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

**Department 10**
**Honorable Frederick S. Chung**

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

**DATE: August 27, 2024 TIME: 9:00 A.M.**

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

**The courthouse is open:** Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

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

**CourtCall is no longer available**: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

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

**Court reporters**: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 17CV315735 | Funding Circle USA, Inc. v. K&S Realty, Inc. et al. | Order of examination: parties to appear. |
| LINE 2 | 24CV433145 | Rich McInnis v. Select Portfolio Servicing, Inc. et al. | Click on LINE 2 or scroll down for ruling. |
| LINE 3 | 24CV433741 | Wen Luo v. Fanbo Zhang | Click on LINE 3 or scroll down for ruling. |
| LINE 4 | 21CV375176 | James Estrada v. City of San Jose | Motion for summary judgment: notice is proper, and the motion is unopposed. Upon review of the moving papers, the court concludes that the City has met its initial burden of showing that there is no triable issue of material fact regarding the negligence and premises liability causes of action. The motion is GRANTED. Moving party to prepare formal order for court's signature. |
| LINE 5 | 21CV388134 | Metropolitan Direct Property and Casualty Insurance Company v. Rafael Loera | Motion for summary judgment: notice is proper, and the motion is unopposed. The court finds that plaintiff has met its initial burden of showing that there is no triable issue of material fact as to its claims, given defendant's admissions. (Code Civ. Proc. § 437c, subd. (p).) The motion is GRANTED. Moving party to prepare formal order for court's signature. |
| LINE 6 | 22CV393460 | Henry Lippincott v. Arash Hassibi et al. | Click on LINE 6 or scroll down for ruling. |
| LINE 7 | 22CV403017 | Applied Materials, Inc. v. Huu T. Vu et al. | Click on LINE 7 or scroll down for ruling in lines 7-8. |
| LINE 8 | 22CV403017 | Applied Materials, Inc. v. Huu T. Vu et al. | Click on LINE 7 or scroll down for ruling in lines 7-8. |

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 9 | 20CV369203 | Jane Doe 1 et al. v. Don Adrian Garcia Francisco et al. | Motion to strike or tax costs: notice is proper, the motion is unopposed, and the court finds good cause to GRANT the motion and strike the amount of the property report ($4.95) and mediation fee ($385). This leaves the amount of allowable costs as $3,940.21. Contrary to plaintiffs' apparent contention, CourtCall fees ($94) are expressly permitted under Code of Civil Procedure section 367.6, subdivision (c), even though the court does not understand why anyone in this day and age is still using CourtCall. Plaintiffs shall submit a proposed order consistent with this minute order. |
| LINE 10 | 23CV425133 | Samuel Flores v. Miroslava Flores et al. | This is a motion to consolidate the present civil case, filed on November 2, 2023, with an ongoing probate case (No. 21PR190255), filed more than two years earlier, on May 21, 2021. Because the motion seeks to consolidate this later-filed case into that earlier-filed probate case, it should have been brought in the probate case, not here. It is up to the judge in the probate case (in Department 1) to decide whether the causes of action here should be consolidated with the causes of action there. Accordingly, the court takes this motion OFF CALENDAR and suggests that defendant bring it in the proper action. |

**- oo0oo -**

**Calendar Line 2**
**Case Name:** *Rich McInnis v. Select Portfolio Servicing, Inc. et al.*
**Case No.:** 24CV433145

Plaintiff Rich McInnis filed this action for declaratory relief, quiet title, violation of Business and Professions Code section 17200, and violation of Civil Code section 2923.6 against defendants Select Portfolio Servicing, Inc. ("SPS") and Arastradero Venture Partners, LLC ("Arastradero"), based on McInnis's ownership of 897 Georgetown Place, San Jose, CA 95126. SPS now demurs to the first, third, and fourth causes of action in the first amended complaint ("FAC"). For the reasons set forth below, the court OVERRULES the demurrer.

## I. BACKGROUND

According to the FAC, McInnis owns real property at 897 Georgetown Place, San Jose, California (the "Subject Property"). (FAC, ¶ 2.) On or around October 13, 2006, McInnis obtained a first position refinancing loan on the Subject Property, with SPS servicing the loan. (*Id.* at ¶ 15.) He then began experiencing financial difficulties. On or about August 19, 2022, a notice of default was allegedly recorded on the Subject Property. (*Id.* at ¶ 17.) On September 11, 2023, a notice of trustee's sale was allegedly recorded on the Subject Property. (*Id.* at ¶ 18.) After this, McInnis spoke to SPS's loan modification department to inquire about applying for a modification. (*Id.* at ¶ 19.) McInnis alleges that he could not provide a tax filing as part of his application for a modification, but SPS's agents told him he could file a hardship letter in lieu of a tax filing. (*Ibid*.) McInnis alleges that on or about March 11, 2024, he submitted a loan modification application with SPS that included the hardship letter. (*Id.* at ¶ 20.) SPS then conducted a trustee's sale on March 27, 2024, with Arastradero purchasing the Subject Property. The trustee's deed upon sale was recorded on April 19, 2024. (*Id.* at ¶¶ 21-22.)

McInnis filed his initial complaint on March 14, 2024 and the operative FAC on May 10, 2024. The FAC alleges causes of action for (1) violations of California Civil Code section 2923.6; (2) quiet title; (3) violations of California Business and Professions Code section 17200 *et seq.*; and (4) declaratory relief.

## II. REQUESTS FOR JUDICIAL NOTICE

### A. SPS's Request

In support of its demurrer to the first, third, and fourth causes of action, SPS requests that the court judicially notice five exhibits. (Request for Judicial Notice in Support of Demurrer ("SPS RJN"), pp. 2-4.) Exhibit 1 is a copy of McInnis's ex parte application for a temporary restraining order ("TRO") in this matter, filed on March 20, 2024. Exhibit 2 is a copy of McInnis's second ex parte application for a TRO in this matter, filed on March 26, 2024. Exhibit 3 is the court's March 25, 2024 order denying the first TRO application. Exhibit 4 is the court's March 29, 2024 order denying the second application. Exhibit 5 is a copy of a trustee's deed of sale, instrument no. 25625670, recorded on April 19, 2024 in Santa Clara County.

SPS cites Evidence Code section 452, subdivisions (c), (d), and (h), in support. (See SPS RJN, pp. 2-4.) Section 452, subdivision (c), permits a court to take judicial notice of "official acts of the legislative, executive, and judicial departments of the United States and of

any state of the United States." Section 452, subdivision (d), permits a court to take judicial notice of "records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." Section 452, subdivision (h), permits a court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

The court may take judicial notice of recorded deeds. (See *Maryland Casualty Co. v. Reeder* (1990) 221 Cal. App. 3d 961, 977; see also *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal. App.4th 1106, 1116 [upholding judicial notice of various recorded documents related to the deed of trust securing a promissory note].) "[A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal. App. 4th 256, 265 (*Fontenot*), disapproved on another ground in *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal. 4th 919, 937.)

The court grants judicial notice of Exhibits 1-5.

**B. McInnis's Request**

In support of his opposition to SPS's demurrer, McInnis requests that the court judicially notice Exhibit 1, which is attached to his opposition. (Request for Judicial Notice in Support of Plaintiff's Opposition to the Demurrer ("McInnis RJN"), p. 2.) It is a redacted copy of McInnis's own declaration in support of his ex parte application for a TRO, filed on April 11, 2024.

McInnis cites Evidence Code section 452, subdivision (d), in support. (See McInnis RJN, pp. 2-4.) Evidence Code section 452, subdivision (d), permits a court to take judicial notice of "records (1) any court of this state or (2) any court of record of the United States or of any state of the United States." "Although a court is authorized to take judicial notice in connection with a demurrer [citation], it may not judicially notice the truth of assertions in declarations or affidavits filed in court proceedings." (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864-864, citing Code Civ. Proc., § 430.30, subd. (a); see also *South Lake Tahoe Property Owners Group v. City of South Lake Tahoe* (2023) 92 Cal.App.5th 735, 752 ["Courts may not take judicial notice of allegations in affidavits, declarations, and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof. [Citations.]"]; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 689, fn. 22 ["[W]hile court records may be the subject of judicial notice under Evidence Code section 452, subdivision (d), we 'may take judicial notice of a court's action, but may not use it to prove the truth of the facts found and recited.' [Citation.]"].)

The court grants judicial notice of McInnis's Exhibit 1, but it does not judicially notice the truth of any assertions therein.

## III. DEMURRER

### A. General Legal Standards

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . [t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) A demurrer may be brought 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, in ruling on a demurrer, treats it "as admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688 (*Piccinini*), citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. [Citation.] It 'admits the truth of all material factual allegations in the complaint . . . ; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.)

### B. Discussion

#### 1. First Cause of Action: Violation of Civil Code Section 2923.6

SPS demurs to the first cause of action on the ground that McInnis fails to state a violation of Civil Code section 2923.6, because McInnis does not plead that he submitted a "complete loan modification." (Memorandum of Points and Authorities in Support of Demurrer ("MPA"), pp. 6:9-7:7.) SPS also argues that its alleged violation of section 2923.6 is not material, as required by statute, because McInnis does not allege (or show) that if he had submitted a complete application, he would have avoided the sale of the Subject Property. (*Id.* at pp. 6:27-7:5.)

Section 2923.6, subdivision (c), contains the pertinent provisions: "If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer at least five business days before a scheduled foreclosure sale, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs: (1) [t]he mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired[;] (2) [t]he borrower does not accept an offered first lien loan modification within 14 days of the offer[; or] (3) [t]he borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification." In short, subdivision (c) provides that a sale must await a resolution as to the loan modification application. Section 2923.6, subdivision (h), further

provides that an application is deemed "complete" when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer. (Civ. Code, § 2923.6, subd. (h).)

Here, McInnis alleges that he owned the Subject Property, that a notice of default was recorded on the Subject Property on or about August 19, 2022, that a notice of trustee's sale was recorded on the Subject Property on September 11, 2023, that SPS conducted a trustee's sale on March 27, 2024, and that a deed upon sale was recorded on April 19, 2024. (FAC, ¶¶ 13-22.) Prior to the trustee's sale, at an unspecified time, McInnis alleges that he spoke to representatives in SPS's loan modification department to inquire about applying for a loan modification, and these representatives told him that, in lieu of a tax filing, he could submit a hardship letter with his loan modification application that explained that he had no income and therefore no tax filings. (*Id.* at ¶ 19.) SPS allegedly assured McInnis that SPS would deem his loan modification application complete if he submitted this hardship letter. (*Ibid.*) McInnis alleges that he submitted such a letter with his loan modification application on or about March 11, 2024. (*Id.* at ¶ 20.)

Because the court must accept the factual allegations in the FAC as true, the court must find that the foregoing sufficiently alleges a violation of Civil Code section 2923.6. (See *Piccinini, supra,* 226 Cal.App.4th at p. 688.) The court is not persuaded by SPS's contrary position. SPS does not argue that McInnis failed to include a hardship letter with his loan modification request. Instead, SPS argues that McInnis failed to include the requisite tax documents. (See MPA, p. 6:22-26.) Section 2923.6, subdivision (c), does not state what specific documents make a loan modification application complete. As noted above, it simply states that "an application shall be deemed 'complete' when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer." (Civ. Code, § 2923.6, subd. (h).)

SPS has argued that the FAC contains contradictory allegations: *i.e.*, the allegation that McInnis submitted "a complete loan modification application to Defendant SPS" that "included all documents listed in the instructions and conformed to the instructions," but also the allegation that "he was unable to provide a tax filing because he did not have any income report." (FAC, ¶¶ 28, 29.) Without resort to extrinsic evidence, the court cannot find that these allegations are necessarily contradictory. While the word "instructions" may perhaps be ambiguous, given that the FAC does not make clear if this refers to "instructions" on the loan modification document itself or "instructions" given to McInnis by SPS, McInnis does clearly allege that someone from SPS instructed him to submit a hardship letter in lieu of tax documents. (*Id.* at ¶ 19.) The parties do not appear to dispute that McInnis otherwise submitted a complete loan modification application.

SPS points to the court's previous denials of McInnis's TRO applications in this matter, arguing that McInnis "made similar arguments" in support of these TROs that "the Court ultimately denied." (MPA, p. 6:25-26.) The court does not find these previous rulings to be relevant to the question of the *sufficiency of a pleading*. Again, on a demurrer, the court must accept all properly pleaded facts as true.

Finally, SPS argues that its alleged violation of section 2923.6 was not "material," and therefore not actionable, because even if the court accepts the FAC's allegations as true,

McInnis does not allege that he would have qualified for a foreclosure avoidance option or otherwise been able to avoid the sale of the Subject Property. (MPA, pp. 6:27-7:5.)

This argument is also unpersuasive. "A material violation [of the California Homeowner Bill of Rights (Civ. Code, § 2923.4 et seq.)] is one that affected the borrower's loan obligations, disrupted the borrower's loan modification process, or otherwise harmed the borrower." (*Billesbach v. Specialized Loan Servicing LLC* (2021) 63 Cal.App.5th 830, 837 (*Billesbach*).) On demurrer, a court asks "whether the alleged violation undermined the overall purpose of the [Homeowner's Bill of Rights]. [Citation.] In doing so, [a court] need not recharacterize the purpose of the [Homeowner's Bill of Rights] because the Legislature has stated it plainly: 'The purpose of the act that added this section is to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.'" (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 304-305 (*Morris*).)

Here, the allegation that SPS foreclosed against his home despite a still-pending loan modification application is sufficient to allege a material violation Civil Code section 2923.6. McInnis alleges that SPS did not "consider" McInnis for, or provide McInnis with a "meaningful opportunity to obtain," a loss mitigation option—*i.e.*, a "loan modification." (See *Billesbach, supra*, 63 Cal.App.5th at pp. 837-838 ["Based on these principles, we hold that where a mortgage servicer's violations stem from its failure to communicate with the borrower before recording a notice of default, the servicer may cure these violations by doing what respondent did here: postponing the foreclosure sale, communicating with the borrower about potential foreclosure alternatives, and fully considering any application by the borrower for a loan modification . . . . Mortgage servicers should take care to comply with their statutory obligations in the first instance, rather than seek to cure violations after a borrower has sued them."]; *Morris, supra*, 78 Cal.App.5th at p. 306 ["By forcing Morris to deal with multiple people, none of whom could inform her of the status of her application; by giving her inconsistent and inaccurate information; and by stringing her along until her home was sold without notice, she alleges that Chase and then Rushmore deprived her of a meaningful opportunity to be considered for a loan modification. That, in our view, states a material violation of section 2923.7"].)

The court overrules SPS's demurrer to the first cause of action.

**2. Third Cause of Action: Violation of the UCL**

SPS argues that McInnis's cause of action under Business and Professions Code section 17200, et seq. (the "UCL") impermissibly derives from McInnis's first cause of action. (MPA, pp. 7:8-25.) According to SPS, courts have "made it clear that the UCL cannot be used as an end-run around the requirements of other statutes" and "[a] court may not allow [a] plaintiff to plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition." (MPA, p. 7:17-24, citing *Glenn K. Jackson Inc. v. Roe* (9th Cir. 2001) 273 F.3d 1192, 1203; *Chamber v. United of Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1048.) SPS also contends that a "defense to the predicate claim is a defense to the alleged violation of the UCL." (*Id.* at p. 7:24-25, citing *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 178 (*Krantz*).)

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct. It embraces [] anything that can properly be called a business practice and that at the same time is forbidden by law. [] [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) "By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent. [Citation.]" (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48.)

The court agrees with SPS that McInnis's Civil Code section 2923.6 cause of action underlies McInnis's third cause of action, but because the court is overruling the demurrer to the first cause of action, that means it also overrules the demurrer to the third cause of action

The demurrer to the third cause of action is overruled.

### 3. Fourth Cause of Action: Declaratory Relief

SPS argues that McInnis seeks a "determination" concerning "the respective rights and duties pursuant to the Deed of Trust and Promissory Note" and "whether Defendant had authority to foreclose on the Property." (MPA, p. 8:14-16.) According to SPS, this cause of action for declaratory relief fails "because Plaintiff failed to sufficiently allege the invalidity of the Deed of Trust or promissory note in his FAC." (*Id.* at p. 7:16-18.)

Code of Civil Procedure section 1060 governs a cause of action for declaratory relief, providing: "Any person interested under a written instrument, excluding a will or a trust, 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." (Code Civ. Proc., § 1060.)

To qualify for declaratory relief under Code of Civil Procedure 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 (*Lee*).) "The 'actual controversy' language in . . . section 1060 encompasses a probable future controversy relating to the legal rights and duties of the parties. [Citation.]" (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885.) "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.]" (*Lee, supra,* 6 Cal.App.5th at p. 546.)

"Under section 1061 of the Code of Civil Procedure the court may refuse to exercise the power to grant declaratory relief where such relief is not necessary or proper at the time under all of the circumstances." (*California Insurance Guaranty Ass'n v. Superior Court* (1991) 231 Cal.App.3d 1617, 1624.) "The refusal to exercise the power is within the court's

legal discretion and will not be disturbed on appeal except for abuse of discretion. [Citation.]" (*General of America Insurance Co. v. Lilly* (1968) 258 Cal.App.2d 465, 471.)

Again, as noted above, SPS argues that "there is no actual controversy in the instant action because Plaintiff failed to sufficiently allege the invalidity of the Deed of Trust or the promissory note," and "Plaintiff's cause[s] of action for unfair business practices and declaratory relief are premised upon his claims for violation of [the California Homeowner Bill of Rights], which fail as a matter of law . . . [; t]herefore, the Court should sustain SPS's demurrer to Plaintiff's cause of action for violation of Unfair Business Practices and Declaratory Relief." (MPA, p. 8:14-18; Defendant's Reply, p. 3:10-13.) Because the court is overruling the demurrer to the first cause of action, however, the entire foundation for this argument is undone.

The court overrules SPS's demurrer to the fourth cause of action.

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**Calendar Line 3**
**Case Name:** *Wen Luo v. Fanbo Zhang*
**Case No.:** 24CV433741

## I. BACKGROUND

This action arises from an alleged breach of a settlement agreement between plaintiff Wen Luo ("Luo") and defendant Fanbo Zhang ("Zhang"). Luo and Zhang were formerly in a romantic relationship that ultimately ended in the settlement agreement. The original complaint in this matter was filed on March 22, 2024. The operative first amended complaint ("FAC") was filed on May 17, 2024.

The FAC appears to be intended to state two causes of action against Zhang and various Does: (1) fraud and (2) intentional infliction of emotional distress ("IIED"). The actual causes of action are somewhat unclear because the FAC does not comply with Rule 2.112 of the California Rules of Court, which provides: "Each separately stated cause of action, count, or defense must specifically state: (1) Its number (e.g., 'first cause of action'); (2) Its nature (e.g., 'for fraud'); (3) The party asserting it if more than one party is represented on the pleading (e.g., 'by plaintiff Jones'); and (4) The party or parties to whom it is directed (e.g., 'against defendant Smith')." The FAC ignores (1) and (2). Failure to comply with Rule 2.112 "presumably renders a complaint subject to a motion to strike (§ 436), or a special demurrer for uncertainty." (*Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1014 (*Grappo*) [citing Weil & Brown. *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2016) § 6:113, pp. 6-33 to 6-34].)

Attached to the FAC is a copy of the June 30, 2023 settlement agreement signed by the parties (Exhibit A). Paragraphs 1 and 2 (following the "Recitals" section) state the following:

> Provided that Luo signs this Agreement, Zhang will give Luo a 2018 White Audi A4 (VIN: WAUENAF42JA076044A) to Luo, a David Yurman ring, and $3,000 (Three Thousand Dollars) cash. The vehicle should be given and the title transfer shall take place no later than December 31, 2023, and the ring and the cash should be given to Luo no later than July 31, 2023. The vehicle, the ring, and the $3,000 cash shall constitute the consideration of this Agreement made by Zhang.
>
> In exchange for the settlement funds or other consideration under this Agreement, Luo hereby fully and forever releases and discharges Zhang from any all past, present or future claims, demands, actions, causes of action, liabilities, damages, costs, expenses or judgments of any kind or character in law, equity or otherwise, known or unknown, suspected and unsuspected, disclosed and undisclosed, directly or indirectly relating to Luo's relationship with Zhang at any time prior to and including the date of execution.

The settlement agreement also contains an integration clause, which states that it constitutes the entire agreement between Luo and Zhang, and that it can only be modified through a writing signed by both parties. (See Exhibit A, ¶ 10.)

Currently before the court is a demurrer to the FAC and a motion to strike portions of the FAC, filed by Zhang on June 11, 2024. Any timely oppositions to the demurrer and motion

to strike were due by August 14, 2024. Luo filed an opposition to the demurrer just before 6:00 p.m. on August 19, 2024, five days late. She did not file any opposition to the motion to strike. "A trial court has broad discretion to under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 765.) While no explanation for the late opposition to the demurrer has been provided, the court will exercise its discretion to consider the filing.

## II. DEMURRER TO THE FAC

### A. General Standards

The court, in ruling on a demurrer, 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.) Facts appearing in exhibits attached to the complaint are given precedence over inconsistent allegations in the complaint. (See *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."].)

Where a demurrer is to an amended complaint, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer"]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents of which judicial notice is properly taken. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. This includes declarations. The court has only considered the two declarations from counsel Yunchao Song to the extent that they discuss the meet-and-confer efforts required by statute. The court has not considered the attached exhibits. The court has also not considered any portion of the declaration of counsel Peter Chao, submitted with the late opposition to the demurrer, including the attached exhibit.[1]

Code of Civil Procedure section 430.60 states that "[a] demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The rules of court also require that the

[1] While Code of Civil Procedure sections 430.41 and 435.5 require a declaration from the moving party, there is no authority for the submission of a declaration from the opposing party.

demurrer itself (distinct from a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

**B. The Basis for the Demurrer**

Zhang demurs to the causes of action alleged in the FAC on the grounds of uncertainty and failure to state sufficient facts. (See Notice of Demurrer and Demurrer).[2]

**C. Discussion**

**1. Uncertainty**

The court SUSTAINS Zhang's demurrer to the FAC based on uncertainty. While uncertainty is ordinarily a disfavored ground for demurrer, the FAC is so poorly drafted (as is the original complaint) and so clearly flouts Rule 2.112 that the actual causes of action being alleged are highly unclear. (See *Grappo, supra*.) Luo's late opposition brief also fails to address this ground for demurrer, which creates the inference that the argument is meritorious. (See *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410.) Nevertheless, because this is the first pleading challenge to be heard in this case, the court will grant 20 days' leave to amend. The court expects any second amended complaint to comply fully with the California Rules of Court.

**2. Failure to State Sufficient Facts**

The court also SUSTAINS Zhang's demurrer to the FAC on the basis of a failure to state sufficient facts to constitute a cause of action. While the causes of action are not properly identified, Zhang's demurrer assumes that the FAC has attempted to state causes of action for fraudulent inducement of contract and IIED, and the court will do so as well.

**a) Fraud**

"The elements of fraud are (1) the defendant made a false representation as to a 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 [citation omitted].) "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

[2] The notice of demurrer, demurrer, and supporting memorandum have been filed as one continuous document without any page numbers, making specific citations unnecessarily difficult.

they said or wrote, and when the representation was made." (*Id*. at 793 [citation and quotation marks omitted].) Courts enforce the specificity requirement in consideration of its two purposes. (*Id*. at 793.) The first purpose is to give notice to the defendant with sufficiently definite charges so that the defendant can meet them. The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings. (*Ibid*.) Thus, the pleading should be specific enough to enable the court to determine whether there is any prima facie foundation for the charge of fraud.

Zhang's demurrer accurately describes the FAC's apparent allegations of fraudulent inducement of contract as "legal conclusions." Only two paragraphs of the FAC are pertinent, and they allege, in their entirety: "To date, the transfer of the Audi has not been done. Furthermore, Fanbo Zhang lied about quitting his job at Apple and moving back to China. [¶] Plaintiff Wen Luo justifiably relied on these representations to her detriment." (Complaint, ¶¶ 8-9.) Luo's tardy opposition confirms that these two, bare paragraphs are the only basis for the fraud claim. (See Opposition, p. 3:4-10.) These allegations do not come close to alleging fraud with specificity. Indeed, they appear to describe nothing more than a possible breach of contract. Moreover, there is no explanation given—either in the FAC itself or in the attached settlement agreement—about the alleged promises made by Zhang regarding quitting his job or moving to China and how they are even remotely relevant to the settlement agreement. What do these promises have to do with the Audi, the David Yurman ring, or the $3,000 promised by Zhang? The reader is left completely in the dark.

**b) Intentional Infliction of Emotional Distress**

"A cause of action for intentional infliction of emotional distress exists when there is (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. A defendant's conduct is outrageous when it is so extreme as to exceed all bounds of that usually tolerated in a civilized community. And the defendant's conduct must be intended to inflict injury or engaged in with the realization that injury will result. Liability for intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities . . . . With respect to the requirement that the plaintiff show emotional distress, this court has set a high bar. Severe emotional distress means emotional distress of such a substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 [internal quotations and citations omitted].)

"[I]t is 'not . . . enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' [Citation.]" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496 (*Cochran*) [internal citations omitted]; see also *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 945 [manager of severely obese employee mocked her need for properly sized uniform, asked if she was considering weight loss surgery, and told kitchen staff, within her hearing, not to give her extra

food; comments were inappropriate but not severe, and manager's official actions were not outrageous conduct].)

"[M]any cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235.) "[T]he trial court initially determines whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Where reasonable men can differ, the jury determines whether the conduct has been extreme and outrageous to result in liability. Otherwise stated, the court determines whether severe emotional distress can be found; the jury determines whether on the evidence it has, in fact, existed." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1614.)

The allegations of IIED in the FAC appear to be based primarily on a disagreement between Luo and Zhang over whether to terminate her pregnancy: "Wen Luo was getting older and worried she might not be able to have another child. She did not want the abortion and wanted to take care of the baby herself[;] however, [Zhang] insisted on the abortion because he did not want to be financially responsible for the baby. [¶] Wen Luo almost committed suicide because of this argument with [Zhang]. [¶] Defendant Fanbo Zhang was both the proximate and actual cause of the abortion." (FAC, ¶¶ 11-13, brackets added.) The FAC also alleges that "on or about March 17, 2023," prior to the settlement agreement and release being signed, Zhang "kicked plaintiff twice which [led] to another suicide attempt by Wen Luo." (*Id.* at ¶ 14.)

Luo's opposition brief insists that "Zhang's desire that plaintiff have an abortion is intentional [infliction of emotional distress]." (Opposition, p. 3:15-18, brackets added.)

The court finds these allegations to be insufficient on their face. An alleged disagreement over whether to have an abortion cannot be construed as sufficiently outrageous conduct by Zhang. The allegation of kicking (after the abortion had already occurred) also fails to support an IIED claim by itself, because it is not enough that a defendant's alleged acts are tortious or criminal. (See *Cochran, supra*, 65 Cal.App.4th 496.) Under Luo's interpretation of the law, any simple assault or battery, without more, would be the basis for an IIED cause of action. Finally, allegations of suicide attempts by Luo also fail to support an IIED cause of action, as they do not describe any conduct by Zhang (or anyone else other than Luo).

A plaintiff bears the burden of demonstrating that an amendment would cure the defect identified on demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) Luo has not met this burden as her opposition simply states that the demurrer should be overruled and that no amendment is necessary.

Despite this failure, the court grants 10 days' leave to amend, given that this is the first pleading challenge, and it is not 100% clear to the court that the insufficient allegations are incapable of being cured.

Luo's opposition suggests that she may wish to allege additional causes of action, but the court reminds her that when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend only the causes of action to which the demurrer has been sustained, not to add entirely new causes of action. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. "Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing Harris v. Wachovia Mortgage, FSB (2010) 185 Cal.App.4th 1018, 1023.)

The court grants leave to amend only as to the apparent causes of action currently in the FAC: fraud and intentional infliction of emotional distress.

## III. MOTION TO STRIKE PORTIONS OF THE FAC

### A. General Standards

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading, or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. Irrelevant matter includes: (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc. § 431.10, subds. (b), (c).) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63 (*Turman*) [citing *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255].)

A motion to strike may be brought against a portion of a cause of action that is purportedly defective—*e.g.*, because it seeks an improper remedy. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680.) At the same time, as Courts of Appeal have emphasized, "[W]e have no intention of creating a procedural 'line item veto' for the civil defendant." (*Id.* at p. 1683.) Rule 3.1322(a) of the California Rules of Court requires that "[a] notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively."

As with a demurrer, extrinsic evidence cannot be considered, and additional arguments cannot be raised for the first time in a reply brief.

### B. Discussion of Zhang's Motion

As noted above, Zhang's motion to strike is unopposed. Zhang moves to strike two specific portions of the FAC's prayer: "b. Attorneys' fees according to proof," and "c. Punitive damages pursuant to California Civil Code section 3294." (See Zhang's Notice of Motion and Motion.)[3]

#### 1. Attorney's Fees

In the absence of some special agreement, statutory provision, or exceptional circumstances, attorney's fees are to be paid by the party employing the attorney (Code Civ. Proc., § 1021); in other words, attorney's fees are awardable as costs to a prevailing party only if the fees are expressly authorized by contract, statute, or other law. (Code Civ. Proc., § 1033.5, subd. (a)(10).) The contractual or statutory basis for a request for attorney's fees should be alleged within the body of the complaint. (See *Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470, 1474 [due process is satisfied if complaint requests unspecified amount of attorney's fees and alleges entitlement to fees based on contract or statute]).

Here, the FAC does not state any basis for the recovery of attorney's fees, and the one and only mention of them is in the prayer. The settlement agreement attached to the FAC also does not contain any language supporting a request for attorney's fees. Accordingly, the court GRANTS the motion to strike the prayer's request for attorney's fees with 20 days' leave to amend. (The court urges Luo and her counsel to consider whether she truly has a legitimate basis for requesting attorney's fees before making any election to amend.)

#### 2. Punitive Damages

"In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. 'Malice' is defined in the statute as conduct 'intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.'" (*Turman, supra*, 191 Cal.App.4th at p. 63 [internal citations omitted].)

Specific factual allegations are required to support a punitive damages claim. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.) Nevertheless, as a pleading is read as a whole, even conclusory allegations may suffice when read in context with facts alleged as to defendant's wrongful conduct. (*Perkins v. Sup. Ct.* (1981) 117 Cal.App.3d 1, 6-7.)

In his motion, Zhang correctly points out that the FAC lacks any specific factual allegations of the type required to support a request for punitive damages. At the same time, because the court is sustaining the demurrer to the FAC with leave to amend, the motion to

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[3] Again, the motion to strike, like the demurrer, fails to include page numbers.

strike the request for punitive damages in the FAC's prayer is moot, and the court DENIES the motion on that basis.

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**Calendar Line 6**
**Case Name:** *Henry Lippincott v. Arash Hassibi et al.*
**Case No.:** 22CV393460

This is a motion to compel further responses to requests for production of documents and special interrogatories propounded by plaintiff Henry Lippincott on defendants Arash Hassibi and Joinedapp, Inc. ("Defendants"). Lippincott identifies a number of issues with Defendants' responses, but Defendants oppose the motion solely on the ground that Lippincott did not adequately meet and confer before filing this motion.

It appears that Lippincott's meet-and-confer efforts consisted of a handful of emails that were sent by counsel between December 2023 and March 2024. The court finds these efforts to have been slight and minimal. The court would have expected the parties to engage in a far more robust discussion regarding their disagreements, *including live conversations, either in person or on the telephone*, rather than the brief email exchanges submitted with the moving papers. The court would have expected plaintiff's counsel to make a greater effort to narrow the outstanding issues before filing this motion, or at least to get a response to some of the outstanding questions, which are still unanswered on this motion. Nevertheless, the court finds that Defendants' counsel's notably delayed responses and unkept promises indicate that at least some of the parties' disputes would likely not have been resolved even with further discussions—perhaps a subset of the disagreements would have been resolved, but not all of them. Accordingly, the court will proceed to rule on the merits of the motion, at least in part.

The court finds and orders as follows:

1. Hassibi will provided verifications for his written discovery responses within 30 days of notice of entry of this order.

2. Defendants will provide supplemental responses to Interrogatories Nos. 3, 9, and 10 within 30 days of notice of entry of this order.

3. Defendants shall supplement their responses to Interrogatories Nos. 2, 5, 6, and 7 with either: (1) a specific identification of responsive documents in Defendants' document production (by Bates numbers), or (2) a substantive answer to the subject matter of the interrogatory at issue. This is due within 30 days of notice of entry of this order.

4. Defendants shall supplement their responses to Requests for Production Nos. 4, 6-11, and 13-18 with either a statement of compliance or a representation of inability to comply, in accordance with Code of Civil Procedure sections 2031.220, 2031.230, and 2031.240, within 30 days of notice of entry of this order.

Lippincott has raised a number of issues with the contents of Defendants' document production(s) to date, including allegedly missing documents, the absence of native files, and the inclusion of certain blank documents stating "Technical Exception" without further explanation. These issues are properly the subject of a motion to compel compliance under Code of Civil Procedure section 2031.320, which has not been fairly raised in Lippincott's notice of motion. (The notice of motion simply refers to "a motion to compel further discovery responses," without an identification of any of the relevant code sections. A motion to compel further responses falls under section 2031.310, not section 2031.320.) Accordingly, the court

denies Lippincott's motion to the extent that it raises issues with the contents of the document production. The court orders the parties to meet and confer further—*by telephone or in person*—about any missing documents in Defendants' production. If the parties are not able to resolve any of their disagreements about allegedly missing text messages, native files, or other documents, then the court will entertain a motion under section 2031.320 that carefully lays out any efforts to meet and confer and any explanations for why certain documents have not been included in the production.

The motion is granted in part and denied in part. The court denies Lippincott's various requests for sanctions (terminating, issue, and monetary sanctions), in view of the half-baked meet-and-confer efforts that preceded this motion.

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**Calendar Lines 7-8**
**Case Name:** *Applied Materials, Inc. v. Huu T. Vu et al.*
**Case No.:** 22CV403017

Defendant Capital Asset Exchange & Trading LLC ("CAE") has filed a motion to compel further responses to requests for production of documents from plaintiff Applied Materials, Inc. ("Applied"). Applied has filed a motion to seal a supplemental declaration filed in support of its request for a default judgment.

**1. CAE's Motion to Compel**

The court denies the motion to compel, which seeks privileged documents in response to Requests for Production Nos. 57, 59-62, 64-88, 90, and 93-100. These requests focus on communications with Scott Russell—a Product Line Manager at Applied—and documents relied on by him in preparing his January 30, 2024 declaration and May 2, 2024 supplemental declaration in support of Applied's request for a default judgment against defendant James C. Nguyen. Applied represents that is has produced all non-privileged and responsive documents in connection with these requests, but CAE argues that it is also entitled to any privileged documents. Although communications with and documents prepared by Applied's counsel would ordinarily be protected by the attorney-client privilege or work product doctrine, CAE argues that Applied has now waived any such privilege because the Russell declarations contain "expert opinion" testimony.

The court has now reviewed the Russell declarations—which, incidentally, CAE failed to submit with its moving papers—and finds that they do not contain expert opinion testimony. In both of these declarations, Russell states that he: (1) examined photographs of Applied parts seized from Nguyen by law enforcement; (2) identified these products based on his 31 years of experience as a Supply Chain Manager, Domain Account Manager, Customer Engineering Specials Manager, and Product Line Manager; (3) reviewed price and cost information at Applied (including "the minimum and maximum price based on Applied sales data"); and (4) then used this pricing and cost information to provide a "part-by-part valuation" or "Estimated Value" for each part. (Declaration, ¶¶ 7-10; Supplemental Declaration, ¶¶ 7-11.) These are not expert opinions. Although they rely on Russell's knowledge and experience as an employee to identify the products seen in the photographs, they are ultimately assertions of fact. The only "opinion" contained in these declarations is Russell's claim that the information he used to arrive at the estimated value for each part "means that my valuations below are conservative and are lower than the actual monetary value of the seized parts." (Declaration, ¶ 9; see also Supplemental Declaration, ¶ 9 [containing similar but slightly different language].) This opinion is immaterial to the allegations against CAE.

As a general matter, the evidentiary standard of proof for damages on a default judgment is a *prima facie* showing of damages. (See *Johnson v. Stanhiser* (1999) 72 Cal. App. 4th 357, 361-362.) That is how the court construes the Russell declarations—as setting forth a prima facie case for the amounts sought against Nguyen. For a default judgment, the evidence does not even have to meet the preponderance standard (*ibid.*), and it is simply unheard of to expect that a default prove-up would actually include expert opinion testimony. The court finds CAE's interpretation of the Russell declarations as containing expert opinions to be unreasonable.

Applied goes on to argue in its opposition that even if the estimated values listed in these declarations could be considered expert opinions, any disclosure of privileged communications and work product underlying these declarations would be premature, given that the expert disclosure deadlines have not yet arrived in this case, at least as to CAE and the other non-defaulting defendants. CAE responds by speculating that the claimed damages against Nguyen could potentially be relevant to the damages claim against CAE, and that "AMAT may even intend to claim the damages award should be given collateral estoppel effect against CAET." (Reply, p. 10:4-6.) The court reiterates here what it has previously told the parties: the court has no intention of entering a default judgment against Nguyen before a judgment can be entered in the case as a whole, precisely to avoid these types of unnecessary disagreements between the parties and to avoid the possibility of inconsistent outcomes in this case.

In any event, the court does not need to make any ruling as to whether discovery of privileged information from Applied and Russell is "premature," because the court concludes that the Russell declarations do not contain expert opinion testimony, and so there has been no privilege waiver.

The motion to compel is DENIED.

**2. Applied's Motion to Seal**

The court GRANTS the unopposed motion to seal the unredacted version of the May 2, 2024 supplemental Russell declaration, for the same reasons that the court granted the unopposed motion to seal the unredacted January 30, 2024 Russell declaration on April 30, 2024. The court finds, under rule 2.550(d) of the California Rules of Court, that the redactions to the supplemental declaration are targeted and that an overriding interest exists to overcome the right of public access to the redacted information. The court also finds that the overriding interest supports sealing the redacted information; a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; the proposed sealing is narrowly tailored; and no less restrictive means exist to achieve the overriding interest. Access to the unredacted version of the May 2, 2024 declaration in the file will remain restricted until further order of the court.

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