SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: February 27, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED.

FOR ORAL ARGUMENT: **Before 4:00 PM today you must notify the:**

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

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

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

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:

https://www.scscourt.org/general_info/court_reporters.shtml

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.

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	20CV370750	MARK BELMESSIERI vs RACHEL DEPALMA	Parties are ordered to appear.
2	23CV411588	Mark Porter vs County of Santa Clara Sheriff's Office	Plaintiff's discovery motion is MOOT. Please scroll down to lines 2, 4-5, 12-13 for full tentative rulings. Parties are ordered to appear for argument; Court to prepare formal order.
3	22CV405290	Scott Yu et al vs Eric Yuan et al	Defendants' Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to line 3 for full tentative ruling. Court to prepare formal order.
4	23CV411588	Mark Porter vs County of Santa Clara Sheriff's Office	The County's Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to lines 2, 4-5, 12-13 for full tentative rulings. Parties are ordered to appear for argument; Court to prepare formal order.
5	23CV411588	Mark Porter vs County of Santa Clara Sheriff's Office	The County's motion to strike is MOOT. Please scroll down to lines 2, 4-5, 12-13 for full tentative rulings. Parties are ordered to appear for argument; Court to prepare formal order.
6	22CV397470	Hai Nguyen et al vs Ramesh Balakrishnan et al	This motion was withdrawn by the moving party on February 13, 2024.
7	22CV404170	Scott Johnson vs Dry Creek Grill, Inc.	Notice of unconditional settlement filed February 15, 2024; this matter is off calendar.
8	19CV359785	Bh Financial Group, Llc , A Limited Liability Company vs Derrick Pugh	Derrick Pugh's Claim of Exemption is GRANTED, IN PART. Mr. Pugh's wages shall be garnished $50 per pay period until the debt is satisfied. Court to prepare formal order.
9	20CV370750	MARK BELMESSIERI vs RACHEL DEPALMA	Parties are ordered to appear for the hearing. Defendant asserts that she paid Plaintiff in accordance with the Court's orders, but Plaintiff refused the checks. Although these payments may have been late, if made, they reflect Plaintiff's substantial compliance with the Court's orders. The Court orders Defendant to produce evidence of these payments and Plaintiff to confirm receipt.
10	22CV396774	Gregory Young vs D&L Movers et al	Gregory Young's Motion to Enforce Settlement is GRANTED. A notice of motion with this hearing date and time was served by mail on Defendants on January 19, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The parties also stipulated to the Court retaining jurisdiction to enforce their settlement as a judgment pursuant to Code of Civil Procedure section 664.6. The settlement agreement required Defendants to make an initial $16,000 payment, then ten $5,000 monthly payments. (Settlement Agreement, ¶ 1.) Defendants made the $16,000 payment and one $5,000 payment, although both were late. (Declaration of Gregory Young, ¶3, Ex. A.) Defendants have made no further payments. (*Id.*) The settlement agreement also provides for attorney's fees to the prevailing party. (Settlement Agreement, ¶12.) Plaintiff is thus entitled to judgment in the amount of the unmade payments, plus late fees, and attorney's fees according to proof. Plaintiff shall provide the Court with a declaration detailing attorney's fees incurred to enforce the Settlement Agreement and a form of judgment three weeks from service of this formal order. Court to prepare formal order.

11	22CV408553	DAVID JENKS vs DOE DEFENDANT 1 et al	Defendants moved to consolidate Case Nos. 22CV408584, 22CV408553, 22CV409052, and 22CV408884. Plaintiffs filed dismissals without prejudice in Case Nos. 22CV409052, 22CV408884, and 22CV408553. However, the clerk's office did not enter these requests because of some technical problems with the filings. If Plaintiffs still intend to dismiss these three cases, they are ordered to email corrected notices of dismissal to Department6@scscourt.org before the time for the hearing on Defendants' motion to consolidate, and the Court will process these dismissals, rendering Defendants' motion moot. If, however, Plaintiffs have had a change of heart, the Court will consolidate these four cases pursuant to Code of Civil Procedure section 1048(a). Plaintiffs to prepare dismissals, or, if cases remain pending, Court will prepare formal order.
12	23CV411588	Mark Porter vs County of Santa Clara Sheriff's Office	Plaintiff's motion to toll the statute of limitations is not appropriately made as a motion and is therefore DENIED WITHOUT PREJUDICE. Please scroll down to lines 2, 4-5, 12-13 for full tentative rulings. Parties are ordered to appear for argument; Court to prepare formal order.
13	23CV411588	Mark Porter vs County of Santa Clara Sheriff's Office	Plaintiff's motion for relief is DENIED. Please scroll down to lines 2, 4-5, 12-13 for full tentative rulings. Parties are ordered to appear for argument; Court to prepare formal order.
14	23CV417015	Keep America Safe and Beautiful vs Selini New York, Inc.	Defendant's Motion to Approve Consent Judgment is GRANTED. Moving party to prepare formal order.
15	23CV424872	Silverio V. Zuniga vs Alesia Murrieta et al	Plaintiff's Motion for Interlocutory Judgment of Partition and Appointment of Referee is GRANTED. Please scroll down to line 15 for full tentative ruling. Court to prepare formal order granting the motion; moving party to submit from of Interlocutory Judgment and Appointment of Referee.
16	22CV405831	Cornelius Lopes vs Law Offices of Patricia Turnage et al	Case transferred to Alameda County as of February 22, 2024; order to show cause accordingly off calendar.

Calendar Lines 2, 4-5, 12-13
Case Name: *Mark Porter v. County of Santa Clara Sheriff's Office*
Case No.: 23CV411588

Before the Court is (1) Defendant County of Santa Clara's (the "County")[1] demurrer to plaintiff Mark James Porter's second amended complaint; (2) the County's motion to strike portions of the SAC; (3) Plaintiff's motion to toll/suspend the statute of limitations; (4) Plaintiff's motion for relief; and (5) Plaintiff's discovery motion. Pursuant to California Rule of Court 3.1308, the Court issues its tentative rulings below.

I. Background

This is a personal injury matter arising out of incidents that occurred during Plaintiff's incarceration. On August 7, 2020, a deputy twisted Plaintiff's wrist over tightened handcuffs, causing injury. (SAC, p. 40; Attachment to Complaint, p. 4.)[2] On October 3, 2020, another deputy challenged Plaintiff because he refused orders to confront another inmate. (*Ibid*.) Plaintiff identifies another incident on October 29, 2020. (SAC, Exh. G.)

Plaintiff initiated this action on March 1, 2023, asserting a claim for general negligence. On March 16, 2023, he filed his FAC, which asserted claims for general negligence, intentional tort, and constitutional violations. On September 7, 2023, the Court issued its order (the "Order") sustaining the demurrer to Plaintiff's FAC with leave to amend. On September 25, 2023, Plaintiff filed his SAC, which asserts claims for general negligence, intentional tort, and constitutional violations.[3]

II. Plaintiff's Motion to Allow Tolling or Suspend the Statute of Limitations

On September 25, 2023, Plaintiff filed a motion to allow tolling or to suspend the statute of limitations.

A. Plaintiff's Request for Judicial Notice

Plaintiff requests judicial notice, however, he does not identify any items to be judicially noticed. Thus, the request for judicial notice is DENIED.

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[1] The County was erroneously sued as the County of Santa Clara Sheriff's Office.
[2] The SAC is the operative pleading, however, Plaintiff failed to include any attachments for his claims in the SAC, thus the Court will refer to the attachment for the statement of facts from the Complaint.
[3] Plaintiff adds a sexual assault claim in his SAC. However, the Order only permitted leave to amend the existing claims; it expressly did not permit Plaintiff to add new claims: "the Court does not grant leave to amend to add new parties or new claims." (Order, 6:6-7.)

B. Analysis

Plaintiff does not identify a legal basis for this motion. The statute of limitations is suspended through tolling, however, the Court does not consider tolling arguments on a separate motion. Thus, the motion is DENIED. However, the Court will address Plaintiff's arguments regarding tolling the statute of limitations in connection with the County's demurrer and motion to strike.

III. Plaintiff's Motion for Relief

Plaintiff appears to seek relief from the claim presentation requirement of the Government Claims Act, which is governed by Government Code section 946.6.[4]

A. Legal Standard

The Government Claims Act requires a plaintiff to present a claim to a public entity before filing a complaint in Superior Court. (Gov. Code, § 945.4.) "[F]ailure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239 (*State of California*); see also Gov. Code, §§ 911.2, 945.4.) A claimant must file suit against the public entity or its employee within six months after a written notice of rejection of the claims is "personally delivered or deposited by mail." (Gov. Code, § 945.6, subd. (a)(1).) If written notice of rejection is not given, suit must be filed within two years after the cause of action accrued. (Gov. Code, § 945.6, subd. (a)(2).)

A personal injury claim must be filed within six months of the accrual of the cause of action. (Gov. Code, § 911.2) "When a claim…is not presented within that time, a written application may be made to the public for leave to present that claim." (Gov. Code, § 911.4.) The application shall be submitted "within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim." (Gov. Code, § 911.4, subd. (b).) If the application is denied or deemed denied, a petition may be made to the court for an order relieving the petitioner from Section 954.4. (Gov. Code, § 946.6, subd. (a).)

A court does not relieve a potential plaintiff of the claim requirement under Section 945.4 as a matter of course. (*City of Fresno v. Superior Court* (1980) 104 Cal.App.3d 25.) The plaintiff must first

[4] Plaintiff cites to California Code of Regulations section 632.8, which involves an application to present a late claim and contains the same time limit and categories for relief as Section 946.6.

demonstrate by a preponderance of evidence that the claim was presented within a reasonable time, and that the failure to file a timely claim was due to mistake, inadvertence, surprise, or excusable neglect. (*Ibid*; see also *Moore v. California* (1984) 157 Cal.App.3d 715, 721.)

> The mere recital of mistake, inadvertence, surprise, or excusable neglect is not sufficient to warrant relief. Relief…is available only on a showing that the claimant's failure to timely present the claim was reasonable when tested by the objective "reasonable prudent person" standard…
>
> There must be more than the mere failure to discover a fact; the party seeking relief must establish the failure to discover the fact in the exercise of reasonable diligence. The party seeking relief based on a claim of mistake must establish he was diligent in investigating and pursuing the claim and must establish the necessary elements justifying relief by the preponderance of the evidence.

(*Dep't of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293.)

Section 946.6 is a remedial statute and "should be liberally construed. However, this does not mean relief…should be granted casually. As noted above, a petitioner must show more than his or her failure to discover a fact until it was too late; *the petitioner must establish that in the use of reasonable diligence he or she failed to discover it*." (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1783-1784 [emphasis added].)

B. Analysis

1. Untimely Claims Presentation

The accrual date for purposes of the government presentation deadline is the date on which the cause of action accrues for the running of the statute of limitations. (Gov. Code, § 901.) The accrual date begins on the date of injury or when the last element essential to the cause of action occurs. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931.) The statute of limitation for "an action for assault, battery, or injury to… caused by the wrongful act or neglect or another" is two years. (Code Civ. Proc., § 335.1.)

Plaintiff repeatedly concedes that his claims accrued on August 7, 2020; October 3, 2020; and October 29, 2020. Plaintiff contends that his injuries fully manifested on January 25, 2022, however he

fails to allege any facts in support of this assertion, and it is not clear to the Court what injuries Plaintiff refers to, since his claims arise from alleged incidents during his incarceration. Plaintiff states he was incarcerated until August 3, 2021, however his incarceration does not toll the time limit for presenting a government claim. (Code Civ. Proc., § 352.1, subd. (b) ["This section does not apply to an action against a public entity…upon a case of action for which a claim is required to be presented in accordance with [Section 900, et al.]"].) Even if the Court considers January 25, 2022, the date of accrual, Plaintiff failed to timely satisfy the presentation requirement as he did not present his claims until March 1, 2023. (SAC, p. 6.)

2. Relief From the Government Claims Filing Requirement

Plaintiff requests relief on the basis of (1) mistake, (2) his incarceration, (3) Probate Code section 811, subdivision (d)(4), and (4) the fact that his injury manifested at a later time. Plaintiff's second and fourth arguments were addressed above.

Government Code, section 946.6, subdivision (c)(1), allows relief if the Petitioner can establish that "[t]he failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect…" (Gov. Code, § 946.6, subd. (c)(1).) Plaintiff states he filed a complaint form against the County of Santa Clara Board of Supervisors under the impression that it was the Government Claim Act form. (Motion for Relief, p. 1.) Plaintiff further explains that after the October 29, 2020, incident, he was advised to file a lawsuit and the request was forwarded to the chaplain. (Motion for Relief, pp. 2-3.) On December 2, 2020, the chaplain gave Plaintiff some information for pro bono attorneys and explained that there were dozens of forms. (Motion for Relief, p. 3.) Plaintiff states he was under the impression that he sent the notice to the Board of Supervisors office on January 21, 2021, and then he spoke with Catholic Charities, which had him sign another Government Claims Act form, which was to be sent to the Board of Supervisors. (Motion for Relief, p. 3.) Plaintiff fails to provide a copy of this form or any evidence that it was sent to the Board of Supervisors. Moreover, Plaintiff does not allege any efforts to follow up on the form or his claims while incarcerated or after his release even though he was aware of the facts giving rise to his claims during that time and the process of bringing a claim against a government entity. As a result, Plaintiff fails to allege reasonable diligence to follow up on his claim. (See *Munoz*, 33 Cal.App.4th at 1783-1784.)

Plaintiff also requests relief under Probate Code section 811, subdivision (a)(4), which provides:

> A determination that a person is of unsound mind or lacks capacity to make a decision or do a certain act, including but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decisions or acts in question:
>
> (4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness, apathy, or indifference, that is inappropriate in degree to the individual's circumstances.

(Prob. Code, § 811, subd. (a)(4).) "A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question." (Prob. Code, § 811, subd. (b).)

Plaintiff states he suffers several mental health disorders, including PTSD, OCD, Bipolar, and Antisocial disorder. (Motion for Relief, p. 2.) A determination that Plaintiff is of unsound mind has not been made and one cannot be made on this motion. Plaintiff also fails to allege when or how he was impaired. The Court does not dispute that Plaintiff suffers from these mental health conditions, however, it does not appear they impair him such that he can be determined to be of unsound mind. (See Prob. Code, § 811, subd. (b).) Plaintiff also provides no authority, and the Court is not aware of any, that allows a Plaintiff to use this section for relief from the Government Claims Act presentation requirement.

Government Code section 911.4, specifically states: "(a) When a claim that is required by Section 911.2 to be presented not later than six months after the accrual of the cause of action is not presented within such time, a written application may be made to the public entity for leave to present such claim. (b) the application shall be presented to the public entity…within a reasonable time *not to exceed one year* after the accrual of the cause of action and shall state the reason for the delay in

presenting the claim." (Gov. Code, § 911.4, subd. (b) [emphasis added].) "Filing a late-claim application within one year after the accrual of a cause of action is a jurisdictional prerequisite to a claim-relief petition. (*Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 713.) When the underlying application to file a late claim is filed more than one year after the accrual of the cause of action, the court is without jurisdiction to grant relief under Section 946.6. (*Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 488.) (*Munoz,* 33 Cal.App.4th at 1779 (emphasis added).)

Plaintiff's claims accrued on October 29, 2020, at the latest. Thus, Plaintiff had until April 29, 2021, to present his claim, which he did not do. (Gov. Code, §§ 912.4, 912.6.) Plaintiff had until October 29, 2021, to file a written application to the County for leave to present his claims. He did not file the application until September 19, 2023, almost two years after the deadline. Even if the Court applies a January 25, 2022, accrual date, Plaintiff had until July 25, 2022 to present his claim and until January 25, 2023 to file the application for leave to present his late claims. Plaintiff did not file for the application for leave to present a late claim until September 18, 2023, which exceeds the one year deadline of the actual accrual date of the claims *and* Plaintiff's requested date of accrual. Therefore, the Court is without jurisdiction to grant relief under Section 946.6. (*Greyhound,* 187 Cal.App.3d at 488.) Thus, Plaintiff's motion for relief is DENIED.

IV. The County's Demurrer

A. Requests for Judicial Notice

The County asks the Court to take judicial notice of Plaintiff's complaint, filed on March 1, 2023. (See Evid. Code, § 452, subd. (d).) With respect to court records, the law is settled that "the court will not consider the truth of the document's contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375.) With this caveat, the County's request is GRANTED.

Plaintiff submits a request for judicial notice, but he does not identify the items for which he is requesting judicial notice. Thus, Plaintiff's request for judicial notice is DENIED.

B. Legal Standard for a Demurrer

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

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) Courts may consider matters subject to judicial notice and evidentiary facts found in exhibits attached to a complaint on demurrer. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

The County demurs to each claim on the grounds that it is time-barred, Plaintiff failed to satisfy the presentation requirement of the Government Claims Act, the County is immune from liability, it fails to identify a statutory basis for the claim, and fails to allege sufficient facts to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e) & (f).)

C. Analysis

1. Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (*Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "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." (*Ibid*.)

"[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.)

The County identifies uncertainty as a basis for the demurrer in the notice of motion, however, it fails to offer any argument regarding uncertainty in the memorandum of points and authorities. The pleading is also not so unintelligible that the County cannot reasonably respond to it. (*Khoury*, 14 Cal.App.4th at 616.) Thus, the demurrer on the basis of uncertainty is OVERRULED.

2. <u>Statute of Limitations</u>

The statute of limitations for personal injury claims is two years. (Code Civ. Proc., § 335.1.) A cause of action under 42 U.S.C. § 1983 is subject to the forum state's statute of limitations for personal injury torts. (*Shalabi v. City of Fontana* (2021) 11 Cal.5th 842, 847.) "Federal law determines…when the statute of limitations begins to run for a [Section] 1983 claim." (*Belanus v. Clark* (9th Cir. 2015) 796 F.3d 1021, 1025.) "Under federal law, a cause of action accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action." (*Ibid*.)

Plaintiff's claims are based on incidents which occurred on August 7, 2020 to October 29, 2020. Plaintiff commenced this action on March 1, 2023, which is more than two years after the last incident occurred. Plaintiff argues the statute of limitations for his claims were tolled during his incarceration.

Code of Civil Procedure section 352.1, provides:

(a) If a person entitled to bring an action… is, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal charge for a term less than for life, the time of that disability is not part of the time limited for the commencement of the action, not to exceed two years…

(b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented…

(c) This section does not apply to an action, other than an action to recover damages or that portion of an action that is for the recovery of damages, relating to the conditions of confinement, including an action brought by that person pursuant to Section 1983 of Title 42 of the United States Code.

(Code Civ. Proc., § 352.1, subd. (a)-(c).)

Plaintiff's state claims are not tolled by Section 352.1 both because he was required to present his claims to the County and because he was in county jail, not state prison. (Code Civ. Proc., § 352.1, subd. (b); *Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 ["Therefore, a would-be plaintiff is imprisoned on a criminal charge within the meaning of [Section] 352.1 if he or she is serving a term of imprisonment in the state prison] [emphasis added].)

The presentation requirement does not apply to claims brought under 42 U.S.C. § 1983. (See *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713.) However, the statute of limitations tolling under Section 352.1 does not apply to claims brought under Section 1983. (See Code Civ. Proc., § 352.1, subd. (c).) Therefore, Plaintiff's claims accrued at latest on October 29, 2020. Plaintiff filed his action on March 1, 2023, which is over two years after the claims accrued, and his state and Section 1983 claims are time-barred.

3. <u>Compliance with the Government Claims Act</u>

As the Court stated above, Plaintiff failed to comply with the presentation requirement of the Government Claims Act, and the Court is without jurisdiction to grant relief under Section 946.6. (See *Greyhound*, 187 Cal.App.3d at 488.)

Plaintiff does not request leave to amend his SAC. It also does not appear to the Court that Plaintiff can successfully amend the SAC given the above analysis. Accordingly, the County's demurrer to the SAC is SUSTAINED without leave to amend. (*Camsi IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1542 (*Camsi IV*)["absent an effective request for leave to amend in specified ways," it is an abuse of discretion to deny leave to amend "only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case"]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*) ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"], quoting *Cooper v. Leslie Salt Co*. (1969) 70

Cal.2d 627, 636 (*Cooper*); *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 (*Hendy*) ["the burden is on the plaintiff… to demonstrate the manner in which the complaint might be amended"].)

V. The County's Motion to Strike

Given the Court's ruling sustaining the County's demurrer without leave to amend, the County's motion to strike allegations regarding punitive damages and any new claims from the SAC is MOOT.

VI. Plaintiff's Discovery Motion

Plaintiff requests documents be produced under Rule 34 of the Federal Rules of Civil Procedure.

It does not appear that this is a motion to compel production of the documents but rather an initial request to the County to produce the requested documents. Plaintiff does not assert the County failed to respond to any request, and the County states it served responses to Plaintiff's request. (Opp., 2:22-24.) Given this, and the Court's ruling on the County's demurrer, Plaintiff's discovery motion is MOOT.

Calendar Line 3
Case Name: *Scott Yu v. Zoom Video Communications, Inc. et.al.*
Case No.: 22CV405290

Before the Court is Defendants Zoom Video Communications, Inc.'s and Eric Yuan's demurrer to Plaintiff Scott Yu's second amended complaint ("SAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling below.

I. Background

This action arises from breach of an alleged contract. According to the SAC, on October 27, 2011, Mr. Yuan solicited Plaintiff, a software engineer specializing in user-interface ("UI") designs, via email to provide UI design services for his project, which would later become known as Zoom. The email designated Plaintiff as "UI consultant," and his job was to provide his professional opinions and make recommendations for improving the product's UI.

Between October 27, 2011, and October 29, 2011, Mr. Yaun and Plaintiff exchanged emails regarding contract terms, eventually entering a Shares-for-Services Agreement ("Agreement") on October 29, 2011. Under the Agreement, Plaintiff was to receive 20,000 shares of Zoom's stock in exchange for his UI services and his continued consultation through June 2012. The shares were to be held by Mr. Yuan or Zoom, safeguarded, and transferred to Plaintiff after Zoom's Initial Public Offering ("IPO").

Plaintiff completed his UI services on December 23, 2011. On April 18, 2019, Zoom became a public company via an IPO. On October 3, 2019, Mr. Yuan informed Plaintiff that the agreed upon shares would not be transferred to him.

Plaintiff filed suit on September 28, 2022, and subsequently filed a First Amended Complaint asserting breach of contract, breach of fiduciary duty, fraud and securities fraud under Corporations Code section 25401. Defendants demurred, and by order dated August 25, 2023, the Court sustained the demurrer with 10 days leave to amend as to all claims except for the claim under Corporations Code section 25401, which claim the Court sustained without leave to amend because it is barred by the statute of limitations.

Plaintiff filed the SAC on September 14, 2023, alleging (1) breach of contract by Mr. Yuan, (2) breach of contract by Zoom, (3) breach of fiduciary duty by Mr. Yuan, (4) breach of fiduciary duty by

Zoom, (5) fraud based on deceit by false promise by Mr. Yuan, and (6) fraud based on deceit by false promise by Zoom.

II. Legal Standard

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

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) Courts may consider matters subject to judicial notice and evidentiary facts found in exhibits attached to a complaint on demurrer. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) It is the plaintiff's burden to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id*.)

III. Analysis

A. First & Second Causes of Action: Breach of Contract

To properly state a claim for breach of contract Plaintiff must allege: (l) the existence of contract; (2) Plaintiff's performance or excuse for nonperformance; (3) Defendant's breach; and (4) damage to Plaintiff resulting from that breach. (*Careau Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.)

Contract interpretation is a question of law for the court to determine. (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 472.) "The overriding goal of contract interpretation is to give effect to the mutual intentions of the parties at the time of contracting, 'so far as the same is ascertainable and lawful.'" (*South Pacific Transportation Co. v. Santa Fe Pacific* (1999) 74 Cal.App.4th 1232, 1240, citing Civil Code §1636.) The language of a contract governs its interpretation, if said language is clear, unambiguous and does not involve absurdity. (*National Marble Co. v. Bricklayers & Allied Craftsmen* (1986) 184 Cal.App.3d 1057, 1067.) If two or more interpretations of a contract provision are reasonable, it will be considered ambiguous. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 878.) To resolve ambiguities in a contract the court generally looks at the ordinary meaning of the words of the contract, the circumstances under which it was drawn up and the intent of the parties. (*Id.*)

For a contact to exist, a meeting of the minds must occur on all material terms. "[T]he failure to reach a meeting of the minds on all material points prevents the formation of a contract even though the parties have [] agreed upon some of the terms, or have taken some action related to the contract." (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358.) Contract formation is governed by objective manifestations, not the subjective intent of any individual involved. (*Atlas Assurance Co. v. McCombs Corp.* (1983) 146 Cal.App.3d 135, 144; *Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942-943.) The test is "what the outward manifestations of consent would lead a reasonable person to believe." (*Meyer v. Benko*, 55 Cal.App.3d at 942-943.)

For an offer and acceptance to constitute a binding contract, the offer must be squarely assented to, and the acceptance must be absolute and unqualified. (Civil Code § 1585; *Landberg v. Landberg*, (1972) 24 Cal.App.3d 742, 750, 752.) A valid acceptance of an offer must be unconditional and must "in every respect correspond with the offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they are stated." (*Yore v. Bankers &*

Merchants Mutual Life Association of U.S. (1891) 88 Cal. 609; *Robbins v. Pacific Eastern Corp*. (1937) 8 Cal.2d 241, 276; *Banner Entertainment*, 62 Cal.App.4th at 359.)

Plaintiff claims that in exchange for his UI services for the Zoom App, Mr. Yuan promised in his personal capacity to transfer 20,000 shares of Zoom's stock to him after its IPO. The stocks were to be transferred from either Mr. Yuan's personal portfolio or by Zoom if the Agreement was assigned to Zoom. (SAC, ¶ 114.) Consistent with the terms of their Agreement, Plaintiff asked for the transfer of the stocks after Zoom's IPO in April 2019. Mr. Yuan breached their Agreement when he refused to transfer the stocks in a text communication on October 3, 2019. (SAC, ¶ 116.)

Plaintiff argues in his opposition and alleges in his SAC: "The Email string that began on October 27, 2011, and ending on October 29, 2011, includes all of the elements of contract formation, including offer, counteroffers, the exchange of mutual consideration in the form of valuable promises, and finally words of acceptance by Mr. Yuan, in his Individual capacity, on October 29, 2011 when a Meeting of the Minds was reached, thereby completing formation of the Shares-for-Services Agreement, and was subsequently confirmed and performed by Plaintiff." (SAC, ¶ 113.) The Court is not persuaded.

In an email sent to Plaintiff on October 27, 2011, Mr. Yuan wrote:

> " … I am so excited that we can get your help during this exciting journey … I attach our current client …. Please play around and let us know how to make it look cool and more professional from visual UI perspective …. Appreciate it if you can keep what we are doing confidential and please do not distribute the client to any others …. Please let me know your opinion on stocks you would like to get. To start with, you will be our UI consultant. We would like you to join permentally [sic] sometime next year after we close the Series A founding…."
>
> (SAC, ¶ 23, Ex. B.)

On October 28, 2011, Plaintiff responded:

> Yes, I am open to joining full time next year if that's possibility. In terms of stock, I am thinking 20,000 shares and no cash…. I have done other work for several very early stage startups… and have done PowerPoint presentations for them to show VCs. The amount of stock is usually around 10,000 shares but the work is more marketing related and

timeframe [sic] for project is usually 1-2 months. Since this is more product related, I am thinking 20,000 options or shares to come up with visual design for the client on various platforms. I am estimating I'll be working part time over a span of 3-4 months while the clients are developed in that timeframe, If it goes beyond that timeframe with additional work, maybe get some more shares?...

(SAC, ¶ 30, Ex. C.)

Approximately an hour later Mr. Yuan responds:

Given that we only grant $40k stock options with a 4-year exercise plan for senior engineers, so 20,000 is not a small amount… However, I do trust you and enjoy the past working experiences with you a lot…so 20,000 shares is OK with one request below: "It will be busy in the next 3 months till the end of Jan, 2012 as we are developing the product, but the work load will be much less after that, so I want to check it is if it is possible for you to sign up a one year consultant role till the end of Oct. 2012…" (SAC, ¶ 33, Ex. D.)

These emails evince negotiation, not a meeting of the minds on all essential terms. Plaintiff proposed he receive 20,000 shares of stock by using the words "I am thinking" and the question mark at the end of his "thought". Mr. Yuan agreed to give Plaintiff 20,000 on the condition that Plaintiff sign up for one year as a consultant. This condition was expressed clearly, and its importance was further emphasized by using quotation marks around the paragraph containing the condition. Responding to Mr. Yuan's conditional offer, on October 29, 2011, Plaintiff wrote:

I understand but a full hire would have full pay with benefits and the stocks is a nice bonus whereas I agree to only stock and there is chance I get nothing at the end. Plus if company grows and position opens, I like the opportunity to come in as full-time next year if that is an option.

How about I stay on as consultant til June 2012 and we can decide after that? (SAC, ¶ 37, Ex. E.)

Mr. Yuan responds:

> Excellent! End of June works well as I guess by then you already come on board as the regular employee …Thanks much for help, Scott. Let's work together to build a cool product! (SAC, ¶ 54, Ex. G.)

Contrary to Plaintiff's assertions, these Exhibits do not demonstrate a meeting of minds or a binding written contract. Plaintiff's response was not an unequivocal assent to Mr. Yuan's conditional offer. As demonstrated by his question, his response, at best, was a counter-offer to Mr. Yuan's one-year consultancy condition for obtaining 20,000 shares. While Exhibit G shows Mr. Yuan's assent to Plaintiff's shorter consultancy period, there is no language indicating his willingness to waive the one-year requirement and/or to pay 20,000 shares despite this reduced service period. Instead, Mr. Yuan writes that Plaintiff will be joining as a regular employee. Mr. Yuan's response did not correspond with Plaintiff's Exhibit E counter-offer and was not unqualified.

Exhibits E and G also contain no language to even remotely support the allegation that Mr. Yuan agreed to hold and safeguard 20,000 shares and deliver them to Plaintiff on a date after the IPO. Plaintiff alleges no *facts* to support his "unilateral belief" that Mr. Yuan agreed to do this. Conclusory statements at SAC paragraphs 36, 49, 66, 120, 133 that "Mr. Yuan, like Plaintiff, also understood that Plaintiff's Zoom stock wasn't to be transferred until after the IPO" are not facts. Plaintiff alleges no further conversations with, actions by, or even interactions with Mr. Yuan that suggest, much less demonstrate, Mr. Yuan's agreement in his personal capacity or in his capacity as a Zoom executive to hold 20,000 shares for Plaintiff until Zoom experienced a liquidity event.

Plaintiff's SAC fails to allege a meeting of the minds between Plaintiff and Mr. Yuan personally or in his capacity as a Zoom executive. Plaintiff has already amended twice and relies on the same evidence each time. Plaintiff does not demonstrate what more can be added to survive demurrer. The Court thus SUSTAINS Defendants' demurrer WITHOUT LEAVE TO AMEND.

B. Third & Fourth Causes of Action for Breach of Fiduciary Duty

"In order to plead cause of action for breach of fiduciary duty, there must be shown the existence of fiduciary relationship, its breach, and damage proximately caused by that breach. The absence of any one of these elements is fatal to the cause of action." (*Brown v. California Pension Administrators Consultants, Inc*. (1996) 45 Cal.App.4th 333, 347-348; CACI, No. 605.) "While breach of fiduciary duty

is question of fact, the existence of legal duty in the first instance and its scope are questions of law." (*Kirschner Brothers Oil, Inc. v. Natomas, Co.* (1986) 185 Cal.App.3d 784, 790.) "Before a person can be charged with fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another or must enter into relationship which imposes that undertaking as matter of law." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 632.) However, "[a] mere contract or debt does not constitute trust or create fiduciary relationship." (*Id*. at 634; see also *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30-31.)

Plaintiff alleges a fiduciary relationship was created when Mr. Yuan:

(1) assented to the formation of the Agreement and accepted the delayed transfer of the stocks until after the IPO (SAC, ¶ 27);

(2) asked him to start UI services without an agreement on the number of shares he would receive in exchange. Plaintiff understood Mr. Yuan wanted him to trust that (a) he would agree to a fair Agreement, (b) the Agreement would be structured to avoid unnecessary dilution and taxable events, and (c) he, in his personal capacity and as agent for Zoom, would safeguard and protect Plaintiff's interest in Zoom Stock (SAC, ¶¶ 27, 139);

(3) made certain confidential disclosures about Zoom's stock in October 2011and wrote in the Exhibit D email, "…I do trust you and enjoy the past working experiences with you a lot…." As a result, "Plaintiff believed he should put his fiduciary trust in Mr. Yuan regarding the offer of 20,000 shares…" (SAC, ¶¶ 32, 140);

Defendants contend Plaintiff fails to allege facts showing they knowingly agreed to act on Plaintiff's behalf and subordinate their interests to his. Opposing the demurrer, Plaintiff argues, (1) the Agreement also served as a "stock purchase agreement," (2) Mr. Yuan acted as promotor of the "stock offering" that formed a constituent part of the Agreement, (3) the Agreement implicitly required Mr. Yuan to perform additional acts under Civ. Code § 1656, e.g., record the shares in Zoom's ledger, properly apply stock split, and include the shares in Zoom's S-1 registration statement, and (4) as a beneficial shareholder, who didn't receive the shares due to breach of contract, he is owed an independent fiduciary duty.

First, in testing the validity of a complaint against a demurrer, courts must look exclusively at the facts alleged in the complaint. Plaintiff's opposition sets forth new facts that the Agreement served as a stock purchase agreement and Mr. Yuan acted as promoter of stock offering. An opposition to a demurrer is not the proper place to plead additional, new facts pertaining to an additional, new claim. (See *Childs v. State of California*, (1983) 144 Cal. App. 3d 155; *SKF Farms v. Superior Court*, (1984) 153 Cal.App.3d 902; *BGJ Associates, LLC v. Superior Court*, (1999) 75 Cal.App.4th 952.)

Second, Plaintiff's equating the Agreement to a stock purchase agreement lacks merit since the sole purpose of such agreements is the sale of stocks for valuable consideration. In contrast, the purpose of the Agreement was to obtain Plaintiff's UI services and the shares of stock were exchanged consideration.

Third, as stated above, a contract was not formed between the parties and there was no meeting of the minds that either Mr. Yuan or Zoom would hold and safeguard Plaintiff's shares until after an IPO. Plaintiff alleges no facts showing either Mr. Yuan or Zoom knowingly undertook the act of holding 20,000 shares of stock for Plaintiff from 2011 to 2019 or until after an IPO. Nor are fiduciary obligations necessarily and automatically created when one party entrusts valuable intellectual property to another for commercial development. (*City of Hope Nat's Med. Ctr. V. Genentech, Inc.* (2008) 43 Cal. 4th 375, 391-92.)

The Court finds a fiduciary relationship was not created between the parties. Therefore, there is no need for the Court to analyze whether this claim is barred by the applicable statute of limitations.

Defendants' demurrer to the third and fourth causes of action is SUSTAINED WITHOUT LEAVE TO AMEND.

C. Fifth & Sixth Causes of Action for Fraud Based on Deceit by False Promise

"The elements of fraud are (1) the defendant made false representation as to past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.) "To maintain an action for deceit based on false promise, one must specifically allege and prove, among other things, that the promisor did not intend to perform at the

time he or she made the promise and that it was intended to deceive or induce the promise to do or not do particular thing. Given this requirement, an action based on false promise is simply a type of intentional misrepresentation, i.e., actual fraud." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) Cal.App.4th 153, 159.) "It is not sufficient to allege fraud or its elements upon information and belief, unless the facts upon which the belief is founded are stated in the pleading." (*Findley v. Garrett* (1952) 109 Cal.App.2d 166, 176.)

In his fraud cause of action, Plaintiff alleges:

(1) Mr. Yuan, in his individual capacity, made a false promise to transfer 20,000 shares of Zoom's stock to Plaintiff when he wrote in the Exhibit D that "… 20,000 shares is Ok."

(2) This false promise was made to induce Plaintiff to provide UI services.

(3) Mr. Yuan intended to induce Plaintiff's services when, in Exhibit G, he accepted Plaintiff's counterproposal to shorten employment availability to nine months.

(4) After Plaintiff provided his UI services and following Zoom's IPO, Mr. Yuan sent a text stating "we can't grant any stock without signing 12 months advisor work," in direct contravention of the availability terms he agreed to in Exhibit E.

(5) Mr. Yuan knew on October 29, 2011 at the inception of the Agreement that the shortened nine-month term violated Zoom's policy for stock consideration. Therefore, his acceptance of the shortened availability term was a deceptive and a malicious plan to disavow the obligation to transfer the stocks to Plaintiff.

(6) Mr. Yuan intentionally led Plaintiff to believe he would honor his fiduciary trust and transfer his Zoom's stock to Plaintiff after the IPO. At no time before October 3, 2019, did Mr. Yuan tell Plaintiff he would not transfer his Zoom stock to him after the IPO.

(7) Plaintiff justifiably did not ask for the transfer of the stocks prior to October 3, 2019, because the Agreement provided for the transfer after the IPO, and Mr. Yuan had the obligation to disclose his intend not to transfer the shares.

(8) Plaintiff did not discover Mr. Yuan's deceit and intent to harm until October 3, 2019. (SAC ¶¶ 155-172)

Again, Plaintiff fails to allege a statement made by Mr. Yuan indicating he intended to hold Zoom's shares for Plaintiff until a liquidity event and then transfer them to Plaintiff thereafter. As stated above, no contract was formed between the parties and there was no provision that explicitly or implicitly delayed the transfer of the stocks to after the IPO. Plaintiff misstates Mr. Yuan's statement in Exhibit D, where he agreed to give Plaintiff 20,000 shares of stock on the condition that Plaintiff remain available as a consultant for one year. Plaintiff fails to allege Mr. Yuan made an unconditional promise to give Plaintiff 20,000 shares in consideration for his UI services—either in his personal capacity or as Zoom's executive.

Accordingly, Defendants" demurrer to the fifth and sixth causes of action is SUSTAINED WITHOUT LEAVE TO AMEND.

D. Leave to Amend

Plaintiff asserts Defendants fail to show the SAC is incapable of amendment, and, if so required, Plaintiff will provide additional facts and allegations to support his claims.

However, it is Plaintiff who has the burden of showing how the complaint can be amended to state a legitimate cause of action. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.) Plaintiff fails to meet his burden here. Plaintiff alleges the same facts in his SAC as he alleged in his FAC, which the Court earlier found insufficient. (August 25, 2023 Order.) The same defects afflict Plaintiff's SAC. The Court cannot reasonably infer what new factual allegations can be added to support a meeting of the minds regarding Defendants' alleged obligation to hold 20,000 shares for an unidentified period then to transfer 20,000 those shares to Plaintiff after a liquidity event.

The Court accordingly DENIES leave to amend.

Calendar Line 15
Case Name: *Silverio V. Zuniga vs Alesia Murrieta et al*
Case No.: 23CV424872

Before the Court is Plaintiff's Motion for Interlocutory Judgment of Partition and Appointment of Referee. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff filed this action on October 23, 2023 seeking partition of a single family residence located at 455 W. Main Avenue, Morgan Hill, CA 95037 (the "Property"). Plaintiff Silverio V. Zuniga and Defendant Esther Velador Zuniga are mother and son. Esther Zuniga is the Trustee of the Ester V. Zuniga Revocable Living Trust Dated December 20, 2004 ("Trust"). Defendant Alesia Murrieta is the Successor Trustee under the terms of the Trust and Esther Zuniga's granddaughter.

The facts are not disputed. Esther Zuniga and her ex-husband, Plaintiff's father, purchased the Property as their residence in 1972. On July 2, 2003, Plaintiff's father/Esther Zuniga's ex-husband gifted fifty percent of the Property to Plaintiff, leaving Esther Zuniga with fifty percent of the Property. Shortly thereafter, Plaintiff became estranged from the rest of the family for 20 years when, in July 2023, Plaintiff moved into the Property's backyard, where he has been living ever since.

Plaintiff contends he has been deprived of living in the Property even though he owns fifty percent of it. Defendants contend Plaintiff has been abusive, waived his right to partition, and it would be unfair to force Esther Zuniga who is 81 and lived in the Property nearly her entire life to move out, which would be required if the Court partitioned the Property as Plaintiff requests.

II. Legal Standard and Analysis

In a partition action, the court must find (1) the plaintiff has a right to partition; (2) determine the ownership interests of the parties; and (3) direct the manner of partition. (Code Civ. Pro. §§872.710, 872.910.) If plaintiff has a right to partition and the ownership interests of the parties are indisputable, the court "shall" appoint a partition referee. (Code Civ. Pro. §872.010.) "A co-owner of property has an absolute right to partition unless barred by a valid waiver." (*Orien v. Lutz* (2017) 16 Cal.app.5th 957; Code Civ. Pro. §872.710(b); *Bacon v. Wahrhaftig* (1950) 97 Cal.App.2d 599, 603; *American Medical International, Inc. v. Feller* (1976) 59 Cal.App.3d 1008, 1013; *Miranda v. Miranda* (1947)

81Cal.App.2d 61, 68.) A waiver may be found where there is a writing evincing "an agreement among co-owners of a property. . .." (*Orien v. Lutz* (2017) 16 Cal.app.5th 957, 963.)

The parties do not dispute that each owns a 50% interest in the Property. Defendants" argument that the grant deeds are ambiguous are not persuasive and do not change this fact. Thus, elements (1) and (2), above are clearly met: Plaintiff is entitled to partition, and the parties" ownership interest in the Property is undisputed. Defendants nevertheless argue the Court should deny partition essentially because it would be unfair. While Defendants separate this argument into waiver and equity, it is really the same argument. Namely, the Property was purchased by Defendant Esther Zuniga and her ex-husband to be their life-long residence, and it would therefore be unfair to thwart that earlier agreement by permitting Plaintiff to force a sale of the Property through partition.

The Court agrees that selling this Property is painful and difficult for Defendants. However, the law dictates partition in this situation; in fact, partition was designed for such situations. Defendants cite case law demonstrating Plaintiff steps into his father's shoes for purposes of waiver but fail to cite cases supporting that waiver occurred here. Cases where courts have found waiver in the partition context are rare and typically include a writing or known prior restriction. (See, e.g., *American Medical International, Inc. v. Feller* (1976) 59 Cal.App.3d 1008, 1013; *Pine v. Tiedt* (1965) 232 Cal. App. 2d 733; *Thomas v. Witte* (1963) 214 Cal. App. 2d 322; *Miranda v. Miranda* (1947) 81Cal.App.2d 61, 68.) This is unsurprising, since if an implied waiver could be found on these facts, the very purpose of partition would be frustrated.

Accordingly, Plaintiff's motion for interlocutory judgment and appointment of partition referee is GRANTED.