FOR JUDICIAL NOTICE

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

In support of his demurrer, Flaxman submits a request for judicial notice of five documents, submitted as Exhibits A-E to the request. Exhibits A-D are also submitted for judicial notice in support of the motion to strike. Flaxman asserts that all five documents can be noticed pursuant to Evidence Code section 452, subdivision (d).

Exhibit A is a copy of Mummah's original cross-complaint. Exhibit B is a copy of the court's order on Flaxman's JOP motion. Exhibit C is a copy of Mummah's FACC. Exhibit D is a copy of the court's December 5, 2023 order on the demurrer to the FACC. Exhibit E is a copy of the SACC.

The court DENIES judicial notice of Exhibits A-C. They are irrelevant to the material issue before the court, which is the sufficiency of the allegations in the SACC. The court GRANTS judicial notice of Exhibit D, even though it is somewhat redundant, as the court has already taken notice of its prior order. Finally, judicial notice of the pleading already being reviewed on demurrer is not necessary, and so the request as to Exhibit E is DENIED. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn.1 [denying as unnecessary a request for judicial notice of pleading under review on demurrer].)

III. DEMURRER TO THE SACC

A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *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.) A plaintiff is not ordinarily required to allege "'each evidentiary fact that might eventually form part of the plaintiff's proof' [Citation]." (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341.)

B. Analysis of Flaxman's demurrer to the UCL Claim

As noted above, the sole basis upon which the prior demurrer was sustained was that the FACC failed to state sufficient facts to support the UCL cause of action because it failed to allege that Flaxman was regularly engaged in the practice of debt collection through litigation.

That is the only basis on which Flaxman may challenge the UCL cause of action again, given the previous demurrer. (See Code Civ. Proc., § 430.41(b).) Flaxman argues that the UCL cause of action fails to state sufficient facts because "Mummah has not alleged that Flaxman is regularly involved in consumer debt collection, nor has he alleged that Flaxman is an attorney who regularly litigates consumer debt collection cases." (Notice of Demurrer and Demurrer at p. 3:18-21.)

Flaxman is correct. As Mummah's opposition admits, "[t]he allegations of the SACC are substantially identical to those in the FACC, other than the addition to the allegations at paragraph 2 which now reads as follows: 'Mummah is informed and believes, and thereon alleges that cross-defendant Scott A. Flaxman ('Flaxman') is an attorney at law and is a 'debt collector' as defined in 15 U.S.C. § 1692a(6) and Civ. Code § 1788.2(c).'" (Opposition at p. 6:20-24.)

This addition to paragraph 2 of the SACC is inadequate on its face, as it does not comply with the court's December 9, 2023 order.

A plaintiff or cross-complainant cannot, "by placing the incantation 'information and belief' in a pleading, [ ] insulate herself or himself" from the requirements of Code of Civil Procedure section 128.7, irrespective of whether the pleading is verified or unverified. (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596, fn. 9.) Additionally, even when it is permissible to allege an ultimate fact on the basis of information and belief, a party cannot simply include the phrase "information and belief" without more. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-59.) To plead an allegation on the basis of information and belief properly, a plaintiff must allege the facts or information that led him or her to infer or believe the truth of the ultimate factual allegation. (*Id*. at pp. 1158-59; see also *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 100, 1106 ["where factual allegations are based on information and belief, the plaintiff must allege 'information that 'lead[s] [the plaintiff] to believe that the allegations are true.'"].) The SACC does not allege any facts or information that led Mummah to form a reasonable belief that Flaxman meets the definition of a "debt collector" under 15 U.S.C. § 1692a(6) and Civil Code section 1788.2, subdivision (c). Moreover, as Flaxman points out, this bare allegation citing these statutory provisions is a *conclusion of law*, which is not something that the court accepts as true on a demurrer. The SACC therefore continues to fail to state sufficient facts under Code of Civil Procedure section 430.10, subdivision (e).

Mummah's opposition does not request further leave to amend, much less explain how Mummah could comply with the court's prior order after failing to do so in the SACC. "The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'" (*Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145.) As it now does not appear that Mummah can in good faith allege that Flaxman was regularly engaged in the practice of debt collection through litigation, the court SUSTAINS the demurrer WITHOUT further leave to amend.

IV. MOTION TO STRIKE PORTIONS OF THE SACC

A. General Standards

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading, or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63, citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.)

A motion to strike may be brought against a portion of a cause of action that is purportedly defective—for example, because it seeks an improper remedy. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680.) At the same time, as courts have observed, "[W]e have no intention of creating a procedural 'line item veto' for the civil defendant." (*Id*. at p. 1683.)

B. Analysis of Flaxman's Motion to Strike

Flaxman moves to strike the entire SACC on the following grounds: "1) the SACC fails to allege facts that support its prayers for relief because the SACC fails to allege [that Mummah] lost any money or property to Flaxman; 2) the SACC fails to allege facts that confer standing on [Mummah] to bring a cross-complaint for a UCL violation against Flaxman because the SACC fails to allege [Mummah] lost any money or property to Flaxman and 3) the SACC still contains the time-barred fair debt collection action practices act causes of action that were ruled time barred by" the court's May 18, 2023 order on Flaxman's JOP motion. (See December 29, 2023 Notice of Motion and Motion at p. 2:11-19.)

The court DENIES the motion to strike as MOOT, in light of the court's ruling sustaining the demurrer to the SACC.

Considered on its merits, the motion to strike would also be denied, as it does not state any proper basis under section 436. A failure to state sufficient facts is not a basis for a motion to strike; in addition, "prayers for relief" are not required to state facts supporting any requested relief, as pleadings are considered as a whole. A motion to strike is also not an appropriate vehicle for challenging standing to bring any specific claim, particularly on the supposed basis that the claim fails to allege certain elements. Asserting that a claim is time-barred is also not a basis for a motion to strike; moreover, the SACC only alleges a single claim for violation of the UCL. It no longer alleges any separate cause of action under the FDCPA or the Rosenthal Act.

In short, the court SUSTAINS the demurrer to the SACC WITHOUT leave to amend, and the court DENIES the motion to strike.

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Calendar Line 3
Case Name: *Lilen Mahat v. Toyota Motor Sales, U.S.A., Inc.*
Case No.: 23CV421075

This is a "lemon law" case in which plaintiff Lilen Mahat seeks further responses to certain document requests (Nos. 16-21) from defendant Toyota Motor Sales, U.S.A., Inc. ("TMS"). These requests seek information not about Mahat's specific automibile (a 2017 Lexus RX purchased on April 19, 2017 (the "Subject Vehicle")), but rather the following categories of documents regarding "vehicles of the same year, make, and model as the [Subject Vehicle]": (1) internal analyses and investigations regarding the "electrical defect" that allegedly manifested itself in the Subject Vehicle; (2) communications regarding the electrical defect; (3) electronic documents "relating to any decision to issue any notices, letters, campaigns, warranty extensions, technical service bulletins and recall concerning the [electrical defect]; (4) customer complaints relating to the electrical defect; (5) electronic documents "concerning failure rates of vehicles . . . as a result of [the electrical defect]"; and (6) any "fixes" for the electrical defect.

The court finds the document requests at issue to be speculative and overbroad. The motion is DENIED.

As a threshold matter, the court finds that the meet-and-confer effort on behalf of the moving party was minimal but adequate. Although Mahat should not have waited until right before the motion deadline to meet and confer about TMS's supplemental responses—especially right before Christmas—TMS also could have agreed to a short extension of the deadline in order to discuss the parties' disagreement in good faith. The fact that TMS did not and that the parties' positions have since ossified, with neither party budging in their briefing, indicates to the court that additional meet-and-confer discussions would have been futile. Even with the holidays falling during this period, the court finds TMS's excuse that it did not have client authorization to extend the deadline for a short period of time to be weak and unconvincing, at best.

The court also finds Mahat's opening brief to be highly generic and devoid of specific explanations regarding the disputed requests. Indeed, the brief does not even include or discuss the specific text of the requests at issue. The court must turn to Mahat's separate statement in order to find the language of the requests themselves, where Mahat repeats many of the same generic arguments as in the opening brief. Even after reading all of these papers, the court is left with a critical unanswered question: *what exactly is the "electrical defect"*? The opening brief identifies a number of seemingly disparate defects: "[p]re-collision system," "brake override system," "[p]ark assist," "[b]ack up sensor," and "[i]noperative display screen." (Memorandum, p. 2:18-20.) How are these various defects related to each other, if at all? It is ironic that the opening brief complains about "boilerplate" discovery responses from TMS when the opening brief itself consists primarily of vague, generic arguments and boilerplate discussions of the law that could easily have been "cut-and-pasted" from other briefs.

While there may well be circumstances under which documents relating to cars other than the Subject Vehicle may be potentially relevant or discoverable in this case, the motion fails to identify those circumstances here. The court has been given no indication that the "electrical defect" at issue has appeared in any other vehicle aside from Mahat's. While the

presence of the same recurring electrical defect in other vehicles could certainly be probative of TMS's knowledge of a more widespread issue, there has been no showing by Mahat that that in fact existed here, apart from two technical service bulletins ("TSBs") identified in the opening brief. (Memorandum, p. 3:7-14). But the requested discovery is not limited to these TSBs, which appear to be directed to two discrete, narrow, and (again) completely unrelated electrical issues: (1) the navigation screen and (2) pre-collision safety sensors. By contrast, the requested discovery broadly seeks information about (potentially) all electrical issues with any 2017 Lexus RX sold worldwide.

There may well be narrower, more targeted information that could be discoverable, but it is not the court's job to fashion it for the parties. They need to identify it, or meet-and-confer to narrow the scope of overbroad requests to pinpoint potentially relevant information. Of course, in this case, the parties barely met and conferred. The court expects a greater effort on the part of counsel in the future, with a greater focus on what may actually be potentially relevant rather than on what one speculatively hopes to find

Because Mahat's motion fails to demonstrate good cause for the requested documents, the motion is DENIED.

The court also DENIES TMS's responsive request for monetary sanctions. Again, even though the documents requests were overbroad, TMS also played a role in curtailing the meet-and-confer efforts that preceded the filing of the motion.

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Calendar Lines 4 & 12
Case Name: *John Doe 6 v. Doe 1 et al.*
Case No.: 19CV360748

Defendant Doe 1 moves to compel the mental examination of plaintiff John Doe 6; plaintiff John Doe 6 moves to compel third-party Pablo Geraldo Boas to comply with a deposition subpoena. Both of these motions were originally set for hearings in the spring, but the court advanced the hearings at the requests of the parties to February 22, 2024, because this case is now set for trial on April 2, 2024.

1. Motion to Compel Mental Examination of John Doe 6.

Doe 1 argues that Doe 6 has placed his mental condition at issue in this case, given his claims that he "continues to suffer from post-traumatic stress disorder, depression, repressed feelings and memories of his encounters, aggression, psychological struggles, substance abuse, psychological trauma[,] and an inability to maintain meaningful relationships as a result of the alleged childhood sexual abuse that forms the basis of his complaint." (Notice of Motion at p. 1:12-15.) Doe 1 further argues—in response to issues raised by Doe 6's counsel during meet-and-confer discussions—that its proposed forensic psychiatrist, Marc A. Cohen, needs a full day (up to eight hours) to conduct a complete examination of Doe 6 and that the examination should be permitted to go forward without counsel or any other third person in attendance. Doe 1 supports its request with a declaration from Cohen that describes the need for a full-day examination and for it to be a one-on-one examination.

In response, Doe 6 does not address these issues regarding the duration of the examination or the attendance of a third-person observer at all. Instead, he argues that the examination should not be held in Los Angeles (where Cohen is located) and instead should be held within 75 miles of his residence in Roseville, California, which is in Placer County. In addition, he argues that his "schedule should be considered" and "accommodated."

Under Code of Civil Procedure section 2032.320, the court finds good cause for the deposition to take place in Santa Clara County, which is more than 75 miles from Roseville. First, Doe 6 has filed this action in Santa Clara County, where the events that form the basis of the complaint occurred. Second, Doe 1 has indicated in meet-and-confer correspondence that its preference is for the examination to take place in Los Angeles, but that it can make alternate arrangements in San Jose. Third, Doe 6 has not set forth any reason why he cannot travel to Santa Clara County, to which he will be required to travel for trial in any event. In his opposition, he seems primarily to be concerned about payment of travel costs. Accordingly, under section 2032.320, subdivision (e)(2), the court orders that Doe 1 advance the reasonable travel costs for attending an all-day examination in Santa Clara County.

As for Doe 6's request that his schedule be "considered" and "accommodated," the court orders the parties to meet and confer about a date for the examination that is within 28 days of the date of this order (*i.e.*, the examination is to occur no later than **March 21, 2024**). If Doe 1 offers at least two non-consecutive weekdays for the examination during this period, Doe 6 must accept at least one of those two days. Although the court would ordinarily afford greater latitude in the scheduling of an IME, the court finds that the delay in scheduling this particular examination was largely the fault of Doe 6 and his counsel. The court finds that Doe 6's counsel was not sufficiently responsive during meet-and-confer communications regarding

the proposed examination, raised issues that Doe 6 does not even attempt to argue on this motion, and ultimately caused unnecessary motion practice in this court, which led to the present delay. Given the impending trial date, there is no room for further delay.

2. Motion to Compel Deposition of Third-Party Pablo Geraldo Boas

Doe 6 argues that he properly served a deposition subpoena on Boas, and that Boas failed to respond, failed to object, and failed to appear at the noticed time and location. Doe 6 also notes that he has reached out to Boas since the deposition to meet and confer, and Boas has not responded. At the same time, the court notes that Doe 6 reached out on February 7, 2024 by "certified letter," and that February 7, 2024 is also the date that Doe 6 filed this motion. The deposition itself was supposed to be on February 5, 2024, just two days before the filing of this motion.

On February 12, 2024 (which was a court holiday), the court signed an order granting Doe 6's ex parte application to advance the hearing date on this motion to February 22, 2024. In doing so, the court's order stated that "Defendants shall file an opposition by no later than February 16, 2024. There will be NO reply brief." It appears that there may have been some delay in the court's service of this order on the parties, and so the undersigned asked the courtroom clerk to follow up with the parties to see if a response would be filed this week. Ultimately, Defendants did file a further "response and partial opposition to plaintiff's motion to shorten time" on February 20, 2024, but this filing responds only to the application to shorten time—which the court already granted—and does not address the merits of the motion to compel. In addition, the February 20, 2024 filing opposes any request to continue the trial date—a continuance that the court has already rejected multiple times (on February 2, 2024, February 8, 2024, and February 12, 2024).

Understanding that Boas may not have received notice of the advanced hearing date on this motion, the undersigned asked the courtroom clerk to reach out to the parties again to attempt to provide Boas with the February 22, 2024 hearing date, as well as information on how to appear (in person or remotely).

Assuming that the parties have attempted in good faith to give Boas notice to appear for the hearing (which, again, the court found good cause to advance to February 22, 2024, given the trial date), the court will GRANT the motion to compel, unless it hears a convincing reason not to do so. Boas shall appear for deposition by no later than **March 25, 2024**, as requested by Doe 6 in his motion.

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Calendar Lines 6-7
Case Name: *Carleen Whittelsey v. Hopkins & Carley et al.*
Case No.: 21CV384630

This is a petition to confirm an arbitration award, filed by defendants Hopkins & Carley and Bruce B. Roberts (collectively, "Hopkins"), and a petition to vacate that same arbitration award, filed by plaintiff Carleen Whittelsey.[2] After reviewing the voluminous papers submitted by the parties on these dueling petitions (over 1,700 pages), the court now GRANTS the petition to confirm and DENIES the petition to vacate.

1. Background

This case arises out of Hopkins's representation of Carleen Whittelsey ("Whittelsey") and her now-deceased husband Stuart G. Whittelsey Jr. ("Stuart") in estate planning and estate administration over the course of numerous years, including in litigation regarding the estate after Stuart passed away. On June 22, 2021, Whittelsey filed this action for legal malpractice and breach of fiduciary duty against Hopkins. On March 22, 2022, this court (Judge Kirwan) granted Hopkins's motion to compel arbitration after a contested hearing in which Whittelsey raised a number of the same arguments that she now raises here. The matter proceeded to arbitration with the American Arbitration Association. On July 18, 2023, a three-arbitrator panel issued an interim award, and on September 11, 2023, the panel issued a final award. The panel found "multiple acts of negligence constituting malpractice" on the part of Hopkins and awarded damages to Whittelsey in the amount of $532,246, plus interest and costs.

Although the arbitration award was largely in Whittelsey's favor, it was significantly less than the total amount she sought, which included sums that the panel found to be "unproven," "speculative," and "wishful thinking at best." She now seeks to vacate the award in its entirety and start over with a jury trial.

2. The Propriety Of The Parties' Papers

As a threshold matter, the court notes that the parties' papers on these petitions can be characterized (somewhat uncharitably, though not as uncharitably as could be) as a *complete morass*. The court received a petition to confirm from Hopkins on November 16, 2023 and then *two* substantive responses (15 pages plus 17 pages) from Whittelsey just five days later, on November 21, 2023. Hopkins's petition to confirm was apparently then re-filed in virtually identical form a month later, on December 20, 2023, and Whittelsey again filed two lengthy responses on December 27, 2023: a 15-page "Memorandum of Points and Authorities in Support of Plaintiffs'/Respondents' [sic] Whittelsey's Response to Defendants'/Petitioners' Hopkins & Carley's and Bruce Roberts' [sic] Re-Filed Petition to Confirm Arbitration Awards and Plaintiffs'/Respondents' [sic] Request That Arbitration Awards Be Vacated," plus a ***30-page*** "Response to Defendants'/Petitioners' Hopkins & Carley's and Bruce Roberts' [sic] Re-Filed Petition to Confirm Arbitration Award and Plaintiffs'/Respondents' [sic] Request That Arbitration Awards Be Vacated." These two later responses of Whittelsey are not identical to her earlier two responses, but there is substantial overlap. In between these filings, on December 13, 2023, Whittelsey also filed a 15-page memorandum of points and authorities in

[2] Arguably, there are two "awards"—an interim award and a final award—but the court will refer to them as a singular "award."

support of her petition to vacate, cutting and pasting many of the same arguments from her opposition to Hopkins's petition into her affirmative brief.

There was no authorization to file these overlong, overlapping, duplicative, and extremely confusing papers that clearly run afoul of the normal law-and-motion page limits. The most obvious offender is the 45 pages of written argument that Whittelsey has submitted in direct response to Hopkins's motion to vacate, but Hopkins has also attempted to perform a blatant end run around the page limits by claiming to "incorporate by reference as [if] set forth in full herein" a 10-page reply brief submitted last year in support of its petition to compel arbitration *plus* an 11-page opposition brief filed last year in response to a motion to disqualify counsel *into its 15-page opposition brief* to Whittelsey's motion to vacate. (See Opposition to Motion to Vacate at pp. 10:27-11:2; 17:17-18.)

On top of these glaring violations of California Rule of Court 3.1113, the parties have submitted hundreds of pages of exhibits that are not pertinent to any petition to confirm, correct, or vacate an arbitration award under Code of Civil Procedure section 1285 (and section 1286.2); rather, these documents appear to be submitted in an effort to reargue the merits of the arbitration itself, which is not the purpose of this hearing. The court has reviewed these documents but accords many of them zero weight, given their irrelevance to the issues at hand.

The court DENIES Hopkins's request for judicial notice of its January 10, 2022 petition to compel arbitration, which appears to be yet another attempt to incorporate by reference additional, previously filed pages into the current briefs. That is not what Evidence Code section 452, subdivision (d), is for; moreover, the court does not need it in any event. All the court needs is Judge Kirwan's prior order. On its own motion, the court takes judicial notice of Judge Kirwan's March 22, 2022 minute order from the hearing on the petition to compel arbitration, under section 452, subdivision (d).

3. Whether the Arbitration Agreement Was Void Or Illegal

a. Conflict of Interest

Although Whittelsey raises a number of arguments in these petitions, the central argument—and the only colorable one—is that the arbitration provisions in the 2007 and 2009 agreements with Hopkins were "void" and "illegal." This is the same argument that Whittelsey made in opposition to the petition to compel arbitration on March 22, 2022, which did not ultimately sway Judge Kirwan, who granted the petition. At that time, she relied heavily on the California Supreme Court's decision in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59 (*Sheppard Mullin*), and she now relies heavily on the same case.

The problem for Whittelsey is that *Sheppard Mullin* is plainly distinguishable from the present case. In *Sheppard Mullin*, there was a clear conflict of interest in the law firm's representation of its client that "violated rule 3-310(C)(3) of the Rules of Professional Conduct," because the law firm failed to disclose to the client its "simultaneous" representation of an opposing party. (*Sheppard Mullin*, 6 Cal.5th at pp. 68-70.) As a result of this "ethical violation," the Court of Appeal concluded that the arbitration clause was "unenforceable in its entirety," and the Supreme Court agreed. (*Id.* at p. 68.) In this case, by contrast, there is *no concrete evidence* of a conflict of interest at the time the 2007 and 2009 agreements were

signed. Whittelsey argues in her papers that there was an "actual" conflict between herself and Stuart, given that Stuart had signed a "Woodside Property Allocation Provision" and "Side Agreement," both allegedly without her knowledge, that purported to keep the Woodside Property as separate property rather than community property, contrary to her wishes. The court finds no support for this "actual" conflict.

In fact, the arbitration panel determined, quite to the contrary, that "Stuart and Carleen" were aligned in their decision to transmute all of their separate property into community property, and that the "Side Agreement" and "Woodside Property Allocation Provision" were "part of a then[-]arguably accepted estate planning technique" that would "allow Stuart to receive the benefit of a step-up in half of the tax basis of his otherwise separate property if Carleen died first, which in Stuart's case would result in a substantial tax saving." (Interim Award, dated July 18, 2023, at p. 2.) Thus, the "Woodside Property Allocation Provision" was an effort to save on taxes in the event that Stuart outlived Carleen, not a secretive effort to deprive Carleen of her community property interest. It appears that the probate court in San Mateo County likewise found an alignment of interest between Stuart and Carleen regarding the transmutation of the Woodside Property from separate property to community property. (Statement of Decision, dated March 14, 2019, at pp. 9-10.)[3]

b. Forfeiture

Hopkins argues that Whittelsey forfeited any claim as to the voidness or illegality of the arbitration provisions by failing to raise the claim with the arbitrators. The court agrees. In *ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP* (2017) 9 Cal.App.5th 885, 906 (*ECC*), the Court of Appeal held that a former client "forfeited [its] arguments by failing to raise them earlier in the proceedings" with the arbitrator. These arguments included the notion that its engagement agreement with a law firm was "an illegal agreement" because of an undisclosed conflict of interest, thereby rendering the arbitration provision unenforceable. That is precisely the situation that we have here. Whittelsey could have raised these same arguments with the arbitration panel but chose not to do so. (Accord *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 314 [a party may not "bypass the arbitral process, and invoke the jurisdiction of the courts, by asserting that the agreement itself was the product of fraud"; rather, "the entire dispute should be resolved through arbitration"].)

Whittelsey does not address *ECC* anywhere in her briefing. Instead, she contends that she properly "reserved the issue of the illegality and voidness of the agreements for later hearing" with the court, during the hearing on the petition to compel arbitration. (Opposition to Petition to Confirm, p. 1:14-18.) This is an incorrect interpretation of Judge Kirwan's March 22, 2022 Order, as well as the oral argument at the hearing. Indeed, the hearing concluded with the following exchange:

> THE COURT [Judge Kirwan]: Okay. All right. Unless there is anything else, I will go ahead and adopt the tentative[,] all[] right?"

[3] It appears that Whittelsey's contention that she had a conflict "with herself" (as the *trustee* of the family trust and as a *beneficiary* of the trust) is also based solely on this alleged conflict with Stuart. It is not a free-standing conflict and merits no further discussion beyond this footnote.

> MS. REIMER [for Whittelsey]: I would like that the court order also just state clearly that the issues regarding the contracts and their enforceability is preserved, and the plaintiffs can raise that at a later point.
>
> THE COURT: Well, the tentative speaks for itself, okay? I'm not here to cut deals with folks about how the tentative reads. I think it reads for itself. I think I responded to your question today to try to be as clear as I can, but I'm going to politely decline the request to amend the tentative, all right?

(Transcript of March 22, 2022 Hearing, pp. 8:21-9:5.) The undersigned does not read Judge Kirwan's tentative ruling as reserving the issue of enforceability for a post-arbitration hearing with the court. The March 22, 2022 Order instead makes it clear that the question of "enforceab[ility]," "ethics violations," and "conflicts of interest" were not ripe for the court's consideration at the March 22, 2022 hearing because they were "core issues alleged in the Complaint and have not [yet] been adjudicated." (Order at p. 2.) Elsewhere in the hearing, the court stated that the question of whether the contracts were "null and void" was "an ultimate issue in the case," and "not something the Court adjudicates at this stage of the proceedings." (Transcript at p. 6:14-27.)

All of these statements by Judge Kirwan support Hopkins's argument that Whittelsey should have raised the issue with the arbitrators under *ECC*, because the arbitrators were the ones who would be deciding the "core issues" and the "ultimate issue" in the case—*i.e.*, legal malpractice, breach of fiduciary duty, and conflicts of interest. All of these statements support the holding in *ECC* that the "later point" at which counsel for Whittelsey was to raise the voidness issue was *the arbitration itself*, not some post-arbitration hearing on the "core issues" and "ultimate issue." Indeed, it appears that Judge Kirwan was explicitly non-committal in the face of Whittelsey's counsel's effort to "reserve" a later court hearing:

> MS. REIMER: They don't have the ability to make determinations on that. So I'm trying to preserve the record because we will be back with respect to these agreements , all of the agreements. There is actually a total of five. They're all illegal and void. And so they are not -- nothing will -- the arbitration award will basically just be a detour for us.
>
> THE COURT: Well, I don't -- you know, *I'm not here to debate this with you*. I'm here to hear to any arguments you have, and I'll [let] Mr. Bening respond. *But what the arbitrator may or may not do or what happens down the road, we can all speculate,* but let's stick to the motion at hand this morning.
>
> MS. REIMER: Okay. Well, you have clarified the record that this matter will be ruled on and will be ruled on at a later point. And that's what I'm concerned with is to preserve those issues.

(Transcript at p. 7:5-17, emphasis added.) Again, counsel's invocation of a vague "later point" does not establish that that later point would actually be a post-arbitration hearing rather than the arbitration itself.

In short, because Whittelsey did not raise the issue of illegality and voidness with the arbitration panel, and because (as already noted above), the arbitration panel's decision provides *no factual support* for the notion that there was an actual conflict of interest, the court

finds that there is no basis for a conclusion that the arbitration provisions in 2007 and 2009 were void *and* that Whittelsey forfeited this claim in any event. Accordingly, Whittelsey has not shown that the "award was procured by corruption, fraud or other undue means," or that the "arbitrators exceeded their powers." (Code Civ. Proc., § 1286.2, subds. (a)(1) & (a)(4).) There is no basis for the court to vacate the arbitration award.

4. Other Arguments That Were Either Raised Or Could Have Been Raised In The Arbitration

Finally, the court notes that Whittelsey has raised other arguments regarding "fraud" that are actually efforts to reargue the merits of the arbitration. She claims that Hopkins attorney Bruce Roberts "lied" and committed "fraud" in connection with the "phony story" that he witnessed Stuart "tearing up" the Side Agreement. This is an allegation that arose from the arbitration and should have been raised in the arbitration. Moreover, even if it was not, it does not form a basis for vacating the arbitration award, because it is not one of the enumerated statutory grounds under Code of Civil Procedure section 1286.2. Just because Roberts "lied"—if he lied—does not necessarily mean that the arbitration award was "procured" by fraud. Indeed, the court does not even understand how this confusing argument works: if Roberts did in fact "lie" about seeing Stuart "tear up" the Side Agreement, how does that help Whittelsey in any way? How does that alleged "fraud" have any bearing on her claims of malpractice and breach of fiduciary duty? How does it undermine the arbitration panel's findings and conclusions? If the only purpose of such an allegation now is to demonstrate that Roberts was a bad person, that is not enough, and it is certainly not helpful.[4]

Similarly, Whittelsey argues that Hopkins committed "fraud" by refusing to produce documents during the arbitration, documents that the panel concluded were not relevant to the proceedings. Again, this has no bearing on whether the arbitration award was "procured" by fraud; there is no factual support for the allegation that these documents would have revealed even further fraud; and even if they did, there is no explanation as to how this impacts the validity of the arbitration award. Whittelsey cannot relitigate a discovery dispute on which she failed to prevail during the arbitration—that is not what a hearing on a petition to vacate was designed to address.

For the foregoing reasons, the court grants the motion to confirm and denies the motion to vacate.

The court previously set this matter for trial on November 18, 2024, but the court will also now set this matter for a case management conference on **April 16, 2024** at **10:00 a.m.** in Department 10.

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[4] In her briefs, Whittelsey makes a passing reference to "punitive damages," but there is no explanation as to how a supposedly "phony story" that does not have any discernible impact on her malpractice damages would somehow provide support for a claim for punitive damages.

Calendar Line 9
Case Name: *Santa Clara Valley Transportation Authority v. Z Hanna LLC et al.*
Case No.: 21CV392358

This is an eminent domain action concerning a property located at 29-31 East Santa Clara Street, San Jose, California. On November 9, 2023, plaintiff Santa Clara Valley Transportation Authority ("VTA") filed a notice of abandonment of this proceeding under Code of Civil Procedure section 1268.510. On December 8, 2023, defendant Z Hanna, LLC ("Z Hanna") (which may or may not also be the same as defendant "San Jose 29 East Santa Clara Street LLC," and which is apparently owned by an individual named Amanuel Keleta) filed the present motion to set aside the abandonment.[5] The court ultimately finds that defendant(s) have failed to show that they "cannot be restored to substantially the same position" as before with an award of money damages. (Code Civ. Proc., § 1268.510, subd. (b).) The motion is therefore DENIED.

Under Code of Civil Procedure section 1268.510, subdivision (b), the court may set aside an abandonment:

> . . . if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding ***and*** such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(Emphasis added.) In this case, the VTA concedes that Z Hanna has shown detrimental reliance but argues that Z Hanna has not shown the need for equitable relief, because any harm or "detriment" can be addressed with an award of money damages. The court agrees. The detrimental reliance identified by Z Hanna in its motion consists entirely of amounts that can be reimbursed: rent to the prospective landlord at the new location; amounts paid for fixtures and equipment at the new premises; amounts owed to a contractor; and the cost of a new liquor license. All of these amounts are easily quantifiable and reimbursable—in fact, Z Hanna has already attempted to do so in its opening brief. (See Memorandum at p. 4:4-16.)

Z Hanna cites three California Supreme Court cases to support setting aside the abandonment: *Torrance v. Superior Court of Los Angeles County* (1976) 16 Cal.3d 195 (*Torrance*); *Times-Mirror Co. v. Superior Court of Los Angeles County* (1935) 3 Cal.2d 309 (*Times-Mirror*); and *McGee v. Los Angeles* (1936) 6 Cal.2d 390 (*McGee*). Having reviewed these cases, the court finds them to be completely distinguishable. In *Torrance*, the real party in interest had already *purchased new property* and undertaken to incorporate that new property physically into its ongoing development on adjacent land, based on "the City's repeated and emphatic assurances that it had every intention of prosecuting its eminent domain action to final judgment." (*Torrance*, 16 Cal.3d at p. 207.) In light of these irreversible circumstances, the real party "could not be restored to substantially its prior position." (*Ibid.*) In *Times-Mirror*, the Supreme Court affirmed the trial court's determination that *constructing a new building*, based "upon the understanding that the site of the old building was included in the civic center plan," required the city "to prosecute said condemnation causes to final judgment." (*Times-Mirror*, 3 Cal.2d at pp. 333-334.) Both of these situations are materially

[5] The motion has been filed by "Attorneys for Defendant San Jose 29 East Santa Clara Street LLC," but the text of the brief focuses on Z Hanna and Keleta's objection to the abandonment.

different from entering into a fixed lease with a fixed amount of rent with a new landlord, an amount that (again) is easily ascertainable and reimbursable.

As for *McGee*, this case appears to support the VTA's position. *McGee* was an action "to recover the amount of a judgment awarded [plaintiff] in a condemnation action." (*McGee*, 6 Cal.2d at p. 391.) In other words, it was an action for *money damages*, based on the appellant's detrimental reliance, not an action to compel the governmental entity to proceed with a condemnation.

Z Hanna makes two other unsupported arguments that the court cannot accept. First, it contends that damages are unavailable under Code of Civil Procedure section 1268.620, subdivision (b), because it "could be interpreted as meaning only damages related to Keleta's old property[,] not the detriment and damages incurred at the new location." (Reply at p. 9:6-8.) The court disagrees. Subdivision (b) states that a court shall "[m]ake such provision as shall be just for the payment of all damages proximately caused by the proceeding and its dismissal as to that property." According to Z Hanna, the phrase "as to that property" "*could be*" interpreted as meaning damages only "as to that property." This speculative interpretation defies grammar and common sense. The phrase "as to that property" in this provision modifies the "*dismissal*" of the proceeding, not the "*damages* proximately caused" by the proceeding. Z Hanna cites no legal authority for its implausible reading of the statute, and the court rejects it.

Second, Z Hanna argues that the VTA cannot abandon the eminent domain proceeding without the approval of the Board of Directors of VTA, and there is no evidence that the Board approved this particular abandonment. In support, Z Hanna cites Code of Civil Procedure section 1245.220, which states that a "resolution of necessity" is required from the "governing body" before an eminent domain proceeding may "commence." But Z Hanna cites no authority for the proposition that a "resolution of necessity" is also needed before an eminent domain proceeding may be *terminated*. Certainly, there is nothing in the language of Code of Civil Procedure section 1268.510 itself that says so, and this is the statute that provides for the mechanism of abandonment "[a]t any time after the filing of the complaint and before the expiration of 30 days after final judgment." (Code Civ. Proc., § 1268.510, subd. (a).) Indeed, the court cannot imagine that the California Legislature would have intended to impose such a cumbersome and impractical requirement in eminent domain actions without explicitly saying so. The court accepts the Notice of Abandonment, dated November 9, 2023, as a valid court filing. Z Hanna's contrived reading of the statutory scheme is once again totally unsupported by legal authority and contrary to both logic and common sense.

The court DENIES the motion.

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