SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding

191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 5/14/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (5/13/2024) 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 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 3**.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website here:
https://reservations.scscourt.org/

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

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.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV416173	Charles Gardyn vs OSCAR MARTINEZ et al	Hearing: Demurrer to Cross Complaint by Plaintiff Charles Gardyn Ctrl Click (or scroll down) on Line 1 for ruling. The court will prepare the order.
LINE 2	23CV420692	Andre LaForge et al vs Matthew Leal	Hearing: Demurrer to the First Amended Complaint by Defendant Matthew Leal (In Pro Per) Ctrl Click (or scroll down) on Line 2 for ruling. The court will prepare the order.

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LINE 3	23CV424203	Lee Brothers, Inc. vs SAIA, Inc., et al	Hearing: Demurrer to Plaintiff Lee Brothers Inc's Amended Complaint by Defendant SAIA, Inc. and Saia Motor Freight Line, LLC Ctrl Click (or scroll down) on Line 3 for ruling. The court will prepare the order.
LINE 4	22CV396838	Nationwide Agribusiness Insurance Company vs Rahsa Hubbard	Motions: Compel further responses to Special Interrogatories ("SI") set one and Form Interrogatories ("FI") set one served upon Defendant and for monetary sanctions Ctrl Click (or scroll down) on Line 4 for tentative rulings. The court will prepare the order.
LINE 5	23CV424636	JPMorgan Chase Bank N.A. vs David Shapiro	Motion: Admissions Deemed Admitted of facts specified in request for admissions ("RFA"), Set One, Nos. 1-5, be deemed admitted by defendant David Shapiro filed by plaintiff JPMorgan Chase Bank NA. Unopposed and GRANTED. Moving party to submit proposed order [with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet).]
LINE 6	23CV425040	Hugo Bravo Aragon et al vs Signature Concrete, LLC	Hearing: Petition to Compel Arbitration for Plaintiff Hugo Bravo Aragon by Defendant Signature Concrete, LLC Ctrl click (or scroll down) on Line 6 for tentative ruling. The court will prepare the order.
LINE 7	23CV425040	Hugo Bravo Aragon et al vs Signature Concrete, LLC	Hearing: Petition to Compel Arbitration for Plaintiff Cristian Villa Perez by Defendant Signature Concrete, LLC. Ctrl click (or scroll down) on Line 7 for tentative ruling. The court will prepare the order.
LINE 8	23CV425899	S & L Engineers, Ltd., a Nevada Limited Company vs Does 1 through 10	Motion: Compel responses to subpoena by Plaintiff S & L Engineers, Ltd **set per 4/4/2024** **OFF CALENDAR by moving party.**

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LINE 9	22CV398371	CKS Prime Investments LLC vs Olga Dunster	Motion: Set Aside Default/Judgment and Dismiss case by Defendant Olga Dunster (In Pro Per) **continued to 5/14/2024 per minute order from 3/12/2024** APPEAR.
LINE 10	24CV431817	RAMIN LAK vs UNITECH TOOL & MACHINE, INC	Hearing: Petition to Compel Arbitration, for Appointment of Neutral Arbitrator, and for award of attorney's fees of $33,381.50 and costs of $2,501.26 for a total amount of $35,882.76 against Respondent UNITECH TOOL & MACHINE, INC. fka UTM MFG. ACQUISITION CORPORQTION, a Texas corporation, by Petitioner Ramin Lak. Unopposed and GRANTED. Moving party to submit proposed order [with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet).]
LINE 11			
LINE 12			

- oo0oo -

Calendar Line 1
Case Name: *Charles Gardyn v. 7&8 Partnership, et al.*
Case No.: 23-CV-416173

Demurrer to the Cross-Complaint by Cross-Defendant Charles Gardyn

Factual and Procedural Background

The underlying case is an action for foreclosure of a deed of trust and breach of contract brought by plaintiff Charles Gardyn ("Gardyn") against defendants 7&8 Partnership, Oscar Martinez ("Oscar"), Gloria Martinez ("Gloria"), Alina Martinez Cordova ("Alina"), State of California Franchise Tax Board,[1] United States of America – Internal Revenue Service, and Robert Bass, LLC (collectively, "Defendants").[2]

According to the complaint, Defendants have a present ownership interest in or to real property located at 15814 Winchester Blvd. in Los Gatos, California ("Subject Property"). (Complaint at ¶¶ 13, 15.) Plaintiff Gardyn loaned money to Defendants to purchase and/or refinance the Subject Property. (Id. at ¶ 14.)

On December 10, 2007, for valuable consideration, Defendants made, executed and delivered a written straight note ("Note") to Plaintiff in the sum of $100,000. (Complaint at ¶ 16.) The parties later modified the Note on January 28, 2016. (Id. at ¶ 21.) By the terms of the modified Note, Defendants promised and agreed to pay Plaintiff monthly installments of $1,953.14, principal and interest beginning February 1, 2016. (Ibid.) Defendants made sporadic payments since 2016 but defaulted on the Note in January 2022. (Ibid.) Thus, Defendants are indebted to plaintiff Gardyn in an amount not less than $516,870.96. (Id. at ¶ 35.)

On May 11, 2023, plaintiff Gardyn filed a complaint against Defendants alleging causes of action for: (1) foreclosure of deed of trust and appointment of receiver; (2) breach of contract; and (3) account stated.

On February 15, 2024, cross-complainants 7&8 Partnership, Oscar, Gloria, and Alina (collectively, "Cross-Complainants") filed a cross-complaint against Gardyn setting forth the following causes of action:

- First Cause of Action: Fraud – Intentional Misrepresentation;
- Second Cause of Action: Fraud – Negligent Misrepresentation;
- Third Cause of Action: Fraud – False Promise;
- Fourth Cause of Action: Fraud - Concealment;
- Fifth Cause of Action: Constructive Fraud (Civil Code, § 1573);
- Sixth Cause of Action: Breach of Fiduciary Duty – Failure to use Reasonable Care;

[1] Defendant State of California Franchise Tax Board was dismissed from this action by stipulation and order filed on April 15, 2024.
[2] At times, the court refers to some 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.)

- Seventh Cause of Action: Breach of Fiduciary Duty – Duty of Undivided Loyalty;
- Eighth Cause of Action: Breach of Oral Contract;
- Ninth Cause of Action: Breach of Written Contract;
- Tenth Cause of Action: Breach of Implied Covenant of Good Faith and Fair Dealing;
- Eleventh Cause of Action: Breach of Implied Duty to Perform with Reasonable Care;
- Twelfth Cause of Action: Intentional Interference with Prospective Economic Relations;
- Thirteenth Cause of Action: Negligent Interference with Prospective Economic Relations;
- Fourteenth Cause of Action: Conversion;
- Fifteenth Cause of Action: Trespass to Chattels;
- Sixteenth Cause of Action: Unfair Competition in Violation of Business and Professions Code section 17200;
- Seventeenth Cause of Action: Civil Extortion;
- Eighteenth Cause of Action: Civil Theft (Penal Code, § 496);
- Nineteenth Cause of Action: Elder Abuse – Financial Abuse;
- Twentieth Cause of Action: Unjust Enrichment;
- Twenty-First Cause of Action: Accounting;
- Twenty-Second Cause of Action: Declaratory Relief.

According to the cross-complaint, Cross-Complainants and cross-defendant Gardyn entered into a series of transactions dating back to at least 2006. (Cross-Complaint at ¶¶ 1, 11.) During this time, they relied on Gardyn, a licensed CPA and real estate broker, to conduct all the arrangements and execute the relevant contracts. (Id. at ¶ 13.) These transactions however demonstrate a pervasive pattern of fraud, predatory lending, bad faith, and abuse by cross-defendant Gardyn. (Id. at ¶¶ 1, 11.)

On March 11, 2024, cross-defendant Gardyn filed the motion presently before the court, a demurrer to the cross-complaint. Cross-Complainants filed written opposition.

A further case management conference is set for July 2, 2024.

Demurrer to the Cross-Complaint

Cross-defendant Gardyn argues each cause of action in the cross-complaint is subject to demurrer on the following grounds: (1) standing/legal capacity to sue; (2) uncertainty; (3) statute of limitations; and (4) failure to state a cause of action.

Meet and Confer Requirement

Before filing a demurrer, a demurring party must "meet and confer in person or by telephone" with the opposing party to determine "whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code of Civ. Proc., § 430.41,

subd. (a).) This conference should occur at least five days before the deadline to file. (Code Civ. Proc, § 430.41, subd. (a)(2).)

When filing the demurrer, the demurring party must include a declaration stating either "the means by which the demurring party met and conferred with [the other party] and that the party did not reach an agreement resolving the objections raised in the demurrer" or "[the other party] failed to respond to the meet and confer request of the demurring party or otherwise failed to meet in good faith." (Code Civ. Proc., § 430.41, subd. (a)(3).) A court's determination that the meet and confer process was insufficient is not a ground to sustain or overrule a demurrer. (Code Civ. Proc., § 430.41, subd. (a)(4).)

Here, attorneys on both sides filed declarations describing the parties' efforts to meet and confer prior to filing the instant demurrer. (See Cohen Decl.; Corrinet Decl.) While those efforts were ultimately unsuccessful, there appears to be some degree of hostility and animosity between counsel. And, while meet and confer in this instance could have been more productive, the court does not sustain or overrule a demurrer based on any perceived failure to do so adequately. That said, the court reminds counsel to undertake the obligations set forth in Code of Civil Procedure section 430.41 with sincerity and good faith.[3]

Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Standing/Legal Capacity to Sue

"Standing is the threshold element required to state a cause of action and, thus, lack of standing may be raised by demurrer. [Citations.] To have standing to sue, a person, or those whom he properly represents, must ' "have a real interest in the ultimate adjudication because [he or she] has [either] suffered [or] is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." [Citation.]' [Citation.] Code of Civil Procedure section 367 establishes the rule that '[e]very

[3] Santa Clara County Bar Association's Code of Professionalism, § 9 ["A lawyer should at all times be civil, courteous, and accurate in communicating with adversaries, whether in writing or orally"].

action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.' A real party in interest is one who has 'an actual and substantial interest in the subject matter of the action and who would be benefitted or injured by the judgment in the action.' [Citation.]" (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031-1032.)

Also, "[a] party initiating a lawsuit must have both capacity to sue (the right to come into court) and standing to sue (the right to state a cause of action seeking particular relief). [Citation.] Incapacity is ' "a legal disability, such as infancy or insanity, which deprives a party of the right to come into court." ' [Citation.] A challenge to a party's capacity must be brought at the earliest opportunity or the challenge is forfeited. [Citations.]" (*Smith v. Cimmet* (2011) 199 Cal.App.4th 1381, 1390.) Such a challenge may be brought by demurrer under Code of Civil Procedure section 430.10, subdivision (b).

As to these grounds for demurrer, cross-defendant Gardyn argues simply the cross-complaint fails to allege that any Cross-Complainants suffered harm. (See Demurrer at pp. 4:23-5:3.) This argument is not persuasive as Cross-Complainants repeatedly allege throughout the operative pleading that they suffered harm. (See Cross-Complaint at ¶¶ 38, 47, 56, 65, 73, 80, 87, 95, 103, 112, 119, 127, 137, 144, 151, 174.) The court will separately consider whether sufficient facts have been pled to state a valid cause of action in support of these harms later in this order. Nor does such an argument demonstrate a lack of capacity to sue as Cross-Complainants are not infants or otherwise adjudicated as incompetent or insane. The demurrer is therefore not sustainable on these grounds.

Accordingly, the demurrer to the cross-complaint on the grounds of lack of standing and legal capacity to sue are OVERRULED.

Uncertainty

" ' "[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is incomprehensible that a defendant cannot reasonably respond." ' [Citations.] ' "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." ' [Citations.]" (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Here, the arguments in support of uncertainty are largely intertwined with points raised in connection with the general demurrer for failure to state facts. Given the contentions raised on general demurrer, cross-defendant Gardyn appears to be on notice of the claims against him in this litigation. Nor does the court find the cross-complaint to be so incomprehensible or ambiguous to support a demurrer for uncertainty. And, to the extent there is any such uncertainty, the parties can clarify those ambiguities utilizing civil discovery procedures. (See *Davies v. Super. Ct.* (1984) 36 Cal.3d 291, 299 [purpose of civil discovery is to take game

element out of trial preparation and assist parties in obtaining facts and evidence necessary for expeditious resolution of their dispute].)

Consequently, the demurrer to the cross-complaint on the ground of uncertainty is OVERRULED.

Statute of Limitations

A statute of limitations prescribes the period "beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 806 (*Fox*).) It "strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

"A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements." (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 509-510, internal citations and quotation marks omitted.)

Although the statute of limitations is a factual issue, it can be subject to demurrer if the pleading discloses that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962 (*Fuller*).) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff's burden "even at the pleading stage" to establish an exception to the limitations period. (*Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197 (*Aryeh*).)

" '[I]t is difficult for demurrers based on the statute of limitations to succeed because (1) trial and appellate courts treat the demurrer as admitting all material facts properly pleaded and (2) resolution of the statute of limitations issue can involve questions of fact. Furthermore, when the relevant facts are not clear such that the cause of action might be, but is not necessarily, time-barred, the demurrer will be overruled. [Citation.] Thus, for a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed.' [Citation.]" (*Schmier v. City of Berkeley* (2022) 76 Cal.App.5th 549, 554.)

When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

Here, cross-defendant Gardyn argues each cause of action is time barred as the events alleged in the cross-complaint occurred in 2006. But, while Gardyn identifies the applicable statute of limitations for each claim, he fails to identify any specific time when each cause of action accrued to trigger the statute of the limitations. There is only the conclusory statement in the moving papers that the events "appear" to have occurred in 2006. (See *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 ["In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear

on the face of the complaint; it is not enough that the complaint shows that the action may be barred."].) Thus, the statute of limitations argument is undeveloped and fails on this ground alone. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants."].)

Furthermore, Cross-Complainants appear to be relying either on the delayed discovery rule or fraudulent concealment doctrine to overcome a statute of limitations defense. (See OPP at pp. 3:15-7:13.)

"[I]n order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.' [Citation.]" (*Fox, supra,* 35 Cal.4th at p. 808.)

"The doctrine of fraudulent concealment tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale." (*Aryeh, supra,* 55 Cal.4th at p. 1192.) "In support of this doctrine, a plaintiff must allege the supporting facts—i.e., the date of discovery, the manner of discovery, and the justification for the failure to discover the fraud earlier—with the same particularity as with a cause of action for fraud. [Citation.]" (*Fuller, supra,* 216 Cal.App.4th at p. 962.)

Here, Cross-Complainants allege the action is timely as they did not discover cross-defendant Gardyn's misdeeds until February 2023. (Cross-Complaint at ¶ 31.) At that time, Gardyn sent a demand letter to Cross-Complainants with a balance of ($2,312,411) far in excess of earlier escrow papers and based on the earlier fraudulent notes for $565,000, which is what prompted them to finally discover his misdeeds. (Id. at ¶ 27.) Cross-Complainants did not make discovery of the misdeeds earlier as they justifiably relied on Gardyn as a family friend, licensed CPA, and real estate broker. (Id. at ¶¶ 16, 31; see *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921 [" 'If the plaintiff and defendant are in a confidential relationship there is no duty of inquiry until the relationship is repudiated. The nature of the relationship is such as to cause the plaintiff to rely on the fiduciary, and awareness of facts which would ordinarily call for investigation does not excite suspicion under these special circumstances.' "].) Nor did Cross-Complainants make earlier discovery as Gardyn repeatedly refused to provide accountings or explanations and provided fraudulent ones to them. (Cross-Complaint at ¶¶ 16, 27.) Such allegations may support exceptions for delayed discovery or fraudulent concealment to defeat a pleading challenge on demurrer under the statute of limitations.

Therefore, the demurrer to the cross-complaint on the ground that each claim is barred by the statute of limitations is OVERRULED.

Failure to State a Cause of Action

" 'The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the cause of action on assumed facts without a trial.' [Citation.] 'Conversely, a general

demurrer will be overruled if the complaint contains allegations of every fact essential to the statement of a cause of action, regardless of mistaken theory or imperfections of form that make it subject to special demurrer.' [Citation.]" (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 291-292 (*Morris*).)

"A complaint, with certain exceptions, need only contain a 'statement of the facts constituting the cause of action, in ordinary and concise language' [citation] and will be upheld ' "so long as [it] gives notice of the issues sufficient to enable preparation of a defense." ' [Citation.] '[T]o withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law.' [Citation.]" (*Morris, supra,* 78 Cal.App.5th at p. 292.)

First Cause of Action: Intentional Misrepresentation

"The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage." (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.)

"Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*), citation and quotation marks omitted.)

Courts enforce the specificity requirement in consideration of its two purposes. (*West, supra,* 214 Cal.App.4th at p. 793.) The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them. (*Ibid.*) The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud. (*Ibid.*)

Cross-defendant Gardyn asserts the first cause of action fails to allege sufficient facts to support the elements of a fraud claim. This assertion lacks merit as Cross-Complainants allege specific misrepresentations made by Gardyn that were knowingly false, intended to be relied upon by Cross-Complainants, and reasonably relied upon by them which resulted in harm. (See Cross-Complaint at ¶¶ 33-39.) To the extent that Gardyn disputes reasonable reliance, there are prior allegations incorporated into the first cause of action demonstrating Cross-Complainants' reliance based on their relationship to Gardyn as a family friend, licensed CPA, and real estate broker. (Id. at ¶¶ 16, 18, 31, 32.) Thus, the demurrer is not sustainable on this ground.

Accordingly, the demurrer to the first cause of action on the ground that it fails to state a claim is OVERRULED.

Second Cause of Action: Negligent Misrepresentation

The demurrer to the second cause of action is OVERRULED for the same reasons explained above in connection with the court's ruling on the intentional misrepresentation claim.

Third Cause of Action: False Promise

The demurrer to the third cause of action is OVERRULED for the same reasons stated above in connection with the court's ruling on the intentional misrepresentation claim.

Fourth Cause of Action: Concealment

The demurrer to the fourth cause of action is OVERRULED for the same reasons articulated above in connection with the court's ruling on the intentional misrepresentation claim.

Fifth Cause of Action: Constructive Fraud (Civ Code, § 1573)

The demurrer to the fifth cause of action is OVERRULED for the same reasons explained above in connection with the court's ruling on the intentional misrepresentation claim.

Sixth Cause of Action: Breach of Fiduciary Duty – Failure to Use Reasonable Care

"The elements of a cause of action for breach of fiduciary duty are; (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." (*Gutierrez v. Giradi* (2011) 194 Cal.App.4th 925, 932.)

Cross-defendant Gardyn contends the sixth cause of action fails to allege a fiduciary relationship, breach of that relationship, and harm/damages to state a valid claim. Again, this argument is not persuasive as Cross-Complainants allege a fiduciary relationship with Gardyn as a licensed CPA, real estate broker, and tax advisor. (See Cross-Complaint at ¶ 77; see also *Wolf v. Super. Ct.* (2003) 107 Cal.App.4th 25, 29 [a fiduciary relationship includes any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party].) They also allege breach of that relationship and subsequent harm that incorporate prior allegations of Gardyn's misconduct to support a claim for breach of fiduciary duty. (Cross-Complaint at ¶¶ 13, 14, 16-18, 20, 27, 76, 78-81.) The demurrer is therefore not sustainable on this ground.

Consequently, the demurrer to the sixth cause of action on the ground that it fails to state a claim is OVERRULED.

Seventh Cause of Action: Breach of Fiduciary Duty – Duty of Undivided Loyalty

The demurrer to the seventh cause of action is OVERRULED for the same reasons stated above in connection with the court's ruling on the breach of fiduciary duty – failure to use reasonable care claim.

Eighth and Ninth Causes of Action: Breach of Oral Contract/Breach of Written Contract

To prevail on a cause of action for breach of contract, the plaintiff must allege and prove: (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.)

"If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.)

Also, "[i]n an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-199.) "In order to plead a contract by its legal effect, plaintiff must 'allege the substance of its relevant terms. This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions.' [Citation.]" (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489.)

Cross-Complainants allege they entered into multiple contracts with cross-defendant Gardyn that include: (1) a contract pertaining to the 1031 exchange; (2) a contract by which Gardyn promised to pay them the discrepancy in value from the 1031 exchange; and (3) the purported notes totaling $565,000. (Cross-Complaint at ¶¶ 91, 99.)

Here, the alleged oral and written contracts are identical. But, to the extent that Cross-Complainants are alleging an oral contract, they refer to certain notes totaling $565,000 that appear to be a written instrument. And, to the extent they are alleging a written contract, no such contracts are attached to the pleading, set out verbatim in the body of the cross-complaint, or pled according to their legal effect. Nor does the opposition assist the court in resolving the conflict between these causes of action.

Therefore, the demurrer to the eighth and ninth causes of action is SUSTAINED WITH 15 DAYS' LEAVE TO AMEND for failure to state a claim. Cross-Complainants should clarify in their amended pleading whether they are seeking relief based on breach of written or oral contracts and, if written, to attach the written contracts, set out the terms verbatim in the body of the first amended cross-complaint, or plead the legal effect of the contracts.

<u>Tenth Cause of Action: Breach of Implied Covenant of Good Faith and Fair Dealing</u>

The demurrer to the tenth cause of action is SUSTAINED WITH 15 DAYS' LEAVE TO AMEND for failure to state a claim. There can be no claim for breach of the implied covenant without a contractual relationship. (See *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1033 [stating that the prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties]; *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032 [there is no obligation to deal fairly or in good faith absent an existing contract].) And, no such relationship exists here given the court's ruling sustaining the demurrer to the breach of contract claims for reasons stated above.

Eleventh Cause of Action: Breach of Implied Duty to Perform with Reasonable Care

The demurrer to the eleventh cause of action is SUSTAINED WITH 15 DAYS' LEAVE TO AMEND for the same reasons articulated above in connection with the court's ruling on the breach of implied covenant of good faith and fair dealing claim.

Twelfth Cause of Action: Intentional Interference with Prospective Economic Relations

"The elements of intentional interference with prospective economic advantage have been stated as follows: '(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.' [Citations.]" (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521-522.)

Here, cross-defendant Gardyn argues the interference claim fails as it is not supported by allegations of a valid contract. In support, Gardyn cites *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126. But, Gardyn relies on elements in support of a claim for intentional interference with contractual relations, not prospective economic advantage (or relations). The latter claim, as relevant here, does not require allegations or proof of a valid contract. And, to the extent that Gardyn asserts there is no specific harm alleged, this assertion is not persuasive as the alleged harm is connected to Gardyn's intent to disrupt Cross-Complainants' prospective economic relationships. (See Cross-Complaint at ¶¶ 121-128.) In addition, Cross-Complainants request the sum of $3,000,000 in damages with respect to this cause of action and others alleged in the cross-complaint. (See Prayer for Judgment at No. 1.)

Accordingly, the demurrer to the twelfth cause of action on the ground that it fails to state a claim is OVERRULED.

Thirteenth Cause of Action: Negligent Interference with Prospective Economic Relations

The demurrer to the thirteenth cause of action is OVERRULED for the same reasons explained above in connection with the court's ruling on the intentional interference with prospective economic relations claim.

Fourteenth Cause of Action: Conversion

"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. [Citations.]" (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.)

"[M]oney cannot be the subject of a conversion action unless a specific sum capable of identification is involved." (*Software Design & Application v. Hoefer & Arnett* (1996) 49 Cal.App.4th 472, 485.) A generalized claim for money is not actionable as conversion. (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235.)

Cross-defendant Gardyn first contends money cannot be a basis for conversion. But, as stated above, money can support a conversion claim where a specific sum capable of identification has been alleged. That is the case here as Cross-Complainants allege they had possessed or a right to possess a specific identifiable sum of at least $1,099,000. (Cross-Complaint at ¶ 141.) Gardyn also argues the conversion claim fails as it references real property. This argument is unavailing as the focus of the conversion claim pertains to Gardyn knowingly or intentionally taking possession of the $1,099,000 along with rents, issues, and profits. (Id. at ¶ 142.) Thus, the demurrer is not sustainable on this ground.

Consequently, the demurrer to the fourteenth cause of action on the ground that it fails to state a claim is OVERRULED.

Fifteenth Cause of Action: Trespass to Chattels

"[T]respass to chattels 'lies where an intentional interference with the possession of personal property has proximately caused injury' [citation], but the interference is ' "not sufficiently important to be classed as conversion" ' [citation]. 'Though not amounting to conversion,' in an action for trespass to chattels 'the defendant's interference must … have caused some injury to the chattel or the plaintiff's right in it.' [Citations.]" (*Berry v. Frazier* (2023) 90 Cal.App.5th 1258, 1271.)

Again, cross-defendant Gardyn asserts money cannot support a claim for trespass to chattels. In support, Gardyn cites *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glasser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384. This decision however is not persuasive as it does not address a claim for trespass to chattels but instead considers causes of action for conversion and breach of fiduciary duty in connection with a motion for summary judgment. (See *Murphy v. City of Alameda* (1992) 11 Cal.App.4th 906, 914 ["It is fundamental that cases are not authority for propositions not considered and decided."].) Gardyn also contends the trespass to chattels claim fails as it references real property. But, like the conversion cause of action, the trespass to chattels claim alleges Gardyn intentionally interfered with Cross-Complainants' use or possession of the $1,099,000 along with rents, issues, and profits. (Cross-Complaint at ¶ 149.) Thus, the demurrer is not sustainable on this ground.

Therefore, the demurrer to the fifteenth cause of action on the ground that it fails to state a claim is OVERRULED.

Sixteenth Cause of Action: Unfair Competition in Violation of Business and Professions Code, § 17200

"The UCL defines 'unfair competition' to 'mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising' and any act prohibited by [Business and Professions Code] section 17500. [Citation.]" (*Searle v. Wyndham Int'l* (2002) 102 Cal.App.4th 1327, 1332-1333 (*Searle*).) "Section 17200 'is not

confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. [Citation.] Thus, California courts have consistently interpreted the language of section 17200 broadly.' [Citation.]" (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877-878.) "The statute prohibits 'wrongful business conduct in whatever context such activity might occur.' [Citation.]" (*Searle, supra*, at 102 Cal.App.4th at p. 1333.)

"A private person now has standing to assert a UCL claim only if he or she (1) 'has suffered injury in fact,' and (2) 'has lost money or property as a result of the unfair competition.' " (*Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 852 (*Hall*).)

A plaintiff suffers an injury in fact for purposes of standing under the UCL when he or she has: (1) expended money due to the defendant's acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has a cognizable claim. (*Hall, supra*, 158 Cal.App.4th at pp. 854-855.)

In addition, a plaintiff must show he or she lost money or property as a result of the alleged unfair competition. (*Hall, supra*, 158 Cal.App.4th at p. 855.) This causation element requires a showing of a causal connection or reliance on the unlawful, unfair, or fraudulent act. (*Ibid*.)

Here, cross-defendant Gardyn contends the UCL claim is subject to demurrer as Cross-Complainants fail to allege any illegal business practices. This contention however lacks merit as the UCL allows for relief also for *unfair or fraudulent business practices*. (See *Adhav v. Midway Rent A Car, Inc.* (2019) 37 Cal.App.5th 954, 970 [since the UCL is written in the disjunctive, it establishes three varieties of unfair competition]; see also *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 718 ["It is not necessary for a business practice to be 'unlawful' in order to be subject to an action under the unfair competition law."].) For purposes of this action, the UCL claim appears to arise out of fraudulent conduct on the part of cross-defendant Gardyn which is sufficient under the UCL. (See Cross-Complaint ¶ 156.) Gardyn also argues there is no specific harm alleged to support the UCL claim. Harm in this instance refers to standing which, as stated above, requires Cross-Complainants to allege a loss of money or property as result of unfair competition. No such allegations appear here to establish standing under the UCL and thus the demurrer is sustainable on this ground.

Accordingly, the demurrer to the sixteenth cause of action is SUSTAINED WITH 15 DAYS' LEAVE TO AMEND for failure to state a claim.

Seventeenth Cause of Action: Civil Extortion

Extortion is defined as "the obtaining of property from another, with his consent … induced by a wrongful use of force or fear …" (Pen. Code, § 518.) It includes "the making of threats that, in and of themselves, may not be illegal," but which " 'nevertheless becomes illegal when coupled with a demand for money.' " (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.) Although extortion is a crime, case law has recognized the existence of a civil cause of action for extortion. (*Ibid*.; *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 426 (*Fuhrman*) ["However denominated (e.g., extortion, menace, duress), our Supreme Court has recognized a cause of action for the recovery of money obtained by the wrongful

threat of criminal or civil prosecution"], disapproved on another ground in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219.)

A civil cause of action for extortion "is essentially a cause of action for moneys [or other consideration] obtained by duress …" (*Fuhrman, supra*, 169 Cal.App.3d at p. 426; see *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 207.) The doctrine "may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person …to succumb to the perpetrator's pressure." (*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1157.)

Here, cross-defendant Gardyn asserts there is no specific allegation of extortion to support the seventeenth cause of action. But, Cross-Complainants allege facts showing Gardyn made wrongful threats against them, including foreclosure, in exchange for payments, in which they ultimately complied with those demands. (Cross-Complaint at ¶¶ 158-162.) Such allegations are sufficient to state a claim for civil extortion for pleading purposes.

Consequently, the demurrer to the seventeenth cause of action on the ground that it fails to state a claim is OVERRULED.

Eighteenth Cause of Action: Civil Theft

The eighteenth cause of action is a claim for civil theft under Penal Code section 496. Subdivision (a) of that section provides in relevant part:

> "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." (Pen. Code, § 496, subd. (a).)

"While section 496(a) covers a spectrum of impermissible activity relating to stolen property, the elements required to show a violation of section 496(a) are simply that (i) property was stolen or obtained in a manner constituting theft, (ii) the defendant knew the property was so stolen or obtained, and (iii) the defendant received or had possession of the stolen property." (*Switzer v. Wood* (2019) 35 Cal.App.5th 116, 126.)

Like the civil extortion claim, cross-defendant Gardyn contends there is no specific allegation of theft to support the eighteenth cause of action. Cross-Complainants however allege Gardyn (1) received stolen property or property that had been obtained by theft or extortion, (2) knew the property to be so stolen or obtained, and (3) concealed and withheld property from Cross-Complainants knowing it to be stolen. (Cross-Complaint at ¶ 165.) These

allegations are sufficient to state a claim for civil theft and overcome a pleading challenge on general demurrer.

Therefore, the demurrer to the eighteenth cause of action on the ground that it fails to state a claim is OVERRULED.

Nineteenth Cause of Action: Elder Abuse – Financial Abuse

" 'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secrets, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
(3) Takes, secrets, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70. (Welf. & Inst. Code, § 15610.30, subd. (a).)

"A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (b).)

"For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (c).)

Financial elder abuse claims, like other statutory claims, must be pled with particularity. (See *Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771, 790 [financial elder abuse claims must be pled with particularity]; *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 407, 410.)

Here, the elder abuse claims appears to be brought by cross-complainant Oscar who was 65 years or older at the time of the conduct. (Cross-Complaint at ¶ 171.) According to the elder abuse cause of action, cross-defendant Gardyn allegedly took, hid, appropriated, obtained, and retained Oscar's property with the intent to defraud and by undue influence which resulted in harm. (Id. at ¶¶ 170, 172-174.) None of the points raised in challenging the elder abuse claim are meritorious and thus the demurrer is not sustainable on this ground.

Accordingly, the demurrer to the nineteenth cause of action on the ground that it fails to state a claim is OVERRULED.

Twentieth Cause of Action: Unjust Enrichment

Unjust enrichment is not a cause of action or even a remedy, but rather a general principle underlying various legal doctrines and remedies. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231.) It is synonymous with restitution. (*Ibid.*) This court therefore construes the twentieth cause of action as a quasi-contract claim seeking restitution. (*Ibid.*)

"There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. [Citations.] Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead seek restitution on a quasi-contract theory (an election referred to at common law as 'waiving the tort and suing in assumpsit'). [Citations.] In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment. [Citations.]" (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388.)

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

"The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it. [Citation.]" (*First Nationwide Savings, supra*, 11 Cal.App.4th at p. 1663, italics in the original.)

According to the unjust enrichment claim, cross-defendant Gardyn was unjustly enriched by benefits from Cross-Complainants that included: (1) at least $1,099,000 that Cross-Complainants paid to him; (2) rents, issues, and profits that Gardyn wrongfully collected; and other monetary payments that Cross-Complainants made to him. (Cross-Complaint at ¶ 178.) Again, like the elder abuse cause of action, none of the points raised in challenging the unjust enrichment claim are meritorious and thus the demurrer is not sustainable on this ground.

Consequently, the demurrer to the twentieth cause of action on the ground that it fails to state a claim is OVERRULED.

Twenty-First Cause of Action: Accounting

"[T]he nature of a cause of action in accounting is unique in that it is a means of discovery. An accounting is a 'species of disclosure, predicated upon the plaintiff's legal inability to determine how much money, if any, is due.' [Citation.] Thus, the purpose of the accounting is, in part, to discover what, if any, sums are owed to the plaintiff, and an accounting may be used as a discovery device. [Citation.]" (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 180 (*Teselle*).)

"A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." (*Teselle, supra,* 173 Cal.App.4th at p. 179.)

"An action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation. A plaintiff need not state facts that are peculiarly within the knowledge of the opposing party." (*Teselle, supra,* 173 Cal.App.4th at p. 179.)

"[A] fiduciary relationship between the parties is not required to state a cause of action for accounting. All that is required is that some relationship exists that requires an accounting. The right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant's relationship with the plaintiff, the defendant is obligated to surrender." (*Teselle, supra,* 173 Cal.App.4th at pp. 179-180.)

According to the accounting claim, Cross-Complainants allege they had a relationship that requires an accounting based on their extensive transactions with cross-defendant Gardyn and that some balance is owed to them that can only be ascertained by an accounting. (See Cross-Complaint at ¶¶ 182-183.) Gardyn contends Cross-Complainants are not entitled to an accounting because they have all of the information regarding payments allegedly made. (Demurrer at p. 14:8-11.) This contention however is a factual argument that cannot be resolved on demurrer and thus the demurrer is not sustainable on this ground. (See *Catsouras v. Department of California Highway* Patrol (2010) 181 Cal.App.4th 856, 889-890 [resolution of factual issues is not appropriate on demurrer].)

Therefore, the demurrer to the twenty-first cause of action on the ground that it fails to state a claim is OVERRULED.

Twenty-Second Cause of Action: Declaratory Relief

Code of Civil Procedure section 1060 provides in relevant part:

> "Any person interested under a written instrument … or under a contract, or 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 in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. …"

To qualify for declaratory relief under section 1060, a plaintiff's action must present two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546.) " 'The "actual controversy" language in … section

1060 encompasses a probable future controversy relating to the legal rights and duties of the parties.' [Citation.] It does not embrace controversies that are 'conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.' [Citation.]" (*Ibid*.)

Here, Cross-Complainants seek declaratory relief in connection with cross-defendant Gardyn's wrongful liens on the Winchester property. (Cross-Complaint at ¶¶ 186-189.) On demurrer, Gardyn makes the conclusory argument that there is no actual controversy to support declaratory relief as Cross-Complainants owe money to him and are merely disputing this fact. (Demurrer at p. 14:12-13.) Again, to the extent that the attack on declaratory relief raises a factual argument, that is not appropriate at the demurrer stage.

Accordingly, the demurrer to the twenty-second cause of action on the ground that it fails to state a claim is OVERRULED.

Disposition

The demurrer to the cross-complaint on the grounds of lack of standing and legal capacity to sue are OVERRULED.

The demurrer to the cross-complaint on the ground of uncertainty is OVERRULED.

The demurrer to the cross-complaint on the ground that each claim is barred by the statute of limitations is OVERRULED.

The demurrer to the first, second, third, fourth, fifth, sixth, seventh, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second causes of action on the ground that they fail to state a claim is OVERRULED.

The demurrer to the eighth, ninth, tenth, eleventh, and sixteenth causes of action is SUSTAINED WITH 15 DAYS' LEAVE TO AMEND for failure to state a claim.

The court will prepare the Order.

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Calendar Line 2
Case Name: *Andre LaForge, et al. v. Matthew Reid Leal, individually and dba Leal Law Firm*
Case No.: 23-CV-420692

Demurrer to the First Amended Complaint by Defendant Matthew Reid Leal, individually and dba Leal Law Firm

Factual and Procedural Background

This is an action for malicious prosecution and other claims brought by plaintiffs Andre LaForge and Apache Tech, Inc. ("Plaintiffs" or "LaForge") against defendant Matthew Reid Leal, individually and dba Leal Law Firm ("Leal").

According to the first amended complaint ("FAC"), on November 15, 2012, defendant Leal filed a complaint on behalf of his client, Anthony Tran ("Tran"), and against LaForge for breach of contract, fraud, conversion, and other claims arising out of the LED light business that LaForge developed. (FAC at ¶ 7.) The action was filed in Santa Clara County Superior Court as *Anthony Tran v. Andre La Forge, et al.* (case no. 112CV236232) ("Underlying Action"). (Ibid.) In the lawsuit, Tran claimed he was the true owner of the LED light business carried on by LaForge. (Ibid.)

Defendant Leal filed the Underlying Action despite the fact that no reasonable attorney would have thought the claims legally tenable and out of hostility and ill will. (FAC at ¶¶ 8-10.) He also harassed and intimidated LaForge to attack their business efforts with the aim of taking over the LED business. (Id. at ¶¶ 10-11.)

Following a bench trial, the court issued judgment in favor of LaForge on March 17, 2017. (FAC at ¶ 12.) Thereafter, on May 4, 2017, Leal appealed the judgment on behalf of Tran with the Sixth District Court of Appeal. (Id. at ¶ 14.) The appellate court affirmed the judgment on August 18, 2021 and issued a remittitur remanding the case to the superior court on October 20, 2021. (Id. at ¶ 15.)

On August 9, 2023, Plaintiffs filed a complaint against defendant Leal alleging causes of action for malicious prosecution and intentional infliction of emotional distress.

On December 26, 2023, defendant Leal filed a demurrer to the complaint. The motion was set for hearing on February 13, 2024.

On January 25, 2024, prior to the hearing, Plaintiffs filed the operative FAC asserting causes of action for:

(1) Malicious Prosecution;
(2) Intentional Infliction of Emotional Distress;
(3) Intentional Interference with Contractual Relations;
(4) Negligent Interference with Contractual Relations;
(5) Intentional Interference with Prospective Economic Advantage; and
(6) Negligent Interference with Prospective Economic Advantage.

Given the filing of the FAC, the demurrer was taken off calendar.

On March 20, 2024, defendant Leal filed the motion presently before the court, a demurrer to the FAC. Leal filed a request for judicial notice in conjunction with the motion. Plaintiffs filed written opposition. Leal filed reply papers.

Demurrer to the FAC

Defendant Leal argues each claim is time-barred under the applicable statute of limitations. (See Code Civ. Proc., § 430.10, subd. (e); see also *Kendrick v. City of Eureka* (2000) 82 Cal.App.4th 364, 367 ["Where a complaint shows on its face that the action is barred by the statute of limitations, a general demurrer for failure to state a cause of action will lie."].)

Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In support, defendant Leal requests judicial notice of the following:

(1) Plaintiff's original complaint in this action filed August 9, 2023 (Leal Dec. at Ex. A);
(2) Second Amended Cross-Complaint filed in a Santa Clara County Superior Court action titled *Anthony Tran v. Advanced Technologies Innovations, Inc., et al.* (Leal Decl. at Ex. B).

The court may take judicial notice of these exhibits as records of the superior court under Evidence Code section 452, subdivision (d). (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) Plaintiffs do not oppose the request and the exhibits are relevant to arguments raised in support of the demurrer. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Accordingly, the request for judicial notice is GRANTED.

Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible

difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Statute of Limitations

A statute of limitations prescribes the period "beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 806.) It "strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

"A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements." (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 509-510, internal citations and quotation marks omitted.)

Although the statute of limitations is a factual issue, it can be subject to demurrer if the pleading discloses that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962.) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff's burden "even at the pleading stage" to establish an exception to the limitations period. (*Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197.)

" '[I]t is difficult for demurrers based on the statute of limitations to succeed because (1) trial and appellate courts treat the demurrer as admitting all material facts properly pleaded and (2) resolution of the statute of limitations issue can involve questions of fact. Furthermore, when the relevant facts are not clear such that the cause of action might be, but is not necessarily, time-barred, the demurrer will be overruled. [Citation.] Thus, for a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed.' [Citation.]" (*Schmier v. City of Berkeley* (2022) 76 Cal.App.5th 549, 554.)

When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

First Cause of Action: Malicious Prosecution

There are four essential elements to a malicious prosecution claim: (1) there had to have been a prior action commenced by or at the direction of the defendant that was pursued to a legal termination in the plaintiff's favor; (2) the defendant must have brought the prior action without probable cause; (3) the defendant must have initiated the prior action with malice; and (4) the plaintiff must show resulting damage, which may include out-of-pocket losses of attorney fees and costs, as well as emotional distress and injury to reputation. (*Maleti v. Wickers* (2022) 82 Cal.App.5th 181, 203.)

Applicable Statute of Limitations

" 'California has never prescribed by statute a specific period of limitation for malicious prosecution.' [Citation.] Instead, courts have long held the tort was encompassed by statutes governing claims for ' "injury to" 'a person ' "caused by the wrongful act or neglect of another." ' [Citation.] Currently, this statute is [Code of Civil Procedure] section 335.1, which provides a two-year limitations period.[4] [Citation.]" (*Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 789 (*Connelly*).)

Defendant Leal however argues the malicious prosecution claim is barred by the one-year statute of limitations under Code of Civil Procedure section 340.6, subdivision (a). That section states:

(a) "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. If the plaintiff is required to establish the plaintiff's factual innocence for any underlying criminal charge as an element of the plaintiff's claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is required to establish the plaintiff's factual innocence, the time for commencement of legal action shall not exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury.
(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.
(3) The attorney willfully conceals the facts constituting the wrongful act or omission when those facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.
(4) The plaintiff is under a legal or physical disability that restricts the plaintiff's ability to commence legal action.
(5) A dispute between the lawyer and client concerning fees, costs, or both is pending resolution under Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code. As used in this paragraph, 'pending' means from the date a request for arbitration is filed until 30 days after receipt of notice of the

[4]Section 335.1 provides: "Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another."

> award of the arbitrators, or receipt of notice that the arbitration is otherwise terminated, whichever occurs first." (Code Civ. Proc., § 340.6, subd. (a).)

In opposition, Plaintiffs contend the malicious prosecution claim is not subject to the one-year statute of limitations as defendant Leal was not Plaintiffs' attorney and did not provide professional services to them. (See OPP at p. 5:4-6.) In support, Plaintiffs rely on *Lee v. Hanley* (2015) 61 Cal.4th 1225 (*Lee*) where the California Supreme Court concluded that section 340.6, subdivision (a)'s "time bar applies to claims *whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services*." (*Lee, supra,* 61 Cal.4th at pp. 1236-1237, italics added.) The Court further stated:

> "In this context, a 'professional obligation' is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct. By contrast, as the Court of Appeal observed, section 340.6(a) does not bar a claim for wrongdoing—for example, garden-variety theft—that does not require proof that the attorney has violated a professional obligation, even if the theft occurs while the attorney and the victim are discussing the victim's legal affairs. Section 340.6(a) also does not bar a claim arising from an attorney's performance of services that are not 'professional services,' meaning 'services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys.' [Citation.]" (*Id*. at p. 1237.)

But, the Supreme Court in *Lee* did not expressly consider application of the statute of limitations to malicious prosecution claims against attorneys. (*Connelly, supra,* 33 Cal.App.5th at p. 793; see *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775 [*Lee* did not analyze whether section 340.6, subdivision (a) applies to claims against a former litigation adversary's attorney].) That issue however has been subsequently addressed in cases by the California appellate courts in the First and Fifth Districts.

For example, in *Connelly*, cited in the moving papers (Demurrer at p. 3:3-5), the plaintiff sued his former landlord and the landlord's attorney nearly two years after they had voluntarily dismissed an unlawful detainer action against him. (*Connelly, supra,* 33 Cal.App.5th at p. 788.) The attorney moved for judgment on the pleadings claiming the one-year statute of limitations in section 340.6 barred plaintiff's cause of action against him. (*Ibid*.) The trial court granted the motion and entered judgment in favor of the attorney. (*Ibid*.)

On appeal, the plaintiff argued the two-year limitations period under section 335.1 applied instead of the statute of limitations in section 340.6, subdivision (a). (*Connelly, supra,* 33 Cal.App.5th at p. 789.) The First Appellate District disagreed, concluding that section 340.6, subdivision (a) governs malicious prosecution claims against attorneys who performed professional services in the underlying litigation. (*Id*. at pp. 784, 799.) The appellate court reasoned:

> "[A]n attorney who engages in malicious prosecution violates the obligation, embodied in the Rules of Professional Conduct, to not 'bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.' [Citation.] This

obligation is a near-perfect mirror of two of the three elements of malicious prosecution and implicates a lawyer's core professional duty to employ reasonable skill, prudence, and diligence in litigation." (*Id*. at pp. 794-795.)

The First District also noted that malicious prosecution differs from claims identified in *Lee* as falling outside of the statute's scope, such as an attorney's garden-variety theft or sexual battery. (*Connelly, supra,* 33 Cal.App.5th at p. 795.) The latter type of wrongdoing "is intrinsically conduct that is incidental or ancillary to the provision of professional services itself." (*Ibid*.) "In contrast, the wrongful conduct when an attorney engages in malicious prosecution *is the provision of professional services itself*." (*Id*. at p. 796, original italics.)

Similarly, in *Garcia v. Rosenberg* (2019) 42 Cal.App.5th 1050 (*Garcia*), also cited in the moving papers (Demurrer at p. 3:8-10), the Fifth Appellate District considered a malicious prosecution claim brought against the attorney for the opposing party in the underlying litigation. (*Garcia, supra,* 41 Cal.App.5th at pp. 1054-1055.) The attorney filed an anti-SLAPP motion, asserting in part the plaintiffs' claim was barred by the statute of limitations. (*Id*. at p. 1055.) The trial court granted the motion. (*Ibid*.) The appellate court affirmed concluding plaintiffs could not establish a probability of success on the merits as the malicious prosecution claim was barred by the statute of limitations. (*Id*. at pp. 1059-1061.) In doing so, the Fifth District relied on the reasoning set forth in *Connelly* to determine the plaintiffs' claim was time-barred. (*Ibid*.)

More recently in *Escamilla v. Vannucci* (2023) 97 Cal.App.5th 175 (*Escamilla*), again cited by defendant Leal (Demurrer at p. 3:12-16), the First Appellate District, relying on *Connelly* and *Garcia*, concluded that section 340.6, subdivision (a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation, without being limited to malpractice actions between clients and attorneys. (*Escamilla, supra,* 97 Cal.App.5th at p. 180, 184-189.)

While Plaintiff disputes the applicability of section 340.6, subdivision (a) to his malicious prosecution claim, he fails to address or distinguish authorities like *Connelly*, *Garcia*, and *Escamilla* in his opposition. Nor is Plaintiff's reliance on *Lee* persuasive as the California Supreme Court did not consider the statute of limitations to malicious prosecution claims brought against attorneys.[5] (See *Murphy v. City of Alameda* (1992) 11 Cal.App.4th 906, 914 ["It is fundamental that cases are not authority for propositions not considered and decided."].) Thus, based on the foregoing, the court finds the one-year statute of limitations under section 340.6, subdivision (a) applies to the malicious prosecution claim.

Accrual

"The limitations period—the period in which a plaintiff must bring suit or be barred—runs from the moment a claim accrues. [Citations.] Ordinarily, a claim accrues from the occurrence of the last element essential to the cause of action. [Citation.] A cause of action for malicious prosecution accrues upon dismissal or other termination of the prior action that concludes it in favor of the malicious prosecution plaintiff. [Citation.]" (*Garcia, supra,* 42 Cal.App.5th at p. 1060.)

[5] Also, the parties do not cite and this court is not aware of any Sixth Appellate District authority addressing malicious prosecution claims and the statute of limitations in this context.

"The fact that the time for appeal from the judgment has not yet run does not prevent the filing of the suit and therefore does not stay the running of the statute. [Citation.] However, the pendency of an appeal from the judgment in the underlying action prevents the maintenance of a malicious prosecution action based on that judgment. [Citation.] Therefore, the statute of limitations runs from accrual upon entry of judgment until the date of filing of notice of appeal. [Citation.] The statute is then tolled until the conclusion of the appellate process, at which time it commences to run again. [Citation.]" (*Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.* (1988) 202 Cal.App.3d 330, 334-335.)

As stated above, the trial court entered judgment in favor of LaForge on March 7, 2017. (FAC at ¶ 12.) Thereafter, defendant Leal filed a notice of appeal on behalf of Tran on May 4, 2017. (Id. at ¶ 14.) Thus, for statute of limitations purposes, approximately 58 days had elapsed between entry of judgment and filing a notice of appeal. The statute is then tolled until the appellate process has concluded. On August 18, 2021, the Sixth Appellate District affirmed the judgment for LaForge. (Id. at ¶ 15.) "In cases affirmed on appeal, the statute of limitations begins running again on the issuance of the remittitur." (*White v. Lieberman* (2002) 103 Cal.App.4th 210, 217; see *Siry Investments, L.P. v. Farkhondehpour* (2015) 238 Cal.App.4th 725, 730 ["It is well settled that an appeal is not final until the court has issued its decision *and* issued the remittitur, at least when the decision is 'on the merits.' "].) Here, the remittitur issued on October 20, 2021. (FAC at ¶ 15.) Plaintiffs however did not file their initial complaint until August 9, 2023, well beyond the one-year limitations period allowed under section 340.6, subdivision (a). The demurrer is therefore sustainable on this ground.

Leave to Amend

Should the court sustain the demurrer, Plaintiffs request leave to amend to include additional facts demonstrating that defendant Leal's conduct was not carried out in the course of professional services. (See OPP at p. 7:15-18.) But, rather Leal and Tran operated as business partners and thus Leal engaged in wrongful conduct as his partner, not as an attorney. (Id. at p. 7:18-19.) While it is not clear what impact these additional facts will have on the statute of limitations defense, the court will afford Plaintiffs an opportunity for leave to amend. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if the plaintiff has not had an opportunity to amend the pleading in response to a motion challenging the sufficiency of the allegations, leave to amend is liberally allowed as a matter of fairness, unless the pleading shows on its face that it is incapable of amendment].)

Consequently, the demurrer to the first cause of action is SUSTAINED WITH 15 DAYS' LEAVE TO AMEND based on the statute of limitations.

Second through Sixth Causes of Action: IIED and Interference Claims

Plaintiffs also seek relief for intentional infliction of emotional distress along with contractual and economic interference causes of action. On demurrer, defendant Leal argues these claims are also subject to a one-year statute of limitations as they are based on the malicious prosecution cause of action. (See Demurrer at p. 3:17-28.) This argument lacks merit as these claims are *also* supported by allegations separate and apart from the rendering of professional services by an attorney. (See FAC at ¶¶ 10, 11, 13, 25, 26, 28, 32, 34, 39, 46, 49, 53, 59, 65, 67.) Furthermore, cases like *Connelly*, *Garcia*, and *Escamilla* do not assist the

court as they do not examine claims for emotional distress or interference in connection with the statute of limitations under section 340.6, subdivision (a). Thus, the court finds the one-year statute of limitations is not applicable to these claims.

In the alternative, defendant Leal contends these claims would still be time-barred under the two-year statute of limitations. (See Demurrer at p. 4:21-5:13.) The court however is not persuaded by this contention as it is not clear when the claims for emotional distress and interference accrued to trigger the statute of limitations. (See *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 ["In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred."].) For example, the allegations incorporated in these claims include conduct by defendant Leal during the lawsuit and appeal. (See FAC at ¶ 11.) As the appeal officially concluded with the filing of the remittitur, any such claims would accrue at the latest on October 21, 2021. Since this action was filed on August 9, 2023, the emotional distress and interference causes of action appear to be timely under the two-year statute of limitations.

Accordingly, the demurrer to the second, third, fourth, fifth and sixth causes of action based on the statute of limitations is OVERRULED.

Disposition

The demurrer to the first cause of action is SUSTAINED WITH 15 DAYS' LEAVE TO AMEND based on the statute of limitations.

The demurrer to the second, third, fourth, fifth and sixth causes of action based on the statute of limitations is OVERRULED.

The court will prepare the Order.

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Calendar Line 3
Case Name: *Lee Brothers, Inc. v. SAIA, Inc. et al.*
Case No.: 23CV424203

I. Factual and Procedural Background

Lee Brothers Inc. dba Four in One Co., Inc. ("Plaintiff") brings this breach of contract and fraud action against SAIA Motor Freight Line, LLC and SAIA, Inc. (collectively, "Defendants").

According to the allegations of the First Amended Complaint ("FAC"), Defendants are in the shipping business. (FAC, ¶ 7.) On or around February 2, 2022, Plaintiff requested that Defendants provide a quote for the pickup of products from a vendor in Indiana and to deliver those products to San Jose, California. (*Id.* at ¶ 8.) Defendants, through their employee Zaida Ladua ("Ladua"), emailed Plaintiff two quotes for a total price of $3,517.97 for the pickup and delivery. (*Id.* at ¶ 9.) The quotes were good through March 1, 2022 and Defendants advertise that the quotes are binding for three days after the date of the quote. (*Ibid*.) Based on the quote, Plaintiff issued a purchase order for the pickup and delivery. (*Id.* at ¶ 10.)

Plaintiff believes Defendants picked up the order on February 22, 2024 and the products were delivered to Plaintiff on February 24, 2022. (FAC, ¶ 11.) On the day of the delivery, Defendants invoiced Plaintiff for $14,313.23. (*Id.* at ¶ 12.) The invoice included the two quotes and an additional fabricated quote. (*Ibid*.)

On March 9, 2022, Plaintiff notified Defendants that the invoice was wrong. (FAC, ¶ 13.) On March 10, 2022, Ladua acknowledged that the invoice was incorrect and said she would fix it. (*Id.* at ¶ 14.) On March 30, 2022, in reliance on Defendants' promise to reduce the invoice amount, Plaintiff paid the correct amount of $3,517.97. (*Id.* at ¶ 15.) Defendants failed to correct the invoice and on April 7, 2022, they sent Plaintiff a new invoice for $10,895.26, the remaining amount of the incorrect invoice. (*Id.* at ¶ 17.) Plaintiff notified Defendants that this invoice was wrong and Ladua again acknowledged the error. (*Id.* at ¶¶ 18-19.)

On April 14, 2022, Plaintiff sent Ladua another email requesting a correction of the invoice and Ladua told Plaintiff to disregard the invoice and that she would tell the collector to stop contacting Plaintiff. (FAC, ¶¶ 20-21.) Defendants failed to correct the invoice. (*Id.* at ¶ 22.)

On June 14, 2022, Defendants sent another incorrect invoice to Plaintiff and Plaintiff emailed Ladua about the issue. (FAC, ¶ 23.) Plaintiff received an email from a new employee, who advised that Ladua no longer worked for Defendants and insisted that Plaintiff pay a total of $11,700. (*Id.* at ¶ 24.)

On April 5, 2023, Defendants sent a demand letter to Plaintiff for the amount owed and stated that if Plaintiff did not pay this amount within 10 days, Defendants would send the claim out for collection. (FAC, ¶ 25.) Since April 2023, Defendants have used a collection agency to attempt to collect the improper charges. (*Id.* at ¶ 26.)

On January 31, 2024, Plaintiff filed its FAC, asserting the following causes of action against Defendants:

1) Breach of Contract;
2) Breach of Contract; and
3) Fraud.

On March 6, 2024, Defendants filed a demurrer to the fraud cause of action. Plaintiff opposes the motion.

II. Demurrer

a. Legal Standard

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

b. Third Cause of Action – Fraud

Defendants demur to the third cause of action for fraud on the ground that it is preempted by the Federal Aviation Administration Authorization Act ("FAAAA").

i. Preemption Generally

"'Under the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2), federal law "shall be the supreme Law of the Land." Therefore Congress may preempt state laws to the extent it believes such action is necessary to achieve its purposes.'" (*Curtin Maritime Corp. v. Pacific Dredge & Construction, LLC* (2022) 76 Cal.App.5th 651, 669 (*Curtin*).)

"Congress may exercise that power expressly, or the courts may infer preemption under one of three implied preemption doctrines: conflict, obstacle, or field preemption. Express preemption occurs when Congress defines the extent to which a statute preempts state law. Conflict preemption exists when it is impossible to simultaneously comply with both state and federal law. Obstacle preemption occurs when state law stands in the way of full accomplishment and execution of federal law. Field preemption applies when comprehensive federal regulations leave no room for state regulation." (*Curtin, supra,* 76 Cal.App.5th at p. 669 [internal citations omitted].)

"Preemption may be based either on federal statutes or on federal regulations that are properly adopted in accordance with statutory authorization. As a result, a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation and render unenforceable state or local laws that are otherwise not inconsistent with federal." (*Curtin, supra,* 76 Cal.App.5th at p. 669 [internal citations and quotations omitted].)

"[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated … in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088 [internal citations and quotations omitted].)

"Although federal law may preempt state law, '[c]ourts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it.' [Citation.]" (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815.)

ii. FAAAA and Preemption

"In 1980, Congress deregulated trucking. In 1994, Congress similarly sought to pre-empt state trucking regulation." (*People ex rel. Harris v. Pac Anchor Transportation,*

Inc. (2014) 59 Cal.4th 772, 779 (*Pac Anchor*).) Congress "wrote into its 1994 law language that says: A State ... may not enact or enforce a law … related to a price, route, or service of any motor carrier …with respect to the transportation of property." (*Ibid*. [internal quotations omitted].)

"Specifically, the FAAAA was intended to prevent state regulatory practices including entry controls, tariff filing and price regulation, and regulation of types of commodities carried." (*Pac Anchor, supra*, 59 Cal.4th at pp. 779-780.) "[T]he FAAAA preempts only state laws that relate to motor carrier price, route, or service …with respect to the transportation of property." (*Id.* at p. 781, citing *Dan's City Used Cars, Inc. v. Pelkey* (2013) 569 U.S. 251, 254 (*Dan's*).)

iii. Analysis

In support of their demurrer, Defendants argue Plaintiff's fraud cause of action is subject to FAAAA preemption because it seeks to "enhance or enlarge substantive standards upon SAIA, a motor carrier, relating to its price and/or services beyond those mandated by the federal law." (Demurrer, p. 8:7-9.) Defendants contend that Plaintiff is seeking to hold Defendants liable under state and common law, which clearly has a direct relation to rates, routes, or services provided by Defendants to its customers. (*Id.* at p. 8:14-16.)

In opposition, Plaintiff argues it alleges that after the dispute over the excessive invoices arose, Defendants then committed fraud by making the false promise to reduce their claim if Plaintiff paid the undisputed amount. (Opposition, p. 2:12-14.) Plaintiffs contend that the dispute occurred after the goods were transported and delivered to Plaintiff and so it therefore is not a dispute involving the transportation of property. (*Id.* at p. 2:15-21.) While Plaintiff asserts that this is not addressed by Defendants, it appears Defendants do address this issue on page 9 of their demurrer. Specifically, Defendants assert that "even if the alleged promise to reduce the amount of freight charges originally billed was a separate contract, such separate contract is directly related to the 'rates, routes, or services' SAIA provided to its customers" because it stems from the freight charges owed to Defendants for transportation of Plaintiff's cargo. (Demurrer, p. 9:9-13.)

Plaintiff additionally relies on *Dan's* to support its argument. Plaintiff asserts that in *Dan's*, the plaintiff alleged that after defendant towed his car, the defendant violated state tort and statutory law in storing and disposing of the vehicle and the Supreme Court held that these violations did not relate to the transportation of property and that the preemption law did not apply to events taking place after the transportation was completed. (Opposition, p. 3:13-16, citing *Dan's, supra*, 569 U.S. at p. 262.)[6]

In reply, Defendants argue that *Dan's* supports their preemption arguments because the statute at issue specified the procedure for storage and disposal of vehicles after the tow had concluded. The plaintiff argued the tow company did not follow the state statutory procedure providing for the disposal of the car once it completed the tow and the Supreme Court

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[6] In a footnote on p. 3 of the opposition, Plaintiff also states that Courts have held that the preemption statute does not apply to personal injury actions or to claims of discrimination. (Opposition, p. 3, fn. 1, citing *Aquino v. Asiana Airlines, Inc.* (2003) 105 Cal.App.4th 1272 (*Aquino*).) First, a court may decline to address arguments made exclusively in a footnote. (See *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.) Second, on a motion for summary judgment, the First District Court of Appeal determined that the Airline Deregulation Act of 1978 "does not preempt state law personal injury and discrimination causes of action that have only a peripheral effect on deregulation." The *Aquino* Court did not address fraud or the FAAAA and is therefore inapposite.

determined that the state statute was only applicable after the towing ended and therefore was not connected to the transportation of property. (See Reply, p. 2:11-16, citing *Dan's*, *supra*, 569 U.S. at p. 255.) Defendants contend that the key holding in *Dan's* is that the FAAAA preemption applies only where the statute regulation directly or indirectly involves rates, routes, and services tied to the transportation of property, and in this case, the allegations involve rates for the transportation of Plaintiff's property. (Reply, p. 2:21-25.)

The Court finds Defendants' interpretation of *Dan's* to be persuasive. At issue in *Dan's* was Chapter 262 of the New Hampshire Revised Statutes Annotated ("Chapter 262") which established procedures by which an authorized official or the owner of any private property on which a vehicle is parked without permission may arrange to have the vehicle towed and stored and after 30 days, if the vehicle is unclaimed, the custodian of the vehicle may dispose of it. (*Dan's*, *supra*, 569 U.S. at p. 257.) The Supreme Court explained that "Chapter 262 addresses 'storage companies' and 'garage owners or keepers,' not transportation activities." (*Id.* at p. 263.) The Court continued that Chapter 262 "has neither a direct nor an indirect connection to any transportation services a motor carrier offers its customers." (*Ibid.*) The *Dan's* Court concluded the FAAAA did not preempt the owner's claims under state law stemming from the storage and disposal of the vehicle after the vehicle was towed. (*Id.* at p. 251.)

In this case, the allegations pertain to the rate Defendants charged Plaintiff for transporting Plaintiff's property from Indiana to California. (See FAC, ¶¶ 11-12, 43-44.) While the dispute regarding the charge occurred after the transportation took place, the fraud claim is still directly related to the transportation services provided by Defendants. (See e.g., *People v. Superior Court (Cal Cartage Transportation Express, LLC)* (2020) 57 Cal.App.5th 619, 629 [the phrase "related to" in the FAAAA embraces state laws having a connection with or reference to carrier rates, routes, or services, whether directly or indirectly.] Thus, the demurrer to the third cause of action may be sustained on the ground it is preempted by the FAAAA.

Accordingly, the demurrer to the third cause of action is SUSTAINED without leave to amend. (See *McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 105 ["'where the nature of plaintiff's claim is clear, but under substantive law no liability exists, leave to amend should be denied, for no amendment could change the result'"].)

III. Conclusion and Order

The demurrer to the third cause of action is SUSTAINED without leave to amend. The Court shall prepare the final order.

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Calendar line 4
Case Name: Nationwide Agribusiness Insurance Company vs Rahsa Hubbard
Case No.: 22CV396838

COMPEL FUTHER RESPONSES TO SI, SET ONE AND FI, SET ONE

Good cause appearing, plaintiff Nationwide Agribusiness Insurance Company ("Plaintiff")'s motion to compel further responses to Special Interrogatories ("SI") set one and Form Interrogatories ("FI") set one served upon defendant Rahsa Hubbard is GRANTED. Defendant shall provide verified code-compliant further responses to SI set one, Nos. 1-3, and FI set one, Nos. 102.1, 102.5, 102.11, 104.1, 112.1, 112.2, 112.3, 114.1, 120.1, 120.2, 120.3, 120.4, and 120.8. within 60 days.

Where a response to interrogatories has been made, but the propounding party is not satisfied with it, the remedy is a motion to compel further responses. (Cal. Code of Civ. Proc. ("CCP") §2023.300; see *Best Products, Inc. v. Sup Ct.* (*Granatelli Motorsports, Inc*.) 119 Cal.App.4th 1181, 1189-1190.)

Monetary sanctions are recoverable against the party engaging in discovery misconduct. (CCP section 2023.030(a).) Misuses of the discovery process include [making without substantial justification, an unmeritorious objection to discovery] and making an evasive response to discovery. (CCP section 2023[.010, subd. (e) and (f).]

Plaintiff's request for monetary sanctions [for the motion to compel further responses to SI set one and FI set one] against Defendant in the reasonable amount (of 4.5 hours at $350 per hour plus $60 filing fee for a total of) $1,635 is GRANTED. Defendant shall pay this amount to Plaintiff within 60 days.

Plaintiff's request for monetary sanctions against defense counsel is DENIED. There are other circumstances that make the imposition of sanctions against defense counsel unjust.

Defendant's request to continue the motion for 60 days to allow defense counsel adequate time to locate Defendant and respond is DENIED. However, the court has allowed Defendant 60 days to provide further responses and pay monetary sanctions considering the circumstances.

The court will prepare the order.

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Calendar Line 5

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Calendar Line 6
Case Name: Hugo Bravo Aragon et al vs Signature Concrete, LLC
Case No.: 23CV425040

Petition to Compel Arbitration for Plaintiff Hugo Bravo Aragon by Defendant Signature Concrete, LLC

Defendant Signature Concrete, LLC ("Defendant")'s motion for an order staying this matter pending a ruling on this motion pursuant to Code of Civil Procedure section 1281.4 and the court inherent authority to control its proceedings is GRANTED.

Defendant's motion for an order compelling arbitration pursuant to the terms of a binding and enforceable arbitration agreement that plaintiff Hugo Bravo Aragon ("Plaintiff") executed on or about November 9, 2021, is GRANTED.

Defendant's motion for an order dismissing this action is DENIED. Defendant's motion for alternatively staying this action pending [completion of the] arbitration of Plaintiff's claim is GRANTED.

Federal and State Law Strongly Favor Enforcement of Arbitration Agreements

Federal and California law strongly favor the enforceability of arbitration agreements and require that – where parties have agreed to arbitrate – they must do so in lieu of litigating in court. (*Buckeye Cheek Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443; *Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25; *Harris v. Tap Worldwide, LLC* (2016) 248 Cal.App.4th 373, 380 ["California law favors enforcement of valid arbitration agreements."]; the United States Arbitration Act, commonly referred to as the Federal Arbitration Act or "FAA"; California Arbitration Act, CCP § 1280 et seq., "CAA".) In almost identical language, each Act makes arbitration agreements valid, irrevocable, and enforceable except on grounds that exist for revocation of any type of contract generally. (Code Civ. Proc., § 1281; 9 U.S.C. § 2; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 701.)

The FAA

The FAA creates a strong presumption in favor of arbitration. (*Nguyen v. Applied Med. Res. Corp.* (2016) 4 Cal.App.5th 232, 245.) Its main purpose is to "ensur[e] that private arbitration agreements are enforced according to their terms" and it "preempts any state law rule that "stand[s] as an obstacle to the accomplishment of the FAA's objectives." (*Nguyen, supra,* 4 Cal.App.5th at p. 246, quoting *Carbajal v. CWPSC* (2016) 245 Cal.App.4th 227, 238.) The FAA applies to contracts in the employment context where the employment affects interstate commerce. (*Carmax Auto Superstores Cal. LLC v. Hernandez* (9th Cir. 2015) 94 F.Supp.3d 1078, 1099.)

The FAA provides that "[a] written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) The phrase "involving commerce" is the "functional equivalent of affecting commerce," which is "a term of art that ordinarily signals the broadest permissible exercise of Congress's commerce clause power." (*Nguyen, supra,* 4 Cal.App.5th at p. 246 (citations omitted).) The minimal nexus to interstate commerce required by the FAA exists here.

Under the FAA, the basic role for this Court is to determine whether the movant has shown that: (1) a valid arbitration agreement exists and, if so, (2) the arbitration agreement encompasses the claims at issue. (*Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947, 955-56.) The party opposing arbitration must demonstrate that the arbitration agreement is invalid. (*See Green Tree Fin. Corp. v. Randolph* (2000) 531 U.S. 79, 91-92.) Doubts as to whether Plaintiff's claims are subject to arbitration must be resolved in favor of arbitration. (*See Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25; *A&T Tech., Inc. v. Communication Workers of Am.* (1986) 475 U.S. 643, 650.)

The CAA

The CAA requires courts to enforce arbitration clauses where one party has shown the existence of an agreement to arbitrate that encompasses the dispute in question, unless the party opposing arbitration demonstrates that the petitioner waived the right to compel arbitration, or that grounds exist for revocation of the agreement. (*See* Code Civ. Proc., § 1281.2; *see generally St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187.) The CAA states in relevant part:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court **shall order** the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) [t]he right to compel arbitration has been waived by the petitioner; or (b) [g]rounds exist for the revocation of the agreement.

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"The party seeking arbitration bears the initial burden of demonstrating the existence of an arbitration agreement." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223; *see also United Steelworkers of Am. V. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582-83 [courts must defer to arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute…"]; *Vianna v. Doctor's Management Co.* (1994) 27 Cal.App.4th 1186, 1189 [any "[d]oubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration."].)

There is Valid Arbitration Agreement

Defendant has met its initial burden of demonstrating the existence of an arbitration agreement between the parties by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.394, 396*; Condee v. Longwood Mgmt. Corp.* (2001) 88 Cal.App.4th 215, 218-19.) Defendant's payroll and human resources assistant, Paola Jimenez, conducted Plaintiff's onboarding, personally presented him with a copy of the agreement, explained its meaning in Spanish, watched him sign the agreement before storing it in his personnel file. The arbitration agreement includes "all disputes that may arise between them that are in any way related to Employee's employment by Employer, including but not limited to disputes regarding termination of employment and compensation." (Jimenez Decl. ¶ 7, Ex. 1.) All the claims in Plaintiff's complaint are "related to Employee's employment by

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Here, the arbitration agreement provides that the claims "shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"), in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. Sec 1280 *et seq.*, including section 1283.05 and all of the Acts's other mandatory and permissive rights to discovery.) The parties here agree that the FAA applies to this agreement because Employer's business involves substantial Interstate commerce." (Jimenez Decl. ¶ 7, Ex. 1.)

The Agreement Complies with the Requirements Set Forth in *Armendariz*

In *Armendez v. Foundation Health Psychare Services Inc.* (2000) 24 Cal.4th 83, the California Supreme Court set forth five requirements for the enforcement of arbitration agreements in the employment contest. An arbitration agreement must: (1) provide for a neutral arbitrator; (2) provide for more than minimal discovery; (3) require the arbitrator to issue a written decision; (4) provide for the same remedies that would otherwise be available to the employee in court; and (5) not require the employee to bear costs unique to arbitration. (*Id*., at pp. 102-13.) As set forth in Defendant's moving papers, the arbitration agreement signed by Plaintiff meets all these requirements.

Unconscionability

The party opposing arbitration bears the burden of proving any defense, such as unconscionability. (*Harris*, *supra*, 248 Cal.App.4th at 380-81; *Pinnacle Museum Tower Ass'n*, *supra*, 55 Cal.4th at 236.) Unconscionability is lack of meaningful choice by one party, plus contact terms unreasonably favorable to the other. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243.) The burden to prove a defense is a heavy one, because the law favors arbitration. (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1347; *Titolo v. Cano* (2007) 157 Cal.App.4th 310, 316.)

To establish a defense to enforcement of the parties' arbitration agreement based on unconscionability, Plaintiff bears the burden of demonstrating "both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one side results." (*Baltazar*, *supra*, 62 Cal.4th at 1243, citing *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 133 [emphasis added].) "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree…. [T]he more

substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Baltazar, supra,* 62 Cal.4th at 1244, citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.)

Procedural Unconscionability

Procedural unconscionability is present when the way an agreement is negotiated involves (i) oppression and/or (ii) surprise. (*Armendariz*, 24 Cal.4th at 114.) "[There are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. ...Contracts of adhesion involve surprise or other sharp practices lie on the other end of the spectrum. (*Baltazar, supra,* 62 Cal.4th at 1244.) Court's "must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement." (*Armendariz, supra,* 24 Cal.4th at 115.) "Where an adhesive contract is oppressive, surprise need not be shown to establish procedural unconscionability. [Citation.]" (*Bakersfield College v. California Community College Athletic Assn.* (2019) 41 Cal.App.5th 753, 764 [internal quotations omitted].) "'When the weaker party is presented the clause and told to 'take it or leave it' *without the opportunity for meaningful negotiation*, oppression, and therefore procedural unconscionability, are present.' [Citation.]" *(Id*., at 762 [emphasis added].)

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"Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 853.) "An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis.' [Citations]" (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126.)

"Analysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion--i.e., a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms. (*Armendariz, supra*, 24 Cal. 4th at pp. 113-114; [Citations].) A finding of a contract of adhesion is essentially a finding of procedural unconscionability. [Citations]." (*Flores, supra,* 93 Cal.App.4th at 853.)

> "The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1348, fn. omitted.) With respect to *preemployment* arbitration contracts, we have observed that "the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz, supra*, 24 Cal.4th at p. 115.)

(*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126-127.)

Surprise

"Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. [Citation.]" (*Flores, supra,* 93 Cal.App.4th at 853.)

> "Unfair surprise results from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice. [Citations.]" ([(*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154,] at p. 173, fn. omitted.)
>
> "'[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. … Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum.'" (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.)

(*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 214.)

Substantive Unconscionability

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create an overly harsh or one-sided result. (*Armendariz, supra,* 24 Cal.4th at 114.) Where provisions of the arbitration contract are unconscionable, courts may sever or restrict the operation of those provisions. (*Id*. at 124.) Where the "central purpose of the contract is tainted with illegality," then severance is not appropriate and the contract should be voided. (*Ibid.*) Where "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage [,]" voiding the contract rather than severing the unconscionable provisions is appropriate. (Ibid.) "Although procedural unconscionability alone does not invalidate a contract, its existence requires courts to closely scrutinize the substantive terms 'to ensure they are not manifestly unfair or one-sided.'" (*OTO, supra*, 8 Cal.5th at 130.)

Plaintiff's Arguments and Analysis

Plaintiff argues the Arbitration Agreement is unenforceable because it is unconscionable. Plaintiff bears the burden of proving unconscionability. *(Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal. App. 4th 704, 708.)

Plaintiff contends that he does not speak, read, or write in English, therefore he was not able to competently understand the arbitration agreement that was given to him upon his hiring.

However, "[t]he general rule is that, when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding." *(Palmquist v. Mercer* (1954) 43 Cal. 2d 92, 98.) Moreover, "[a]n arbitration clause within a contract may be binding on a party even if the party never actually read the clause. (Citations omitted.)." *(Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1418; *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 163 ["It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.") The general rule applies even if a person does not speak or understand English. (See *Ramos v. Westlake Service LLC* (2015) 242 Cal.App.4th 674, 687 [Under general contract principles, signing a contract in a language plaintiff did not completely understand would not bar enforcement because if he did not speak or

understand English sufficiently to comprehend the English contract, he should have had it read or explained to him].)

In *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74; defendant provided Spanish translations for some portions of the employment agreement but not for others, which indicated that defendant knew plaintiffs required Spanish translations and did not read and understand English sufficiently. *(Id.* at 50-51.) This factor, along with others, supported a finding a procedural unconscionability. *(Id.)*

Similarly, in *Penilla v. Westmont Corporation* (2016) 3 Cal.App.5th 205, defendants knew plaintiffs were not proficient in English and informed plaintiffs in Spanish that they were required to sign the rental agreements without providing any information about the arbitration provision or its terms and failed to give plaintiffs sufficient time to review the agreements. *(Id.* at 216.)

Here, the declaration by Jimenez acknowledges that he "explained to [Plaintiff], in Spanish, that by signing the agreement, he was agreeing that any legal disputes between him and Signature would be resolved in individual, private arbitration, and that he would waive his right to trial by jury. [Plaintiff] did not ask me for any further explanation of the agreement." (Jimenez Decl. ¶ 8.) The fact that Jiminez was speaking in Spanish to Defendant indicated that he was aware that Plaintiff required a Spanish translation of the arbitration agreement. Indeed, Jiminez claims that he "provide[s] Spanish speaking new hires with forms in Spanish when available. When Spanish versions are not available, [Jiminez] explain[s] the meaning of the document and answer[s] any questions the employee has, including interpreting the document if requested." (Jimenez Decl. ¶ 5.)

Plaintiff further argues the Arbitration Agreement did not contain, and Defendant did not provide, copies of the applicable arbitration rules. However, an employer's failure to provide copies of the arbitration rules does not render an employment agreement procedurally unconscionable per se. (See, e.g., *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179-180, citing *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 246, fn. 9.)

In summary, considering all the facts and circumstances, this court finds that the arbitration agreement is a contract of adhesion and there is a high degree of procedural unconscionability.

Substantive Unconscionability

While Plaintiff suggests the arbitration agreement is substantively unfair merely by being an arbitration agreement, that is not supported by existing law.

A provision is substantively unconscionable if it "involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1322.)

In assessing substantive unconscionability, the "paramount consideration" is mutuality of the obligation to arbitrate. *(Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal. App. 4th 1267, 1287.) "[I]t is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'" *(Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 117; *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1174 [applying Calif, law, unilateral agreement presumed substantively unconscionable]; *Baltazar v. Forever 21, Inc., supra,* 62 Cal.4th at 1248-1249 [agreement listing only employee claims as examples of types arbitrable not unfairly one-sided if it

requires arbitration of all employment related claims].) An agreement lacks mutuality if it requires one party but not the other to arbitrate claims. (*Armendariz, supra*, 24 Cal.4th at p.120.)

Here, the only clause that Plaintiff pointed to in his opposition papers as being substantively unconscionable was a purported conflict between the arbitration agreement's fee award provision and California law. Without quoting the arbitration agreement's language, Plaintiff argues that "[t]he clause states that the arbitrator can grant attorney's fees and costs to any party, **at their discretion**." (See Plaintiff's Opp., p. 5 [emphasis added].) However, Plaintiff's *unpersuasive* argument ignores the actual language of the arbitration agreement which states:

> "Employer shall pay all of AAA/JAMS costs, including arbitrator's fees, for nonfrivolous claims. The burden of all other litigation expenses, including attorney's fees, shall be decided by the arbitrator **according to California law.**" (Jimenez Decl. ¶ 7, Ex. 1 [emphasis added].)

Accordingly, no such conflict exists because of the language "shall be decided by the arbitrator **according to California law.**" (*Id*.) Furthermore, the arbitration agreement states that "the arbitrator shall have discretion to award all appropriate remedies, including but not limited to monetary damages, punitive damages, restitution, and injunctive relief the arbitrator deems appropriate, **but only to the extent consistent with law**." (Jimenez Decl. ¶ 7, Ex. 1 [emphasis added].)

As there is no substantive unconscionability, Plaintiff has not satisfied his burden of proof that the arbitration agreement is unconscionable. Accordingly, Plaintiff is ordered to arbitrate all his claims alleged in this action in accordance with the binding arbitration agreement and as such, this matter is STAYED pending completion of the arbitration.

The court will prepare the order.

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Calendar Line 7
Case Name: Hugo Bravo Aragon et al vs Signature Concrete, LLC
Case No.: 23CV425040

Petition to Compel Arbitration for Plaintiff Cristian Villa Perez by Defendant Signature Concrete, LLC.

Defendant Signature Concrete, LLC ("Defendant")'s motion for an order staying this matter pending a ruling on this motion pursuant to Code of Civil Procedure section 1281.4 and the court inherent authority to control its proceedings is GRANTED.

Defendant's motion for an order compelling arbitration pursuant to the terms of a binding and enforceable arbitration agreement that plaintiff Christian Villa Perez ("Plaintiff") executed on or about March 12, 2021, is GRANTED.

Defendant's motion for an order dismissing this action is DENIED. Defendant's motion for alternatively staying this action pending [completion of the] arbitration of Plaintiff's claim is GRANTED.

Federal and State Law Strongly Favor Enforcement of Arbitration Agreements

Federal and California law strongly favor the enforceability of arbitration agreements and require that – where parties have agreed to arbitrate – they must do so in lieu of litigating in court. (*Buckeye Cheek Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443; *Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25; *Harris v. Tap Worldwide, LLC* (2016) 248 Cal.App.4th 373, 380 ["California law favors enforcement of valid arbitration agreements."]; the United States Arbitration Act, commonly referred to as the Federal Arbitration Act or "FAA"; California Arbitration Act, CCP § 1280 et seq., "CAA".) In almost identical language, each Act makes arbitration agreements valid, irrevocable, and enforceable except on grounds that exist for revocation of any type of contract generally. (Code Civ. Proc., § 1281; 9 U.S.C. § 2; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 701.)

The FAA

The FAA creates a strong presumption in favor of arbitration. (*Nguyen v. Applied Med. Res. Corp.* (2016) 4 Cal.App.5th 232, 245.) Its main purpose is to "ensur[e] that private arbitration agreements are enforced according to their terms" and it "preempts any state law rule that "stand[s] as an obstacle to the accomplishment of the FAA's objectives." (*Nguyen, supra,* 4 Cal.App.5th at p. 246, quoting *Carbajal v. CWPSC* (2016) 245 Cal.App.4th 227, 238.) The FAA applies to contracts in the employment context where the employment affects interstate commerce. (*Carmax Auto Superstores Cal. LLC v. Hernandez* (9th Cir. 2015) 94 F.Supp.3d 1078, 1099.)

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Under the FAA, the basic role for this Court is to determine whether the movant has shown that: (1) a valid arbitration agreement exists and, if so, (2) the arbitration agreement encompasses the claims at issue. (*Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947, 955-56.) The party opposing arbitration must demonstrate that the arbitration agreement is invalid. (*See Green Tree Fin. Corp. v. Randolph* (2000) 531 U.S. 79, 91-92.) Doubts as to whether Plaintiff's claims are subject to arbitration must be resolved in favor of arbitration. (*See Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25; *A&T Tech., Inc. v. Communication Workers of Am.* (1986) 475 U.S. 643, 650.)

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"Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 853.) "An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis.' [Citations]" (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126.)

"Analysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion--i.e., a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms. (*Armendariz, supra*, 24 Cal. 4th at pp. 113-114; [Citations].) A finding of a contract of adhesion is essentially a finding of procedural unconscionability. [Citations]." (*Flores, supra,* 93 Cal.App.4th at 853.)

> "The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1348, fn. omitted.) With respect to *preemployment* arbitration contracts, we have observed that "the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz, supra*, 24 Cal.4th at p. 115.)

(*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126-127.)

Surprise

"Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. [Citation.]" (*Flores, supra,* 93 Cal.App.4th at 853.)

> "Unfair surprise results from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice. [Citations.]" ([(*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154,] at p. 173, fn. omitted.)
>
> "'[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. … Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum.'" (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.)

(*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 214.)

Substantive Unconscionability

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create an overly harsh or one-sided result. (*Armendariz, supra,* 24 Cal.4th at 114.) Where provisions of the arbitration contract are unconscionable, courts may sever or restrict the operation of those provisions. (*Id*. at 124.) Where the "central purpose of the contract is tainted with illegality," then severance is not appropriate and the contract should be voided. (*Ibid.*) Where "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage [,]" voiding the contract rather than severing the unconscionable provisions is appropriate. (Ibid.) "Although procedural unconscionability alone does not invalidate a contract, its existence requires courts to closely scrutinize the substantive terms 'to ensure they are not manifestly unfair or one-sided.'" (*OTO, supra*, 8 Cal.5th at 130.)

Plaintiff's Arguments and Analysis

Plaintiff argues the Arbitration Agreement is unenforceable because it is unconscionable. Plaintiff bears the burden of proving unconscionability. *(Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal. App. 4th 704, 708.)

Plaintiff contends that he does not speak, read, or write in English, therefore he was not able to competently understand the arbitration agreement that was given to him upon his hiring.

However, "[t]he general rule is that, when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding." *(Palmquist v. Mercer* (1954) 43 Cal. 2d 92, 98.) Moreover, "[a]n arbitration clause within a contract may be binding on a party even if the party never actually read the clause. (Citations omitted.)." *(Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1418; *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 163 ["It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.") The general rule applies even if a person does not speak or understand English. (See *Ramos v. Westlake Service LLC* (2015) 242 Cal.App.4th 674, 687 [Under general contract principles, signing a contract in a language plaintiff did not completely understand would not bar enforcement because if he did not speak or

understand English sufficiently to comprehend the English contract, he should have had it read or explained to him].)

In *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74; defendant provided Spanish translations for some portions of the employment agreement but not for others, which indicated that defendant knew plaintiffs required Spanish translations and did not read and understand English sufficiently. *(Id.* at 50-51.) This factor, along with others, supported a finding a procedural unconscionability. *(Id.)*

Similarly, in *Penilla v. Westmont Corporation* (2016) 3 Cal.App.5th 205, defendants knew plaintiffs were not proficient in English and informed plaintiffs in Spanish that they were required to sign the rental agreements without providing any information about the arbitration provision or its terms and failed to give plaintiffs sufficient time to review the agreements. *(Id.* at 216.)

Here, the declaration by Jimenez acknowledges that he "explained to [Plaintiff], in Spanish, that by signing the agreement, he was agreeing that any legal disputes between him and Signature would be resolved in individual, private arbitration, and that he would waive his right to trial by jury. [Plaintiff] did not ask me for any further explanation of the agreement." (Jimenez Decl. ¶ 8.) The fact that Jiminez was speaking in Spanish to Defendant indicated that he was aware that Plaintiff required a Spanish translation of the arbitration agreement. Indeed, Jiminez claims that he "provide[s] Spanish speaking new hires with forms in Spanish when available. When Spanish versions are not available, [Jiminez] explain[s] the meaning of the document and answer[s] any questions the employee has, including interpreting the document if requested." (Jimenez Decl. ¶ 5.)

Plaintiff further argues the Arbitration Agreement did not contain, and Defendant did not provide, copies of the applicable arbitration rules. However, an employer's failure to provide copies of the arbitration rules does not render an employment agreement procedurally unconscionable per se. (See, e.g., *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179-180, citing *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 246, fn. 9.)

In summary, considering all the facts and circumstances, this court finds that the arbitration agreement is a contract of adhesion and there is a high degree of procedural unconscionability.

Substantive Unconscionability.

While Plaintiff suggests the arbitration agreement is substantively unfair merely by being an arbitration agreement, that is not supported by existing law.

A provision is substantively unconscionable if it "involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1322.)

In assessing substantive unconscionability, the "paramount consideration" is mutuality of the obligation to arbitrate. *(Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal. App. 4th 1267, 1287.) "[I]t is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'" *(Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 117; *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1174 [applying Calif, law, unilateral agreement presumed substantively unconscionable]; *Baltazar v. Forever 21, Inc., supra,* 62 Cal.4th at 1248-1249 [agreement listing only employee claims as examples of types arbitrable not unfairly one-sided if it

requires arbitration of all employment related claims].) An agreement lacks mutuality if it requires one party but not the other to arbitrate claims. (*Armendariz, supra*, 24 Cal.4th at p.120.)

Here, the only clause that Plaintiff pointed to in his opposition papers as being substantively unconscionable was a purported conflict between the arbitration agreement's fee award provision and California law. Without quoting the arbitration agreement's language, Plaintiff argues that "[t]he clause states that the arbitrator can grant attorney's fees and costs to any party, **at their discretion**." (See Plaintiff's Opp., p. 5 [emphasis added].) However, Plaintiff's *unpersuasive* argument ignores the actual language of the arbitration agreement which states:

> "Employer shall pay all of AAA/JAMS costs, including arbitrator's fees, for nonfrivolous claims. The burden of all other litigation expenses, including attorney's fees, shall be decided by the arbitrator **according to California law.**" (Jimenez Decl. ¶ 7, Ex. 1 [emphasis added].)

Accordingly, no such conflict exists because of the language "shall be decided by the arbitrator **according to California law.**" (*Id*.) Furthermore, the arbitration agreement states that "the arbitrator shall have discretion to award all appropriate remedies, including but not limited to monetary damages, punitive damages, restitution, and injunctive relief the arbitrator deems appropriate, **but only to the extent consistent with law**." (Jimenez Decl. ¶ 7, Ex. 1 [emphasis added].)

As there is no substantive unconscionability, Plaintiff has not satisfied his burden of proof that the arbitration agreement is unconscionable. Accordingly, Plaintiff is ordered to arbitrate all his claims alleged in this action in accordance with the binding arbitration agreement and as such, this matter is STAYED pending completion of the arbitration.

The court will prepare the order.

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