

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

**Honorable Carrie Zepeda is hearing these matter for  
Honorable Amber Rosen, Presiding**

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

**DATE: 11-09-23    TIME: 9 A.M.**

**All those intending to speak at the hearing are requested to appear by video.**

**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 strongly prefers in person appearances. If you must 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](https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml)

**TO SET YOUR NEXT HEARING DATE:** You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: **408-882-2430** When you can call: **Monday to Friday, 8:30 am to 12:30 pm**

**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.

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LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	21CV381965 Demurrer	Ling Wang vs Lori Greymont, et al	See Tentative Ruling below. The court will issue the final order.
<a href="#">LINE 2</a>	17CV314208 Motion to Set Aside	Jianhua Liu, et al vs Yan Liang, et al	A POS has not been filed. The matter is ordered OFF CALENDAR.
<a href="#">LINE 3</a>	21CV387639 Request for Disqualification Order	Elizabeth Chung vs Altva Capital Management Limited, et al	See Tentative Ruling below. Defendant David Chung shall submit the final order.
<a href="#">LINE 4</a>	21CV389131 Pro Hac Vice	UHG I, LLC vs Ramin Eskandarian	Luke Chamberlain is ordered to appear at the hearing.
<a href="#">LINE 5</a>	21CV389517 Motion to Withdraw	Geber Magana Barrientos, et al vs Ravi Sreeramineni	Benjamin Drake is ordered to appear at the hearing.
<a href="#">LINE 6</a>	21CV389517 Motion to Withdraw	Geber Magana Barrientos, et al vs Ravi Sreeramineni	Benjamin Drake is ordered to appear at the hearing.
<a href="#">LINE 7</a>			
<a href="#">LINE 8</a>			
<a href="#">LINE 9</a>			
<a href="#">LINE 10</a>			
<a href="#">LINE 11</a>			
<a href="#">LINE 12</a>			

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## Calendar Line 1

**Case Name:** *Wang v. Greymont, et al.*

**Case No.:** 21CV381965

### I. Factual and Procedural Background

On November 15, 2022, plaintiff Ling Wang (“Wang” or “Plaintiff”) filed her First Amended Complaint (“FAC”) against defendants Lori Greymont (“Greymont”); SJREI, a corporation; 95 Hamilton, LLC (“95 Hamilton”); Eagle Home Loans and Investment, LLC; Home Loan Eagle Inc.; Eagle Home Loans Inc.; James McClenahan (“McClenahan”); and Saul Flores (“Flores”)(collectively, “Defendants”).

The FAC alleges Plaintiff was one of several lenders who was misled into lending money to Greymont, McClenahan, and Flores through several fraudulent real property development schemes. (FAC, p. 2:9-11.) Defendants convinced Plaintiff to abandon her secured deeds of trust on one development project, on the promise of being secured by another development project. (*Id.* at p. 2:11-13.) The second development project was already significantly over-encumbered and resulted in Plaintiff losing the entirety of her loan principal, interest, and other charges. (*Id.* at p. 2:13-16.)

Plaintiff asserts the following five causes of action against Defendants:

- 1) Breach of contract [against defendants 95 Hamilton, Flores, McClenahan, Eagle LLC, Home Loan Eagle Inc., and Eagle, Inc.];
- 2) Fraud [against Saul Flores, James McClenahan, Greymont and SJREI];
- 3) Dissolution of LLC [against 95 Hamilton LLC];
- 4) Breach of fiduciary duties [against Saul Flores, James McClenahan, and Greymont];
- 5) Violation of Unfair Business Practices Act [against Cross-complainants, Greymont, and SJREI].

Plaintiff, SJREI, and Greymont<sup>1</sup> eventually entered into a settlement agreement and on May 16, 2023, the Court entered an order of good faith settlement by defendants SJREI and Greymont. Defendants/cross-complainants 95 Hamilton, Eagle Home Loans and Investment LLC, Flores, and McClenahan (“Cross-complainants”) opposed the good faith settlement.

On February 23, 2023, Cross-complainants filed a cross-complaint against cross-defendants Plaintiff Wang, individual and as trustee of Giant Rock Inc. Plan Trust; Pensco Entity; and Lori Greymont (“Greymont” or “Cross-defendant”). On June 16, 2023, cross-defendant Greymont and defendant SJREI filed a motion for judgment on the pleadings as to the cross-complaint to be heard on October 12, 2023.

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<sup>1</sup> According to the FAC, SJREI is alleged to be wholly owned by Greymont. (FAC, ¶¶ 24, 65.) The motion for good faith settlement was jointly made by Greymont and SJREI.

However, on August 23, 2023 prior to the hearing on the motion for judgment on the pleadings, Cross-complainants filed a First Amended Cross-Complaint (“FAXC”)<sup>2</sup> against cross-defendants Plaintiff Wang, individually and as trustee of Giant Rock Inc. Plan Trust, Pensco Entity, and Lori Greymont (“Greymont” or “Cross-defendant”), asserting the following causes of action:

- 1) Common Count – Unjust Enrichment [against Plaintiff];
- 2) Usury and Treble Damages [against “Cross-Defendant”];
- 3) Indemnity [against Pensco Entity]; and
- 4) Indemnity [against Greymont].

The Court determined the motion for judgment on the pleadings was moot and that it would hear the demurrer to the FAXC on November 9, 2023.

Cross-defendants<sup>3</sup> demur to the FAXC’s fourth and fifth<sup>4</sup> causes of action.

## II. Demurrer

### A. Legal Standard

“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.) The only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

### B. Preliminary Matters

#### 1. Code of Civil Procedure section 472

Cross-defendant argues that Cross-complainants’ FAXC runs afoul of Code of Civil Procedure section 472 because they filed and served the FAXC without leave of court and after Cross-defendant had already filed an answer to the initial cross-complaint. (Demurrer, p. 4:17-22.) Cross-complainants do not address this argument in their opposition to the demurrer.

Code of Civil Procedure section 472, subdivision (a) states, in relevant part:

- (a) A party may amend its pleading once without leave of the court at any time before the answer, demurrer, or motion to strike is filed, or after a demurrer or motion to strike is filed but before the demurrer or motion to strike is heard if the amended pleading is filed and served no later than the date for

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<sup>2</sup> Cross-complainants filed a Judicial Council form complaint.

<sup>3</sup> Greymont and SJREI have filed the demurrer currently before the Court. However, SJREI is not named as a cross-defendant in the FAXC. As such, the Court will treat the demurrer as if by Greymont only.

<sup>4</sup> As will be discussed in more detail below, the FAXC does not contain a fifth cause of action.

filing an opposition to the demurrer or motion to strike. A party may amend the pleading after the date for filing an opposition to the demurrer or motion to strike, upon stipulation by the parties.

(Code Civ. Proc., § 472, subd. (a).)

In this case, Cross-complainants served their initial cross-complaint on Cross-defendant on December 13, 2022. The cross-complaint was rejected twice and was filed properly with the Court on February 23, 2023. However, the February 23, 2023 cross-complaint contains the same December 13, 2022 proof of service. On January 13, 2023, Cross-defendant served and filed an answer to the cross-complaint that was served in December. On June 16, 2023, Cross-defendant filed and served a motion for judgment on the pleadings to the initial cross-complaint's fourth cause of action. On August 23, 2023, Cross-complainants served and filed their FAXC. On July 25, 2023, before the FAXC had been served or filed, Cross-defendant filed a demurrer to the FAXC.

As an initial matter, the Court notes that a demurrer “exists as a procedural mechanism to determine whether, if the allegations of the operative complaint are presumed to be true, the plaintiff has sufficiently stated a cause of action.” (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 842 [emphasis omitted].) Thus, a demurrer is not the appropriate procedural vehicle to strike an unauthorized pleading. Accordingly, the Court will treat Cross-defendant's section 472 argument as a motion to strike, rather than a demurrer.

Here, although the initial cross-complaint was rejected, Cross-defendant was not re-served with the cross-complaint and the Answer was filed in response to that cross-complaint. Thus, Cross-complainants should have sought leave of court before filing the FAXC.<sup>5</sup>

That being said, the Court declines to strike the FAXC on this basis, as it is well established that “California courts have ‘a policy of great liberality in allowing amendments at any stage of the proceedings so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others.’” (*Douglas v. Superior Ct.* (1989) 215 Cal.App.3d 155, 158.) Moreover, Cross-defendant has substantively demurred to the FAXC and the Court finds it would be a needless waste of time to strike the FAXC on this ground, only to have the same substantive issues raised again in a subsequent demurrer or motion for judgment on the pleadings.

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<sup>5</sup> To the extent that Cross-defendant requests the Court strike the FAXC for the additional reasons laid out in their Reply, including adding a new cross-defendant, as noted above, a demurrer is not the proper procedural vehicle to strike the pleadings. Cross-defendant appears to be aware of this, as they quote a portion of Code of Civil Procedure section 436, subdivision (b), stating that a Court may, *upon a motion strike*, strike out a pleading not drawn or filed in conformity with the laws. (Reply, p. 7:6-9.) Moreover, courts need not consider arguments raised for the first time in reply. (See *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 [“This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points”].)

Accordingly, the motion to strike the FAXC for filing an amended cross-complaint without leave of court is DENIED.

## 2. Fifth Cause of Action

In addition to demurring to the fourth cause of action, Cross-defendant also demurs to a fifth cause of action, apparently labeled “intentional tort.” (See Demurrer, p. 9:4-5.) Upon review of the FAXC that is filed with the Court, the Court finds neither a fifth cause of action nor a cause of action labeled “intentional tort.” Further, the language Cross-defendant quotes as the fifth cause of action within the FAXC does not appear to be part of the pleading. (See Demurrer, p. 3:4-12.) As the Court is unable to rule on a cause of action that is not before it, the Court will not address Cross-defendant’s arguments regarding a fifth cause of action.

## 3. Cross-defendants’ Request for Judicial Notice

In support of their demurrer, Cross-defendant requests the Court take judicial notice of this Court’s (Hon. Rosen) May 16, 2023 Order regarding Cross-defendant’s motion for good faith settlement (“Ex. A”).

The request for judicial notice is GRANTED. (See Evid. Code, § 452, subd. (d); *In re Martin L.* (1986) 187 Cal.App.3d 534, 539 [“court may take judicial notice of records and orders in its own file”]; *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].)

## C. Fourth Cause of Action – Indemnity

Cross-defendant demurs to the fourth cause of action for indemnity on the ground it fails to state facts sufficient to constitute a cause of action.

### 1. Indemnity and Contribution Generally

Courts recognize two basic types of indemnity: express indemnity and equitable indemnity. (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1157 (*Prince*).)

“Express indemnity refers to an obligation that arises by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances. Express indemnity generally is not subject to equitable considerations or a joint legal obligation to the injured party; rather, it is enforced in accordance with the terms of the contracting parties’ agreement.” (*Prince, supra*, 45 Cal.4th at p. 1158 [internal citations and quotations omitted].)

“Unlike express indemnity, traditional equitable indemnity requires no contractual relationship between an indemnitor and an indemnitee. Such indemnity ‘is premised on a joint legal obligation to another for damages,’ but it ‘does not invariably follow fault.’ Although traditional equitable indemnity once operated to shift the entire loss upon the one bound to indemnify, the doctrine is now subject to allocation of fault principles and comparative equitable apportionment of loss.” (*Prince, supra*, 45 Cal.4th at p. 1158 [internal quotations omitted].)

“The doctrine of comparative equitable indemnity is designed to do equity among defendants.’ The purpose of equitable indemnification is to avoid unfairness, under the theory of joint and several liability, of holding one defendant liable for the plaintiff’s entire loss while allowing another potentially liable defendant to escape any financial responsibility for the loss.” (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 212 [internal quotations omitted].) “Under the equitable indemnity doctrine, defendants are entitled to seek apportionment of loss between the wrongdoers in proportion to their relative culpability so there will be equitable *sharing* of loss between multiple tortfeasors.” (*GEM Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal.App.3d 419, 426 [internal quotations and citations omitted; emphasis original].)

“[A] defendant may pursue a comparative equitable indemnity claim against other tortfeasors either (1) by filing a cross-complaint in the original tort action or (2) by filing a separate indemnity action after paying more than its proportionate share of the damages through the satisfaction of a judgment or through a payment in settlement.” (*Evangelatos v. Superior Ct.* (1988) 44 Cal.3d 1188, 1197-1198.) A cause of action for equitable indemnity requires: 1) a showing of fault on the part of the indemnitor and 2) resulting damages to the indemnitee for which the indemnitor is equitably responsible. (*C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, 700.)

Similarly, a claim for contribution stems from a legally recognized right forged from principles of equity and natural justice. (*Borba Farms v. Acheson* (1988) 197 Cal.App.3d 597, 601.) “The right of contribution, although necessarily related to some former transaction or obligation, exists as an entirely separate contract implied by law. In situations where two or more parties are jointly liable on an obligation and one of them makes payment of more than his share, the one paying possesses a new obligation against the others for their proportion of what he has paid for them.” (*Id.* at p. 602 [internal citations omitted].)

Cross-defendant argues the FAXC’s fourth cause of action fails to state a claim because: 1) there can be no equitable indemnity for joint tortfeasors as barred by Code of Civil Procedure section 877.6; 2) there is no valid claim for equitable indemnity for fraudulent or intentional acts; and 3) there is no cause of action for express indemnity because Cross-complainants do not allege Greymont’s duty to indemnify arises from an express contractual provision.

## 2. Code of Civil Procedure section 877.6

Cross-defendant first asserts that a good-faith settlement discharges the settling tortfeasor from all liability for comparative indemnity to any other parties. (Demurrer, p. 6:21-24, citing Code Civ. Proc., § 877, subd. (b).) She contends that where a court determines the settlement was made in good faith, other joint tortfeasors are barred from any further claims against the settling tortfeasor for equitable comparative contribution or partial or comparative indemnity based on comparative negligence or comparative fault. (Demurrer, pp. 6:24-7:2, citing Code Civ. Proc., § 877.6, subd (c).) In opposition, Cross-complainants assert that section 877.6 is inapplicable because it is not a comparative fault case. (Opposition, p. 2:15.)

In this case, the Court granted the motion for good faith settlement, determining that settling defendants (defendants Greymont and SJREI) met their burden in making a sufficient showing that the settlement was made in good faith. (See RJN, Ex. A, pp. 2, 6.)



Code of Civil Procedure section 877 provides that: “[w]here a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall . . . discharge the party to whom it is given from all liability for any contribution to any other parties.” (Code Civ. Proc., § 877, subd. (b).) Further, Code of Civil Procedure section 877.6, subdivision (c) states that: “[a] determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor . . . from any further claims against the settling tortfeasor . . . for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.” (*Id.* at § 877.6, subd. (c).)

Section 877.6 “is designed to further two equitable policies: (1) encouragement of settlements and (2) equitable allocation of costs among joint tortfeasors.” (*Std. Pac. of San Diego v. A. A. Baxter Corp.* (1986) 176 Cal.App.3d 577, 588.) “[T]he language used in section 877.6 encompasses all claims for equitable indemnity.” (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1031, fn. 11.) The term “joint tortfeasors” as used in section 877.6, subdivision (c) includes joint, concurrent, and successive tortfeasors. (See *Turcon Constr. v. Norton-Villiers* (1983) 139 Cal.App.3d 280, 282 [determining trial court properly dismissed cross-complaint for contribution or indemnity where the cross-complaint could only be read as seeking indemnity on the basis of partial or comparative fault].) However, section 877.6 does not provide a specific procedure barring indemnity or contribution claims, thus a demurrer, summary judgment motion, or motion to dismiss is necessary to effectuate the bar. (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1266.)

In opposition, Cross-complainants argue that section 877.6 “can only apply if the basis of the cross complaint is that Cross-[complainants] are joint tortfeasors liable for an apportionable wrong, and are asking for equitable comparative contribution or comparative indemnity.” (Opposition, p. 6:1-4.) Cross-complainants assert that the FAXC seeks indemnity based on Greymont’s breach of duty to *Cross-complainants* not contribution for Greymont’s breach of a duty to Wang. (Opposition, p. 6:10-12.)

Turning to FAXC, the fourth cause of action alleges as a “direct and proximate result of [Greymont’s] breach of a duty of care to [plaintiffs], Cross-[complainants] seek indemnity and damages for all such amounts that Cross-[complainants] may become liable for under the First Amended Complaint.” (FAXC, p. 6 [emphasis added].) As Cross-defendant notes, the FAXC’s basis for Greymont’s duty to indemnify “is the claim that any damages for which Cross-[complainants] are held liable arise out of Greymont’s alleged breach of a duty that she owed to Plaintiff.” (Demurrer, p. 2:26-28.) Moreover, whether or not Greymont owes a duty of care to Cross-complainants does not seem to be at issue anywhere in the fourth cause of action. Thus, any contention that the FAXC seeks indemnity based on Greymont’s breach of duty to Cross-complainants is unavailing. Accordingly, section 877.6 effectively bars Cross-complainants indemnity claim.

### 3. Intentional Acts

Cross-defendant next argues that there can be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person. (Demurrer, p. 7:15-16, citing Code Civ. Proc., § 875(d).) Cross-defendant contends that because Plaintiff’s remaining claims against Cross-complainants are for intentional torts and alleged intentional conduct, indemnity by Greymont

is unavailable as a matter of law. (Demurrer, p. 8:11-14.) Cross-complainants concede this argument, asserting, in part, that “[t]here is no doubt the contribution statute does not allow contribution for fraud.” (Opposition, pp. 2:16-22; 6:5-6 [“since by law and statute there can be no contribution if the basis for liability is an intentional tort (here fraud or constructive fraud) the Cross-complaint can be attacked under 877.6 only if the complaint alleges some other ‘comparative indemnity’ against Greymont”]; 8:3-4 [“intentional torts are not apportionable nor subject to contribution”].) As the parties are in agreement as to this point, the Court need not address this argument further.

#### 4. Express Contractual Provision

Finally, Cross-defendant asserts that the FAXC does not allege express indemnity arising from contract and so there can be no cause of action for express indemnity. Cross-complainants do not directly address this argument but assert that if the outcome related to the FAC “is based on contract or limited to economic loss, or based on a statutory remedy limited to economic loss . . . Cross-[complainants] will be entitled to offsets and contribution.” (Opposition, p. 10:17-19.) As Cross-defendant notes, nothing in the fourth cause of action indicates there is a contractual agreement that includes an indemnity provision. (See e.g., *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1737 [indicating courts must look to the words of the contract and the specificity of the language in interpreting an express indemnity agreement].)

Based on the foregoing, Cross-complainants have failed to sufficiently allege a cause of action for indemnity against Cross-defendant. Accordingly, the demurrer to the fourth cause of action is SUSTAINED.

### III. Leave to Amend

The pleading party “bears the burden of proving there is a reasonable possibility of amendment.” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).) To satisfy this burden, the party “must show in what manner [they] can amend [their] complaint and how that amendment will change the legal effect of [their] pleading.” (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The party “must clearly and specifically set forth the ‘applicable substantive law’ and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, [the party] must set forth factual allegations that sufficiently state all required elements of that cause of action. Allegations must be factual and specific, not vague or conclusionary.” (*Rakestraw, supra*, 81 Cal.App.4th at pp. 43-44 [internal citations omitted].)

Here, while Cross-complainants request leave to amend if the Court sustains the demurrer to their FAXC (see Opposition, p. 10:21-22), they do not explain how a further amendment will change the legal effect of their pleading or what additional facts they may allege to sufficiently state a cause of action for indemnity against Cross-defendant. Furthermore, any potential argument regarding amendment that would be raised for the first time at the November 9, 2023 Hearing need not be considered by this Court, as “[s]uch tardiness amounts to a forfeiture or waiver” of the untimely argument. (*Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621, 646; see also *Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, 480 [arguments raised at hearing for the first time were untimely]; *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356, fn. 6 [court “not required to consider any point made for the first time at oral

argument, and it will be deemed waived”].) Accordingly, leave to amend is denied. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App5th 1125, 1145 [“The onus is on the plaintiff to articulate the ‘specifi[c] ways’ to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend ‘only if a potentially effective amendment [is] both apparent and consistent with the plaintiff’s theory of the case’”].)

#### IV. Conclusion and Order

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

The Court will prepare the final Order.

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#### **Calendar Line 2**

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#### **Calendar Line 3**

**Case Name: Elizabeth Chung vs Altva Capital Management Limited, et al**

**Case No.: 21CV387639**

#### **Defendant David Chung’s Motion to Disqualify Mikael A. Abye**

##### I. Factual and Procedural Background

In dissolving their marriage, Elizabeth Chung and David Chung are dividing their assets. Bend Capital, LLC (“Bend”) holds title to the family home. Elizabeth and David are Members of Bend and each holds a 50% interest in Bend. The purpose of Bend was to borrow money and hold title to the family home. Elizabeth and David disagree about whether there is an outstanding loan on the family home. Elizabeth filed this lawsuit against various company defendants and David for declaratory and injunctive relief as to whether the loan on the family home is legitimate and should be enforced. She did not sue Bend. One defendant, Altva Capital Management Limited, filed a counterclaim against Elizabeth, David and Bend to enforce the loan on the family home. Elizabeth, as a Member of Bend, hired attorney Mikael A. Abye to defend Bend. David filed a motion to disqualify Abye from representing Bend. David contends that Elizabeth had no right to hire Abye without his consent according to paragraph 6.1 of Bend’s Operating Agreement. David argues that since he did not give consent

to retain Abye, Abye has no authority to represent Bend in this action. He relies on *Jarvis v. Jarvis* (2019) 33 Cal.App.5th 113 (*Jarvis*), to disqualify Abye.

On October 30, 2023, Bend and Elizabeth filed separate oppositions to David's motion to disqualify Abye. Any opposition to the motion was due nine court days before the hearing, which was October 27, 2023. (Code of Civ. Pro. §1005.) Bend and Elizabeth do not offer any reasons as to why their oppositions were filed late.

The court has discretion to consider a late filed paper. To avoid the expenditure of any additional resources by the parties and the expenditure of any further judicial resources, the court will look past this procedural violation and consider the oppositions on their merits. Furthermore, the court finds no prejudice to David because he was able to file a timely reply. Nevertheless, Bend and Elizabeth are hereby admonished for the procedural violation. Any future violation may result in the court's refusal to consider untimely filed papers.

Bend and Elizabeth oppose David's motion and contend that paragraph 4.1 of the Operating Agreement allows her to hire Abye without David's consent because doing so was in the ordinary course of business, just as David, in the past, has hired counsel to represent Bend without Elizabeth's consent.

## II. Discussion

The court finds *Jarvis* to be instructive in this matter and the facts therein to be similar to the instant action. In *Jarvis*, two brothers each owned a 50% interest in a partnership. One brother hired counsel to represent the partnership and the other brother moved to disqualify counsel because he had not consented to the hiring of counsel. In determining who had the authority to select counsel and direct the partnership's defense, the court looked first to the terms of the partnership agreement. The partnership agreement was silent on the point. It did not delegate the selection of counsel or decision making regarding litigation to either of the general partners. It did not say what happened when the general partners were deadlocked. (*Jarvis, supra*, 33 Cal.App.5th at 137-138.)

Initially, this court examines Bend's Operating Agreement. Paragraph 4.1 of the Operating Agreement provides:

**4.1 Management.** The business of the Company shall be managed by the Members. In the event of a dispute between Members, final determination shall be made by a vote of a majority of the Members (unless a greater percentage is required in this Agreement or under California law). Any Member may bind the Company in all matters in the ordinary course of business.

Paragraph 6.1 of the Operating Agreement provides:

**6.1 Members and Voting Rights.** Members shall have the right and power to vote on all matters with respect to which this agreement or California law requires or permits such Member action. Voting shall be based on Membership Interests. Unless otherwise stated in this Agreement or under California law, the vote of the Members holding a majority of the Membership Interest shall be required to approve or carry an action.

The Operating Agreement is silent as to which Member, if any, can hire counsel or direct litigation on behalf of Bend or what to do should the Members be deadlocked on an issue that requires a vote.

Reading paragraphs 4.1 and 6.1 of the Operating Agreement together and in full, something that neither party did in their analysis, the court understands that Bend must be managed by the Members, and a vote of the Members is required to approve or carry an action. If there is a dispute between the two Members, final determination shall be made by a vote of a majority and a majority vote is required to approve or carry an action. However, if the Members disagree on an issue, since each owns 50% of the business, there would be no majority and the Operating Agreement is silent as to what happens in such a scenario. But, an exception to the rule of requiring a vote to approve or carry an action, is that either Member may bind Bend in all matters in the ordinary course of business.

Therefore, according to the terms of Bend's Operating Agreement, Elizabeth and David must jointly manage Bend and their vote is required to approve or carry an action. This court finds that hiring an attorney to represent Bend is a lawsuit is an action which is within the scope of managing Bend, and therefore, the action approving and hiring counsel Abye to represent Bend required both David and Elizabeth's vote.

As for Elizabeth's contention that the act of hiring counsel was within the ordinary course of business, the court does not agree. Here, Elizabeth and David have adverse opinions as to whether Bend owes on a loan on the family home. Elizabeth is personally suing David over that issue. Each has a personal stake in the outcome of that decision. Obviously, each party wants to control how Bend interprets, fights or confirms any loan on the family home, its formation, and enforcement. The court does not construe hiring counsel and controlling Bend's litigation when the interests of one member over the other is at stake is a matter within the ordinary course of Bend's business.

In addition, the court is not persuaded by Elizabeth's argument that because David independently hired counsel to represent Bend in the past that Elizabeth can now hire counsel independently. The court will not go back in time and analyze whether each time David may have hired counsel on Bend's behalf was an action done in the ordinary course of business. And, there is no reason to conclude that because Elizabeth did not wish to challenge David's prior actions or may have chosen not to enforce her rights as a Member of Bend that David has currently waived his right to enforce his Member rights set forth in Bend's Operating Agreement.

Accordingly, David is correct in his assertion that he had a right to vote on or consent to Bend's representation by Abye, which was not an action taken by Elizabeth within the ordinary course of Bend's business. As a vote of the Members did not occur, his motion to disqualify Abye from representing Bend in this action is GRANTED.

In this matter, the court has additional concern about Abye's duty of loyalty in his representation of Bend. In *Jarvis*, when the Court could not find guidance from the partnership agreement, its analysis continued, "With no clear resolution from the partnership agreement or partnership law, we return to the Supreme Court's discussion of the values and interests at stake in a disqualification motion. The "paramount concern" in evaluating a motion to disqualify counsel "must be to preserve public trust in the scrupulous administration of justice and the

integrity of the bar.” (Citation.) The primary fiduciary values at stake in conflict of interest cases are the client's right to confidentiality and the attorney's duty of loyalty. (Citation.) While we have noted this is not a conflict of interest case, in our view [one brother] has raised legitimate points regarding [the attorney’s] duty of loyalty, not as between multiple clients, but as to his representation of the Partnership. Since [one partner] selected [the attorney], is paying [the attorney], and is directing the litigation, there is the appearance that [the attorney] may advance [one partner’s] interests over [the other partner’s] interests, which may not necessarily be in the best interests of the Partnership. Despite [the attorney’s] declaration that he represents the Partnership, and not [one partner], [the other partner] also raises legitimate concerns that [the attorney] will not act in the Partnership's best interests by running up unnecessary litigation costs that will deplete the Partnership's assets and adversely impact [one partner’s] ownership interest in the Partnership.” (*Jarvis, supra*, 33 Cal.App.5th at 139-140.)

The instant lawsuit began because of a dissolution action and adverse contentions over what property and obligations were owned and owed by the community. David and Elizabeth have competing interests and positions as to whether Bend has a legitimate obligation to pay on a loan on the family home. Elizabeth hired Abye to represent Bend and is directing the litigation. David contends that the Abye has never contacted him for an understanding of Bend’s position on the loan or for instructions on how to proceed on behalf of Bend. Abye does not contest these assertions.

In Bend’s opposition to this motion, Bend incorporates by reference the detailed fact pattern in Elizabeth’s opposition to this motion, which was filed on the same date as his opposition. Furthermore, Bend also takes the position that David is openly adverse to Bend and that Abye is duty-bound to protect the organization’s interest by not taking direction from David.

The court finds it troubling that Abye may be advancing Elizabeth’s interest over the interests of Bend where he incorporates her attorney’s version of the “facts” in Bend’s opposition brief herein, and where Abye calls David’s position openly adverse to Bend’s even though he has not talked to David about Bend’s dealings. If Abye is representing Bend, he should be protecting and advancing the interests of Bend, and not either Member. It appears that Abye has not taken any independent investigation or analysis of Bend’s business or what is best for Bend. Instead, Abye has only spoken to Elizabeth and has adopted her version of the facts. By his actions, Abye’s duty and loyalty to Bend is questionable. As it is not clear that Abye is acting in the best interest of Bend, or that his loyalty is to Bend. Accordingly, there is another reason to disqualify Abye from representing Bend.

### III. Conclusion

Defendant David Chung’s Motion to Disqualify Mikael A. Abye is GRANTED. David shall prepare the final order.

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