SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Hon. Thomas Kuhnle (covering for Hon. Frederick S. Chung)

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

DATE: November 2, 2023 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 prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored.

***New information* (please read)**: To set future motion hearings, you no longer need to file your motion before receiving a hearing date. Phone lines are now open for you to call and reserve a hearing date *before filing and serving* your motion. Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve your date. This will obviate the need to file and serve a separate amended notice at a later time. Please note: if your motion papers are not filed within five business days of reserving the hearing date, 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.

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	17CV311924	Cavalry SPV I, LLC v. David L. Garcia	See below.
LINE 2	22CV396247	Georgette Stanley v. Dusty Lynn White et al.	See below.
LINE 3	22CV396247	Georgette Stanley v. Dusty Lynn White et al.	See below.
LINE 4	22CV396247	Georgette Stanley v. Dusty Lynn White et al.	See below.
LINE 5	22CV395964	Michael Ward v. Sean Anderson et al.	Per the order filed on October 20, 2023, this motion has been CONTINUED to January 18, 2024. Parties need not appear at the November 2, 2023 hearing.
LINE 6	20CV371411	Dutchints Development, LLC et al. v. Richard Tod Spieker et al.	The motions to withdraw as counsel for each named plaintiff are unopposed. After reviewing the submissions, the Court GRANTS both motions. Plaintiffs' counsel shall prepare separate proposed orders for each motion and submit each electronically to the court. The orders are effective upon the filing of the proof of service of the signed order upon each named plaintiff.
LINE 7	20CV371411	Dutchints Development, LLC et al. v. Richard Tod Spieker et al.	See related matter immediately above.

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LINE 8	22CV402338	ARGO Construction, Inc. v. FPC Builders, Inc. et al.	Plaintiff's motion to compel arbitration and stay the case was not opposed. The motion is GRANTED. So too is the request for judicial notice. The further case management conference set on November 21, 2023, is VACATED. A further case management conference is SET on April 16, 2024, at 10:00 a.m. in Department 10. Plaintiff's counsel shall prepare and submit electronically to the court the proposed order.
LINE 9	22CV403338	Dylan T. Rogers et al. v. Prime Vista Montana, LLC et al.	The unopposed motion to withdraw filed by plaintiffs' counsel is GRANTED. Plaintiffs' counsel shall prepare separate proposed orders for each motion and submit each electronically to the court. The orders are effective upon the filing of the proof of service of the signed order upon each named plaintiff.
LINE 10	23CV414082	Citibank, N.A. v. Grace King	Plaintiff's unopposed motion to deem unanswered FRAs admitted is GRANTED. Plaintiff's counsel shall prepare and submit electronically to the court the proposed order.
LINE 11	20CV373696	Jerry Ivy, Jr. v. Jerry Ivy, Sr. et al.	See below.
LINE 12	23CV423013	MILPITAS-DISTRICT 2 OWNER, LLC vs TERRY ZHENG et al	See below.

Calendar Line 1
Case Name: Cavalry SPV I, LLC v. David L. Garcia
Case Number: 17CV311924

A default judgment in the amount of $3,263.15 was entered on August 31, 2018. According to plaintiff, as of July 19, 2023, defendant has not made any payments on the judgment, and interest continues to accrue. On September 25, 2023, defendant submitted a claim for exemption re: wage garnishment. On October 5, 2023, plaintiff requested a hearing on the claim for exemption.

Defendant's financial statement shows he is paid $1,200 per week, and approximately $5066 per month. Plaintiff proposes $25.00 per pay period be withheld.

The court GRANTS IN PART defendant's claim of exemption. The court ORDERS defendant to pay $25.00 per pay period. The pay period is weekly. The amount may be garnished from defendant's wages.

Plaintiff shall prepare a formal order and submit it to the court electronically.

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Calendar Lines 2-4
Case Name: Georgette Stanley v. Dusty Lynn White et al
Case Number: 22CV396247

The unopposed demurrers to Plaintiff's Second Amended Complaint filed by defendant Dusty Lynn White and defendant Technology Credit Union (together, "Defendants") are SUSTAINED WITHOUT LEAVE TO AMEND.

The court GRANTS IN PART White's request for judicial notice. The court takes judicial notice of the Ex Parte Order Approving Settlement Agreement, dated September 26, 2016, which attaches a copy of the settlement agreement between White and Plaintiff, among others, in Santa Clara County Case No. 2015-1-PR-177038. (See Evid. Code, § 452, subd. (d).) In doing so, however, the court does not take judicial notice of the truth of the matters in these documents (the order and settlement agreement), nor does the court take judicial notice of the truth of any findings of fact made by the prior judge, only that those findings were made. (*Barri v. Workers' Comp. Appeals Board* (2018) 28 Cal. App.5th 428, 437-438.) For similar reasons, the court does not take judicial notice of Defendants' legal arguments about the consequences of these documents (e.g., the argument that Plaintiff "waived any and all rights"). Apart from taking judicial notice of the order and attached settlement agreement, the court DENIES White's request for judicial notice. The court GRANTS Technology Credit Union's request for judicial notice of documents 2-4, though once again, it does not take judicial notice of the truth of the matters in these documents. The court GRANTS Technology Credit Union's request for judicial notice of document 1.

The events giving rise to this action appear to have occurred between 2008 and 2013. Each cause of action alleged against the Defendants in the Second Amended Complaint, which was filed on April 20, 2023, is therefore barred by the statute of limitations. As an alternative basis

for sustaining the demurrers, the court agrees with Defendants that: (1) Plaintiff's causes of action are barred by the court's prior judgment and order on the settlement agreement, where plaintiff signed a release of her claims; (2) Plaintiff has not pled sufficient facts to show that she has standing to allege financial elder abuse of the decedent; and (3) Plaintiff has not pled her fraud/deceit claim with particularity.

The court GRANTS White's motion to strike.

Counsel for each defendant share prepare separate proposed orders and submit them electronically to the court.

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Calendar Line 11
Case Name: JERRY IVY, Jr. et al vs JERRY IVY, Sr. et al
Case Number: 20CV373696

I. Background

This action arises from a dispute over the management of several closely held corporations in which Plaintiff Jerry Ivy ("Plaintiff"), individually and in his capacity as a Trustee of the Jerry L. Ivy, Jr. Descendants' Trust, has sued Defendants Jerry Ivy, Sr. ("Jerry Sr."), Deborah J. Ivy ("Deborah") and Edward Ivy ("Edward," collectively "Defendants").[1] Plaintiff is a resident of Washington State. Defendants Jerry Ivy Sr. and Deborah Ivy, Plaintiff's parents, reside in Santa Clara County. Defendant Edward Ivy, Plaintiff's brother, resides in Contra Costa County.

Plaintiff's original Complaint was filed on November 17, 2020. Defendants initially brought a demurrer against this complaint, but this was rendered moot when the operative First Amended Complaint ("FAC") was filed on May 18, 2021. The FAC originally stated 13 causes of action against all Defendants: (1) Breach of Fiduciary Duty (brought by Plaintiff individually); (2) Breach of Fiduciary Duty (brought derivatively on behalf of AC California only); (3) Breach of Fiduciary Duty (brought derivatively on behalf of AC Washington only); (4) Breach of Fiduciary Duty (brought derivatively on behalf of AC Oregon only); (5) Breach of Fiduciary Duty (brought derivatively on behalf of EMJ only); (6) Accounting (brought by Plaintiff individually); (7) Accounting (brought derivatively on behalf of AC California only); (8) Accounting (brought derivatively on behalf of AC Washington only); (9) Accounting (brought derivatively on behalf of AC Oregon only); (10) Accounting (brought derivatively on behalf of EMJ only); (11) Violation of California Corporations Code section 315 (purportedly brought both by Plaintiff individually and derivatively on behalf of AC California); (12) Violation of Oregon Revised Statute §60.364 (brought by Plaintiff individually and derivatively on behalf of AC Oregon), and; (13) Restitution based on quasi-contract or unjust enrichment (brought by Plaintiff individually and derivatively on behalf of all the companies).

[1] Due to their shared last name, at times the court may refer to Defendants by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

Defendants also brought a demurrer to the FAC which was heard by the court (Judge Kirwan) on September 9, 2021. In his formal order on the demurrer issued on September 9[2] Judge Kirwan noted that the parties had represented to the court at the August 31, 2021 case management conference that an agreement had been reached as to the derivative claims and those claims would be dismissed. As no dismissal had occurred by the time of the demurrer hearing, the court sustained the demurrer to the second, third, fourth, fifth, seventh, eighth, ninth, tenth, eleventh (as brought derivatively on behalf of AC California), twelfth (as brought derivatively on behalf of AC Oregon) and the thirteenth cause of action (as brought derivatively on behalf of the companies) without leave to amend. (See Sept. 9, 2021 order at p. 3:1-15.)

The court also sustained Defendants' demurrer to the eleventh and twelfth causes of action as brought by Plaintiff individually without leave to amend. The court overruled the demurrer as to the first, sixth and thirteenth causes of action, and these are the only causes of action remaining.

Defendants filed an answer to the FAC on September 24, 2021. The answer's nineteenth affirmative defense states in pertinent part that "these answering Defendants allege that all times and places mentioned in the Complaint herein, the action is barred by the statute of limitations under the Code of Civil Procedure." (Answer at p. 5:13-15.) This is the only answer Defendants have filed in this case.

Currently before the court is a motion for summary judgment/adjudication brought by Defendants as to the remaining claims in the FAC, the first, sixth and thirteenth causes of action. Defendants' motion was filed on August 10, 2023. Plaintiff's opposition was filed on October 19, 2023. The motion was originally set for hearing on October 19, but was continued to the present hearing date pursuant to a September 11, 2023 ex parte order by the court (Judge Chung). This matter is currently set for trial on November 27, 2023.

II. Request for Judicial Notice

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evidence Code §450.) A precondition to judicial notice in either its permissive or mandatory form 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 § 453(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 their motion Defendants have submitted a request for judicial notice of four documents, attached to the request as exhibits A-D. Defendants' request is made under Evidence Code section 452(c), (d), and (h). As an initial matter, Evidence Code section 452(h) does not apply to any of the submitted documents. (See *Gould v. Md. Sound Indus*. (1995) 31 Cal.App.4th 1137, 1145 (*Gould*) ["Judicial notice under Evidence Code section 452, subdivision (h) is intended to cover facts which are not reasonably subject to dispute and are

[2] The court takes judicial notice of the September 9, 2021 order on its own motion under Evidence Code section 452(d).

easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."].)

Notice of exhibits A and B, copies of the original complaint and the operative FAC, is GRANTED under Evidence Code section 452(d) (court records) only. Notice is not taken of the truth of the allegations made. Notice of exhibit C, a copy of Judge Kirwan's September 9, 2021 order, is GRANTED under Evidence Code section 452(c) (official acts) and Evidence Code section 452(d) (court records).

Notice of exhibit D, consisting of copies of "[c]over pages and relevant pages of JohnsonDiversey Inc.'s Form 10-K annual report submitted to the United State Security and Exchange Commission for the year ending December 31, 2008," (Request at p. 2:4-6), is DENIED. Excerpts from a report prepared by a private party and on file with state or federal agencies are not court records and are not noticeable under section 452(h). They are also not noticeable as official acts of the agency, state or federal, with which they are filed. (See *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 607-608 [applications and supporting documents filed by private parties with Department of Insurance were not official acts of department subject to judicial notice]; *Hughes v. Blue Cross of N. Cal*. (1989) 215 Cal.App.3d 832, 856, fn. 2, citing Evid. Code, § 452(c) [Statement of Information, although on file with a government agency, not subject to judicial notice as an official act under subdivision (c) because it was prepared by private parties, not the Secretary of State]; *People v. Thacker* (1985) 175 Cal.App.3d 594, 598-599 [copies of articles of incorporation, statement by domestic corporation, and notice of issuance of shares were materials prepared by private person, merely on file with state agencies, and not official acts].)

The decisions cited by Defendants (Request at p. 3:1-7) do not support judicial notice of exhibit D. The decision in *Smiley v. Citibank (SD), N.A.* (1995) 11 Cal. 4th 138, 145, fn. 2 does not support the request as it merely recites general authority relating to judicial notice. Neither does the decision in *Kruss v. Booth* (2010) 185 Cal.App.4th 699, 710, which simply notes the actions of the trial court in that case, nor does *Aquila, Inc. v. Sup. Ct.* (2007) 148 Cal.App.4th 556, 575, which also simply notes actions previously taken by the trial court in the decision under review. "[C]ases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal 4th 1250, 1268 fn. 10.)

III. Defendants' Motion for Summary Judgment/Adjudication

A. General Standard

The pleadings limit the issues presented for summary judgment/adjudication and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion."].) This is relevant here as Defendants' answer to the FAC fails to properly assert a statute of limitations defense.

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25

Cal.4th 826, 850.) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code of Civil Procedure ["CCP"] §437c(f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."]) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.) The only "claim for damages" that can be independently summarily adjudicated under CCP §437c(f)(1) is a claim for punitive damages.

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252.)

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* at 850.)

B. Grounds for Defendants' Motion

In their Notice of Motion and Motion "for summary judgment" Defendants state that they seek "summary judgment or in the alternative summary adjudication because there are no triable issues of material fact in this action." (Notice of Motion and Motion at p. 2:1-2.) The Notice of Motion and Motion also states that the motion is made "as to the following issues," and goes on to assert that the first cause of action "fails as a matter of law because it is barred by the applicable statute of limitations," and "because there are no facts sufficient to constitute a cause of action because there was no breach of a fiduciary duty." It asserts that the sixth cause of action "fails as a matter of law because there are no facts sufficient to state a cause of action since there is not a Breach of Fiduciary Duty." It also asserts that the thirteenth cause of action "fails as a matter of law because it is barred by the statute of limitations." (See Notice of Motion and Motion at p. 2:3-17.)

Rule of Court 3.1350(b) states that "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts."

The separate statement of undisputed material facts ("UMFs") filed by Defendants "in support of motion for summary judgment" does not comply with Rule of Court 3.1350(b) as it makes no mention of the sixth or thirteenth causes of action. It simply lists a total of 24 UMFs in support of two "issues" (neither of which address an issue of duty) relating to the first cause of action. None of the UMFs in Defendants' separate statement address or are directed at the sixth or thirteenth cause of action. The second issue listed in the statement also does not "repeat, verbatim" the second basis for judgment on the first cause of action that is stated in the Notice of Motion.

This motion therefore must be considered one for summary judgment only. Summary adjudication in the alternative of any of the three remaining causes of action is unavailable. Where a motion is for summary judgment only the court has no power to grant summary adjudication of any particular claim, issue, or defense. (See *McMillan Companies, LLC v. American Safety Indemnity Co*. (2015) 223 Cal.App.4th 518, 542, citing *Montevalli v. Los Angeles Unified School Dist*. (2004) 122 Cal.App.4th 97, 114 ["a motion for summary adjudication cannot be considered by the court unless the party bringing the motion for summary judgment duly gives notice that summary adjudication is being sought as an alternative to summary judgment, in the event summary judgment is denied"]; see also 6 Witkin, *Cal. Procedure* (5th ed. 2019) Proceedings Without Trial § 322 [listing cases].)

C. Analysis of Defendants' motion for summary judgment

Defendants motion for summary judgment is DENIED as follows.

Defendants' first argument is that the first cause of action (and by extension the sixth and thirteenth) are time-barred by statutes of limitation from four states, California (CCP section 339), Washington (RCW section 4.16.080(2), Oregon (ORS section 12.110(1), and Georgia (no one statute relied upon). (See Defendants' supporting memorandum at pp. 5:11-8:26 generally; UMFs nos. 1-19.) The statute of limitation is also the only specific argument made by Defendants against the thirteenth cause of action. (See Memo. at pp. 10:17-11:7.) Summary judgment or adjudication cannot be granted on this ground as Defendants' answer to the FAC, and specifically their nineteenth affirmative defense, failed to properly raise a statute of limitations defense.

CCP section 458 states: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section _____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure…" The failure to properly plead the statute of limitations waives the defense. "There are two ways to properly plead a statute of limitations: (1) allege facts showing that the action is barred, and indicating that the lateness of the action is being urged as a defense and (2) plead the specific section and subdivision. . . . *The failure to properly plead the statute of limitations waives the defense*." (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91, emphasis added, citing *Mysel v. Gross* (1977) 70

Cal.App.3d Supp. 10, 15; see also *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691 ["It is necessary for defendant who pleads the statute of limitations to specify the applicable section, and, if such section is divided into subdivisions, to specify the particular subdivision or subdivisions thereof. If he fails to do so the plea is insufficient."])

The only answer filed by Defendants in this case, the September 24, 2021 answer to the FAC, does not allege facts showing that any claim alleged in the FAC is time-barred and does not properly identify any statute of limitations. Any defense based on a statute of limitations has been waived. The fact that no pleading challenge was made to the answer is irrelevant. A party is not required to demur to an answer to preserve the objection that the answer fails to comply with CCP section 458. (See *Area 55, LLC v. Nicholas & Tomasevic LLP* (2021) 61 Cal.App.5th 136, 172). It is also irrelevant that Plaintiff's opposition to this motion does not raise this issue. The waiver occurred on September 24, 2021 regardless. Defendants could have sought leave to amend their answer at any point before filing this motion but did not. Summary judgment cannot be granted on a basis not raised by the operative pleadings.

As this motion is one for summary judgment only—and the statute of limitations is the only ground for judgment that the Notice of Motion and Motion and the supporting memorandum expressly raise against the thirteenth cause of action—the waiver of any statute of limitations defense is a sufficient basis by itself to deny the entire motion.

Defendants' second argument against the first cause of action is based on their interpretation of certain language in the document governing Plaintiff's trust and in the operating agreement for the EMJ entity. Defendants assert that this language establishes that there could be no breach of fiduciary duty. First, Defendants rely on language in Article 5 of Plaintiff's Trust stating that Defendant Deborah may "direct" the way the trustee shall vote stock and may "direct" the investment or reinvestment of any assets of the trust estate by the trustee, with such power continuing even after Deborah ceased to be a trustee. (See UMF no. 22, citing to exhibit 3 to the declaration submitted by Defendant Deborah.) Second, they rely on language in the EMJ Holdings LLC operating agreement, specifically sections 6.02 and 6.05. (See UMFs 23 and 24, citing the copy of the agreement attached to Defendant Deborah's declaration as exhibit 4.)

The interpretation of these documents is a question of law for the court. "The interpretation of a contract is a question of law unless the interpretation turns on the credibility of extrinsic evidence." (*Sierra Vista Regional Medical Center v. Bonta* (2003) 107 Cal.App.4th 237, 245.) Generally, "It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence." (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 724.)

Even if summary adjudication of the first cause of action were available to Defendants (and it is not) triable issues of material fact would remain as to whether the portions of either document that Defendants rely on establish that there are "no acts" to support the breach of fiduciary duty claim.

Regarding Article 5 of the document governing Plaintiff's trust, on March 25, 2002 Defendant Deborah sent Plaintiff a letter stating in pertinent part that "[e]ffective immediately, I hereby irrevocably waive, renounce, relinquish and surrender all authority, power and right granted to me under Article Four" of the trust document. (See exhibit G to the declaration of

Plaintiff's Counsel Sanjeet Ganjam ("Ganjam Decl.").) Defendant Deborah also testified at deposition that she had never exercised her power under Article 5 to "direct" Plaintiff to vote a certain way or to make an investment. (See exhibit A to the Ganjam Decl. at pp. 36:14-42:8.) A triable issue of material fact clearly remains as to whether the loans on which the first cause of action is based upon could have been authorized by Article 5 of the trust document.

Regarding sections 6.02 and 6.05 of the EMJ operating agreement, Article IV of the operating agreement ("Company Funds"), states in pertinent part that "All funds received by the Company shall be used for Company purposes as determined by the Manager in the best interests of the Company." As Plaintiff points out, Defendants' motion (and in particular the separate statement) does not establish that the loans on which the first cause of action is based upon were "in the best interests" of EMJ. None of Defendants' UMFs address this issue. It is the "golden rule" of summary judgment that all material facts must be set forth in the separate statement. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) If it is not in the separate statement, it does not exist. (*Id*.; See also *North Coast Business Park v Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 29, fn. 4 [finding that facts not set forth in the moving party's separate statement of facts cannot be considered in ruling on a motion for summary judgment.].) " 'Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement*.' And if the separate statement does not contain all material facts on which the motion is based, the moving party has failed to meet its initial burden of production and is 'not entitled to summary adjudication as a matter of law.'" (*California-American Water Co. v. Marina Coast Water District* (2022) 86 Cal.App.5th 1272, 1297, emphasis in original, internal citations omitted but citing *United Community Church, supra*, and *Troyk v. Farmers Group, Inc*. (2009) 171 Cal.App.4th 1305, 1353.)

As Defendants' motion for summary judgment only is denied based on their waiver of any statute of limitations defense and failure to demonstrate that either Plaintiff's Trust document or the EMJ Holdings LLC operating agreement establish that "there are no facts sufficient to constitute a cause of action because there was no breach of a fiduciary duty," (Notice of Motion and Motion at p. 2:10-11) it is not necessary for the court to rule on Plaintiff's objections to Defendants' supporting evidence or Defendants' objections to Plaintiff's opposition evidence. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (CCP § 437c(q).)

The Court will prepare the formal order.

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Calendar Line 12
Case Name: Milpitas District 2 Owner LLC v. Zheng, et al.
Case Number: 23CV423013

I. Background

This is a limited civil unlawful detainer action brought by Plaintiff Milpitas-District 2 Owner, LLC ("Plaintiff"), owner of real property located at 1455 McCandless Drive, Unit #531, Milpitas, CA 95035. The action is brought against Defendants Terry Zheng ("Zheng"), Guihong Ni ("Ni") and various Does.

The original and still operative verified Complaint was filed on September 20, 2023. Attached to the Complaint as exhibits A and B are copies of the lease contract for the subject property between Plaintiff and Defendant Zheng (exhibit A) and a three-day notice to quit dated September 5, 2023 (exhibit B). No proof of service for the complaint has been filed.

Currently before the court is a motion to quash service of summons brought by Defendants Zheng and Ni, who are self-represented. The motion was filed on October 2, 2023. Plaintiff's opposition was filed on October 19, 2023. Defendants' reply was filed on October 31, 2023.

The motion was originally set for hearing on October 27, 2023 before Judge Overton in Department 11. As Defendants stated in their moving papers that they were bringing a challenge to Judge Overton under Code of Civil Procedure ("CCP") section 170.6, the case was transferred to Department 10 and continued to the current hearing date.

II. Defendants' Motion to Quash Service

Defendants' motion is brought under CCP sections 1167.4 (permitting motions to quash in unlawful detainer actions) and 418.10 (the statute governing motions to quash service).

Once a defendant files a motion to quash service, the burden is on the plaintiff to establish the necessary facts of jurisdiction, including service of process, by a preponderance of the evidence. (*Lebel v Mai* (2012) 210 Cal.App.4th 1154, 1160.) "When a defendant challenges the court's personal jurisdiction on the ground of improper service of process the burden is on the plaintiff to prove ... the facts requisite to an effective service." (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 413.) The filing of a proof of service that complies with applicable statutory requirements by itself creates a rebuttable presumption that service was proper. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441.) However, as noted above, no proof of service has been filed in this case. A declaration of service by a registered process server establishes a presumption that the facts stated in the declaration are true. (Evidence Code §647; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.)

Defendants' motion argues that personal service of the Complaint did not occur. "Whomever attempted service merely threw the summons and complaint on the ground. This is not actual physical deliver[y] of the summons and complaint by the process server to the Defendants while in each other's presence." (Notice of Motion and Motion at p. 4:24-28.) Defendants' motion is accompanied by a declaration from Defendant Zheng stating in pertinent part that "[o]n September 26, 2023 I returned home to discover a copy of the summons and

complaint on the ground outside my front door. I have not heard any knocks at my door by any purported process server." (Zheng decl. at ¶¶ 3-4.)

Plaintiff's opposition responds that "[t]he [d]eclaration of the registered process server, Martin Garcia, filed herewith, indicates that defendant was indeed served with the Summons and Complaint." (Opposition at p. 1:26-27.)

Attached as exhibit 1 to Plaintiff's opposition is a copy of the declaration of registered process server Martin Garcia "in support of service of process." Mr. Garcia states under penalty of perjury in paragraph 3 of his declaration that "[o]n or about September 26, 2023 I personally served the summons and the complaint upon the defendants at the subject premises located at 1455 McCandless Drive #531. I personally served them at about 6:10 p.m. I knocked on the door and a man came to the door. A woman stood behind him. They opened the door about 6 inches, enough to obtain a clear description. I said their names loudly enough for each to hear. They did not deny who they were. I told them I was there to serve some papers from their property management company. The male told me he could not trust me and refused to take the papers. The male was an Asian American looking man. He stood about 5'6". He had sort black hair and fair skin of average build. The woman was an Asian American looking woman. She stood about 5'5" and was average build as well. She had black hair that went to her shoulders."

Defendant Zheng has submitted another declaration with Defendants' reply. This declaration states that on September 26, 2023 he was at San Francisco International Airport until approximately 5:20 p.m. picking up a relative, and that he then went to dinner with family members, returning home at approximately 9:30 p.m.

Personal jurisdiction is a question of law where no conflicting evidence exists; where conflicting declarations exist as they do here, the court has the discretion to decide which to "believe" so long as "substantial evidence" supports the decision. (*Evangelize China Fellowship v. Evangelize China Fellowship* (1983) 146 Cal.App.3d 440, 445.) Here, while Defendant Zheng's initial declaration was lacking in detail, the court finds the more detailed declaration submitted by Defendant Zheng with the reply to be more credible that the declaration from Mr. Garcia, and it raises a significant question as to whether it was possible for Defendants to have been personally served by Mr. Garcia at 6:10 p.m. on September 26 as Mr. Garcia's declaration claims. Also notable in Defendant Zheng's declaration is that he is 6'0" tall, and not 5'6" as reported by Mr. Garcia, and that Defendant Ni is a man and not a woman.

As Plaintiff has not established by a preponderance of the evidence that personal service did in fact occur, Defendants' motion to quash service is GRANTED.

The Court will prepare the formal order.

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