SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: October 12, 2023 TIME: 9:00 A.M.

TO REQUEST ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO HAVE THE HEARING REPORTED: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

TO SET YOUR NEXT hearing date: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed by January 2024.

Where to call for your hearing date:	408-882-2430
When you can call:	Monday to Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	18CV332043	CREDITORS ADJUSTMENT BUREAU, INC. vs SILICON VALLEY TAXI DRIVERS INC. et al	Defendant is ordered to appear in person to be examined. Defendant was also ordered to produce two electronic files of documents by overnight mail no later than Friday, September 15, 2023. Defendant's failure to comply with these orders may result in a $2,000 bench warrant being issued and/or other fines, fees, and/or sanctions.
2	18CV332043	CREDITORS ADJUSTMENT BUREAU, INC. vs SILICON VALLEY TAXI DRIVERS INC. et al	Defendant is ordered to appear in person to be examined. Defendant was also ordered to produce two electronic files of documents by overnight mail no later than Friday, September 15, 2023. Defendant's failure to comply with these orders may result in a $2,000 bench warrant being issued and/or other fines, fees, and/or sanctions.
3	23CV414397	JONATHAN HOLMES vs KARYN GUARASCIO et al	Defendants' Demurrer to the Second, Third and Fourth Causes of Action is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to Line 3 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
4	22CV405861	KATHERINE DeWIT vs MICHAEL STREET et al	The Demurrer to the Cross-Complaints is OVERRULED. Please scroll down to Lines 4-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
5	22CV405861	KATHERINE DeWIT vs MICHAEL STREET et al	Plaintiff's motion to compel is GRANTED. Prandecki is ordered to produce code compliant responses to the special interrogatories without objections within 20 days of service of the formal order. Plaintiff's request for monetary sanctions GRANTED, IN PART. Please scroll down to Lines 4-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
6	22CV405861	KATHERINE DeWIT vs MICHAEL STREETet al	Plaintiff's motion to compel is GRANTED. Street is ordered to produce code compliant responses to the special interrogatories without objections within 20 days of service of the formal order. Plaintiff's request for monetary sanctions GRANTED. Please scroll down to Lines 4-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
7	22CV405861	KATHERINE DeWIT vs MICHAEL STREETet al	Plaintiff's motion to compel is GRANTED. Hillside is ordered to produce code compliant responses to the special interrogatories without objections within 20 days of service of the formal order. Plaintiff's request for monetary sanctions GRANTED, IN PART. Please scroll down to Lines 4-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

8	22CV405861	KATHERINE DeWIT vs MICHAEL STREETet al	Plaintiff's motion to compel Street to provide further responses to requests for production and requests for admission and for sanctions is GRANTED, IN PART. Street is ordered to produce code compliant responses without objections within 20 days of service of the formal order and to pay Plaintiff $3,000 in sanctions within 60 days of service of the formal order. Please scroll down to Lines 4-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
9	22CV405861	KATHERINE DeWIT vs MICHAEL STREETet al	Plaintiff's motion to compel Hillside to provide further responses to requests for production and requests for admission and for sanctions is GRANTED, IN PART. Street is ordered to produce code compliant responses without objections within 20 days of service of the formal order and to pay Plaintiff $1,500 in sanctions within 60 days of service of the formal order. Please scroll down to Lines 4-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
10	22CV406491	Li Wen Wang vs Bobby Chow	Plaintiff Li wen's Motion for An Order Establishing Admissions and for $1,312.50 in Sanctions is GRANTED, IN PART. An amended notice of the motion with this hearing date was served on Defendant by overnight and electronic mail on August 15, 2023. Plaintiff failed to file an opposition. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) Further, Plaintiff served a first set of requests for admission on Defendant by overnight mail on March 3, 2023. Defendant served no responses. Plaintiff followed up with a letter to Defendant on June 21, 2023. Defendant still did not respond. A party served with Requests for Admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the Requests for Admission deemed admitted—as Defendant has done here, the Court must order the Requests for Admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Plaintiff's request for sanctions is granted. Counsel's $525.00 hourly rate is reasonable for this market, and the 1.5 hours taken to prepare this motion and the accompanying motion to compel interrogatories and requests for production is appropriate. However, there was no opposition and no hearing will likely be necessary. Accordingly, Defendant is ordered to pay $787.50 to Plaintiff for both motions to compel within 60 days of service of the formal order. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

11	21CV392764	Jose Rendon vs Kia America, Inc.	Motion for Superior Court to Resume Jurisdiction is GRANTED; Plaintiff's motion for sanctions is DENIED. Please scroll down to Line 11 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
12	22CV406853	RUBEN OLIVA vs ALLEN GEOFFROY et al	Plaintiff's Motion for An Order for Service by Publication is GRANTED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
13	22CV406491	Li Wen Wang vs Bobby Chow	Plaintiff's Motion to Compel Responses to Form and Special Interrogatories (Set One) and Requests for Production of Documents and for $1,575.00 in Sanctions is GRANTED, IN PART. An amended notice of the motion with this hearing date was served on Defendant by overnight and electronic mail on August 15, 2023. Plaintiff failed to file an opposition. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) Further, Plaintiff served Form Interrogatories (Set One), Special Interrogatories (Set One), and Requests for Production of Documents (Set One) on Defendant by overnight mail on March 3, 2023. Defendant served no responses. Plaintiff followed up with a letter to Defendant on June 21, 2023. Defendant still did not respond. Where, as here, a responding party fails to timely respond to Interrogatories and/or Requests for Production, absent a demonstration that the failure to respond was due to mistake, inadvertence, or excusable neglect and responses have since been served, the responding party waives all objections to the interrogatories, including objections based on privilege or on the protection for work product. (Code of Civ. Proc. §§2030.290(a), 2031.300.) Defendant is therefore ordered to serve code-compliant responses without objections within 20 days of service of this final order. Plaintiff's request for sanctions is granted. Counsel's $525.00 hourly rate is reasonable for this market, and the 1.5 hours taken to prepare this motion and the accompanying motion deem requests for admission admitted is appropriate. However, there was no opposition and no hearing will likely be necessary. Accordingly, Defendant is ordered to pay $787.50 to Plaintiff for both motions to compel within 60 days of service of the formal order. (Code of Civ. Pro. §2030.300(d); *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1285, 1291-1293; *Parker v. Wolters Luwer United States, Inc.* (2007) 149 Cal.App.4th 285, 293.) To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

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Calendar Line: 3
Case Name: *Holmes v. Guarascio et.al.*
Case No.: 23CV414397

Before the Court are Defendants', Karen Guarascio and Mathew D. Guarascio ("Defendants") demurrers to Plaintiff's, Jonathan Holmes, complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

As alleged in the complaint, Defendants and Plaintiff are adjacent neighbors in San Jose. On February 15, 2023, while Plaintiff was out of town, Defendants' workers wrongfully entered Plaintiff's property and removed two matured birch trees without Plaintiff's knowledge and consent. On the following day, when Plaintiff arrived home, he received a note from Defendants acknowledging that their employees had removed the two birch trees.

On April 10, 2023, Plaintiff filed this complaint against Defendants alleging: (1) trespass, (2) treble damages for wrongful cutting or removal of timber pursuant to Civil Code section 3346(A) and Code of Civil Procedure section 733, (3) diminution of real property value, (4) vandalism, and (5) negligence. Defendants demur to the second, third, and fourth causes of action. Plaintiff opposes.

II. Legal Standard

A demurrer tests the sufficiency of a complaint and raises only questions of law. (*Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1706.) On a demurrer, the court must assume the truth of (1) the properly pleaded factual allegations; (2) facts that can be reasonably inferred from those expressly pleaded; and (3) judicially noticed matters. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The court may not consider contentions, deductions, or conclusions of fact or law. (*Moore v. Conliffe* (1994) 7 Cal.App.4th 634, 638.) Because a demurrer tests the legal sufficiency of a complaint, a plaintiff must demonstrate that the complaint alleges facts sufficient to establish every element of each cause of action. (*Rakestraw v. California Physicians Service* (2000) 81 Cal.App.4th 39, 43.) Where the complaint fails to state facts sufficient to constitute a cause of action, courts should sustain the demurrer. (Code of Civ. Proc. §430.10(e); *Zelig v. County of Los Angeles* (2002) 27 Cal.App.4th 1112, 1126.)

Sufficient facts are the essential facts of the case "with reasonable precision and with particularity sufficiently specific to acquaint the defendant with the nature, source, and extent of his

cause of action." (*Gressley v. Williams* (1961) 193 Cal.App.2d 636, 643-644.) Whether the plaintiff will be able to prove the pleaded facts is irrelevant. (*Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 609-610.)

A demurrer may also be sustained if a complaint is "uncertain." Uncertainty exists where a complaint's factual allegations are so confusing, they do not sufficiently apprise a defendant of the issues the defendant is being asked to meet. (*Williams v. Beechnut Nutrition Corp*. (1986) 185 Cal.App.3d 135, 139, fn. 2; Code of Civ. Proc. §430.10(f).) A pleading is required to assert general allegations of ultimate fact. Evidentiary facts are not required. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47; *Lim v. The.TV Corp. Internat.* (2002) 99 Cal. App. 4th 684, 690.)

III. Analysis

Defendants demur to the second, third, and fourth causes of action on the grounds that each of the challenged causes of action fails to allege facts sufficient to state a claim and are duplicative in nature to the trespass cause of action. (Code of Civ. Proc. §§ 430.10 (e) and (f).) Defendants also demurrer to the fourth cause of action on the ground that vandalism is a crime and not a civil cause of action.

A. Second Cause of Action

Plaintiff's second cause of action is for "treble damages for wrongful cutting or removal of timber [Civ. Code §3346(A) Code Civ. Proc. §733].) Civil Code section 3346 (a) provides:

> For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that ***where the trespass*** was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land ***on which the trespass was committed*** was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment. [Emphasis added.]

Code of Civil Procedure 733 provides:

> Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, ***without lawful authority***, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction. [Emphasis added.]

Defendants argue these statutes provide for enhanced damages and are not separate causes of action. Plaintiff argues these statutes allow alternative theories of recovery in case Defendants' entry on his property does not constitute a trespass. Neither party cites any authority for their position. However, the analysis dictates a finding for Defendants on this point.

First, the plain language of Civil Code section 3346 (a) requires that a trespass take place before the section applies, and Code of Civil Procedure 733, which is titled "Trespass for cutting or carrying away trees or timber; Treble damages" requires that the defendant have acted "without lawful authority" before enhanced damages apply.

Next, cases interpreting these statutes treat them not as separate causes of action, but rather, as statutes permitting enhanced damages. (See, e.g., *Heninger v. Dunn* (1980) 101 Cal. App. 3d 858, 867 ("Appellants' first amended complaint sought double damages, and also sought treble damages pursuant to Civil Code section 3346 and Code of Civil Procedure section 733, which have both been construed as providing for recovery of treble damages where a trespass resulting in wrongful injury to timber, trees, or underwood was wilful or malicious."); *Drewry v. Welch* (1965) 236 Cal. App. 2d 159; *Caldwell v. Walker* (1963) 211 Cal. App. 2d 758; *Crofoot Lumber, Inc. v. Ford* (1961) 191 Cal. App. 2d 238; *Fick v. Nilson* (1950) 98 Cal. App. 2d 683.) Finally, Plaintiff seeks in his prayer for relief: "treble damages pursuant to California Civil Code § 3346 and California Code of Civil Procedure § 733, or, alternatively, double the sum that would compensate Plaintiff for the actual detriment cause by damage to his trees and vegetation". (Complaint, p. 7.)

Defendants' demurrer to the second cause of action is SUSTAINED without leave to amend.

B. Third Cause of Action

Plaintiff's third cause of action is "diminution in value of real property". Defendants argue this is also a form of damages and not a distinct cause of action. Plaintiff again argues this is an alternative theory of recovery for the wrongful removal of the trees, should Defendants maintain there was no trespass. Again, neither party cites any authority for their position. However, the Court agrees with Defendants.

For Plaintiff to recover diminution in property value, Plaintiff will necessarily have to show that Defendants engaged in come conduct that damaged the property—a tort—then prove damage—diminution in property value or some other damage—to recover from Defendants. Review of cases discussing diminution of property value reference it as a form of damages for some tortious act (typically trespass). (See, e.g., *Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal.App.4th 660, 663 ("Under California law, damages for diminution in value may only be recovered for permanent, not continuing, nuisances."; CACI No. 3903F.)

Plaintiff's prayer for relief seeks "general damages in an amount to be determined at trial", "special damages of not less than $50,000 due to damage to Plaintiff's trees and vegetation and resulting damage to the Holmes Property; and "all other consequential damages flowing from the damage which is the natural and proximate result of Defendants' conduct". (Complaint, p. 7.) Thus, Plaintiff already has the ability to seek diminution of property value as a form of damages if Plaintiff demonstrates Defendants engaged in tortious conduct.

Defendants' demurrer to the third cause of action is SUSTAINED without leave to amend.

C. Fourth Cause of Action

Plaintiff's fourth cause of action is for vandalism. Vandalism is an intentional property crime subject to penalties under Penal Code section 594 for defacing, damaging, or destroying another's personal or real property without permission.

Defendants assert that besides being duplicative of the trespass cause of action, this claim is criminal in nature and not a civil cause of action. Plaintiff again argues this is simply an alternative theory for relief. Again, neither party cites any authority for their position.

The Court's search did not reveal any cases finding civil liability for vandalism. The case law speaks in terms of trespass and recovery of damages for harm to property as a result of that trespass. As already explained above, the balance of Plaintiff's Complaint sufficiently alleges both.

Defendants' demurrer to the fourth cause of action is SUSTAINED without leave to amend.

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Calendar Lines 2, 4, 5, 6, 7, & 8
Case Name: *Katherine DeWit v. Michael Street, et al.*
Case No.: 22CV405861

Before the Court is Plaintiff and Cross-Defendant Katherine DeWit's demurrer to Defendants' Cross-Complaint and Hillside Homes Group LLC ("Hillside") and Michael Street ("Street") Cross-Complainants (Collectively, "Cross-Complainants") and motions to compel discovery.[1][2] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of a property dispute. The subject property is located at 1305 Buckthorne Way in San Jose (the "Property"). (Cross-Complaint, ¶ 4.) In March 2022, Cross-Complainants discovered the Property was in tax default status and was about to be auctioned off at a real property sale. (*Ibid*.) Cross-Complainants paid the latest year's real property taxes, which stopped the pending tax sale. (*Ibid*.) After investigation, they determined the Property was abandoned. (Cross-Complainant, ¶ 5.) In March 2022, "with the knowledge of the City of San Jose Building Code Compliance Office officials" Cross-Complainants took possession of the Property, paid off the fines, and corrected all defective and unlawful conditions at the Property. (Cross-Complainant, ¶¶ 6-7.) Cross-Complainants attempted to contact family members of the record owner but received no response. (Cross-Complainant, ¶ 8.) They maintained possession of the Property for 1-2 months to ensure it was indeed abandoned and then they started to clean up the exterior and the interior, spending about $200,000. (Cross-Complaint, ¶ 9.)

When Cross-Complainants took possession of the Property, it was valued at $1,800,000. (Cross-Complainant, ¶ 10.) After Cross-Complainants' improvements, the Property was valued at $3,400,000. (*Ibid*.) Around July 2022, the record owner, Cheryl DeWit, ordered Cross-Complainants to vacate the premises. (Cross- (Cross-Complaint, ¶ 11.) She denied abandoning the Property and indicated her brother had already cleaned up the Property. (Cross-Complaint, ¶ 12.) DeWit refused to consider reimbursing Cross-Complainants for the amount they spent on improvements, which increased the value of the Property. (*Ibid*.)

[1] DeWit acts in her capacity as the Administrator of the Estate of Cheryl Ann DeWit.
[2] Paul Prandecki is a party in the Cross-Complaint.

DeWit initiated this action on October 3, 2022 for unlawful detainer. On November 30, 2022, she filed her first amended complaint ("FAC") for forcible ouster. On February 24, 2023, Cross-Complainants filed their Cross-Complaint, which asserts (1) unjust enrichment and (2) declaratory relief. On April 19, 2023, DeWit filed the instant motion, which Cross-Complainants oppose. The discovery motions are unopposed.

II. Request for Judicial Notice

DeWit request judicial notice of the following items:

(1) Cross-Complainants' Memorandum of Points and Authorities in Support of Motion to Quash, filed on December 27, 2022;

(2) Hillside's Amended Responses to Special Interrogatories (Set One);

(3) Street's Amended Responses to Special Interrogatories (Set One); and

(4) Email from Leo B. Siegel to Sherri Kastilahn, dated July 6, 2022.

"The court will take judicial notice of records such as admissions, answers interrogatories, affidavits and the like, when considering a demurrer, *only where they contain statements of the plaintiff or his agent which are inconsistent with allegations of the pleading before the court.* The hearing on demurrer *may not be turned into a contested evidentiary hearing* through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such materials which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605, emphasis added.)

Items 1 and 4 are court records, thus the Court is permitted to take judicial notice of them.[3] (See Evid. Code, § 452, subd. (d).) However, with respect to all court records, the law is settled that "the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.)

[3] Item 4 was attached to DeWit's FAC, filed on November 30, 2022.

For items 2 and 3, DeWit argues they are proper subjects of judicial notice because they are "facts and propositions that are no reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) However, the facts are being disputed by the parties. Furthermore, the facts contained in items 2 and 3 are consistent with Cross-Complainants' allegations. Thus, the request for judicial notice of items 2 and 3 is DENIED.

III. Demurrer

DeWit demurs to the first and second causes of action on the grounds they fail to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. First Cause of Action: Unjust Enrichment

"Unjust enrichment is not a cause of action or even a remedy, but rather a general principle underlying various legal doctrines and remedies. It is synonymous with restitution." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387, citations omitted.) "Unjust enrichment has also been characterized as describing the result of a failure to make restitution." (*Ibid*.)

The law of restitution allows an individual to make restitution if he or she is unjustly enriched at the expense of another. (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662 (*First Nationwide Savings*).) "A person is enriched if the person receives a benefit at another's expense. Benefit means any type of advantage." (*Ibid,* citations omitted.)

"The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it." (*First Nationwide Savings, supra,* 11 Cal.App.4th at p. 1663.) "[O]ne who confers benefits on another officiously, i.e., by unjustified interference in the other's affairs, is not entitled to restitution. It must ordinarily appear that the benefits were conferred by mistake, fraud, coercion, or request; otherwise, though there is enrichment, it is not unjust." (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App. 3d 1310, 1316 (*Dinosaur Development*), quoting 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 97, p. 126.)

Cross-Complainants contend this claim is really for breach of quasi-contract or breach of implied contract. (Opp., p.2, fn. 1.) It does appear that the first claim is for breach of implied-in-fact/quasi contract, rather than for unjust enrichment. Thus, the Court will analyze it accordingly.

"Unlike an implied-in-fact contract, an implied-in-law contract or quasi-contract is not based on the intention of the parties, but arises from a legal obligation that is imposed on the defendant… The quasi-contract, or contract 'implied in law,' is an obligation … created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money." (*Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 639.)

Repudiation of a contract, or "anticipatory breach," occurs "when a party announces an intention not to perform prior to the time of performance." (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1150.) Express repudiation is a "clear, positive, unequivocal refusal to perform." (*Taylor v. Johnson* (1975) 15 Cal.3d 130, 137.)

Here, it appears DeWit asks the Court to determine whether Cross-Complainants are guilty of criminal trespass and forcible entry. However, a demurrer tests only the sufficiency of the allegations, not the plaintiff's or cross-complainant's ability to prove them. (See *Committee on Children's Television, supra,* 35 Cal.3d at pp. 213-214.) Moreover, it accepts as true, all material factual allegations. (*Ibid*.) Here, DeWit's arguments regarding trespass and forcible entry go beyond allegations in the pleading (i.e., the Cross-Complaint) and into the substantive merits of the claims. Thus, the demurrer cannot be sustained on these arguments.[4]

Cross-Complainants allege they paid the property taxes and stopped the pending tax sale. (Cross-Complaint, ¶ 4.) They allege their investigation with the County taxing authorities and Building and Planning Department Code Compliance Division revealed that the Property had been abandoned for five years. (Cross-Complaint, ¶ 5.) They further allege DeWit did not respond to their efforts to contact her until after the improvements had been made. (Cross-Complaint, ¶ 8.) They allege they spent approximately $200,000 on improving the Property. (Cross-Complaint, ¶ 9.) They further allege DeWit is in anticipatory breach of the implied-in-law contract because she refuses to reimburse them for the amount expended to improve the property and they will be damaged in that amount and in the amount of a reasonable share of the increased equity. (Cross-Complaint, ¶¶ 17-19.) Therefore, Cross-Complainants alleges sufficient facts to state a claim for breach of implied-in-law contract. Thus, the demurrer to the first cause of action is OVERRULED.

C. Second Cause of Action: Declaratory Relief

Code of Civil Procedure Section 1060, which governs declaratory relief, provides:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another … may, in cases of actual controversy

[4] Additionally, DeWit argues that the "Good Faith Improver" statute, codified in Code of Civil Procedure section 871.1, et seq. does not apply here. The Cross-Complaint does not mention the statute, nor do Cross-Complainants in their opposition. Nevertheless, DeWit's argument is well taken as the statute requires the improver to erroneously believe, they are the owner of the land, which is not the case here. (See Cross-Complaint, ¶¶ 8, 9.)

> relating to legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premise, including a declaration of any questions or construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at this time.

(Code Civ. Proc., § 1060.)

The fundamental basis of declaratory relief is the existence of an actual and present controversy over a proper subject. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "A general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged; the pleader need not establish it is entitled to a favorable judgment." (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action, because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.)

Here, there is an actual and present controversy about Cross-Complainants' entitlement to restitution of $200,000 and a reasonable share of the increased equity of the Property. Thus, the demurrer is OVERRULED.

IV. Plaintiff's Motions to Compel Legal Standard

DeWit moves to compel (1) Defendant Prandecki to provide code-compliant responses to special interrogatories (Set One) and for monetary sanctions against him in the amount of $1,565.00; (2) Defendant Street to provide code-compliant responses to special interrogatories (Set Two), responses to requests for admission (set one), and for monetary sanctions in the amount of $ 1,014.50; (3) DeWit moves to compel Defendant Hillside to provide code-compliant responses to special interrogatories (Set Two) and requests monetary sanctions in the amount of $1,113.50; (4) Street to provide further responses to her request for production of documents Nos. 1-8 and requests for admission No. 2; and (5) Hillside to provide further responses to requests for production (set one) and requests for admission (set one). The responding parties did not oppose any of the motions.

A. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

"Unlike a motion to compel further responses, a motion to compel responses is not subject to a 45-day time limit…" (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404 (*Sinaiko*).) There is no meet and confer requirement or time limit for bringing a motion to compel initial discovery responses, and the moving party need only show that the discovery was properly served, and a timely response was not provided. (See Code Civ. Proc., §§ 2030.290 [interrogatories]; 2031.300 [requests for production of documents]; *Sinaiko, supra,* 148 Cal.App.4th at pp. 410-411; *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-906.) No separate statement is required. (Cal. Rules of Court rule 3.1345(b).)

Generally, when a party has failed to timely provide initial responses to the discovery requests at issue, the party waives any objection to them. (Code Civ. Proc., §§ 2030.290, subd. (a) [A party who fails to serve timely responses to interrogatories waives any objections to the requests, including those based on privilege or the work product doctrine]; 2031.300, subd. (a) [a party who fails to serve timely responses to a request for production or inspection of documents "waives 'any objection to the demand, including one based on privilege or on the protection for work product under Chapter 4 (commencing

with Section 2018.010)."]; 2033.280, subd. (a) [A party who fails to serve timely responses to a request for admissions waives any objections to the requests, including those based on privilege or the work product doctrine.]; see also *Scottsdale Ins. Co. v. Super. Ct.* (1997) 59 Cal.App.4th 263, 273 [waiver occurs where the responding party fails to timely raise an objection in its initial response]; *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1125.)

Code of Civil Procedure section 2031.310, subdivision (a)(1), provides, "[o]n receipt of a response to a demand for inspection, copying, testing, or sampling, the demanding party may move for an order compelling further responses to the demand if the demanding party deems that any of the following apply: (1) a statement of compliance with the demand is incomplete… (3) an objection in the response is without merit or too general." (Code Civ. Proc., § 2031.310, subd. (a)(1) & (3).) The motion to compel further responses must: "(1)… set forth specific facts showing good cause justifying the discovery sought by the demand[;] (2)… a meet and confer declaration under Section 2016.040[;] and in lieu of a separate statement required under the California Rules of Court, the court may allow the moving party to submit a concise outline of the discovery request and each response in dispute." (Code Civ. Proc., § 2031.310, subd. (b).)

Code of Civil Procedure section 2031.220, provides,

> A statement that the party to whom a demand for inspection, copying, testing, or sampling has been directed will comply with the particular demand shall state that the production, inspection, copying, testing, or sampling, and related activity demanded will be allowed either in whole or in part, and that all documents and things in the demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be included in the production.

(Code Civ. Proc., § 2031.220.)

Code of Civil Procedure section 2033.290, provides, "[o]n receipt of a response to requests for admissions, the party requesting admissions may move for an order compelling a further response if that party deems that either or both of the following apply: (1) an answer to a particular request is evasive or incomplete; (2) a representation of inability to comply is inadequate; or (3) an objection to a particular request is without merit or too general." (Code Civ. Proc., § 2033.290, subd. (a)(1), (2), & (3).) The motion to compel further responses must: "(1)… be accompanied by a meet and confer declaration under Section 2016.040[;] (2) in lieu of a separate statement required under the California Rules of

Court, the court may allow the moving party to submit a concise outline of the discovery request and each response in dispute." (Code Civ. Proc., § 2033.290, subd. (b).)

The burden is on the moving party to show both relevance to the subject matter and specific facts justifying discovery. (*Glenfed Develop. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117 (*Glenfed*); see also Code Civ. Proc., § 2032.310, subd. (b)(1).) Once the propounding party establishes good cause for the discovery sought, the burden shifts to the responding party to justify any objections or responses. (*Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98 (*Kirkland*).)

A motion to compel further responses must also include a declaration stating facts showing "a reasonable and good faith attempt" to resolve informally the issues presented by the motion. (Code Civ. Proc., §§ 2016.040; 2031.310, subd. (b)(2).)

B. Special Interrogatories (Set One): Prandecki

Plaintiff served special interrogatories on Prandecki on March 22, 2023. (David Shannon ("Shannon") Declaration in Support of Motion to Compel Defendant Paul Prandecki to Provide Discovery Responses ("Shannon Decl. RE: Prandecki")., ¶ 2.) Prandecki served no responses and did not oppose Plaintiff's motion to compel. (Shannon Decl. RE: Prandecki, ¶¶ 2- 6.) Failure to oppose a motion waives any objection they may have to the resulting order. (*Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602; Cal. Rules of Ct., rule 3.311, subd., (a).)

Plaintiff's motion to compel is GRANTED. Prandecki is ordered to produce code compliant responses without objections within 20 days of service of the formal order.

DeWit also requests monetary sanctions in the amount of $1,565.00 against Prandecki under Code of Civil Procedure section 2030.010, subdivision (d), which states that failing to respond or to submit to an authorized method of discovery is a misuse of the discovery process. (Code Civ. Proc., § 2023.010, subd. (d).) Code of Civil Procedure section 2023.030, subdivision (a), provides that the court may impose a monetary sanction on a party engaging in the misuse of the discovery process to pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. (Code Civ. Proc., ¶ 2023.030, subd. (a).)

DeWit incurred $1,505.00 in attorney's fees, billed at $350 per hour, and $60 in out-of-pocket costs. (Shannon Decl. RE: Prandecki, ¶¶ 8-10.) The Court finds the billable rate reasonable but the

amount of time spent on an unopposed motion where no responses were provided to be slightly long. Thus, orders Prandecki to pay monetary sanctions in the amount of $1,000.00 to Plaintiff within 60 days of service of the formal order.

C. Special Interrogatories (Set Two): Street

Plaintiff served Michael Street with special interrogatories on March 22, 2023. (Shannon Declaration in Support of Motions to Compel Defendant/Cross-Complainant Michael Street to Provide Responses and Further Discovery ("Shannon Decl. RE: Street"), ¶ 6.) Street failed to respond. (Shannon Decl. RE: Street, ¶¶ 6-7; 13-15.) Street also failed to oppose this motion to compel. Thus, the motion is GRANTED, and Street is ordered to provide objection-free, code-compliant responses within 20 days of service of the formal order.

DeWit incurred $1,014.50 in attorney's fees at $350 per hour. (Shannon Decl. RE: Street, ¶¶ 17, 21.) The Court finds the amount of time billed and the hourly rate reasonable and thus orders Street to pay Plaintiff $1,014.50 in monetary sanctions within 60 days of service of the formal order.

D. Motion to Compel Responses to Special Interrogatories (Set Two): Hillside

Plaintiff served special interrogatories on Hillside Homes Group on March 22, 2023. (Shannon Declaration In Support of Motions to Compel Defendant/Cross-Complainant Hillside Homes Group LLC to Provide Responses and Further Discovery Responses ("Shannon Decl. RE: Hillside"), ¶ 6.) Hillside provided no responses. (*Id*. at ¶¶ 13-15.) Thus, the motion is GRANTED and Hillside is ordered to provide objection-free, code-compliant responses within 20 days of service of the formal order.

Plaintiff's counsel contends DeWit incurred $1,113.50 in attorneys' fees. However, Mr. Shannon billed 1.8 hours for a total of $630.00 and Ms. Prince billed .70 hours for a total of $108.50. (Shannon Decl. RE: Hillside, ¶¶ 17, 21.) As stated in Mr. Shannon's declaration DeWit incurred $738.50 in attorneys' fees related to this instant motion. (*Id*. at ¶ 22.) She also incurred out-of-pocket costs of $60 for the filing of the motions. (*Id*. at ¶ 24.) Thus, the Court will reduce the amount of sanctions to $798.00 and GRANT the request.

E. Requests for Production of Documents (Set One) and Requests for Admission (Set One): Street

DeWit argues Street's responses to RFPD Nos. 1-8 are incomplete and the objections are without merit and too general. (See Code Civ. Proc., § 2031.310, subd. (a)(1) & (3).)

1. Meet and Confer and Timeliness

The parties met and conferred on March 7 regarding deficient discovery responses. (Shannon Decl. RE: Street, ¶ 5.) They further corresponded and on April 12, Defense counsel Leo Siegel ("Siegel") said he would amend the responses accordingly. (*Id*. at ¶ 11.) The parties further corresponded and agreed to extensions regarding the motions. (*Id*. at ¶¶ 10-12, 14.) The parties engaged in sufficient meet and confer.

"Unless notice of this motion is given within 45 days of the service of the verified response, or any supplemental verified response, or on or before any specific later date to which the demanding party and the responding party agreed in writing, the demanding party waives any right to compel a further response to the demand." (Code Civ. Proc., § 2031.310, subd. (c) [regarding requests for production of documents]; see also Code Civ. Proc., §2033.290, subd. (c) [regarding requests for admission].)

Here, the discovery was propounded on January 6, 2023, and responses were received on January 13, 2023. (Shannon Decl. RE: Street, ¶¶ 2-3.) The parties met and conferred on March 7, 2023. (*Id*. at ¶ 5.) On April 2, 2023, Plaintiff's counsel received supplemental responses as to the RFAs, but not the RFPDs. (*Id*. at ¶ 9.) The parties corresponded further about the deficient responses for RFPDs and RFA No. 2 and Siegel said he would amend the responses. (*Id*. at ¶¶ 10-12; Exh. L.) Siegel also stated, "your time to file any motion to compel is also extended as requested." (Shannon Decl. RE: Street, Exh. L [referring to the request of an extension "up to and including May 19, 2023].) The parties agreed to move the deadline for the motions to May 26, 2023. (*Id*. at ¶ 14; Exh. O.) The motions were filed on May 26, 2023, and thus, they are timely. (See Code Civ. Proc., § 2031.310, subd. (c) [regarding requests for production of documents]; see also Code Civ. Proc., §2033.290, subd. (c) [regarding requests for admission].)

2. RFPD Nos. 1-4

RFPD Nos. 1-4 request production of any documents evidencing various facts relating to Hillside's activities relative to the Property. (See DeWit's Separate Statement, pp. 2:13-17; 4:22-25; 7:11-13; and 9:24-10:1.) Street's objection to each request is that it is burdensome and oppressive

because "Responding Party has previously produced to the Propounding Party all documents in its possession, custody and control that are within the demanded category." DeWit fails to offer any argument or evidence to suggest that this representation is not true. Thus, DeWit fails to meet her burden here and the motion to compel is DENIED.

3. RFPD Nos. 5-8

RFPD Nos. 5-8 request any document evidencing the following purported facts:

(1) "HILLSIDE 'has expended approximately $200,000' improving the PROPERTY, as set forth in the SIEGEL EMAIL";

(2) "after taking possession of the Property, the lease was executed for a tenancy at the Property, as set forth in the SIEGEL EMAIL";

(3) "the 'value' of the PROPERTY prior to HILLSIDE 'having expended some $200,000 to improve it' was 'approximately $1,800,000 – even in its dilapidated state,' as set forth in the SIEGEL EMAIL"; and

(4) " 'a competent Real Estate Broker' has confirmed that the 'value' of the PROPERTY 'prior to HILLSIDE 'having expended some $200,000 to improve it' was 'approximately $1,800,000 – even in its dilapidated state,' as set forth in the SIEGEL EMAIL."

Street objected to these requests on the basis that the information in the email is part of a settlement offer. Evidence Code section 1152, provides:

> Evidence that a person has, in compromise, … furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is *inadmissible to prove his or her liability* for the loss or damage or any part of it.

(Evid. Code, § 1152, subd. (a), emphasis added.) Evidence Code section 1154 makes offers "inadmissible to prove the invalidity of the claim or any part of it." (Evid. Code, § 1154.)

DeWit argues she is entitled to this information because she is seeking further discovery of admissible evidence referenced in the Siegel Email, not seeking to admit the email into evidence; Street fails to oppose this motion. Plaintiff has met her burden to show good cause. Admissibility is not a

perquisite to discovery. (See Evid. Code §§ 1152, 1154; see also *Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481, 1490-1491 [stating that "the fact that evidence is not admissible does not mean that it is also not discoverable… [a] 'claim that discovery is not warranted because the evidence disclosed would not itself be admissible is untenable… [i]t is settled that admissibility is not prerequisite to discovery"].)

Street also objected on the basis that the request is burdensome and oppressive because he has previously produced all ***non-objectionable*** documents in its possession. Street fails to justify his objections, and this response leaves open the possibility that Street withheld documents he found objectionable. Thus, the motion to compel further responses is GRANTED as to RFPD Nos. 5-8.

4. RFA No. 2

RFA No. 2 requests admission that "the following document is genuine: email dated July 6, 2022, from leob@legalsiegel.org to SherriLKastukahn@aol.com, a copy of which is attached hereto as Exhibit 2".

Street objects to the request on the basis that the subject document is an offer of compromise and it is inadmissible to prove his liability for the losses or damages alleged in this action.

DeWit argues she is not seeking to admit this email into evidence, but rather she is seeking an admission that it is genuine. Therefore, Street's objection is without merit. Thus, the motion to compel further responses to RFA No. 2 is GRANTED.

5. Sanctions

DeWit requests sanctions in the amount of $10,727.00. Code of Civil Procedure section 2031.310 (h) provides: "The court shall impose…against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further responses to a demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., § 2031.310, subd. (h).)

DeWit partially prevailed on her motion. Street did not oppose the motion, so the Court is unable to examine whether he acted with substantial justification in opposition. However, it is Street's burden to establish that he acted with substantial justification, and he fails to do that here. (See *Padron v. Watchtower Bible & Tract Society of New York, Inc*. (2017) 16 Cal.App.5th 1246, 1269 (*Padron*)

["the party subject to sanctions bears the burden to establish it acted with substantial justification or other circumstances make the imposition of the sanction unjust."].)

However, the amount of sanctions sought in relation to this straight-forward, unopposed motion to compel is excessive. Numerous attorneys billed for the motion and meet and confer. Thus, while the billable rates appear reasonable for this market, the number of hours spent do not. The Court accordingly reduces the sanction to $3,000, which Street is ordered to pay to Plaintiff within 60 days of service of the formal order.

F. Requests for Production of Documents (Set One) and Requests for Admission (Set One): Hillside[5]

DeWit moves to compel further responses to her request for production of documents Nos. 1-8 and requests for admission No. 2.

1. Meet and Confer and Timeliness

As with the Street motion to compel further responses, the parties engaged in sufficient meet and confer efforts, and the motion is timely.

2. RFPD Nos. 1-4

For reasons stated above, the motion to compel is DENIED as to RFPDs Nos. 1-4.

3. RFPD Nos. 5-8 and RFA No. 2

For reasons stated above, the motion to compel is GRANTED as to RFPDs Nos. 5-8 and RFA No. 2.

4. Sanctions

DeWit seeks $9,882.00 in sanctions. As explained above, while the Court finds the billable rates charged reasonable, the number of attorneys and number of hours spent working on this motion to compel, which is essentially identical to the motion to compel Street to provide further responses, is excessive. The Court accordingly reduced the sanction award to $1,500 for this identical motion, which amount Hillside is ordered to pay to Plaintiff within 60 days of service of the formal order.

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[5] This motion is identical to DeWit's motion to compel further responses from Street.

Calendar Line: 11
Case Name: *Jose Rendon vs Kia America, Inc.*
Case No.: 21CV392764

Plaintiff Jose Rendon's Motion for Superior Court to Resume Jurisdiction and Impose Sanctions came on for hearing before the Court on August 29, 2023. Pursuant to California Rule of Court 3.1308, the Court issued its tentative ruling on August 28, 2023, which granted Plaintiff's motion, stating: "The Court finds a change in the law since the September 12, 2022 order sending this case to arbitration dictates the conclusion that there is no arbitration agreement between Kia and Plaintiff, thus there is no arbitration agreement to enforce." The Parties appeared for argument, and Kia argued the Court did not have jurisdiction to sua sponte reconsider Judge Rudy's prior order sending the matter to arbitration. The Court granted Kia's request to brief and argue the issue. Having reviewed the Parties' supplemental briefing, the Court now issues a revised tentative ruling.

I. Background

This is a lemon law case. According to the Complaint, on or around May 23, 2020, Plaintiff purchased a 2020 Kia Soul (the "Vehicle") which was manufactured, distributed, or sold by Defendant Kia America, Inc. ("Kia"). (Complaint, ¶4.) At the time of purchase, Plaintiff received an express written warranty. (Complaint, ¶6.) During the warranty period, the Vehicle contained or developed various defects, including defects that caused a piston ring to fail, the Vehicle to consume oil, and check engine light to come on. (Complaint, ¶7.)

Plaintiff thus filed this lawsuit on December 28, 2021 asserting (1) breach of the implied warranty of merchantability (Civil Code §1794), (2) Breach of the Implied Warranty of Fitness (Civil Code §1794), (3) Breach of Express Warranty (Civil Code §1794), (4) Failure to Promptly Repurchase Product (Civil Code §1793.2(d)), (5) Failure to Commence Repairs Within A Reasonable Time (Civil Code §1794), (6) Failure to Complete Repairs Within 30 Days (Civil Code §1794), (7) Failure to Maintain Sufficient Service and Repair Facilities (Civil Code §1794), (8) Failure to Make Service Literature and Parts Available (Civil Code §1794), (9) Advertising Defective Merchandise Without Disclosing Defects (Business & Professions Code §§17531, 17535), (10) Conversion, (11) Negligence, and (12) Violation of Civil Code section 1796.5.

By order dated May 31, 2022, the Court (Hon. Christopher Rudy) compelled this case to arbitration under *Felisilda v. FCA US, LLC*(2020) 53 Cal.App.5th 486 based on language in the RISC Plaintiff entered with the dealership at the time of purchase.

Plaintiff made a demand for arbitration before JAMS on August 1, 2022. JAMS issued an invoice on September 10, 2022. Kia refused to pay the invoice because it did not agree to arbitration before JAMS. It prefers to arbitration before AAA or Adjudicate West, as those forums are cheaper and move a case to resolution more quickly.

Plaintiff brought this motion under Code of Civil Procedure section 1281.97(a), which provides that a manufacturer/dealer's failure to pay arbitration fees within 30 days of invoice is a material breach of the arbitration agreement and the court may then resume litigation. Kia opposed the motion on that basis, noting that it had the right under the RISC to decline to approve the arbitral forum selected by the consumer (i.e., JAMS), and that its exercise of that right was reasonable in light of the cost savings and speed and its provision of alternatives other than AAA.

II. Legal Standard and Analysis

Code of Civil Procedure section 1008 (c) provides that if the court "at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion." (*Farmers Ins. Exch. v. Sup. Ct.* (2001) 218 Cal.App.4th 96, 106-07.) There is no time limitation on this inherent power; the court may change interim orders based on a change of law at any time before final judgment is entered. (*Blake v. Ecker* (2001) 93 Cal.App.4th 728, 739.) In considering whether to reconsider a prior order, the court should examine the extent of preparation in the case, the proximity of a trial date, and "the materiality of the change in the law and the potential for prejudice to any of the parties." (*Phillips v. Sprint PCS* (2012) 209 Cal. App. 4th 758, 769.)

Kia argues the undersigned Court may not reconsider the order sending this case to arbitration because Judge Rudy is not unavailable. The Court agrees with Kia that it is imperative that trial courts refrain from reviewing colleagues' opinions and that the case law explains that merely rotating into a new assignment as Judge Rudy has done here does not make a judge "unavailable." (*In re Marriage of Oliverez* (2015) 238 Cal. App. 4th 1242, 1249-1250 ("Generally, one trial court judge may not reconsider and overrule an interim ruling of another trial judge. . . This principle is founded on the

inherent difference between a judge and a court and is designed to ensure the orderly administration of justice. 'If the rule were otherwise, it would be only a matter of days until we would have a rule of man rather than a rule of law. . .defendants would try another and another judge until finally they found one who would grant what they were seeking. Such a procedure would instantly breed lack of confidence in the integrity of the courts.'"; see also *Morite of California v. Superior Court* (1993) 19 Cal.App.4th 485, 493; *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232.)

"However, there are narrow exceptions to this general rule. . . Another exception is when the facts have changed or when the judge has considered further evidence and law." (*In re Marriage of Oliverez* (2015) 238 Cal. App. 4th 1242, 1249-1250, citing *People v. Riva* (2003) 112 Cal.App.4th 981, 992–993 ("Factors to consider include . . . *whether there has been a change in circumstances since the previous order was made*") (emphasis added); *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 706.) This is precisely the basis the undersigned Court articulated in its original tentative—circumstances, here in the form of the legal landscape regarding motions to compel arbitration brought by manufacturers under RISC agreements, have substantially changed since Judge Rudy sent this case to arbitration.

Judge Rudy's prior order rested on *Felisilda*, then the only controlling case with facts remotely analogous to those here. However, after the Court's September 12, 2022 order, numerous cases—*Ford Motor Warranty Cases* (2023) 89 Cal. App. 5th 1324, *Montemayor v. Ford Motor Company* (June 26, 2023) 92 Cal.App.5th 958, *Kielar v. Superior Court of Placer County* (Aug. 16, 2023) C096773 and *Morgan v. Sundance* (2022) 142 S.Ct. 1708)—have held that a manufacturer, like Kia here, cannot enforce an arbitration agreement contained in the RISC entered by the dealership and the purchaser.

Further, at least one trial court under the Third District has determined that *Felisilda* does not apply to manufacturers' motions to compel arbitration. And while trial court decisions are not binding on this Court, they are informative. More recently, the Third District, which authored *Felisilda* has declined to follow its own decision: "we join those recent decisions that have disagreed with *Felisilda* and conclude the court erred in ordering arbitration. (*Montemayor v. Ford Motor Co.* (2023) 92 Cal.App.5th 958, 968–971 [310 Cal.Rptr.3d 82] (*Montemayor*); *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, 1333–1336 [306 Cal. Rptr. 3d 611], review granted July 19,

2023, S279969 (*Ford Motor*).)" (*Kielar v. Superior Court* (2023) 94 Cal. App. 5th 614, 617.) Judge Rudy did not have this law in front of him when he first considered Kia's motion to compel arbitration.

The facts here are also on all fours with those in *Ochoa*, *Montemayor* and *Keilar*, whereas those in *Felisilda* are distinguishable. In *Felisilda,* the dealer sought to enforce the arbitration provision in the RISC, the plaintiff dismissed the dealer to try and avoid arbitration, and the Court found equitable estoppel prevented plaintiff's maneuver. There are no similar facts here. Thus, the Court finds it must follow these most recent authorities, *Ochoa*, *Montemayor* and *Keilar*.

The Court also does not find persuasive Kia's argument that it lacks jurisdiction to do anything in this case once the case is sent to arbitration, as no judgment has been entered, thus the case remains pending before it. A trial court has discretion to stay cases on its own or a party's motion. (See California Rule of Court 3.515, *Freidberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367.) As noted above, trial courts also have the inherent authority to modify prior orders when there is a change of law, so long as judgment has not yet been entered. It thus follows that a trial court may lift an arbitration stay and reconsider an arbitration order, in whole or in part, at any time before judgment is entered.

Accordingly, Plaintiff's Motion for Superior Court to Resume Jurisdiction is GRANTED. The stay is lifted, and the Court sets a further case management conference for December 12, 2023 at 10 a.m. in Department 6.

Plaintiff's motion for sanctions is DENIED. Kia's reliance on the Court's September 2022 order sending this matter to arbitration to conclude that it could rely on the language in the RISC arbitration agreement to decline to arbitrate in JAMS was not frivolous or unreasonable.

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