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

**Department 18b**
**Honorable Shella Deen, Presiding**
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

**DATE: July 2, 2024 TIME: 9:00 A.M.**

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

****Please specify the issue to be contested when calling the Court and Counsel****

## LAW AND MOTION TENTATIVE RULINGS

**FOR APPEARANCES:** Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

**SCHEDULING MOTION HEARINGS**: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

**FOR COURT REPORTERS:** The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have 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

**RECORDING IS PROHIBITED**: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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**LAW AND MOTION TENTATIVE RULINGS**

| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 22CV407608 | MICHAEL HOLYS vs COUNTY OF SANTA CLARA | **Demurrer.** This hearing is continued to July 23, 2024 at 9am in Department 18b. |
| LINE 2 | 23CV418969 | Art Chan vs Michelle Fang et al | **Demurrer.** Scroll down to Line 2 for Tentative Ruling. |
| LINE 3 | 23CV423546 | Irina Buckvar et al vs Bernard Buckvar et al | **Demurrer**. Scroll down to Line 3 for Tentative Ruling. |
| LINE 4 | 20CV372857 | GIOVANNOTTO LAND AND CATTLE, LLC et al vs ELLIOT FRENCH et al | **Motion for Summary Judgment/ Adjudication.** Scroll down to Line 4 for Tentative Ruling. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 5 | 24CV430507 | Bank Of America, N.a. vs Wilfred Mpacko | **Motion to Deem Requests for Admission Admitted**. Motion filed by Plaintiff. No opposition was filed by Defendant. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendant has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Plaintiff served requests for admission on Defendant by mail on March 13, 2024. To date, Defendant has not served any responses. A party served with requests for admission must serve a response within 30 days. (Code Civ. Proc. §2033.250.) When a party fails to respond, the Court must order the requests for admission deemed admitted. (Code Civ. Proc. §2033.280(c)). 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.*) Moving party meets its burden of proof. Good cause appearing, the Motion is GRANTED. Requests for Admission (Set One) served on Defendant Wilfred Davidson Mosi Essombe Mpacko on March 13, 2024, by Plaintiff, are deemed admitted against Defendant Wilfred Davidson Mosi Essombe Mpacko.<br><br>Plaintiff shall prepare a formal order after hearing, that repeats the admissions to be admitted verbatim. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 6 | 20CV372833 | Madison Reading vs Grace Hao et al | **Compromise of Minor's Claim** (Holly Reading). The petition is APPROVED. As the petition is complete, a hearing will not be necessary. The Court will execute the proposed order. The matter will be set for Dismissal Review on October 10, 2024 at 10:00 AM in Department 18b. |
| LINE 7 | 22CV400735 | Rynoclad Technologies, Inc. vs FPC Builders, Inc., a corporation et al | **Pro Hac Vice Counsel Application (**Jean G. Wine). No objection filed. Good cause appearing, the application is GRANTED.<br><br>Moving party to prepare formal order. |
| LINE 8 | 22CV400735 | Rynoclad Technologies, Inc. vs FPC Builders, Inc., a corporation et al | **Pro Hac Vice Counsel** (Edward B. Keidan). No objection filed. Good cause appearing, the application is GRANTED.<br><br>Moving party to prepare formal order. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 9 | 23CV412111 | Ulises Lopez vs General Motors LLC | **Motion to Enforce Court Order**. Plaintiff brings a motion to enforce the November 28, 2023 order that compelled Defendant General Motors LLC's to provide supplemental responses and documents (for special interrogatories and a request for production of documents.) In opposing the motion Defendant General Motors LLC admits that is has not complied with the November 28, 2023 order, but reasons that it will comply by the time of the hearing of this motion. This position is without any justifiable reason and is a blatant disregard of a valid court order. Moving party meets its burden of proof. Good cause appearing, the Motion is GRANTED. Defendant General Motors LLC shall fully comply with the court's November 28, 2023 order no later than noon on July 3, 2024. If there is a further failure by Defendant General Motors LLC to comply, the Court will consider awarding sanctions in favor of Plaintiff.<br><br>Moving party to prepare the formal order. |
| LINE 10 | 23CV426812 | DAYANA GAGE vs CHARLES OMENIHU | **Further Case Management Conference.** This hearing is VACATED. |

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**LAW AND MOTION TENTATIVE RULINGS**

| | | | |
|---|---|---|---|
| LINE 11 | 23CV426812 | DAYANA GAGE vs CHARLES OMENIHU | **Defendant's Motion to Dismiss or Stay Action.** A notice of settlement of the entire action was filed on June 25, 2024. The parties request that this motion be stayed pending dismissal (expected to occur by July 30, 2024). As such, this motion is CONTINUED to August 29, 2024 at 9 a.m. in Department 18b. This matter is set for review after settlement on September 26, 2024 at 10 a.m. in Department 18b. |
| LINE 12 | 24CV428637 | Larry Nguyen vs Alejandra Gonzalez et al | **Motion to Withdraw as Attorney**. Motion by Attorney Alex C. Park to withdraw as attorney for Plaintiff Larry Nguyen. Motion to Withdraw must be served personally or by mail on Plaintiff client. Proof of service filed for service on Plaintiff client only shows electronic service. If there is no appearance, the matter will be ordered OFF CALENDAR. |
| LINE 13 | 19CV351290 | Consumer Loan Asset Fund vs Kristine Gomes | **Claim of Exemption.** Parties to appear. |

**Calendar Line 2**
**Case Name:** *Art Chan v. Artson Group International Trade, Inc., et al.*
**Case No.:** 23CV418969

Before the court is defendant Michelle Fang's demurrer to plaintiff's second amended complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

**I. Background.**

Defendant Artson Group International Trade, Inc. ("Artson Group") was formed in 2004 at the direction of plaintiff Art Chan ("Chan"). (Second Amended Complaint ("SAC"), ¶13.) Before defendant Artson Group's formation, defendant Michelle Fang ("Fang") agreed to be plaintiff Chan's business partner. (SAC, ¶14.)

Defendant Artson Group purchased three commercial property leases in China as well as equipment which it used for its business operations in China. (SAC, ¶15.)

From 2004 until 2012, plaintiff Chan served as President of defendant Artson Group. (SAC, ¶16.) While President of defendant Artson Group, plaintiff Chan brought in B&N Industries, Inc. ("BNI") as a customer for defendant Artson Group. (SAC, ¶17.)

In 2012, defendant Fang terminated plaintiff Chan's employment with defendant Artson Group. (SAC, ¶18.)

In 2014, defendant Artson Group sued BNI for unpaid invoices in San Mateo County Superior Court ("Underlying Action"). (SAC, ¶19.) BNI acknowledged it owed the invoices, but did not know to whom payment should be made since plaintiff Chan and defendant Fang made competing claims to the money. (SAC, ¶20.) After the court granted plaintiff Chan's motion to intervene in the Underlying Action, plaintiff Chan filed a cross-complaint against Artson Group and Fang. (SAC, ¶21.) The Underlying Action was settled by the parties on or about August 13, 2015, pursuant to a written Stipulation for Settlement. (SAC, ¶22.)

Pursuant to the Stipulation for Settlement, BNI agreed to pay 50% of the agreed upon settlement amount to Artson Group/ Fang and 50% to Chan. (SAC, ¶23.) Additionally, Artson Group and Chan were to enter into a legal contract in China to sell the three commercial

property leases and equipment; and split the proceeds 50/50. (SAC, ¶24.) The Stipulation for Settlement did not set forth a deadline to sell the property leases or equipment, but stated that the Artson Group was entitled to recover reasonable expenses advanced to the property (not to exceed $10,000RMB per month) until the leases were sold. (*Id.*) At the time the parties entered into the Stipulation for Settlement, the only tenants at the property were Artson Group and Chan. (SAC, ¶25.) Pursuant to the Stipulation for Settlement, Chan agreed to return the Company car (located in China) to Artson Group. (SAC, ¶26.)

The Underlying Action was dismissed on August 25, 2015. (SAC, ¶27.)

In January 2017, defendants Artson Group and Fang sent a text message to plaintiff Chan requesting Chan return the company car. (SAC, ¶28.) Chan proposed several options for returning the vehicle and requested the contract(s) to sell the property leases be presented to him and signed at the same time the car was returned. (*Id.*) Defendants replied stating the contract(s) to sell the property leases would be sent to Chan within a reasonable time after the car was returned. (*Id.*)

After January 2017, Chan made numerous requests to defendants to provide instructions on how to return the vehicle, but defendants did not respond. (SAC, ¶29.)

On June 30, 2018, Chan received a picture from a former [Artson Group] employee which showed that a company had moved into the property's facilities. (SAC, ¶30.) It is at this point that Chan first had reason to believe defendants would not perform as promised under the Stipulation for Settlement. (SAC, ¶31.) Chan tried to obtain additional information regarding the tenant but the tenant refused to provide any information. (SAC, ¶32.) Without Chan's knowledge or consent, defendants subleased the properties rather than selling the property leases as required under the Stipulation for Settlement. (SAC, ¶33.) Plaintiff Chan does not know when defendants entered into the subleases as defendants did not advise plaintiff Chan as to the subleases and have not shared the proceeds of the rent received. (*Id.*)

Chan retained an attorney in China and on July 9, 2020, Chan filed a lawsuit in China which sought to enforce the terms of the Stipulation for Settlement. (SAC, ¶35.) Defendants opposed the lawsuit in China and argued the Chinese courts did not have jurisdiction to enforce the Stipulation for Settlement and the action had to be maintained in California. (SAC, ¶36.)

On or about October 29, 2021, the court in China found it had no jurisdiction to enforce the Stipulation for Settlement and dismissed the case, a ruling which was affirmed in appellate decisions of March 21, 2022 and September 7, 2022, respectively. (SAC, ¶¶37 – 39.)

On July 13, 2023 , plaintiff Chan filed a complaint against defendants Artson Group and Fang asserting a single cause of action for breach of written settlement agreement.

On December 12, 2023, defendants Artson Group and Fang filed a demurrer to plaintiff Chan's complaint.

On February 5, 2024, pursuant to a stipulation by the parties, the court issued an order granting plaintiff Chan leave to file a FAC and allowing defendants Artson Group and Fang to file an updated demurrer to plaintiff Chan's FAC.

On February 5, 2024, plaintiff Chan filed the FAC which asserted causes of action for:

(1) Breach of Settlement Agreement

(2) Breach of Covenant of Good Faith and Fair Dealing

(3) Unjust Enrichment/ Restitution

On February 20, 2024, defendants Artson Group and Fang filed a demurrer to plaintiff Chan's FAC. In a minute order dated March 5, 2024, the court sustained defendant Fang's demurrer to plaintiff Chan's FAC, but otherwise overruled the demurrer by defendants Artson Group and Fang.

On April 9, 2024, plaintiff Chan filed a SAC, the operative pleading, which continues to assert the same three causes of action asserted in the FAC.

On June 5, 2024, defendant Fang filed the motion now before the court, a demurrer to plaintiff Chan's SAC.

## II. Defendant Fang's demurrer to plaintiff Chan's SAC is OVERRULED.

### A. Alter ego liability.

Defendant Fang demurs to the entirety of plaintiff Chan's SAC on the ground that plaintiff Chan has not sufficiently alleged facts to support alter ego liability against defendant Fang. The court addressed this issue in ruling on defendants' demurrer to plaintiff Chan's FAC and concluded, "plaintiff Chan has not made any allegation that an inequity will result if the corporate entity is treated as the sole actor."

As the court previously explained, "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.)

> "In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used. [Citation.]" [Citations.]

(*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 155.)

There is a non-exclusive list of factors which the court must consider in reaching a determination on the application of the alter ego doctrine. No one factor will govern the determination. The trier of fact must look to all the circumstances. The court in *Claremont Press Publishing Co. v. Barksdale* (1960) 187 Cal.App.2d 813, 817 held, "Whether the facts are sufficient to warrant disregard of the corporate entity is largely a question for the trial court."

On the first requirement for application of the alter ego doctrine [unity of interest and ownership], defendant Fang acknowledges plaintiff Chan's allegation at paragraph 10 of the

SAC, but contends plaintiff must provide more specificity [e.g., when and how FANG allegedly fails to separate personal assets, fails to follow corporate formalities, takes ARTSON GROUP asset for her personal use, etc.]. Defendant Fang's argument implicitly recognizes these allegations are factual allegations. The court finds such allegations to be sufficient. The level of specificity that defendant Fang seeks is not required for pleading.

Defendant Fang also acknowledges plaintiff Chan has now included allegations at paragraph 11 and 12 stating, in relevant part, "adherence to the fiction of the separate existence of ARTSON GROUP as an entity distinct from FANG would permit abuse of the corporate privilege, sanction fraud, and promote injustice. … ARTSON GROUP has insufficient assets to respond to the award of compensatory damages, costs, attorneys' fees, and other damages that will be entered against ARTSON GROUP on Plaintiff's claims described below."

Defendant Fang argues, nevertheless, that the second requirement for application of the alter ego doctrine ["failure to disregard the corporate entity would sanction a fraud or promote injustice"] is insufficient.

> while the doctrine does not depend on the presence of actual fraud, it is designed to prevent what would be fraud or injustice, if accomplished. Accordingly, bad faith in one form or another is an underlying consideration and will be found in some form or another in those cases wherein the trial court was justified in disregarding the corporate entity.

(*Clejan v. Reisman* (1970) 5 Cal.App.3d 224, 239.)

> It is not sufficient that the plaintiff will not be able to collect if the corporate veil is not pierced. "In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable . . . for the equitable owner of a corporation to hide behind its corporate veil." (*Associated Vendors, Inc. v. Oakland Meat Co., supra,* 210 Cal.App.2d 825, at p. 842.)

(*Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal.App.3d 405, 412. See also *VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 245—"even if the

unity of interest and ownership element is shown, alter ego will not be applied absent evidence that an injustice would result from the recognition of separate corporate identities, and '[d]ifficulty in enforcing a judgment or collecting a debt does not satisfy this standard.' [Citation.]". See also *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 539 (*Sonora*).)

In opposition, plaintiff Chan relies upon the Sixth District Court of Appeal's opinion in *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 235-236, where the court wrote:

> Rutherford alleged that Caswell dominated and controlled PDR; that a unity of interest and ownership existed between Caswell and PDR; that PDR was a mere shell and conduit for Caswell's affairs; that PDR was inadequately capitalized; that PDR failed to abide by the formalities of corporate existence; that Caswell used PDR assets as her own; and that ***recognizing the separate existence of PDR would promote injustice***. These allegations mirror those held to pass muster in *First Western Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d 910, 915–916 [73 Cal. Rptr. 657]. As in *First Western*, "[a]ssuming these facts can be proved, [Caswell] … may be held liable … under the alter ego principle." (*Id.* at p. 916.)

Based on *Rutherford*, it would appear that the general allegation that a recognition of the separate existence of the corporate entity and the individual would promote an injustice is sufficient to plead the second requirement for invoking the alter ego doctrine. Plaintiff Chan's allegation at paragraph 11 satisfies this pleading requirement even if the allegation at paragraph 12, if viewed in isolation, would not in light of the authorities discussed above.

Defendant Fang argues further that the alter ego allegations are uncertain because it is inconsistent for plaintiff Chan to allege that defendant Fang is the sole owner and in complete control of defendant Artson Group but to also allege that Artson Group was formed at Chan's direction and that Chan was a business partner. The court does not find such allegations to be inconsistent in light of other allegations found in the SAC. Specifically, the SAC alleges defendant Fang terminated plaintiff Chan's employment with defendant Artson Group in

December 2012. (SAC, ¶18.) [For the same reason, the court does not find allegations made by Chan in the Underlying Action to be fatally inconsistent with the alter ego allegations made in the SAC.][1]

Accordingly, defendant Fang's demurrer to plaintiff Chan's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

**B. Defect or misjoinder of parties.**

In her notice of motion, defendant Fang also demurs on the ground that there is a defect or misjoinder of parties. (Code Civ. Proc. §430.10, subd. (d).) "Demurrers on this ground lie only where it appears on the face of the complaint (or matters judicially noticed) that: some third person is a 'necessary' or 'indispensable' party to the action; and hence must be joined before the action may proceed [or] plaintiffs lack sufficient unity of interest [CCP §378]; or there is no common question of law or fact as to the defendants [CCP §379]." (Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶7:79, p. 7(I)-41.)

Despite identifying this as a ground for demurrer, defendant Fang cites no legal authority and makes no argument in support of this ground for demurrer. Accordingly, defendant Fang's demurrer to plaintiff Chan's SAC on the ground that there is a defect or misjoinder of parties [Code Civ. Proc., §430.10, subd. (d)] is OVERRULED.

**C. Defendant Fang's request for attorney's fees and costs is DENIED.**

Defendant Fang requests, "[s]hould the court dismiss this action against Defendant Fang, Defendant Fang should be considered the prevailing party to reasonable attorney's fees

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[1] In support of her demurrer, defendant Fang requests the court take judicial notice of the complaint in intervention filed by plaintiff Chan in the Underlying Action. Evidence Code section 452, subdivision (d) states that the court may take judicial notice of "[r]ecords of any court of this state." This section of the statute has been interpreted to mean that the trial court may take judicial notice of the existence of the court's own records. Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Woodell* (1998) 17 Cal.4th 448, 455.) Defendant Fang's request for judicial notice is GRANTED insofar as the court takes judicial notice of the existence of the complaint in intervention, not necessarily the truth of any matters asserted therein.

and costs at least in amount of $12,555 (Jiang Decl ¶11-13) pursuant to Stipulation of Settlement, California Civil Code § 1717, California Code of Civil Procedure § 1032 (a)(4) and California Civil Procedure Code §1032(b)."[2]

The merits of defendant Fang's request aside, defendant Fang's request for attorney's fees and costs is DENIED in light of the court's ruling above.

The Court will prepare the formal order.

**- oo0oo -**

[2] See page 10, lines 1 – 5 of the Memorandum of Points and Authorities in Support of Defendant Michelle Fang's Demurrer to Plaintiff's Second Amended Complaint.

**Calendar Line 3**
**Case Name:** *Irina Buckvar, et al. v. Bernard Buckvar, et al.*
**Case No.:** 23CV423546

## I. Background

**Plaintiffs' Complaint**

According to the underlying complaint initiating this action, plaintiffs Irina Buckvar ("Irina") [3] and Owen Buckvar ("Owen") (collectively, "Plaintiffs") seek partition of real property: a single-family home on Linda Vista Drive in Cupertino (the "Cupertino Property"). (Complaint, ¶¶ 1-2.) Owen is married to Irina and is the son of defendant Bernard Buckvar ("Bernard" or "Defendant"). (*Id.* at ¶ 3.) Owen is the owner of an undivided one-eighth tenant-in-common interest in the Cupertino Property, and Irina is owner of an undivided three-eighths interest in the Cupertino Property. (*Id.* at ¶¶ 3-4.) Bernard Owen's father, Irina's father-in-law, a trustee of the Bernard Buckvar Revocable Trust dated October 24, 2014 (the "Trust"), and the owner of an undivided one-half interest in the Cupertino Property. (*Id.* at ¶ 5.)

In December 2014, Bernard and Owen granted their interests in the Cupertino Property to Bernard, as trustee of the Trust, and Owen, as joint tenants through a Grant Deed. (Complaint, ¶ 12, Ex. B.) In September 2018, Bernard, as trustee of the Trust, and Owen quitclaimed their interests in the Cupertino Property to Bernard, as an unmarried man, and Owen, as a married man as his sole and separate property, as joint tenants. (*Id.* at ¶13, Ex. C.) Bernard and Owen also secured a deed of trust with Mortgage Electronic Registration Systems, Inc. ("MERS"), which has since been released through an execution of a Full Reconveyance. (*Id.* at ¶14, Ex. D.) Bernard and Owen again quitclaimed their interests in the Cupertino Property to Bernard, as trustee of the Trust, and Owen, as tenants-in-common through a quitclaim deed. (*Id.* at ¶15, Ex. E.)

On August 20, 2020, Bernard, as trustee of the Trust, and Owen secured an adjustable rate deed of trust with MERS. (Complaint, ¶16, Ex. F.) That same day, Bernard, as trustee of the Trust, and Owen secured a second deed of trust with the Commissioner of Housing and Urban Development. (*Id.* at ¶ 17, Ex. G.) On January 9, 2023, Owen transferred a portion of

[3] Because individuals involved in this case share the same last name, the court will refer to them by their first names. No disrespect is intended. (See *In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 551, fn. 2; *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

his undivided one-half interest in the Cupertino Property through Grant Deed, granting himself an undivided one-eighth interest and Irina an undivided three-eighths interest in the Cupertino Property. (Complaint, ¶ 18, Ex. H.)

The parties' relationship has deteriorated, and they have been unable to reach an agreement to divide the Cupertino Property. (Complaint, ¶ 19.) Plaintiffs have obtained a Title Guarantee and a Property Details Report for the Cupertino Property. (*Id.* at ¶20, Exs. I and J.) Plaintiffs contend they are owners of the Cupertino Property and have a right to interlocutory judgment for partition, a right to full use and occupancy, and a right to writ of possession for the Cupertino Property. (*Id.* at ¶¶ 23-24.) A physical partition of the Cupertino Property is infeasible. (*Id.* at ¶¶ 22, 25-27.) Plaintiffs seek, among other things, an order for the appointment of a partition referee to prepare the Cupertino Property for sale and an order for disbursement. (*Id.* at ¶ 30, p. 5, lns. 7-18.)

On September 28, 2023, Plaintiffs filed a verified complaint stating a sole cause of action for partition against Bernard, as trustee of the Trust; Mortgage Electronic Registration Systems, Inc., and the Commissioner of Housing and Urban Development.

**Bernard's Cross-Complaint**

On 13 November 2023, Bernard filed a verified answer and a verified cross-complaint against Irina and Owen. On December 20, 2023, Bernard filed a First Amended Verified Cross-Complaint stating causes of action for:

(1) Breach of Fiduciary Duty (against Owen)
(2) Accounting (against all cross-defendants)
(3) Financial Elder Abuse (against Owen)
(4) Quiet Title (against all cross-defendants)
(5) Violation of Penal Code section 496 (against all cross-defendants)

On January 23, 2024, Irina and Owen filed a demurrer to Bernard's First Amended Verified Cross-Complaint. The court sustained the demurrer with leave to amend as to the first, third, fourth, and fifth causes of action and overruled the demurrer as to the second cause of action.

On April 11, 2024, Bernard filed a Second Amended Verified Cross-Complaint ("SAXC") asserting causes of action for:

(1) Breach of Fiduciary Duty (against Owen)
(2) Accounting (against all cross-defendants)
(3) Financial Elder Abuse (against Owen)
(4) Quiet Title (against all cross-defendants)
(5) Violation of Penal Code section 496 (against all cross-defendants)
(6) Resulting Trust (against all cross-defendants)
(7) Constructive Trust (against all cross-defendants)
(8) Conversion (against all cross-defendants)

According to Bernard's cross-complaint, Bernard is the father of Owen and father-in-law of Irina, who is currently married to Owen. (SAXC at ¶ 9.) Bernard was born in 1937. (*Id.* at ¶ 10.) In or around 1970, Bernard and his late wife, Helga Buckvar ("Helga"), purchased the subject Cupertino Property on Linda Vista Drive for approximately $37,000. (*Id.* at ¶11.)

In or around May 2004, Bernard received title and ownership to real property located on Kanner Highway in Stuart, Florida (the "Florida Property"). (SAXC at ¶ 12.) Bernard has rented out the Florida Property since acquiring it. (*Id.* at ¶ 13.) Over the years, Bernard took out mortgages against the Cupertino Property. (*Id.* at ¶ 14.) At the time of Helga's death in 2009, there were no longer any loans against the Cupertino Property, and Bernard became the sole owner as surviving joint tenant. (*Id.* at ¶¶ 15-17.)

In 2012, Owen became interested in purchasing a home for himself, but was unable to do so on his own. (SAXC at ¶ 18.) Owen asked Bernard if he would be willing to loan Owen money for the purpose of obtaining a new home. (*Id.* at ¶ 19.) Owen suggested that Bernard take out a mortgage against the Cupertino Property in order to fund Owen's purchase of a new home and Owen agreed. (*Ibid.*) Bernard and Owen also agreed that when Owen purchased a new home, he would obtain a mortgage against it to repay the mortgage against the Cupertino Property. (*Id.* at ¶ 20.)

In July 2012, Bernard put Owen on title to the Cupertino Property to help his son obtain a loan to purchase his own home. (SAXC at ¶ 21.) Prior to this, Owen had never contributed monetarily to the Cupertino Property, including the payment of any mortgage, tax, or other expense. (*Id.* at ¶ 25.) On or about July 30, 2012, Bernard and Owen obtained a loan from JP Morgan Chase in the amount of $285,000. (*Id.* at ¶ 26.) On or about August 22, 2012, using the proceeds of the loan, Owen purchased a home located on Essex Avenue in Sunnyvale (the "Sunnyvale Property"), paying the purchase price of $425,000 in cash. (*Id.* at ¶¶ 27-28.)

Owen agreed to pay the monthly payment on the loan against the Cupertino Property. (SAXC at ¶ 29.) In or around 2020, Owen stated that he would no longer make any of the monthly payments on the mortgage on the Cupertino Property. (*Id*. at ¶ 30.) At that time, Bernard was living on a fixed income from his retirement. (*Id.* at ¶ 31.) On or about 3 September 2020, Bernard obtained a reverse mortgage against the Cupertino Property. (*Id.* at ¶ 32.)

In the last four years, Owen, and Irina (and not Bernard) have retained all the funds from the rent for the Florida Property. (SAXC at ¶ 33.) Also in the last four years, Plaintiffs have taken Bernard to an attorney's office to make changes to Bernard's trust, in order to benefit Irina and Owen. (*Id.* at ¶ 36.) Irina and Owen attempted to put all of Bernard's property in a trust of their own creation. (*Id.* at ¶ 37.) Owen has repeatedly asked Bernard to take out money from Bernard's life insurance policy as a loan, but Owen has never made any payments for these loans. (*Id.* at ¶ 38.) Plaintiffs have taken advantage of Bernard to enrich themselves. (*Id.* at ¶ 39.)

Without Bernard's knowledge, Owen transferred part of his claimed joint tenant interest in the Cupertino Property to Irina. (SAXC at ¶ 40.) Owen and Irina are now trying deprive Bernard of the Cupertino Property, which he has owned for the past 53 years, and take half of the proceeds from the sale despite never providing payment towards the property. (*Id.* at ¶ 41.)

Currently before the court is Plaintiffs' demurrer, filed May 21, 2024 to Bernard's SAXC. Bernard opposed the demurrer and Plaintiffs have filed a reply.

## II. Legal Background

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

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (*Code Civ. Proc.*, §430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (*Ankeny v. Lockheed Missiles and Space Co.*

(1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (*Yolo County Dept. of Social Services v. Municipal Court* (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213 (*Children's Television*).) "It 'admits the truth of all material factual allegations in the complaint . . .; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (*Id.* at pp. 213-214.)

## III. Plaintiffs' Demurrer to Bernard's Second Amended Cross-Complaint

Plaintiffs demur to the first, fourth, sixth, seventh, and eighth causes of action on the ground that each fails to allege sufficient facts to constitute a cause of action under Code of Civil Procedure section 430.10, subdivision (e).

### A. First Cause of Action: Breach of Fiduciary Duty

As to the first cause of action, which is charged against Owen alone, Plaintiffs contend that the SAXC does not adequately plead the existence of a relationship imposing a duty.

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820-821.) "While breach of fiduciary duty is a question of fact, the existence of legal duty in the first instance and its scope are questions of law." (*Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 790.)

"Our Supreme Court has acknowledged that it is difficult to enunciate the precise elements required to show the existence of a fiduciary relationship." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 632 (*Oakland Raiders*) quoting and citing *Children's Television, supra*, 35 Cal.3d at p. 221.) "But the high court has noted that 'before a person can be charged with a fiduciary obligation, he must either knowingly

undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. [Citations.]'" (*Ibid.*)

In the court's order filed March 22, 2024, the court found that that Bernard's allegations in the first amended cross-complaint that the long-standing familial relationship between Owen and Bernard imposed a duty on Owen to act in the best interest of Bernard insufficient to establish a fiduciary relationship. The court stated, "In short, the pleading does not sufficiently allege how Owen knowingly undertook to act on behalf of Bernard or entered into a relationship which imposes that undertaking as a matter of law. (See *Oakland Raiders, supra*, 131 Cal.App.4th at p.632.)" (See Order filed March 22, 2024 in *Irina Buckvar, et al. v. Bernard Buckvar, et al.*, 23CV423546 at p. 7, lns. 9-11 ("March 22 Order").)

In the SAXC, Bernard pleads that Owen undertook a duty to Bernard by serving as a property manager for both the Cupertino and Florida Properties. (SAXC at ¶¶ 43-45.) The SAXC also indicates, with respect to the Cupertino Property, that Owen owes Bernard a duty because they are tenants in common. (*Id.* at ¶ 43.)

With respect to the co-tenancy theory, Owen argues that he is not a co-tenant with Bernard as to the Florida Property. As to the Cupertino Property, Owen concedes that he is a co-tenant and that, where co-tenants receive their interests in the property at the same time and through the same instrument, they each owe a fiduciary duty to the other but, he asserts, when their interests are received at different times, they do not owe such a duty.

"Where tenants in common receive their interests at the same time, such as the same deed or will, again, a fiduciary relationship exists. [¶] But where . . . cotenants acquire their interests at different times through different instruments, and no relationship of trust and confidence exists between them, then no fiduciary relationship can be found to exist." (*Wilson v. S.L. Rey, Inc.* (1993) 17 Cal.App.4th 234, 243.) Here, the SAXC alleges that there is a relationship of trust and confidence between Bernard and Owen. (SAXC at ¶ 43.) Further, in his opposition, Bernard argued that Plaintiffs and Bernard received their interest in the Cupertino property at the same time. Plaintiffs did not respond to that argument in reply, thereby conceding it. (See *Glendale Redevelopment Agency v. Parks* (1993) 18 Cal.App.4th 1409, 1424 [point impliedly conceded by failure to address it]; *DuPont Merck Pharmaceutical*

*Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 ["By failing to argue the contrary, plaintiffs concede this issue."].)

Instead, Plaintiffs argued that Bernard did not exercise control over Owen's actions with respect to the Florida Property and, therefore, Owen could not have a duty based on agency as to the Florida property. But, this argument ignores that a demurrer does not lie to a portion of a cause of action. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.) Accordingly, because the first cause of action is adequately pled as to the Cupertino Property, the demurrer must be overruled as to the first cause of action.

The demurrer is OVERRULED as to the first cause of action.

**B. Fourth Cause of Action: Quiet Title**

The fourth cause of action alleges a claim of quiet title against both Plaintiffs. Plaintiffs argue that, because they hold legal title to the Cupertino Property, in order to quiet title to the property, Bernard must allege fraud and a fraud claim must be pled with particularity.

To maintain an action to quiet title a complaint must be verified and must include (1) a description of the property including both its legal description and its street address or common designation; (2) the title of plaintiff as to which determination is sought and the basis of the title; (3) the adverse claims to the title of the plaintiff against which a determination is sought; (4) the date as of which a determination is sought and, if other than the date the complaint is filed, a statement why the determination is sought as of that date; and (5) a prayer for determination of plaintiff's title against the adverse claims. (Code Civ. Proc., § 761.020.)

Plaintiffs rely on *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2013) 217 Cal.App.4th 62, 81, in which the court explained that "the general rule is that the holder of equitable title cannot maintain a quiet title action against the holder of legal title. [Citation.] But an exception exists 'when legal title has been acquired through fraud.' [Citation.]"

In order to state a claim for fraud, a plaintiff must plead the following elements: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*)) "Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is

everywhere followed that fraud must be specifically pleaded." (*Children's Television, supra*, 35 Cal.3d at p. 216.) This necessitates pleading facts which show "how, when, where, to whom, and by what means the representations were tendered." (*Lazar, supra*, 12 Cal.4th at p. 645.)

The quiet title cause of action alleges that Owen convinced Bernard to obtain a loan against the Cupertino Property in an attempt to provide Owen with funds to purchase his own real property. (SAXC at ¶ 100.) In July 2012, Owen also convinced Bernard to put him on title to the Cupertino Property. (SAXC at ¶¶ 21, 100.) The SAXC goes on to state, "Despite being on title to the Cupertino Home, OWEN also stated and continually agreed that the Cupertino Home belonged only to BERNARD and that it would remain the property of only BERNARD." (*Id.* at ¶ 101.) It further alleges, "When BERNARD transferred a title interest in the Cupertino Home in 2012, he believed OWEN when he said that the Cupertino Home would remain the sole property of BERNARD during his life. In 2023, BERNARD discovered that OWEN's promises were false when he (a) transferred an interest in the Cupertino Home to IRINA, and (b) filed the Complaint in this case asserting that they had a right to partition and sell the Cupertino Home." (*Id.* at ¶ 109.)

Further, the SAXC alleges "BERNARD and OWEN also agreed that OWEN, upon purchasing a home of his own, would obtain a mortgage against his new home to repay the mortgage against the Cupertino Home." (SAXC at ¶ 20.) Owen asked to repay the mortgage by simply making the payments on the Cupertino Property himself but in 2020, he informed Bernard that he could no longer pay. (*Id.* at ¶¶ 29, 30, 92 [incorporating previous paragraphs into fourth cause of action by reference].)

Although these allegations are significant, they do not plead with specificity how, when, and where the representations were tendered. (*Lazar, supra*, 12 Cal.4th at p. 645.) The court finds that the demurrer is sustainable on this basis.

In reply, Owen contends that mere non-performance is insufficient to establish that the promise was fraudulent when made. (See, e.g., *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 575.) This argument is well-taken. " 'To maintain an action for deceit based on a false promise, *one must specifically allege* and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it

was intended to deceive or induce the promisee to do or not do a particular thing.' [Citation.] 'The mere failure to perform a promise made in good faith does not constitute fraud.' [Citation.]" (*Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400, 1414, italics added.) Thus, Bernard has not sufficiently pled fraudulent intent.

" 'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Here, it does not appear that amendment would be futile. Additionally, although Bernard has had the prior opportunity to amend in response to a demurrer, the fraud allegations contained in the fourth cause of action have not previously been tested by demurrer. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 ["[i]f the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment. [Citations.]"].) Accordingly, the court will grant leave to amend.

The demurrer to the fourth cause of action is SUSTAINED with 20 days' leave to amend.

**C. Sixth, Seventh, and Eighth Causes of Action**

**i. Sixth, Seventh, and Eighth Causes of Action**

Plaintiffs argue, with respect to the sixth, seventh, and eighth causes of action, that Bernard added these new causes of action without leave of the court after the court partly sustained their demurrer with leave to amend. In response, Bernard contends that the additional causes of action were added in response to the court's order sustaining in part and denying in part the prior demurrer.

In general, when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not add entirely new causes of action. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015 (*Patrick*).) However, a plaintiff may add a new cause of action when it "directly responds to the court's reason for sustaining the earlier demurrer." (*Ibid.* [after demurrer sustained for plaintiff's apparent lack of standing on shareholder claims, complaint

amended to add claim for declaratory relief to establish plaintiff's community property interest in shareholdings].)

Plaintiffs do not address these authorities in reply. However, while the court acknowledges the new causes of action are based on the same facts alleged in Bernard's first amended cross-complaint, Bernard did not request and the court did not allow Bernard to raise the new causes of action in the amended pleading.

Bernard asserts that the resulting and constructive causes of action were added in response to the court's order. That argument is unconvincing. While the court did acknowledge that the quiet title cause of action pled that Plaintiffs held any interest in the Florida and Cupertino Properties in either constructive or resulting trust, it did so in the context of explaining that the first amended cross-complaint did not support the quiet title cause of action with fraud allegations. (March 22 Order at pp. 9:27-10:2.) The court then went on to state that the authority Bernard cited in opposition to the prior demurrer, *Novak v. Novak* (1967) 249 Cal.App.2d 438, was not on point as the outcome of that case was based on theories of constructive or resulting trust and Bernard's quiet title claim did not meet the requirements of pleading either theory. (March 22 Order at p. 10:3-13.) The court also mentioned that the initial cross-complaint had pled resulting and constructive trust causes of action but that the then-current iteration of the cross-complaint did not contain these same causes of action. (March 22 Order at p. 10, fn. 4.)

However, unlike in *Patrick*, in this case, the assertion of these additional causes of action was not necessary to respond to the court's March 22 Order. In fact, Bernard has also responded to the court's order by adding allegations of fraud to the 2AXC. Notably, in *Patrick*, the new cause of action was added in order to assist the pleader in establishing standing. (See *Patrick*, *supra*, 167 Cal.App.4th at p, 1015 ["Plaintiff may not have been free to add any cause of action under the sun to her complaint, but the court should have allowed her to add *this* cause of action to establish her standing."].)[4] Here, if Bernard wanted to maintain his cause of action for quiet title, he could have simply added to his quiet title claim without the need to add additional causes of action.

[4] The court notes that Bernard's reliance on *Wood v. De Luca* (1963) 211 Cal.App.2d 507 is misplaces as, there, the plaintiff sought leave to amend. (*Id.* at p. 509.)

Here, the applicable statory scheme allows parties to amend their pleadings once as a matter of right. (See *Hedwall v. PCMV, LLC* (2018) 22 Cal.App.5th 564, 574 [Code of Civil Procedure section 472 "limit[s] the right to amend 'the complaint' as a matter of right to the complaint as originally filed, that is, the version of the complaint that commences the action"].) Thereafter, the court may allow parties to amend their pleadings in the interest of justice. (See, generally, Code Civ. Proc., § 473.) But, such amendment requires notice to the opposing party and the court may choose to do so in its discretion. (Code Civ. Proc., § 473, subd. (a) ["The court may . . ., in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars . . . ."].) Bernard did not follow the procedures of sections 472 and 473 and the court's March 22 Order cannot be read as allowing the addition of new causes of action.

The demurrer is SUSTAINED without leave to amend as to the sixth, seventh, and eighth causes of action. (See *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1022-1023 [demurrer properly sustained where amended pleading alleged new causes of action that were outside the scope of order sustaining demurrer with leave to amend].) Although the court is sustaining the demurrer without leave to amend, it would entertain a properly-noticed motion to amend as to these causes of action.

## IV. Conclusion and Order

The demurrer is OVERRULED as to the first and fourth causes of action. The demurrer to the fourth cause of action is SUSTAINED with 20 days' leave to amend. The demurrer is SUSTAINED without leave to amend as to the sixth, seventh, and eighth causes of action.

**- oo0oo -**

**Calendar Line 4**
**Case Name:** *Giovannotto Land and Cattle, LLC, et al. v. Elliot French, et al.*
**Case No.:** 20CV372857

Before the court is defendants Wyatt Bourdet and Twenty Four Seven Livestock, LLC's joint motion for summary judgment; or alternatively summary adjudication of issues. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

**III. Background.**

Plaintiff Giavannotto Land and Cattle, LLC ("GLC") is the owner and in possession of real property consisting of land and several ponds located at approximately 16083 CA-152, Hollister, CA ("GLC Property"). (First Amended Complaint ("FAC"), ¶1.) Plaintiff Salvatore Giovannotto ("Salvatore")[5] is the principal shareholder of plaintiff GLC. (FAC, ¶2.) Defendant Elliot French ("French") is the owner and/or in possession of certain real property consisting of land abutting the GLC Property. (FAC, ¶4.)

On or about August 20, 2020, plaintiff GLC's ranch worker, Joe Spencer ("Spencer"), called plaintiff Salvatore and told him that CalFire representatives requested to meet with him on GLC Property at approximately 4:00 pm that same day. (FAC, ¶18.) When Salvatore arrived at the gate to the GLC Property, Spencer was there but nobody from CalFire had arrived. (FAC, ¶20.) Shortly thereafter, defendant French drove up on a four-wheel all-terrain vehicle having traversed and arrived from roads within GLC Property without permission from plaintiffs. (*Id.*)

Plaintiff Salvatore asked defendant French what he was doing on GLC Property and Spencer informed plaintiff Salvatore that defendant French was there to meet him. (FAC, ¶21.) Defendant French requested the meeting under the guise of acting on behalf of CalFire when he was in no way associated or otherwise authorized to act on behalf of CalFire. (*Id.*) Defendant French is the son of the owner of a parcel of property abutting the southwest portion of the GLC Property. (FAC, ¶22.) Defendant French told plaintiff Salvatore he was on GLC Property to "do whatever it takes to protect my ranch" apparently referencing concerns he had about potential for fires in the area to spread. (FAC, ¶23.) Although there were fires in the

[5] At times, the court refers to the parties by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

region around this time, there were no fires on GLC Property or on any surrounding property that created an impending emergency situation threatening death or serious injury to any person or damage to property. (FAC, ¶24.) Plaintiff Salvatore told defendant French he needed to stay away from GLC Property and asked defendant French to immediately leave the GLC Property. (FAC, ¶25.) Defendant French immediately became hostile and aggressive towards plaintiff Salvatore saying, "Fuck you, old man" and "Go fuck yourself" before getting on his ATV and speeding away on GLC Property roads. (FAC, ¶26.)

The next day, August 21, 2020, plaintiff Salvatore's son, plaintiff Michael Giovannotto ("Michael"), traveled to the GLC Property and observed some roads had been displaced and ground up. (FAC, ¶31.) Plaintiff Michael followed the road until he observed a bulldozer bulldozing GLC Property's road. (*Id.*) Plaintiff Michael had to drive his truck right up to the bucket of the bulldozer to get the operator to stop. (*Id.*) The bulldozer operator told plaintiff Michael that his name was "Paul," who Plaintiffs believe to be defendant Paul Souza ("Souza"), but did not clearly identify who he worked for. (*Id.*) Plaintiff Michael asked defendant Souza if there was anyone else on the GLC Property to which defendant responded that a "CDF" bulldozer was also at the GLC Property. (*Id.*)

Plaintiff Michael told defendant Souza that this was his family's property and defendant Souza was not authorized to be there and asked defendant Souza to leave the GLC Property but defendant Souza remained and continued to bulldoze. (FAC, ¶32.) Plaintiff Michael drove off to look for the second bulldozer when he observed four people standing at the top of a hill. (FAC, ¶33.) Plaintiff Michael attempted to confront the four people by driving up the hill, but his truck got stuck due to the extensive road damage caused by bulldozers. (*Id.*) Plaintiff Michael took out his phone to take pictures of the four individuals but one of the men, later identified as defendant French, pointed a pistol at plaintiff Michael who responded by trying to hide behind the frame of his vehicle and alternately beeping the horn and putting his hands up to surrender. (*Id.*)

Defendant French mounted his ATV and approached plaintiff Michael. (FAC, ¶34.) Plaintiff Michael asked what was happening and defendant French stated a fire was coming. (FAC, ¶35.) Plaintiff Michael told defendant French he was not authorized to do any work on

GLC Property or to be on GLC Property. (*Id.*) Plaintiff Michael asked defendant French about the location of the second bulldozer and defendant French responded it was a "CDF" bulldozer operated by someone named "Wes," provided a description of the location, and then returned up the hill on his ATV. (*Id.*)

Plaintiff Michael then observed and confronted the second bulldozer confirming the name of the operator was "Wes," an agent/ employee of defendant Stanley G. Silva, Jr. Trucking, Inc. who was paid approximately $17,500 by defendants Hawkins Ranch, LLC; Hansen Ranch, LLC; and Mariposa Peak LLC for the use and trucking of the bulldozer used on GLC Property. (FAC, ¶36.) Plaintiff Michael asked Wes who he was working for and Wes said for the "French Ranch." (FAC, ¶37.) Plaintiff Michael instructed Wes he was not authorized to do work on the GLC Property and pointed out the damage the bulldozer caused to GLC Property. (*Id.*)

Plaintiff Michael left and informed his father, plaintiff Salvatore, what had happened. (FAC, ¶¶37 – 38.) Plaintiff Salvatore traveled to the GLC Property with a friend to survey the damage which was extensive and caused plaintiff Salvatore to suffer emotional distress and mental suffering. (FAC, ¶38.) Defendants destroyed not only roads but many trees on GLC Property that are hundreds of years old and irreplaceable. (FAC, ¶39.) Defendants have disturbed, disrupted and otherwise displaced many acres of soil on GLC Property making the roads impassable and limiting access to large tracts of GLC Property. (*Id.*) Defendants' actions have substantially disrupted and destroyed federally protected and designated critical habitat on GLC Property. (FAC, ¶¶39 – 44.)

On October 30, 2020, plaintiffs GLC, Salvatore, and Michael filed a complaint against defendant French.

On February 8, 2021, defendant French filed an answer to the plaintiffs' complaint.

On August 17, 2021, plaintiffs filed an "Amendment to Complaint Naming Doe Defendants," including defendants Wyatt Bourdet ("Bourdet") and Twenty Four Seven Livestock, LLC (erroneously named 24-7 Livestock; hereafter "TFSL"), among others.

On April 1, 2022, plaintiffs filed the operative FAC which asserts causes of action for:

(4) Trespass

(5) Private Nuisance

(6) Public Nuisance

(7) Negligence

(8) Intentional Infliction of Emotional Distress

(9) Negligent Infliction of Emotional Distress

(10) Elder Abuse [against defendant French]

(11) Civil Conspiracy

(12) Aiding and Abetting Tort

(13) Violation of the Bane Act – Civil Code Section 52.1

(14) Declaratory Relief

(15) Permanent Injunction

On May 3, 2022, defendants Bourdet and TFSL jointly filed an answer to the plaintiffs' FAC.

On April 16, 2024, defendants Bourdet and TFSL (collectively referred to as "Moving Defendants") filed the motion now before the court, a motion for summary judgment/ adjudication of the claims asserted against them in the plaintiffs' FAC.

**IV. Moving Defendants motion for summary judgment is DENIED. Moving Defendants' alternative motion for summary adjudication is GRANTED, in part, and DENIED, in part.**

**D. Trespass.**

"Trespass is an unlawful interference with possession of property." (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal. Rptr. 165].) The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the ***defendant's*** intentional, reckless, or negligent ***entry onto the property***; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm. (See CACI No. 2000.)

(*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 261-262.)

"***Trespass may be*** by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or ***by causing the entry of some other person***. . . ." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132; punctuation removed; emphasis added.)

In moving for summary adjudication of plaintiffs' trespass cause of action, Moving Defendants assert they did not enter onto the GLC Property and did not direct, control, or authorize any other defendant's entry onto the GLC Property. To support these assertions, Moving Defendants proffer the following facts: Plaintiff GLC owns the ranch lands located at the area commonly known as 16083 CA-152, in Hollister, California that are the subject of plaintiffs' action.[6] Defendant Bourdet's affiliated entities, including TFSL, own or operate ranch lands ("Bourdet Property") that are contiguous with the GLC Property and other local ranches at certain points in Hollister, California near CA Hwy-152 that are relevant to plaintiffs' FAC.[7] Defendant French's father, Milton (Mitt) French, is a partial owner or manager of the French family's entities (including defendant M&J French Ranch, LLC ("M&J") and Mariposa Peak, LLC ("MP")) which own ranch land at various points contiguous with the GLC Property, Bourdet Property, and other local ranch properties.[8] Defendants Hansen Ranch, LLC ("Hansen") and Hawkins Ranch, LLC ("Hawkins") are managed by Mitt French and own parcels of land that are situated nearby the GLC Property and Bourdet Property.[9] (Collectively, M&J, MP, Hansen, and Hawk are referred to as "French Property.") The GLC Property, Bourdet Property, and French Property are all located in Hollister, California near and south of Highway 152.[10]

On August 20, 2020, the SCU Complex Fire was moving south toward the GLC Property, Bourdet Property, and French Property.[11] On August 20, 2020, after several days of monitoring the SCU Complex Fire and his increasing safety concerns, defendant Bourdet

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[6] See Defendants Wyatt Bourdet and Twenty-Four Seven Livestock, LLC's Joint Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment or Alternatively, Summary Adjudication of Issues ("Moving Defendants' UMF"), Fact No. 1.
[7] See Moving Defendants' UMF, Fact No. 4.
[8] See Moving Defendants' UMF, Fact No. 5, 6, and 7.
[9] See Moving Defendants' UMF, Fact No. 8.
[10] See Moving Defendants' UMF, Fact No. 9.
[11] See Moving Defendants' UMF, Fact No. 10.

began planning that morning for preventive fire protection measures on the Bourdet Property.[12] Defendant Bourdet arranged for one bulldozer from a neighbor to perform preventive firebreak work at the Bourdet Property from late afternoon August 20, 2020 to approximately 2 a.m. on August 21, 2020.[13] On August 20, 2020, between approximately 2:00 p.m. and 4:30 p.m., defendant Bourdet performed firebreak work on public lands situated near the Bourdet Property, after which he quipped to defendant French that he was "[probably] goin' to jail for [his] handywork."[14]

On August 20, 2020, defendant Bourdet's friend arranged for transportation by defendant Stanley Silva, Jr. Trucking, Inc. ("Silva Trucking") of a second bulldozer and its operator (defendant Weston Capurro) to the Bourdet Property.[15] On the afternoon of August 20, 2020, Mitt French arranged for defendant Souza to bring his bulldozer to the Bourdet Property.[16]

On August 20, 2020, defendant French met with plaintiff Salvatore to discuss concerns about the SCU Complex Fire.[17] Moving Defendants were not present and did not otherwise participate in the August 20, 2020 meeting between defendant French and plaintiff Salvatore.[18]

The August 20, 2020 Bourdet Property firebreak work did not extend beyond its borders into the GLC Property upon its completion at approximately 2:00-3:00 a.m. on August 21, 2020.[19] On August 20, 2020 – August 21, 2020, Moving Defendants did not direct, encourage, or oversee any person's firebreak work or entry onto the GLC Property.[20] After the Bourdet Property firebreak work was completed in the early morning hours of August 21, 2020, the participants dispersed.[21]

On August 21, 2020, in the mid-morning hours, defendants Capurro, Souza, French, and non-parties Mitt French and his son-in-law, Eric Brem ("Brem"), gathered at Pacheco Peak

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[12] See Moving Defendants' UMF, Fact No. 11.
[13] See Moving Defendants' UMF, Fact Nos. 12 and 20.
[14] See Moving Defendants' UMF, Fact No. 13.
[15] See Moving Defendants' UMF, Fact No. 14.
[16] See Moving Defendants' UMF, Fact No. 15.
[17] See Moving Defendants' UMF, Fact No. 16.
[18] See Moving Defendants' UMF, Fact No. 17.
[19] See Moving Defendants' UMF, Fact No. 21.
[20] See Moving Defendants' UMF, Fact No. 22.
[21] See Moving Defendants' UMF, Fact No. 23.

near the border of the GLC Property to discuss further firebreak work on the French Property.[22] Defendant Capurro suggested, based on his experience working at other fires, that to be effective a firebreak should be performed on the GLC Property; which is when the decision to perform firebreak work on the GLC Property was first formulated.[23] Moving Defendants were not present for this August 21, 2020 meeting and did not decide to, or instruct anyone to, perform firebreak work on the GLC Property.[24] On August 21, 2020, approximately before noon through 3:30 p.m., firebreak work was performed on the GLC Property by defendants Capurro and Souza.[25] Moving Defendants did not participate in or direct the August 21, 2020 bulldozing on the GLC Property and were unaware that it occurred until after it was underway.[26] The four individuals that plaintiff Michael encountered on August 21, 2020 at the GLC Property where a weapon was allegedly brandished were defendant French and non-parties Mitt French, Brem, and another neighboring rancher, Bardin Bengard, but not defendant Bourdet.[27]

On September 19, 2020, defendant Silva Trucking invoiced defendant TFSL for transportation of Capurro's bulldozer to the Bourdet Property and being "on call" with its truck for four days (the "Invoice").[28] The Invoice was paid on October 1, 2020 by a different Bourdet entity.[29] Defendant TFSL was reimbursed in December 2020 by the entity co-defendants affiliated with the French Property at Mitt French's discretion and authority.[30] Defendant Bourdet never requested or expected reimbursement for the Invoice.[31]

While Moving Defendants' evidence depicts the firebreak work done at the Bourdet Property to be a separate and discrete task from any work done thereafter and without Moving Defendants' involvement, the evidence offered in opposition by the plaintiffs depicts a concerted effort by defendants Bourdet and Mitt French which at least presents a triable issue of material fact with regard to whether the Moving Defendants bear some responsibility for the

[22] See Moving Defendants' UMF, Fact No. 24.
[23] See Moving Defendants' UMF, Fact No. 25.
[24] See Moving Defendants' UMF, Fact No. 26.
[25] See Moving Defendants' UMF, Fact No. 27.
[26] See Moving Defendants' UMF, Fact No. 28.
[27] See Moving Defendants' UMF, Fact No. 31.
[28] See Moving Defendants' UMF, Fact No. 32.
[29] See Moving Defendants' UMF, Fact No. 33.
[30] See Moving Defendants' UMF, Fact No. 34.
[31] See Moving Defendants' UMF, Fact No. 35.

actions of other defendants who trespassed onto the GLC Property. The evidence proffered by plaintiffs from which this court finds the existence of a triable issue of material fact includes the following:

Fearful that the SCU Complex Fire would move south from its location and burn through their respective ranch lands, defendant French, Mitt French, and Bourdet began formulating a plan of action.[32] On August 20, 2020, Mitt French contacted defendant Souza about bringing his bulldozer to the French Property to cut firebreaks.[33] Souza has been close friends with defendant French and Mitt French for 15 and 20 years, respectively; close enough that Souza felt comfortable performing work for Mitt French without payment.[34] After being contacted by Mitt French, Souza made arrangements for a transport to meet him and deliver his bulldozer to the French Property.[35] Souza's bulldozer was unloaded at the ***Bourdet Property*** during the afternoon of August 20, 2020.[36] After unloading, Souza met with defendant French and Bourdet at the top of Pacheco Peak to observe the fire burning to the north where they discussed cleaning the fire road on the Bourdet Property running parallel to SR 152.[37]

Also on August 20, 2020, one of Bourdet's friends, Paul Bianchi ("Bianchi"), contacted his father-in-law, Leon Stanley Smith ("Smith"), the manager of Silva Trucking, asking if defendant Capurro would go to the Bourdet Property and bulldoze some roads because a fire was headed in the direction of the Bourdet Property.[38] At the time, Capurro owed Silva Trucking approximately $68,000.[39] Smith discussed the proposed work with Capurro and then contacted Bianchi to let him know that Capurro agreed to perform work on the Bourdet Property.[40] Smith's intention was that the work performed by Capurro would pay off a portion of the debt owed to Silva Trucking.[41]

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[32] See Plaintiffs' Undisputed Material Facts in Support of Opposition to Motion for Summary Judgment ("Plaintiffs' UMF"), Fact Nos. 360 – 361.
[33] See Plaintiffs' UMF, Fact No. 375.
[34] See Plaintiffs' UMF, Fact Nos. 379 – 380 and 383.
[35] See Plaintiffs' UMF, Fact No. 376 – 378.
[36] See Plaintiffs' UMF, Fact No. 392.
[37] See Plaintiffs' UMF, Fact Nos. 393 – 395.
[38] See Plaintiffs' UMF, Fact Nos. 384 – 386.
[39] See Plaintiffs' UMF, Fact No. 387.
[40] See Plaintiffs' UMF, Fact No. 389.
[41] See Plaintiffs' UMF, Fact No. 391.

Souza and Capurro met at the Bourdet Property on August 20, 2020 between 9:00 p.m. and 10:00 p.m and began cutting firebreaks on the Bourdet Property continuing until approximately 2:00 a.m. on August 21, 2020.[42]

Bourdet offered his cabin to the bulldozer operators which was utilized by Capurro and Souza.[43]

On August 21, 2020, defendants French and Bourdet had a text conversation during which defendant French informed defendant Bourdet that they had cut into plaintiff Salvatore's property.[44] Defendant Bourdet asked if plaintiff Salvatore was aware of this and defendant French told him, "nope."[45] Defendant Bourdet's response was, "Oh boy."[46] Defendant Bourdet went to Pacheco Peak on the afternoon of August 21, 2020 and saw that the bulldozers had crossed over onto GLC Property and caused damage.[47] Also present was defendant Bourdet's wife, Mitt French, defendant French, and defendant Souza.[48]

Smith (of Silva Trucking) was directed by Bianchi to invoice defendant TFSL.[49] Defendant Bourdet never investigated the bulldozing of GLC Property, including discussing the work performed by Capurro with Silva Trucking, or having further discussion regarding authority to be on plaintiffs' property.[50]

The evidence proffered by the parties is in conflict. Defendant Bourdet asserts he did not decide or instruct anyone to perform firebreak work at the GLC Property. The evidence in opposition, however, at least creates an inference to dispute defendant Bourdet's assertion as defendant Bourdet and Mitt French had conversations concerning firebreak work; defendant French arranged for the bulldozer/ operator Souza who performed firebreak work on not just defendant Bourdet's property, but also on GLC Property; Capurro performed firebreak work on not just defendant Bourdet's property, but also on GLC Property; Souza and Capurro utilized Bourdet's cabin during the performance of their firebreak work; and by Moving Defendants'

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[42] See Plaintiffs' UMF, Fact Nos. 396 – 398.
[43] See Plaintiffs' UMF, Fact No. 419.
[44] See Plaintiffs' UMF, Fact No. 440.
[45] See Plaintiffs' UMF, Fact No. 441.
[46] See Plaintiffs' UMF, Fact No. 442.
[47] See Plaintiffs' UMF, Fact No. 444.
[48] See Plaintiffs' UMF, Fact No. 445.
[49] See Plaintiffs' UMF, Fact No. 450.
[50] See Plaintiffs' UMF, Fact No. 454.

own acknowledgment, the Invoice paid by a Bourdet entity encompassed Capurro's work for four days which is beyond the approximately 12 hours of firebreak work he performed at the Bourdet Property to include the firebreak work Capurro performed at the GLC Property.

In summary, the court finds a material dispute exists with regard to whether Moving Defendants caused, directed, and/or authorized the entry of some other person(s) onto GLC Property. Accordingly, Moving Defendants' motion for summary judgment is DENIED. Moving Defendants' alternative motion for summary adjudication of the first cause of action (trespass) of plaintiffs' FAC is DENIED.

**E. Private nuisance.**

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

(Civ. Code, §3479.)

> [T]he essence of a private nuisance is its interference with the use and enjoyment of land. (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal. App. 3d 116, 124 [99 Cal. Rptr. 350]; accord, Prosser & Keeton, Torts, supra, § 87, at p. 619 ["The essence of a private nuisance is an interference with the use and enjoyment of land."].) The activity in issue must "disturb or prevent the comfortable enjoyment of property" (*Venuto v. Owens-Corning Fiberglas Corp. supra*, 22 Cal. App. 3d at p. 126), such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery. (*Ibid.*)

(*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534; see also CACI, No. 2021.)

In moving for summary adjudication of plaintiffs' second cause of action for private nuisance, Moving Defendants again argue that they did not participate in the firebreak work on GLC Property "nor were aware of, directed or authorized it."[51]

For the same reasons discussed above, Moving Defendants' alternative motion for summary adjudication of the second cause of action (private nuisance) of plaintiffs' FAC is DENIED.

**F. Public nuisance.**

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, §3480.) "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." (Civ. Code, §3493.)

In the FAC, plaintiffs allege, in relevant part, "By Defendants[']s acts, they have created a condition or permitted a condition to exist that is a threat to critical habitat for threatened species of California Red Legged frogs and is an obstruction to the free use of Plaintiffs' Ranch property, so as to interfere with the comfortable enjoyment of life or property." (FAC, ¶69.)

In moving for summary adjudication of the plaintiffs' third cause of action for public nuisance, Moving Defendants assert, "Zero evidence supports Defendants impacted any public concern" and "Plaintiffs have no evidence that Defendants impacted a threatened species…" and "Plaintiffs have no evidence of injury to them caused by Defendants."[52]

However, it is not enough for Moving Defendants to simply assert that plaintiffs lack evidence to support their claim. On a motion for summary judgment or adjudication, the Moving Defendants bear the initial burden to affirmatively demonstrate plaintiffs lack evidence. "[A] moving defendant may rely on factually devoid discovery responses to shift the burden of proof pursuant to section 437c, subdivision (o)(2)." (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590; see also *Andrews v. Foster Wheeler LLC* (2006) 138

[51] See page 13, lines 1 – 2 of Defendants Wyatt Bourdet and Twenty-Four Seven Livestock, LLC's Joint Memorandum of Points and Authorities in Support of Motion for Summary Judgment, etc. ("Moving Defendants' MPA").

[52] See page 13, line 22 and 26 – 27 and page 14, line 1 of Moving Defendants' MPA.

Cal.App.4th 96, 104 [Defendant propounded a series of special interrogatories which called for all facts regarding plaintiffs' exposure to asbestos from defendant's products. Plaintiffs' answers "contain[ed] little more than general allegations against [defendant] and does not state specific facts showing that [plaintiff] was actually exposed to asbestos-containing material from [defendant's] products."] See also *Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1102-1103—"a defendant may show the plaintiff does not possess evidence to support an element of the cause of action by means of presenting the plaintiff's factually devoid discovery responses from which an absence of evidence may be reasonably inferred.")

Here, Moving Defendants proffer only one fact to support their argument: "Plaintiffs have no evidence that Defendants caused any damage to the habitat of the California Red Legged Frog."[53] The underlying evidence to support this factual assertion is certain allegations of the plaintiffs' FAC and one citation to the deposition testimony of plaintiff Salvatore. The deposition testimony cited is not factually devoid. Consequently, Moving Defendants have not met their initial burden.

Accordingly, Moving Defendants' alternative motion for summary adjudication of the third cause of action (public nuisance) of plaintiffs' FAC is DENIED.

**G. Negligence.**

"To succeed in a negligence action, the plaintiff must show that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, and (3) the breach proximately or legally caused (4) the plaintiff's damages or injuries." (*Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 662.) A defendant does not owe a legal duty to protect against third party conduct, unless there exists a special relationship between the defendant and the plaintiff. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235.) Moving Defendants contend they did not enter the GLC Property and so they did not owe any duty to plaintiffs. Moving Defendants also contend they did not control any third-parties and no third-parties were acting on their behalf.

As discussed above, the court finds a triable issue of material fact exists with regard to whether Moving Defendants caused, directed, and/or authorized the entry of some other

[53] See Moving Defendants' UMF, Fact No. 36.

person(s) onto GLC Property. Accordingly, Moving Defendants' alternative motion for summary adjudication of the fourth cause of action (negligence) of plaintiffs' FAC is DENIED.

**H. Intentional infliction of emotional distress.**

"The tort of intentional infliction of emotional distress is comprised of three elements: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494; see also *Ross v. Creel Printing & Publishing Co., Inc.* (2002) 100 Cal.App.4th 736, 744 – 745; see also CACI, Nos. 1600 and 1602.)

Moving Defendants contend there is no specific conduct attributed to them as "no evidence exists that Moving Defendants trespassed the GLC Ranch on August 21, 2020."[54] As such, Moving Defendants contend they did not engage in any conduct against plaintiffs, let alone conduct that is extreme and outrageous.

However, the court finds a triable issue of material fact exists with regard to whether Moving Defendants caused, directed, and/or authorized the entry of some other person(s) onto GLC Property and, thus, whether Moving Defendants are vicariously liable for intentional infliction of emotional distress. Accordingly, Moving Defendants' alternative motion for summary adjudication of the fifth cause of action (intentional infliction of emotional distress) of plaintiffs' FAC is DENIED.

**I. Negligent infliction of emotional distress.**

"Negligent infliction of emotional distress [NIED] is not an independent tort in California, but is regarded simply as the tort of negligence. [Citations.] Whether plaintiffs can recover damages for NIED is dependent upon traditional tort analysis, and the elements of duty, breach of duty, causation and damages must exist to support the cause of action." (*Klein v. Children's Hosp. Medical Ctr.* (1996) 46 Cal.App.4th 889, 894.)

[54] See page 15, lines 4 and 11 – 12 of Moving Defendants' MPA.

Since a claim for negligent infliction of emotional distress is essentially a claim for negligence, Moving Defendants reiterate their earlier argument(s) from the fourth cause of action for negligence. For the same reasons discussed above, Moving Defendants' alternative motion for summary adjudication of the sixth cause of action (negligent infliction of emotional distress) of plaintiffs' FAC is DENIED.

**J. Civil conspiracy.**

Civil conspiracy is not an independent tort. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) Rather, it is a " 'legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasor a common plan or design in its perpetration.' [Citation.]" (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1581 (*Kidron*).) Liability for civil conspiracy requires three elements: (1) formation of the conspiracy (an agreement to commit wrongful acts); (2) operation of the conspiracy (commission of the wrongful acts); and (3) damage resulting from operation of the conspiracy. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47; see also CACI, No. 3600.)

"Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. [Citation.] They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. [Citation.] It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree—expressly or tacitly—to achieve it. Unless there is such a meeting of the minds, 'the independent acts of two or more wrongdoers do not amount to a conspiracy.'" (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333.)

For the same reasons discussed above in connection with the first cause of action for trespass, the court finds a material dispute exists with regard to whether Moving Defendants caused, directed, and/or authorized the entry of some other person(s) onto GLC Property and, thus, whether Moving Defendants knew of and agreed to trespass onto the GLC Property. Accordingly, Moving Defendants' alternative motion for summary adjudication of the eighth cause of action (civil conspiracy) of plaintiffs' FAC is DENIED.

**K. Aiding and abetting.**

"'Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.' [Citation.]" (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 653–654; see also CACI, No. 3610.)

For the same reasons discussed above in connection with the first cause of action for trespass, the court finds a material dispute exists with regard to whether Moving Defendants caused, directed, and/or authorized the entry of some other person(s) onto GLC Property and, thus, whether Moving Defendants knew of and provided substantial assistance or encouragement to the other person(s) who trespassed onto GLC Property. Accordingly, Moving Defendants' alternative motion for summary adjudication of the ninth cause of action (aiding and abetting) of plaintiffs' FAC is DENIED.

**L. Bane Act violation.**

> The Bane Act permits an individual to pursue a civil action for damages where another person "interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state." (Civ. Code, § 52.1, subd. (a).) "The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threat[ ], intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." (*Austin B., supra,* 149 Cal.App.4th at p. 883, 57 Cal.Rptr.3d 454.)

(*King v. State of California* (2015) 242 Cal.App.4th 265, 294; see also CACI, No. 3066.)

In the plaintiffs tenth cause of action, the FAC alleges, "Defendants made threats of violence against Michael Giovannotto causing him to reasonably believe that if he exercised

his rights to control and/or otherwise protect the Ranch property, Defendants would commit violence against him and/or the Ranch property and on information and belief, Defendants had the apparent ability to carry out the threats at the time." (FAC, ¶120.) The tenth cause of action incorporates the earlier allegations of the FAC including the allegation that defendant French "point[ed] a pistol at [plaintiff] Michael … [causing Michael to] try[] to hide … behind the frame of the vehicle … and put[] his hands up in a surrender motion." (FAC, ¶¶34 and 118.)

Moving Defendants seek summary adjudication of this tenth cause of action for violation of the Bane Act by asserting that they made no threats toward plaintiff Michael. To support this assertion, Moving Defendants proffer the following relevant facts: In the mid-afternoon of August 21, 2020, after driving away from Souza, plaintiff Michael observed four men on the GLC Property and contends defendant French brandished a firearm at him.[55] The four individuals Michael encountered on August 21, 2020 at the GLC Property, where a weapon was allegedly brandished or he was threatened, were defendant French and non-parties Mitt French, his son-in-law Brem, and another neighboring rancher, Bardin Bengard, but not Bourdet.[56]

In opposition, plaintiffs contend defendant Bourdet is liable under a civil conspiracy theory. While there may be evidence to create a triable issue with regard to whether defendant Bourdet agreed to trespass onto GLC Property, plaintiffs have not presented any evidence to establish any agreement by Bourdet and the other defendants to threaten or intimidate or coerce plaintiff Michael against the exercise of his rights to the GLC Property.

Accordingly, Moving Defendants' alternative motion for summary adjudication of the tenth cause of action (violation of the Bane Act) of plaintiffs' FAC is GRANTED.

**M. Declaratory relief.**

> Any person … who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property ... may, ***in cases of actual controversy*** relating to the 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…. ***The declaration may be had***

[55] See Moving Defendants' UMF, Fact No. 286.
[56] See Moving Defendants' UMF, Fact No. 287.

> ***before there has been any breach of the obligation in respect to which said declaration is sought.***

(Code Civ. Proc., §1060; emphasis added.)

> ***[D]eclaratory relief " 'operates prospectively, and not merely for the redress of past wrongs.*** It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.' " [Citations omitted.]

(*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403; emphasis added.)

Plaintiffs' eleventh cause of action alleges, in relevant part, "Plaintiffs seek a declaration from the Court which states that [ ] Plaintiffs are the rightful owner of the Property, and that Defendants have no right to access the Property or to disturb, alter or otherwise destroy the roads on the Ranch and/or otherwise damaging Plaintiffs' Ranch property and that Defendants are responsible for any and all environmental liabilities that may arise from their actions in trespassing on Plaintiffs' Ranch property." (FAC, ¶125.)

The court agrees with Moving Defendants that plaintiffs have not alleged the existence of an actual present controversy with respect to ownership of the GLC Property. As to the balance of plaintiffs' declaratory relief cause of action, plaintiffs essentially seek a determination of their trespass cause of action.

It is statutorily recognized that declaratory relief is within the discretion of the trial court. "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc. §1061.) "The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not furnish a litigant with a second cause of action for the determination of identical issues." (*California Ins. Guarantee Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617, 1623 – 1624.)

Accordingly, Moving Defendants' alternative motion for summary adjudication of the eleventh cause of action (declaratory relief) of plaintiffs' FAC is GRANTED.

**N. Permanent injunction.**

In moving for summary adjudication of the twelfth cause of action for a permanent injunction, Moving Defendants cite *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 465 where the court stated that injunctive relief "should neither serve as punishment for past acts, nor be exercised in the absence of any evidence establishing the reasonable probability the acts will be repeated in the future. … Unless there is a showing that the challenged action is being continued or repeated, an injunction should be denied." (Punctuation and citations omitted.)

Likewise, Moving Defendants contend injunctive relief is unavailable here because there has been no continued or repeated trespass or probability of repeated trespass. However, Moving Defendants have not met their initial burden as the facts they cite in support[57] do not affirmatively establish that there has been no continued or repeated trespass or probability of repeated trespass.

Accordingly, Moving Defendants' alternative motion for summary adjudication of the twelfth cause of action (permanent injunction) of plaintiffs' FAC is DENIED.

The Court will prepare the formal order.

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[57] See Moving Defendants UMF, Fact Nos. 344 – 345 and 347 – 352.