SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 07-23-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. 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 and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to 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. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 07-23-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV381418 Hearing: Order of Examination	Bryan Carrera, directly and derivatively on behalf of Axon Design, Inc. et al vs John Noori et al	All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 2	17CV315072 Hearing: Demurrers	Gary Christensen et al vs Intero Real Estate Services Inc. et al	See Tentative Ruling. The Court will prepare the final order.
LINE 3	17CV315072 Motions: Strike	Gary Christensen et al vs Intero Real Estate Services Inc. et al	See Tentative Ruling. The Court will prepare the final order.
LINE 4	24CV431378 Hearing: Demurrer	Sadie Marquez vs Fremont Union High School District	Defendant's unopposed Demurrer to the 10th cause of action is SUSTAINED WITHOUT LEAVE TO AMEND. The failure to file a written opposition "'creates an inference that the motion or demurrer is meritorious.'" *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410. Defendant shall submit the final order.
LINE 5	19CV349688 Motion: Tax Cost	Maria Carillo vs Joseph Arnold et al	See Tentative Ruling. Plaintiff shall submit the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 07-23-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 6	22CV409137 Motion: Vacate	PACIFIC CONSTRUCTION & MANAGEMENT vs RANDIP MANRAO et al	Of four court appearances in the case, Plaintiff's counsel has missed three. This cannot be attributed to mere calendaring errors or excusable neglect. Nor had counsel served all Defendants at the time the case was dismissed, despite the case being calendared multiple times for an order to show cause for failure to serve. Plaintiff's counsel has failed to properly move this case forward. Despite this, Plaintiff was given a chance to clear the second order to show case for failure to appear and he failed to do so. The Court does not find his excuses to constitute excusable neglect, mistake or inadvertence. Nor is counsel entitled to the mandatory provisions of 473(b), for the reasons stated in Defendants' opposition. The motion to vacate the dismissal is DENIED. Defendants shall submit the final order within 10 days.
LINE 7	23CV414038 Motion: Leave to File	RELIANT BUSINESS SERVICES, LLC vs Devon Lewis	The motion for leave to amend is GRANTED. Plaintiff shall submit the final order and file the amended complaint within 10 days of the hearing.
LINE 8	23CV415606 Hearing: Petition Compel Arbitration	Linda Pattie et al vs Diane Atkinson et al	The hearing is continued to Dec 10, 2024 per order signed July 8, 2024.
LINE 9	24CV430182 Hearing: Petition Compel Arbitration	Deborah Sharpe vs Brian Chesky et al	See Tentative Ruling. Defendant Airbnb shall submit the final order within 10 days.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 07-23-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

- oo0oo -

Calendar Lines 2-3
Case Name: *Christensen, et al. v. Intero Real Estate Services Inc., et al.*
Case No.: 17CV315072

I. Background

Plaintiffs Gary and Trish Christensen ("Plaintiffs") bring their Second Amended Complaint ("SAC") against Intero Real Estate Services, Inc. ("Intero") and NRT West, Inc. ("NRT").

a. Relevant Parties

Defendant Intero is a licensed real estate broker. Joseph Alderese ("Alderese") and Janet Dayton ("Dayton") (collectively "the Aldereses")[1] are licensed real estate salespersons employed by Intero.

Defendant NRT is a licensed real estate broker doing business as Coldwell Banker Residential Brokerage ("Coldwell"). Paul Bertoldo ("Bertoldo") is a licensed real estate salesperson employed by Coldwell. Bertoldo acted as Plaintiffs' agent as buyers and represented them during the purchase and transaction giving rise to this action.

Cornerstone Title Company ("Cornerstone") acts as an escrow holder in real property transactions and issues title insurance policies in connection therewith. Cornerstone acted as the escrow agent and title insurer in connection with the real estate purchase and sale transaction giving rise to this action.

Diane and Montgomery Roach ("the Roaches") are spouses who sold their real property ("the Property"), which is the subject of this action, to Plaintiffs.

b. Facts

On or about May 29, 2015, the Roaches and Intero entered into a written agreement whereby Intero and the Aldereses acquired the exclusive right to list and sell the Property for $1,075,000. (SAC, ¶ 51.)

On or about June 4, 2015, Intero retained Cornerstone to act as the escrow holder and title insurer in connection with the sale of the Property. (SAC, ¶ 55.)

On or about June 21, 2015, the Aldereses posted a listing of the Property and represented that it had access via both Reynolds Drive and Carlson Drive. (SAC, ¶ 56.) In June 2015, Plaintiffs obtained the listing and contacted the Aldereses to schedule a viewing. (SAC, ¶ 60.) Thereafter, Plaintiffs viewed the Property on two or three occasions and, each time, the Aldereses drove up Reynolds Drive to the Property. (*Ibid*.)

On July 9, 2015, Plaintiffs submitted an offer to purchase the Property for $1,075,000. (SAC, ¶ 65.) On July 13, 2015, the Roaches signed a Real Estate Transfer Disclosure Statement, also signed by Dayton. (SAC, ¶ 67.) No mention of legal access to the Property via Reynolds Drive was mentioned. (*Ibid*.) The Roaches represented to Plaintiffs that they were unaware of a limitation of legal or physical access to the Property. (SAC, ¶ 68.)

---

[1] Alderese and Dayton are a married couple.

Cornerstone had prepared a preliminary title report for the Property and emailed that report to the Aldereses who then emailed the report to Plaintiffs. (SAC, ¶¶ 69-70.)

On August 4, 2015, Plaintiffs emailed Linda Conley ("Conley"), Cornerstone's escrow officer who was handling the transaction, to ask specific questions including whether there was legal access via Reynolds Drive. (SAC, ¶ 73.) Conley responded to the Aldereses and attached a deed history of the Property, including references to easements providing access to the Property. (SAC, ¶ 76.)

On August 19, 2015, Conley emailed an amended preliminary report to the Aldereses including an easement map. (SAC, ¶ 81.) Before the close of escrow, Plaintiffs asked Alderese to verify with the Roaches that there was legal access to the Property from Reynolds Drive. (SAC, ¶ 84.) Alderese informed the Plaintiffs that the Roaches confirmed they had been using Reynolds Drive for years to obtain access to the Property. (*Ibid*.)

On August 25, 2015, a Cornerstone title officer, Richard Hofer ("Hofer") sent Conley an email ("Hofer email") responding in detail to the Plaintiffs August 4, 2015 email and including a second amendment. (SAC, ¶ 85.) The Hofer email stated that it should be shared with all parties who were required to have a copy; that the amended preliminary report was inaccurate and should not have been issued; there was no legal access to the Property via Reynolds Drive; and Cornerstone was not willing to insure these real property interests. (*Ibid*.)

Later that day, Conley forwarded the Hofer email to only the Aldereses, but deleted the paragraph that stated the amended preliminary report was inaccurate and should not have been issued. (SAC, ¶ 87.) Conley did not forward full the email directly to Plaintiffs or to Bertoldo, Plaintiffs' agent. (SAC, ¶ 88.)

On August 25, 2015, Alderese emailed the second amendment to Bertoldo, but omitted the text of the Hofer email. (SAC, ¶ 90.) Bertoldo was out of office at the time he received the email, but Intero never contacted anyone else at the office or confirmed that Plaintiffs received the amendment. (SAC, ¶ 91.) On August 26, 2015, Bertoldo exchanged emailed with Plaintiffs but never forwarded the second amendment to Plaintiffs before escrow closed on September 3, 2015. (SAC, ¶¶ 93, 94.) Plaintiffs believed they had legal access to the Property via Reynolds Drive. (SAC, ¶ 94.)

After close of escrow, Plaintiffs used the private street extensions to access the Property, without knowing they were trespassing on their neighbor's property ("Taylor Property"). Around May 2016, eight months after acquiring the Property, Plaintiffs' neighbor informed them that they were trespassing onto the Taylor Property. (SAC, ¶ 98.)

Over the next several months, Plaintiffs continued to investigate whether there was an easement from the Property via Reynolds Drive and Intero and the Aldereses continued to conceal the Hofer email from them. (SAC, ¶ 101.)

In February 2017, the County of Santa Clara Department of Planning and Development informed Plaintiffs that approval for construction of their new home would not be given unless they established legal access to the Property via Reynolds Drive and brought Carlson Drive up to compliance with County road standards. (SAC, ¶ 102.) Over the next several weeks,

Plaintiffs implored the Aldereses to investigate whether there was legal access to the Property via Reynolds Drive, but they continued to stonewall him. (SAC, ¶ 105.)

On April 9, 2019, Plaintiffs purchased an easement from their neighbor for $240,500 and they were required to purchase a 20-acre parcel for $167,000 as a condition of the easement. (SAC, ¶¶ 112-113.)

On April 8, 2024, Plaintiffs filed their SAC, asserting the following causes of action:

1) Negligent Misrepresentation [against Intero];
2) Intentional Misrepresentation and Concealment [against Intero];
3) Intentional Infliction of Emotional Distress [against Intero];
4) Professional Negligence [against Intero]; and
5) Professional Negligence [against Coldwell].

On April 26, 2024, Intero filed a demurrer and motion to strike portions of the SAC. NRT/Coldwell (hereinafter referred to only as Coldwell) also filed a demurrer and motion to strike portions of the SAC. Plaintiffs oppose all four motions. The parties have stipulated to filing papers that exceed the page limits indicated by the California Rules of Court.

II. Legal Standards

a. Demurrer

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

b. Motion to Strike

A court may strike out any irrelevant, false, or improper matter asserted in a pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) Courts do not read allegations in isolation. (*Ibid.*)

III. Intero's Demurrer

Intero demurs to the third cause of action for intentional infliction of emotional distress ("IIED") on the ground it fails to state facts sufficient to constitute a cause of action.

"The elements of a cause of action for IIED are as follows: (1) defendant engaged in extreme and outrageous conduct (conduct so extreme as to exceed all bounds of decency in a civilized community) with the intent to cause, or with reckless disregard to the probability of causing, emotional distress; and (2) as a result, plaintiff suffered extreme or severe emotional distress." (*Berry v. Frazier* (2023) 90 Cal.App.5th 1258, 1273.)

"Liability for IIED does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Malicious or evil purpose is not essential to liability for IIED." (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1007 [internal quotations omitted].) Additionally, "[i]t is not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) While generally the question of whether the conduct at issue is in fact extreme and outrageous is a question of fact to be determined beyond the pleading stage, many courts have dismissed IIED claims on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law. (See, e.g., *Spink v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004; *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235.)

In support of its demurrer, Intero argues: 1) the third cause of action does not contain the requisite specific allegations of outrageous conduct; 2) an incorrect statement in a property listing does not constitute outrageous conduct giving rise to an IIED claim; and 3) the pleading does not allege that Intero's conduct was directed at Plaintiffs.

Intero first asserts that the third cause of action must be pled with "great specificity" and that it does not contain the requisite specific allegations of outrageous conduct. (Demurrer, p. 5:13-14, 24-25.) California courts have held that "[i]n order to avoid a demurrer, the plaintiff must allege with 'great specificity' the acts which he or she believes are so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832; see also *Schlauch v. Hartford Accident & Indem. Co.* (1983) 146 Cal.App.3d 926, 936.) Intero further argues that their representations regarding access to a road do not amount to outrageous conduct that would give rise to an IIED claim. (Demurrer, p. 6:2-3.)

In opposition, Plaintiffs argue they sufficiently allege facts to support a finding of IIED. Plaintiffs cite multiple paragraphs of the SAC, including: 1) Paragraph 145: stating that Intero intentionally misrepresented that there was legal access to Farmhouse Property via Reynolds Drive and intentionally concealed Cornerstone's admission that the original and amended preliminary report were in error and there was no legal access via Reynolds Drive; and 2) Paragraphs 146-147: indicating that as a result of Intero's actions, Plaintiffs suffered years of severe emotional distress manifesting as physical symptoms, anxieties about building their dream home, and worries about financial issues.

Here, the SAC alleges that on multiple occasions Plaintiffs requested Intero's agents verify that there was legal access to the Property via Reynolds Drive (SAC, ¶¶ 72, 84); that the Roaches informed the Aldereses that the Property might be "landlocked" but the Alderese failed to disclose this information to Plaintiffs (SAC, ¶ 158); that the Alderese forwarded the second amended preliminary report to Bertoldo but deliberately omitted the text of the email including that there was no legal access via Reynolds Drive (SAC, ¶ 90); Intero made no effort to confirm the Plaintiffs received the amendment before close of escrow (SAC, ¶ 91); Plaintiffs

would not have sold their own home or agreed to purchase the Property had they known there was no legal access via Reynolds Drive (SAC, ¶ 128); as a result of Intero's conduct, they had to pay for the Property, an easement to legally access the Property, and additional property taxes on the parcel they were required to purchase to get the easement (SAC, ¶¶ 129); and Intero was paid a commission at the close of escrow (SAC, ¶ 95). The Court finds these allegations are sufficiently specific and amount to outrageous conduct.

Additionally, Plaintiffs contend that Intero intentionally concealed and failed to disclose material facts to them as a means of inducing them to purchase the property they would not have otherwise purchased. (Opposition, p. 10:6-8, citing SAC, ¶¶ 85-95, 137; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 188 (*Godfrey*).) In *Godfrey*, plaintiffs purchased a home that they were told was in good shape. Shortly after moving in, the plaintiffs discovered the house had dry rot and was infested with termites and fungus. (*Godfrey*, *supra*, 128 Cal.App.3d at p. 164.) The plaintiffs brought an action for IIED. (*Ibid*.) As a result of these conditions, plaintiff-wife had trouble sleeping, became depressed, and suffered from increased headaches; the plaintiffs' marriage began to deteriorate; the plaintiff-husband began drinking; and thereafter the plaintiffs were forced to move out and into plaintiff-wife's parents' house. (*Id.* at pp. 166-167.) The evidence showed that the cost to repair the home exceeded the value of the house itself. (*Id*. at p. 173.) The Appellate Court determined the trial court correctly denied the broker's motion for judgment on the pleadings as to the IIED claim. (*Id.* at p. 168.) Thus, Intero's assertion that an incorrect statement in a property listing cannot constitute outrageous conduct giving rise to an IIED claim is not well taken.

Finally, Intero asserts that its conduct was not *directed at* Plaintiffs. Intero does not expand on this argument or cite to relevant authority. (*Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939 ["The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived"].) Here, Intero and its agents made direct representations to Plaintiff and then withheld information that was relevant to Plaintiffs' decision to purchase the Property. (See e.g., SAC, ¶¶ 63, 91.) Moreover, Intero made a commission off Plaintiffs' purchase of the Property. (SAC, ¶ 95.) Thus, Plaintiffs sufficiently allege the conduct was directed at them.

Accordingly, the demurrer to the third cause of action is OVERRULED.

IV. Intero's Motion to Strike

Intero moves to strike the following from the SAC:

1) Portions of Paragraph 129:

> • The interest payments that Plaintiffs have made on the $240,500 Promissory Note, together with interest that has accrued on such payments, at the legal rate;
> • Any additional construction, development, and financing costs that Plaintiffs incur as a proximate result of the delay in construction of their new house at the Farmhouse Property;
> • Property taxes assessed against the Reynolds Drive Easement and the 20-Acre Parcel as a proximate result of Defendant's wrongful acts and omissions. . .

2) The incorporation of Paragraph 129 into Paragraph 142; and
3) The incorporation of Paragraph 129 into Paragraph 159.

Intero argues the Plaintiffs' claims against it are rooted in fraud and their potential damages are therefore governed exclusively by Civil Code section 3343, and any request for damages outside the statutory scope should be stricken. (Motion to Strike, p. 5:23-25, citing *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744 (*Bagdasarian*), 762-763; *Cory v. Villa Properties* (1986) 180 Cal.App.3d 592, 599 (*Cory*).)

In opposition, Plaintiffs contend that with respect to their fraud cause of action (which includes Paragraph 129), they are entitled to recover additional costs under the additional damages provision of Civil Code section 3343, including the costs they have sustained as a proximate result of Intero's fraud. (Opposition to Intero's Motion to Strike, section IV(A).)

Civil Code section 3343 states, in part:

> **(a)** One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:
> **(1)** Amounts actually and reasonably expended in reliance upon the fraud.
> **(2)** An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.
> [. . .]
> **(4)** Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:
> **(i)** The defrauded party acquired the property for the purpose of using or reselling it for a profit.
> **(ii)** The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.
> **(iii)** Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

(Cal. Civ. Code, § 3343.)

This statute defines the exclusive measure of damages for most forms of fraud in connection with the sale of property. (*Bagdasarian, supra,* 31 Cal.2d at pp. 762-763; *Cory,*

supra, 180 Cal.App.3d at p. 599.) It authorizes recovery for "out-of-pocket" loss, which is "the difference between the consideration paid for the property and the actual value of the property, with additional damage, if any." (*McNeill v. Bredberg* (1961) 192 Cal.App.2d 458, 467-468 (*McNeill*).) It does not permit recovery of "benefit of the bargain" damages, which represents the harm to the plaintiff's "expectancy interest," and are measured by the difference between the value received and the value promised. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240, quoting *Stout v. Turney* (1978) 10 Cal.4th 718, 725 (*Stout*).)

In addition to out-of-pocket losses, a party defrauded in the purchase of real estate is entitled to recover "any additional damage arising from the particular transaction, including…[a]mounts actually and reasonably expended in reliance on the fraud," and "[a]n amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that such loss was proximately caused by the fraud." (Civ. Code, § 3343, subds. (a)(1)-(a)(2).) These "additional damages" may be recovered even without evidence of a difference in value, so long as the plaintiff can show the expenses were directly related to defendants' fraud or concealment. (*Stout, supra,* 22 Cal.3d at pp. 729-730.)

None of the authorities relied on by Intero involved cases where the plaintiffs also brought a separate claim for negligence. (See e.g., *Bagdasarian, supra*, 31 Cal.2d 744 [asserting only fraudulent misrepresentation]; *McNeill, supra,* 192 Cal.App.2d 458, 467-468 [claims for rescission based on fraud and money had and received]; *Stout, supra,* 22 Cal.3d 718 [fraud in the sale of real property].) Additionally, they were all decided beyond the pleading stage, mostly in the post-judgment context. Intero fails to provide any authority that precludes Plaintiffs from recovering other measures of damages for nonfraud claims or out-of-pocket expenses,[2] let alone precludes them from alleging such measures at the pleading stage.

Accordingly, the motion to strike Item Nos. 1-3 is DENIED.

V. Conclusion as to Interro's Demurrer and Motion to Strike

Intero's demurrer to the third cause of action is OVERRULED. Intero's motion to strike is DENIED.

VI. Coldwell's Demurrer

Coldwell demurs to the fifth cause of action for professional negligence on the ground it fails to state facts sufficient to constitute a cause of action.

"The elements of a claim for professional negligence are (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1095

[2] Under the out-of-pocket loss rule, "when, as a result of the fraud, the person defrauded has made expenditures which were reasonable under the circumstances, these may ordinarily be recovered, insofar as they have been lost or rendered fruitless because of the deceit." (*McNeill, supra,* 192 Cal.App.2d 458, 469 [internal quotations omitted].)

[internal quotations omitted].) "While negligence is ordinarily a question of fact, the existence of a duty is generally a question of law that may be addressed by demurrer." (*Ibid*.)

"'Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency.'" (*Ryan v. Real Estate of Pacific, Inc.* (2019) 32 Cal.App.5th 637, 646 (*Ryan*).) The *Ryan* Court explained: "If a real estate broker has information that will adversely affect the value of a property he or she is selling, does that broker have a duty to share that information with his or her client? The clear and uncontroversial answer to that question is yes." (*Ibid*.)

Coldwell here argues that because they notified Plaintiffs' agent, Cornerstone, that the initial preliminary report was incorrect and provided Cornerstone with a corrected preliminary report, Plaintiffs had knowledge of the contents of the correct report and Coldwell is not responsible for the agent's failure to give actual notice to Plaintiffs. (Demurrer, p. 5:8-11, 15-20.) Coldwell further relies on this Court's (Hon. Rosen) January 12, 2024 Order, where the Court held that Cornerstone owed Plaintiffs a duty after they contacted Cornerstone directly and requested Cornerstone validate legal means of access to the Property. (See January 12 Order, p. 7:16-21.) In opposition, Plaintiffs argue Coldwell breached its duty by failing to inform Plaintiffs that there was no legal access to the Property via Reynolds Drive and failed to provide them with the second amendment to the preliminary report before close of escrow. (Opposition, p. 12:20-24, citing SAC, ¶¶ 163-166.) Plaintiffs further contend that Coldwell was retained by Plaintiffs to act as their agents for the purchase of the Property and Coldwell failed to act as a reasonable broker would under the circumstances of the transaction. (Opposition, p. 13:2-5, citing CACI 4104; SAC, ¶ 166.)

Here, the SAC alleges that Coldwell received the second amended preliminary report and did not provide that information to Plaintiffs. (SAC, ¶¶ 91, 93.) Nothing in the SAC indicates that Plaintiffs should have been aware of the second amended preliminary report. The pleading asserts that Hofer responded to Plaintiffs' questions by sending an email directly to Conley *after* she had responded to Plaintiffs' initial email indicating there was access to the Property via Reynolds Drive. (SAC, ¶¶ 81, 83, 85.) Eventually, the second amended preliminary report was emailed to Bertoldo, Plaintiffs' alleged agent, who never shared this information with Plaintiffs. (SAC, ¶¶ 91, 93.)

In this case, the SAC sufficiently alleges that Coldwell had information that would adversely affect the value of the Property, and it was aware that legal access to the Property via Reynolds Drive was a large concern for Plaintiffs given the number of times they asked about the legal access, and Coldwell thus had a duty to notify Plaintiffs of this information. (See, e.g., *Ryan*, *supra*, 32 Cal.App.5th at p. 646 ["The Ryans entered into an agreement whereby Defendants were to sell the Ryans' home. . . . [I]f Defendants had some knowledge that could impact the sales price (especially if that information would adversely affect the price), it logically follows that they, in providing a service to their clients, would have a fiduciary duty to share such information."]; *Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25 ["'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. . . . The facts that a broker must learn . . . depend on the facts of each transaction . . . the *questions asked by the principal*, and the nature of the property and the terms of sale."][emphasis added].)

Accordingly, the demurrer to the fifth cause of action is OVERRULED.

VII. Coldwell's Motion to Strike

Coldwell moves to strike the following from the SAC:

1) Portions of Paragraph 129 and the incorporation of those portions of Paragraph 129 into Paragraphs 142, 159, and 167:

> • The interest payments that Plaintiffs have made on the $240,500 Promissory Note, together with interest that has accrued on such payments, at the legal rate;
> • Any additional construction, development, and financing costs that Plaintiffs incur as a proximate result of the delay in construction of their new house at [the Property];
> • Property taxes assessed against the Reynolds Drive Easement and the 20-Acre Parcel as a proximate result of Defendant's wrongful acts and omissions. . .

2) Paragraphs 15, 17, 49, and 50 [allegations concerning Coldwell personnel, Barbara Taylor and Ellen Sargenti, who were not involved in the subject transaction]
3) Prayer for Relief, p. 40 ["3. For attorney's fees, as permitted under contract or by law."]

a. Item No. 1

The motion to strike Paragraph 129, 142, and 159 is DENIED. Paragraph 129 appears under the first cause of action alleged solely against Intero. Paragraph 142 appears under the second cause of action solely against Intero. Paragraph 159 appears under the fourth cause of action also alleged solely against Intero.

Coldwell next moves to strike Paragraph 167, also incorporating Paragraph 129, on the ground they involve Plaintiffs costs of acquiring a Reynolds Drive easement, delaying the construction of their home, and are not awardable under the benefit of the bargain or out-of-pocket measure which is calculated based upon market value of the Property at close of escrow. (Motion to Strike, p. 7:13-18.) Coldwell asserts that that tort causes of action for deceit and negligence could not, under the out-of-pocket measure applied via Civil Code section 3333, result in an award of additionally costs Plaintiffs incurred. (*Id.* at p. 8:8-11, citing *Gagne v. Bertran* (1954) 43 Cal.2d 481, 491-492 (*Gagne*).)

In opposition, Plaintiffs argue their additional costs are considered out-of-pocket losses and they are statutorily entitled under Civil Code section 3333 to recover these additional costs. (Opposition, p. 14:12-15.) Plaintiffs further contend that Coldwell's conduct amounts to constructive fraud and so they are entitled to the damages found in Paragraph 167.

Civil Code section 3333 states:

> For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the

> detriment proximately caused thereby, where it could have been anticipated or not.

(Civ. Code, § 3333.)

"California law is committed to the view that the fraudulent breach of fiduciary duty is a tort, and the faithless fiduciary is obligated to make good the full amount of the loss of which his breach of faith is a cause[.] . . . [W]here, as here, the defrauding party stands in a fiduciary relationship to the victim of fraud, the damages must be measured pursuant to the broad provisions of [Civil Code] section[] 3333[.]" (*Overgaard v. Johnson* (1977) 68 Cal.App.3d 821, 824 (*Overgaard*) [emphasis omitted].) "[T]he measure of damages provided by [section 3333] is substantially the same as that for breach of contract prescribed by section 3300; i.e., it tends to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been had the promise performed the contract[.]" (*Id.* at pp. 824-825.) The *Overgaard* court addressed a similar point raised by the plaintiff who argued that the fiduciary's negligent misrepresentation constituted constructive fraud. The Appellate Court explained that "[plaintiff's] pleadings made no reference to constructive fraud, nor did the findings of fact or conclusions of law. The entire case was tried upon a theory of negligence." (*Id*. at p. 825.) Relying on *Gagne*, the *Overgaard* court explained that "'damages, whether for deceit or negligence, must be measured by the actual losses suffered because of the misrepresentation.'" (*Id.* at p. 827.)

Here, the only cause of action against Coldwell sounds in negligence and no mention of constructive fraud is made regarding Coldwell. Thus, where there are allegations of constructive fraud, Plaintiffs may stand to recover "'loss of future profits or other damages which in an appropriate case would also be recoverable under section[] 3333.'" (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 568; see also *Pepitone v. Russo* (1976) 64 Cal.App.3d 685, 690, fn. 3.) Accordingly, the motion to strike Paragraph 167 is GRANTED with 15 days leave to amend.

b. Item No. 2

Coldwell next moves to strike Paragraphs 15, 17, 49, and 50, which include allegations regarding Coldwell personnel that Coldwell asserts were not part of the subject transaction. The request to strike Item No. 2 is GRANTED with 15 days leave to amend. (See *Godwin v. City of Bellflower* (1992) 5 Cal.App.4th 1625, 1631 ["there is no principle of agency law imputing the knowledge of one agent to all others"].)

c. Item No. 3

Finally, Coldwell moves to strike Plaintiffs' prayer for attorneys' fees. Coldwell argues that the prayer for "attorney's fees, as permitted under contract" should be stricken because there is no alleged written agreement between Plaintiffs and Coldwell and that prayer is related to Plaintiffs' former breach of contract cause of action against the now dismissed defendants, the Roaches. (Motion to Strike, p. 15:10-14.) Plaintiff concedes that a principal is not entitled to recover attorneys' fees from an agent stemming from the agent's fraud or negligence, but requests this Court reconsider the Supreme Court's 40-year old decision. (Opposition, p. 21:17-

19, citing *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 504-505.) The Court declines to do so. The request to strike Item No. 3 is GRANTED with 15 days leave to amend.

VIII. Conclusion as to Coldwell's Demurrer and Motion to Strike

Coldwell's demurrer to the fifth cause of action is OVERRULED. The motion to strike is GRANTED, in part, with 15 days leave to amend, and DENIED, in part as to Item No. 1; and GRANTED as to Item No. 2 and No. 3, with 15 days leave to amend.

The Court shall prepare the final order.

- oo0oo -

Calendar Line 5
Case Name: Maria Lourdes Carillo v. Joseph Arnold, et al.
Case No.: 19CV349688

A jury returned a verdict granting Plaintiff damages in the amount of $3,150 related to a car accident. Plaintiff seeks costs of $28,852, consisting of filing and motion fees ($1,218.85), depositions costs ($19,577), service of process fees ($250), interpreter fees ($3,532), an expert witness fee for Andrew Morris ($2000) and interest of ($2,275). Defendants move to tax the costs requesting that the Court deny all costs, under the discretionary provisions of CCP § 1033(b). Alternatively, Defendant contends that Plaintiff is only entitled to $2,348.45 for the filing and motion fees of $1,218.85, deposition and transcription fees of $880.45, and the service of process fees of $250.

Normally, the prevailing party is entitled to costs. CCP § 1032(b). But "where the prevailing party recovers a judgment that could have been rendered in a limited civil case," then "costs or any portion of claimed costs shall be as determined by the court in its discretion." CCP § 1033(a). Although Plaintiff tries to claim she is entitled to costs without regard to the amount of her recovery (see Opp. at p2), she is incorrect. Whether she may recover her costs or a portion of them is within the court's discretion. Section 1033(a) is an exception to the rule that a prevailing party is entitled to costs, as explicitly stated in the very case cited Plaintiffs, *Moreno v. Bassi* (2021) 65 Cal.App.5th 244. Opp. p2. In that case, the Court stated that "allowable costs are recoverable by [the prevailing party] under section 1032, subject to the discretionary exception in section 1033, subdivision (a)." *Moreno v. Bassi* (2021) 65 Cal. App. 5th 244, 262.

Plaintiff later concedes that the Court may deny costs, but states that the Court should not do so in this case because she reasonably believed she could recover an amount in excess of limited jurisdiction. It is true that Defendant does not argue that Plaintiff's expectation that she could recover more than $25,000 was unreasonable and makes little argument that no costs should be awarded other than to say Plaintiff should have filed in small claims court. For this reason the Court will not deny costs outright.

Defendants next claim that many of the costs sought by Plaintiff are not allowable under § 1033.5. Defendants claim that the only deposition costs allowable are those for transcription costs for Plaintiff and Juan Pena, citing the rules that expert fees are not allowed. But as Plaintiff points out, under § 1033.5(a)(3)(A), Plaintiff may recover costs for the "taking, video recording, and transcribing [of] necessary depositions." Defendants do not address this argument in their reply, which the Court takes as a concession. To the extent that Defendants contest expert fees, however, they are correct. It appears from Plaintiff's declarations that $6000 charged as deposition costs were actually expert fees. While Plaintiff fails to differentiate between fees and deposition costs, a finding that $6000 was for fees is consistent with the declarations attached to Plaintiff's motion which account for only about $12,000-$13,000 in deposition costs. Expert fees are not allowed under § 1033.5(b)(1), even when charged for depositions. *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal. App. 4th 592, 601 (expert witness fees to take the depositions not necessarily recoverable costs). Thus, the Court will deduct $6000 from the deposition costs.

Defendants next argues that the expert fee of $2000 for Andrew Morris, a retained billing expert who did not testify, is not an allowable expense under § 1033.5(b)(1). The Court

agrees. It does not appear to the Court that § 998 even applies, as no provision relates to what happened here -- plaintiff's offer was refused, and plaintiff received less than offered, and defendant made an offer which was refused and plaintiff received more than the offer. As such, the Court also disallows the costs for interest.

The motion to tax costs is GRANTED IN PART. Defendants shall pay to Plaintiff's counsel a total in costs of $18,577 ($28,852- $2000 (Morris fee) – $2275 (interest) - $6000 (depo expert fees)). Plaintiff shall submit the final order.

- oo0oo -

Calendar line 9
Case Name: Deborah Sharpe v. Airbnb, Inc., et al.
Case No.: 24CV430182

Defendant Airbnb moves to compel arbitration and stay proceedings. Plaintiff does not contest that the contract signed with Defendant contains an arbitration agreement. Rather, Plaintiff contends she should not be compelled to arbitrate because (1) due to Defendant's false advertising, there was fraud in the inducement of the contract (Opp. p3); (2) that claims of false advertising and willful negligence are not covered by the arbitration clause (*Id*.); and (3) that the arbitrator should not decide whether the claims are subject to arbitration, under Civil Code § 3515, because the claims are for false advertising (Opp. p4).

The arbitration agreement states that the parties "mutually agree that any dispute, claim or controversy arising out of or relating to these terms or the applicability, breach, termination, validity, enforcement or interpretation thereof, or any use of Airbnb Platform, Host Services, or any Content (collectively, "Disputes") will be settled by binding individual arbitration (the "Arbitration Agreement"). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide the issue." Ex. E, attached to Decl. of McDowell.

A claim of fraud in the inducement does not prevent a party's claim from being subject to arbitration. As stated in *Brawerman v. Loeb & Loeb LLP*, (2022) 81 Cal.App.5th 1106, 1131, "[The California] Supreme Court in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394 [58 Cal. Rptr. 2d 875, 926 P.2d 1061] (*Rosenthal*) held that claims for fraud in the inducement are arbitrable." In support of her claim that fraud in the inducement claims are not subject to arbitration, Plaintiff cites a federal court case and a superior court case out of Riverside County, neither of which are binding on this court. In contrast, the *Rosenthal* decision out of the California Supreme Court case and the *Brawerman* case are binding on this court.

Plaintiff appears to assert that her claims of false advertising and negligence"are not within the scope of the arbitration agreement. This does not appear to be correct, given that the agreement states that "any claim" "arising out of or relating to these terms or the applicability, breach, termination, validity, enforcement or interpretation thereof" is subject to arbitration. But that is not a question for this court. The Agreement states that any dispute about whether the arbitration clause applies is to be decided by the arbitrator. Plaintiff claims that even though the arbitration clause specifically states that the arbitrator is to decide whether a claim is subject to arbitration, the court should make the decision in this case because it is a claim of false advertising which she claims is subject to Civil Code § 3513. That code section is a maxim, which is not intended to qualify any other provisions of the code. See Civil Code § 3509. Plaintiff presents no legal authority for her claim that false advertising claims render the arbitration clause invalid. On the contrary, parties are free to delegate issues of arbitrability to the arbitrator, as was done here. See *Henry Schein, Inc. v. Archer & White Sales, Inc*. (2019) 139 S.Ct. 524, 529.

The motion to compel arbitration and stay the proceedings pending arbitration is GRANTED. Defendant shall submit the final order within 10 days.

- oo0oo -