SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

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

DATE: 02-20-24 TIME: 9 A.M.

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

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV408145 Motion: Strike	Ali Adelkhani vs Yeganeh Bakery and Cafe,LLC et al	See Tentative Ruling. The Court will prepare the final order.
LINE 2	22CV408145 Hearing: Demurrer	Ali Adelkhani vs Yeganeh Bakery and Cafe,LLC et al	See Tentative Ruling. The Court will prepare the final order.
LINE 3	23CV416527 Hearing: Demurrer	Teresa Pereira et al vs Xochitl Mijangos et al	See Tentative Ruling. The Court will prepare the final order.
LINE 4	20CV366134 Motion: Summary Judgment/Adjudication	Kevin Young et al vs Judy Tsai et al	See Tentative Ruling. The Court will prepare the final order.
LINE 5	18CV338830 Hearing: Motion hearings	TRICIA NARDONE et al vs NATIONSTAR MTG LLC et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 6	19CV349624 Motion: Reconsider	Julia Magana et al vs FORD MOTOR COMPANY et al	See Tentative Ruling. Plaintiffs shall submit the final order.
LINE 7	21CV377877 Motion for Sanctions	John Hilton vs Ascendis Pharma, Inc.	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 8	22CV398319 Motion: Withdraw as attorney	PATRICK CHIANG vs ASHLEY RO et al	The unopposed motion is GRANTED. Moving party shall submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 9	23CV410115 Motion: Leave to File	ISIDRO MILLAN vs JUAN RODRIGUEZ et al	Notice appearing proper, the unopposed motion for leave to file is GRANTED. Plaintiff shall submit the final order within 10 days of the hearing and shall file the SAC within 10 days of the filing of the final order.
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1 and 2
Case Name: *Adelkhani v. Yeganeh Bakery and Café, LLC, et al.*
Case No.: 22CV408145

Plaintiff Ali Adelkhani ("Plaintiff") initiated this employment action alleging that his former employer, Yeganah Bakery and Café ("Yeganah") and its owner Reza Tarighat ("Tarighat") harassed and discriminated against him. Defendants Yeganah Bakery and Café and Reza Tarighat (collectively, "Defendants") demur to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh causes of action in the First Amended Complaint ("FAC"). Defendants have also filed a motion to strike certain portions of the FAC.

I. BACKGROUND

A. Factual

According to the allegations of the FAC, Plaintiff was employed at Yeganah. (FAC, ¶¶ 20-21.) On or about August 28, 2021, Plaintiff pointed out to Tarighat that he believed Tarighat had made a mistake with a customer's food order. (*Id.*, ¶ 22.) Tarighat became upset and began yelling at Plaintiff and calling him names in Farsi. (*Id.*, ¶¶ 22-23.) Despite Plaintiff's attempt to apologize, Tarighat threatened Plaintiff and approached him brandishing a knife in a "threatening manner". (*Id.*, ¶¶ 24-25.) Tarighat attempted to grab Plaintiff's shoulder but Plaintiff pushed Tarighat's hand away. (*Id.*, ¶ 26.) Tarighat told Plaintiff to leave so he did so. (*Id.*, ¶¶ 27-28.)

As a result of this incident, Plaintiff claims to have suffered "pain and emotional distress, anxiety, depression, headaches, tension, and other physical ailments, as well and past and future lost wages and benefits." (FAC, ¶ 31.) The FAC also alleges that Plaintiff suffered adverse employment actions, harassment, and discrimination stemming from the same incident described above.

B. Procedural

Plaintiff filed his initial complaint on December 5, 2022. On February 7, 2023, Plaintiff filed his FAC alleging causes of action for: (1) battery, (2) assault, (3) hostile work environment (Gov. Code, § 12940, subd. (j)), (4) negligent supervision and retention, (5) intentional infliction of emotional distress, (6) termination in violation of public policy, (7) discrimination in violation of Government Code section 12940, et seq., (8) retaliation in violation of the Fair Employment and Housing Act ("FEHA"), (9) failure to prevent discrimination and retaliation in violation of Government Code section 12940, subdivision (k), (10) violation of the Ralph Civil Rights Act (Civ. Code, § 51.7), and (11) violation of the Tom Bane Civil Rights Act (Civ. Code, § 52.1).

On May 12, 2023, Defendants filed a demurrer to some of the causes of action in the FAC and a motion to strike portions of the FAC. Plaintiff filed oppositions to both the demurrer and motion to strike on February 7, 2024. Defendant filed replies to both oppositions on February 9, 2024.

II. DEMURRER

A. Legal Standard

As relevant to the instant case, "[t]he 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[;] . . . [t]he pleading is uncertain[;] . . . [or i]n an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct." (Code Civ. Proc., § 430.10, subds. (e)-(g).)[1] 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. (§§ 430.10, 430.50, subd. (a).)

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.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Analysis

Defendants demur to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh causes of action in the FAC.[2] The grounds for demurrer listed in the notice of demurrer and demurrer are: (1) failure to state a cause of action (all challenged causes of action), (2) uncertainty (all challenged causes of action), and (3) to the extent the cause of action is founded on a breach of contract claim, it cannot be ascertained whether the contract is written, oral, or implied (all challenged causes of action except for the third and fourth).[3]

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[1] All further undesignated statutory references are to the Code of Civil Procedure.

[2] At the outset, the court notes that Defendants mention in the memorandum in support of the demurrer that the FAC improperly states the amount of certain damages requested in violation of section 425.10, subdivision (b). (See Memorandum, p. 2, lns. 24-25.) This will be discussed further below in the context of the motion to strike. However, to the extent Defendants are seeking to demur to the FAC on this ground, the demurrer is overruled on that ground because it is not listed in the notice of demurrer or demurrer itself and because a demurrer cannot be sustained "to a particular type of damage or remedy." (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047.)

[3] As will be explained further below, the notice of demurrer and demurrer do not mention that Defendants are challenging the seventh cause of action.

i. Third Cause of Action – Hostile Work Environment (Gov. Code, § 12940, subd. (j))

The notice of demurrer and demurrer indicate that Defendants challenge the third cause of action on the ground of (1) failure to state a cause of action and (2) uncertainty.

Defendants argue that Plaintiff's citation to *Harris v. Forklift Sys.* (1993) 510 U.S. 17 (*Harris*) is misguided because the FAC does not allege the type of discrimination alleged in that case. Admittedly, *Harris* involved discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.). (*Harris*, *supra*, 510 U.S. at p. 19.) But, here, it appears that Plaintiff is making a claim of a hostile work environment under FEHA (Gov. Code, § 12940, subd. (j)). Nonetheless, a court must overrule a demurrer if the allegations of the complaint adequately state a cause of action under *any* legal theory. (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1231.) A complaint survives a demurrer when it states facts disclosing some right to relief. (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1105.) Thus, if the FAC raises a colorable, intelligible claim of a hostile work environment under Government Code section 12940, subdivision (j), the court must overrule the demurrer.

Government Code section 12940, subdivision (j)(1) prohibits employers from harassing employees because of their membership in a protected class, including race, national origin, gender, and age, among other things. The elements of a FEHA hostile workplace cause of action are (1) the plaintiff was a member of a protected class; (2) he or she was subjected to unwelcome harassment; (3) the harassment was based on the plaintiff's protected status; and (4) the harassment unreasonably interfered with his or her work performance by creating an intimidating, hostile, or offensive work environment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.)

In the FAC, Plaintiff contends that he is a member of a protected class in that he is a man and he asserts that he was harassed because he is a man. (FAC, ¶ 60.) The FAC also asserts that Tarighat verbally abused Plaintiff and threatened him with a knife creating a hostile work environment. (FAC, ¶¶ 62-64.) But, the FAC indicates that Tarighat yelled at Plaintiff and threatened him with a knife because Plaintiff pointed out a potential mistake with a customer's order and asked Tarighat to double check with the customer. (FAC, ¶ 22.) Although the FAC makes the conclusory allegation that the incident occurred because Plaintiff is a man, the FAC states no facts supporting that conclusion. In other words, Plaintiff has failed to adequately allege facts that show that the alleged harassment was based on his protected status. The demurrer as to the first cause of action is SUSTAINED on the ground of failure to state a claim.

Defendants also argue that references in third cause of action to "sexual misconduct" and "physical conduct of a sexual nature" are confusing because no sexual misconduct is alleged and this renders the FAC unintelligible. Plaintiff makes no effort to respond to this argument or to explain how the FAC alleges any facts amounting to sexual misconduct.

The mentions of "sexual misconduct" and "physical conduct of a sexual nature" do not, by themselves, render the third cause of action fatally uncertain. A pleading is subject to demurrer where it "is uncertain." (§ 430.10, subd. (f).) For purposes of demurrer, the term " 'uncertain' includes ambiguous and unintelligible." (*Ibid*.) "Demurrers for uncertainty . . . are

disfavored. [Citation.] '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.' [Citation.]" (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.) "It is the well established rule that a special 'demurrer should not be sustained where the allegations of the complaint are sufficiently clear to apprise the defendant of the issues which he is to meet. [Citations.]" (*Butler v. Sequeira* (1950) 100 Cal.App.2d 143, 145-146.) The portions of the FAC that mention sexual misconduct are at most surplusage; they do not render the FAC unintelligible.

Nonetheless, the court notes that some of the allegations in the third cause of action are incomprehensible. For example, paragraph 64 of the FAC states, Tarighat "also threaten [sic] Plaintiff with a knife at work, call him name [sic]. Plaintiff told him to stop but Plaintiff's First Amended Complaints were dismissed and Plaintiff was forced to continue resign [sic]."

The demurrer as to the third cause of action is SUSTAINED on the ground of failure to state a claim. " 'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "Plaintiffs have the burden to show how they could further amend their pleadings to cure the defects. [Citation.]" (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 411.) Here, Plaintiff requests leave to amend but does not explain how he could amend its FAC to cure the defects discussed above.

Defendant points out that Plaintiff has already amended his complaint once previously. But, this occurred without the benefit of the court's reasoning in response to the demurrer. As it does not appear that there is no possibility Plaintiff can amend the FAC to cure the defects identified above, the court will grant Plaintiff 20 days' leave to amend. However, the court cautions Plaintiff that, should he decide to amend the FAC, he must take care to ensure that cut and paste errors and typos do not impair the comprehensibility of the amended complaint.

The demurrer is SUSTAINED with 20 days' leave to amend as to the third cause of action on the ground of failure to state a claim.

ii. Fourth Case of Action – Negligent Supervision and Retention

The fourth cause of action for negligent supervision and retention does not rely on any statutory authority and cites only to *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 (*Z.V.*) for the proposition that "[t]o establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act."

Defendants contend that Plaintiff's citation to *Z.V.* is misplaced because other cases have distinguished *Z.V.* due to its reliance on another case, *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202 (*Mary M.*), which Defendants argue was limited to the specific facts before it. Defendants cite to no cases that have distinguished *Z.V.* on that basis and the *Z.V.*

court expressly did not rely on *Mary M.* (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 891.)[4] Thus, this argument provides no basis to sustain the demurrer.

Defendants also argue that the fourth cause of action is uncertain because it incorporates by reference all prior allegations. Defendants do not flesh out the reason why they believe this renders the fourth cause of action uncertain. However, the court assumes that Defendants are reiterating their argument that the third cause of action is uncertain. As that argument has been rejected in the context of the third cause of action, it is rejected as to the fourth cause of action as well.

Defendants further contend, "without citation to any authority, [the FAC] seeks to state a claim for negligent retention against a Limited Liability Company (LLC) because the Member of the LLC is the alleged bad actor." (Memorandum of Points and Authorities in Support of Demurrer, p. 4, lns. 20-21.) They also assert that the fourth cause of action is "circular in its reasoning, if there is liability against the LLC it is because the conduct of the Member, Reza Tarighat, was actionable, because it is the conduct. [sic] of the Member." (*Id.*, p. 5, lns. 1-2.)

In response to this argument, Plaintiff contends that employers may be directly liable for their own negligence in hiring and supervising their employees. He then goes on to inexplicably argue that this claim as well as the fifth cause of action are not barred by the rule of Worker's Compensation exclusivity, an argument not raised in the demurrer.[5]

"California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee. Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 (internal citations omitted); see also CACI, No. 426.)

" 'An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit.' 'Liability for negligent hiring … is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees.' Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' " (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139, internal citations omitted; see also *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207.)

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[4] The *Z.V.* court stated, "As we explain below, there is considerable doubt that *Mary M.* has any applicability beyond the narrow context of an arrest performed by a uniformed, armed police officer in the normal course of that officer's duties. (See *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 304 (maj. opn.) (*Lisa M.*) [noting that *Mary M.'s* holding was 'expressly limited'].) However, even if *Mary M.* might apply to cases beyond the 'unique' position of police officers (*Mary M.*, *supra*, 54 Cal.3d at p. 206), the undisputed facts take this case out of its reach." (*Z.V.*, *supra*, 238 Cal.App.4th at p. 891.)

[5] Defendants' reply then equally inexplicably asserts that Plaintiff has conceded that the demurrer is meritorious.

Defendants cite to no authority indicating that an LLC may not be held liable for negligent hiring merely because the employee allegedly responsible for Plaintiff's injury happens to be a member. A court may deem an issue or assertion as forfeited or waived if a party "fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority[.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784.) Accordingly, the court finds that Defendants' argument on this point is without merit.

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

iii. Fifth Cause of Action – Intentional Infliction of Emotional Distress

Defendants assert that the fifth cause of action for intentional infliction of emotional distress fails because Plaintiff has "injected" a fraud claim into the cause of action but has not pled fraud with adequate specificity. They point to paragraph 94 of the FAC, which states, "Plaintiff is informed and believe that Defendants acted fraudulently, as they intentionally concealed the fact that Plaintiff's employment rights were being violated, thereby depriving Plaintiff of employment benefits under his contract." (FAC, ¶ 94.)

It is a correct statement of the law that fraud claims must be pled with specificity. "Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) This necessitates pleading facts which show "how, when, where, to whom, and by what means the representations were tendered." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) However, the fifth cause of action is not a fraud claim but a claim for intentional infliction of emotional distress.

"The elements of the tort of intentional infliction of emotional distress are: (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. [Citation.]" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001, internal quotation marks omitted.) Fraud is not one of the elements of intentional infliction of emotional distress and Defendants cite to no authority that the mere mention of the word fraudulently within a non-fraud cause of action in the FAC would require Plaintiff to plead fraud with specificity. Defendants make no argument that any of the elements of intentional infliction of emotional distress are inadequately pled. Accordingly, this argument must be rejected.

Again pointing to paragraph 94 of the FAC, Defendants argue that, to the extent the fifth cause of action depends on a breach of contract claim, the contract is not attached, the terms of the contract are not properly pled, and it cannot be determined whether the contract is written, oral, or implied. Section 430.10, subdivision (g) provides that one of the grounds for demurrer is that "[i]n an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct." But, "[t]he failure to allege whether a contract was written or oral is not a ground for demurrer where, as here, the action is not founded upon a contract." (*Fanucchi v. Coberly-West Co.* (1957) 151 Cal.App.2d 72, 83.) Here, although an employment contract may be tangentially involved in this case, it

cannot be said that the intentional infliction of emotional distress claim is founded upon a contract. The incident that allegedly inflicted Plaintiff's distress occurred when Tarighat allegedly yelled and cursed at Plaintiff and threatened him with a knife.

Further, Defendants' arguments relating to both the fraud allegation and the contract allegation are targeting only one paragraph of the fifth cause of action. A demurrer does not lie to a portion of a cause of action and, therefore, the arguments that paragraph 94 fails to state a claim of fraud or to properly plead a contract is not sustainable on demurrer. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.) Paragraph 94 of the FAC may not add to the clarity of Plaintiff's claim but it does not render the claim uncertain.

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

iv. Sixth Cause of Action – Termination in Violation of Public Policy

With respect to the sixth cause of action, Defendants again argue that Plaintiff has "injected" a fraud element into the claim and mentions a contract without attaching or pleading the terms of the contract, rendering the claim unintelligible and resulting in a failure to state a claim. Again, Defendants point to a specific paragraph of the FAC, paragraph 106, which is identical to paragraph 94. These arguments must fail for the reasons discussed above in the context of the fifth cause of action.

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

v. Seventh Cause of Action – FEHA Discrimination

In their memorandum of points and authorities, Defendants contend that the seventh cause of action is subject to demurrer. But, the notice of demurrer and demurrer make no mention of the seventh cause of action and, therefore, states no grounds for sustaining the demurrer as to that cause of action. (See § 430.60 ["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."].) Nonetheless, the memorandum of points and authorities was filed concurrently with the notice of demurrer and demurrer and Plaintiff was able to respond to Defendants' arguments related to the seventh cause of action in the opposition. Accordingly, the court will overlook this defect.

Defendants contend that the seventh cause of action is unintelligible and therefore fatally uncertain. They also assert that the seventh cause of action fails to state a claim. Both arguments are well taken.

As Defendants point out, paragraph 111 of the FAC states, "As such term is used under FEHA, on the bases enumerated in this part means or refers to discrimination on the bases of one or more of the protected characteristics under FEHA." (FAC, ¶ 111.) This allegation does not make sense. Additionally, the seventh cause of action indicates that Plaintiff is in a protected class for purposes of a FEHA discrimination claim based on his age. (FAC, ¶ 116.) But, the seventh cause of action incorporates the prior paragraphs of the FAC by reference,

(see FAC, ¶ 109),[6] which, as mentioned above, assert that Plaintiff was discriminated against on the basis of his sex. (FAC, ¶ 60.) While it is of course possible for Plaintiff to be a member of more than one protected class, it is not clear why the FEHA-related claims do not all make the same protected class allegations when they appear to all be based out of the same incident with Tarighat.

As to failure to state a claim, the seventh cause of action alleges that he suffered discrimination but the FAC does not indicate in the seventh cause of action what discriminatory actions Plaintiff allegedly suffered. As mentioned above, the seventh cause of action incorporates the prior paragraphs of the FAC by reference and the FEHA discrimination claim appears to be based on the same yelling and knife brandishing incident involving Tarighat. As with the hostile work environment cause of action, the FAC fails to allege sufficient facts to suggest that the alleged discrimination was based on Plaintiff's membership in a protected class.

The court notes that the FAC alleges that Tarighat referred to Plaintiff as a "child" and Plaintiff alleges that he is 22 years old and younger than Tarighat. (FAC, ¶¶ 19, 24, 133.) But, Plaintiff does not argue in opposition to the demurrer that this sole reference to Plaintiff as a child is sufficient to show that the incident was motivated by Plaintiff's age. In context of the other statements Plaintiff alleges Tarighat made including " 'I will break your jaw' ", " 'You are always talking shit left and right' ", " 'I'll take your mouth,' " and " 'I'll take you down if you accuse me again child' ", and the allegation that the incident occurred after Plaintiff called Tarighat out for making a mistake, Plaintiff has not adequately pled that the actions taken by Defendants were motivated by Plaintiff's age. (FAC, ¶ 24.)

Due to the clear allegation that Tarighat began yelling and threatened Plaintiff with a knife only after Plaintiff pointed out a potential mistake and the fact that the FAC inconsistently pleads that Tarighat's actions in the same incident were motivated by his age in the seventh cause of action and by his sex in third cause of action, the demurrer must be sustained. The FAC fails to provide Defendants with sufficient notice as to the claims they must defend against.

The demurrer to the seventh cause of action is SUSTAINED with 20 days' leave to amend on the grounds of uncertainty and failure to state a claim.[7]

vi. Eighth Cause of Action – Retaliation in Violation of FEHA

The eighth cause of action is a claim for FEHA retaliation. Government Code section 12940, subdivision (h), provides that it is an unlawful employment practice for

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[6] Actually, paragraph 109 states, "Plaintiff incorporates, by reference, all allegations in the foregoing *paragraph* [sic] of this First Amended Complaint as though fully set forth herein." (FAC, ¶ 109.)

[7] Plaintiff argues generally that the uncertainty arguments must be rejected because a demurrer on the ground of uncertainty must specify the page and line numbers at which the uncertainty appears. But, Defendants' memorandum of points and authorities has identified the portions they claim are uncertain by page and line number and has even quoted the language of the challenged passages in the FAC. Accordingly, this argument is rejected.

an employer to otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under FEHA. (Gov. Code, § 12940, subd. (h).)

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

Defendants correctly assert that the eighth cause of action asserts conclusory allegations without pleading any factual allegations that would, if proven, establish the elements of such a claim. The FAC states that the elements of a FEHA retaliation claim are: "1) an employee complains of or somehow opposes any practice forbidden under FEHA; 2) the defendant subsequently subjects the employee to an adverse employment action; and 3) the employees First Amended Complaint [sic] or opposition to the forbidden practice was a substantial motivating factor for defendant taking the adverse employment action against the employee." (FAC, ¶ 125.) It then states that these elements were met when "Plaintiff engaged in a protected activity when he resisted harassment from [Tarighat]; 2) he then suffered an adverse employment action when forced to quit; and 3) engaging in the protected activity was a substantial motivating factor for Defendant in taking the adverse employment action against Plaintiff." (FAC, ¶ 126.) Setting aside the fact that the test itself is rendered somewhat confusing due to the insertion of "First Amended Complaint" into its text, the allegation that "engaging in the protected activity was a substantial motivating factor for Defendant in taking adverse employment action against Plaintiff" is conclusory and fails to state actual facts in support.

Additionally, the assertion that Plaintiff was forced to quit is directly contradicted by Plaintiff's assertions elsewhere in the FAC that he was terminated. (See FAC, ¶¶ 21, 115, 127.) In fact, the sixth cause of action is a claim that Plaintiff was terminated in violation of public policy. This renders the FAC fatally uncertain because it is unreasonable to expect Defendants to determine what allegations they are expected to defend against.

Further, as Defendants contend, the eighth cause of action also refers to retaliation based on requesting an accommodation for a religious practice or disability. (FAC, ¶ 124 ["It is also unlawful to retaliate or otherwise discriminate against a person requesting an accommodation/or religious practice or disability regardless of whether the request was granted."].) But, there are no allegations in the FAC that Plaintiff requested an accommodation for a religious practice or disability.

Defendants' argument that fraud has been injected into this claim is rejected for the reasons discussed above in the context of the fifth cause of action.

The demurrer is SUSTAINED with 20 days' leave to amend as to the eighth cause of action on the grounds of uncertainty and failure to state a claim.

vii. Ninth Cause of Action – Failure to Prevent Discrimination and Retaliation (Gov. Code, § 12940, subd. (k)

"The FEHA makes it unlawful for an employer 'to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.' " ([Gov. Code, § 12940, subd. (k).)" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003.) "An actionable claim under section 12940, subdivision (k) is dependent on a claim of actual discrimination: 'Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented.'" (*Id.* at p. 1021.) In other words, a prerequisite to a finding of liability for the failure to take all reasonable steps is a finding that the plaintiff actually suffered unlawful discrimination, harassment, or retaliation. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 282-283.)

Here, because the demurrer has been sustained as to all of the FEHA claims that would expose Defendants to liability, the demurrer must be sustained to the ninth cause of action as well. Further, the only step the FAC mentions that Defendants failed to take is "it did not have a training or education program instructing management from refraining from this type of conduct." (FAC, ¶ 137.) This allegation is insufficient, even in the context of the paragraphs that have been incorporated into the ninth cause of action because it is unclear what "this type of conduct is referring to." While the alleged yelling, cursing, threatening with a knife, amount to conduct that an employer should not engage in, there is no factual basis for the court to conclude that this is the type of conduct that was motivated by Plaintiff's membership in a protected class, which would bring these allegations under the purview of the FEHA.

Defendants' argument that fraud has been injected into this claim is rejected for the reasons discussed above in the context of the fifth cause of action.

The demurrer is SUSTAINED with 20 days' leave to amend as to the ninth cause of action on the ground of failure to state a claim.

viii. Tenth Cause of Action – Violation of Ralph Civil Rights Act (Civ. Code § 51.7) and Eleventh Cause of Action – Violation of Tom Bane Civil Rights Act (Civ. Code, § 52.1)

With respect to the tenth and eleventh causes of action, violations of the Ralph Civil Rights Act and Tom Bane Civil Rights Acts, respectively, Defendants contend that these causes of action fail to allege sufficient facts to show that Defendants' actions were motivated by discriminatory animus. This argument is well taken.

Civil Code section 51.7 "broadly provides that all persons have the right to be free from violence and intimidation by threat of violence based on, among other things, race, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute." (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1146.) "Under the Ralph Act, a plaintiff must establish the defendant threatened or committed violent acts against the plaintiff or their property, and a motivating reason for doing so was a prohibited discriminatory motive, or that

defendant aided, incited, or conspired in the denial of a protected right." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1291.)

Civil Code section 52.1 similarly requires a discriminatory motive. " '[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, *the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7* or a group similarly protected by constitution or statute from hate crimes. [Citation.]" (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290, italics added.)

As with the FEHA causes of action, the tenth and eleventh causes of action fail to allege facts supporting a conclusion that Defendants acted with a discriminatory motive. This problem is compounded by the fact that prior paragraphs of the FAC are incorporated by reference into these causes of action, (FAC, ¶¶ 146, 154), and the allegations in the FAC are inconsistent as to what protected class or characteristics apply to Plaintiff as discussed above.

The demurrer is SUSTAINED with 20 days' leave to amend as to the tenth and eleventh causes of action on the grounds of uncertainty and failure to state a claim.

III. MOTION TO STRIKE

A. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (§ 436, subd. (a).) A court may also strike out all or any part of a pleading not drawn or filed in conformity with the laws of the State of California. (§ 436, subd. (b).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (§ 437, subd. (a).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (§ 437, subd. (a).)

Irrelevant matter includes "immaterial allegations." (§ 431.10, subd. (c).) "An immaterial allegation in a pleading is any of the following: (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; (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (§ 431.10, subd. (b).)

Motions to strike are disfavored and courts considering such motions must presume the allegations contained therein are true and must consider those allegations in context. (See *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) A motion to strike should not be a "procedural line item veto for the civil defendant." (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.)

The court's decision to strike the petition pursuant to section 436 is discretionary. (See § 436 ["The court may . . .strike"]; see also *Colden v. Broadway State Bank* (1936) 11 Cal.App.2d 428, 429 [motion to strike is addressed to the sound discretion of the court].) A motion to strike should be applied cautiously and sparingly because it is used to strike substantive defects. (*PH II*, *supra*, 33 Cal.App.4th at 1682-1683.)

B. Merits of the Motion

Defendants contend that certain portions of the FAC referring to the amount of damages must be stricken because statutory authority provides that the amount of damages shall not be stated in the complaint. (See Notice of Motion and Motion to Strike, pp. 2-3.)

In general, "[i]f the recovery of money or damages is demanded, the amount demanded shall be stated" in the complaint. (§ 425.10, subd. (a).) However, "[n]otwithstanding subdivision (a), where an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated, but the complaint shall comply with Section 422.30 and, in a limited civil case, with subdivision (b) of Section 70613 of the Government Code." (§ 425.10, subd. (b).) Defendants also rely on Civil Code section 3295, subdivision (e), which states, "No claim for exemplary damages shall state an amount or amounts."

Plaintiff concedes that the amounts of damages listed in the portions of the FAC Defendants identify should be stricken and he agrees to amend the FAC to remove them. However, he rallies against striking the actual requests for damages, as opposed to merely the amounts. In response to this, Defendants do not argue that they are seeking to strike the actual requests for damages. They merely note in the reply that Plaintiff concedes their arguments in the motion. Thus, it does not appear that Defendants are attempting to strike the damages requests; they are merely seeking to strike the amounts. Accordingly, the court finds that the amount of damages but not the damages requests themselves should be stricken.

The motion to strike is GRANTED.

IV. Conclusion

Defendants' demurrer to the FAC is SUSTAINED IN PART AND OVERRULED IN PART. The demurrer is SUSTAINED with 20 days' leave to amend as to the third and ninth causes of action on the ground of failure to state a claim. The demurrer is SUSTAINED with 20 days' leave to amend as to the seventh, eighth, tenth and eleventh causes of action on the grounds of uncertainty and failure to state a claim. The demurrer is OVERRULED as to the fourth, fifth, and sixth causes of action.

The motion to strike portions of the complaint is GRANTED in its entirety.

The court will prepare the final order.

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Calendar Line 3
Case Name: *Pereira, et al. v. Mijangos, et al.*
Case No.: 23CV416527

This action arises from an alleged breach of a property purchase agreement. Fidelity National Title Company ("Fidelity") and Katherine Gutierrez, a Fidelity escrow officer, ("Gutierrez") (collectively, "Defendants,") demur to the operative Complaint filed by Teresa Pereira ("Pereira") and Cyclone Fence & Iron, Inc. ("Cyclone"), a California corporation (collectively, "Plaintiffs.")

I. Background

A. Factual

According to the allegations in the operative Complaint, Plaintiff Pereira entered into a "Listing" agreement with prospective buyers, Xiochiti Mijangos and Patel Mijangos (collectively, "Buyers,") for the sale of real property located on 12935 Columbet Avenue, San Martin, California ("Subject Property.") Robert Ellis ("Ellis,") a realtor at Remax Morgan Hill, was the listing agent of the Subject Property. (Complaint. p. 3.) Buyers made an initial offer to purchase Subject Property for $2,410,000, with an escrow period of thirty days, and "no loan contingency." (*Ibid*.) Pereira provided a counteroffer of a sale price of $2,455,000, and the Buyers accepted via the written purchase agreement. (*Ibid.*) The agreed upon escrow period "opened" on May 17, 2022. Plaintiffs allege the purchase agreement dually served "as the operative escrow instructions and written contract" between Pereira and Fidelity. (*Ibid.*)

Approximately a month later, Ellis informed Pereira that the Buyers "had a problem with the financing" and would resolve the matter on or about June 20, 2022. (*Ibid.*) On June 27, 2022, Ellis emailed Pereira informing her that there was "debate about the appraisal," and that the Buyers "are out of contract." (*Ibid.*) That same day, Plaintiffs provided "Notice to Buyer to Perform #1"and allowed Buyers three days to comply. (*Ibid.*) The Buyers subsequently failed "to fund the escrow" prior to the close of escrow on July 5, 2022. (*Ibid.*)

Upon closing of the alleged escrow period, Plaintiff Pereira faxed, hand delivered, and emailed instructions to Defendant Gutierrez for a "Recession [sic] of Signature" on the "grant deed." (*Id.* at 4.) When Gutierrez refused to return the deed, Plaintiff asked her to sign the physical correspondence. (*Ibid.*) Gutierrez simply "acknowledged receipt" of Plaintiff's request via email on July 8, 2022. (*Ibid.*)

Pereira's counsel emailed instructions to Defendants "to cancel escrow" as the Buyers were no longer parties to the purchase agreement. (*Id.* at p. 4.) Despite this instruction, Defendants "closed escrow" and recorded the deed at issue without Plaintiffs' approval. Plaintiffs allege that Defendant Fidelity "knowingly" used Pereira's "rescinded signature" to "fraudulently" approve both the escrow closure and recording of the deed. (*Ibid.*) As a result of these actions, Plaintiffs lost record title to the Subject Property. (*Ibid.*)

B. Procedural

On May 16, 2023, Plaintiffs filed the operative pleading, alleging the following ten causes of action:

1) the first cause of action for breach of contract **(against defendants Buyers, Fidelity, and Remax)**
2) the second cause of action for negligence **(against all defendants)**
3) the third cause of action of breach of fiduciary duty **(against defendants Fidelity, Gutierrez, Remax, and Ellis)**
4) the fourth cause of action for slander of title **(against all defendants)**
5) the fifth cause of action for negligent interference with prospective economic advantage ("NIPEA") **(against all defendants)**
6) the sixth cause of action for intentional interference with prospective economic advantage ("IIPEA") **(against all defendants)**
7) the seventh cause of action for cancellation of instruments **(against all defendants)**
8) the eighth cause of action for rescission and cancellation of instruments **(against all defendants)**
9) the ninth cause of action for false promise **(against defendant Buyers)**
10) the tenth cause of action for rescission of instruments **(against all defendants)**

On October 16, 2023, Defendants Fidelity and Gutierrez demurred to the entirety of the Complaint as it relates to them and to the first, fifth, sixth, and tenth causes of action, individually. Plaintiffs filed an opposition on February 1, 2024. A week later, Defendants filed a reply.

II. Defendants' Demurrer

A. Defendants' Request for Judicial Notice

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

In support of their demurrer, Defendants request this Court to take judicial notice of multiple Court Orders of the Santa Clara County Superior Court, Family Division, in docket 21FL002766, entitled *Pereira v. Pereira*. (See Defendants' Request for Judicial Notice in Support of Demurrer to Complaint.) These requests are granted. (Evid. Code, § 452, subd. (d) [court documents]; *Becerra v. McClatchy Co.* (2021) 69 Cal.App.5th 913, 929 [taking judicial notice of trial court order under parallel circumstances].) The court should grant the request with the caveat that while the court is free to take judicial notice of the existence of a document in a court file, it may not take judicial notice of the truth of hearsay statements contained therein. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.)

Defendants additionally request this Court to take judicial notice of the recorded deeds for the Subject Property. Plaintiffs do not object to these requests, and they are therefore granted. (See *Evans v. California Trailer Court, Inc*. (1994) 28 Cal.App.4th 540, 549 ["The court may take judicial notice of recorded deeds."]; see also *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal. App. 4th 343, 364 [existence of a document judicially noticeable apart from the truth of statements contained in the document and the document's proper interpretation]; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-

65 [court may only rely upon the legal effect of a recorded document "when that effect is clear from its face"].)

Finally, Defendants ask this Court to take judicial notice of Plaintiffs' operative Complaint for the instant action. As the Complaint is the pleading under review, this request is denied as unnecessary. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [denying as unnecessary a request for judicial notice of pleading under review on demurrer].)

B. Legal Standard

"A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).)

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

C. Merits of the Demurrer

ii. Demurrer to Entirety of the Complaint

1. Misjoinder/Defect in Joinder

Defendants demur to the entirety of Plaintiffs' complaint for failing to include an "indispensable party." (Demurrer, p. 2.) Specifically, Defendants argue that the Complaint fails to include Pereira's former spouse, a joint tenant of the Subject Property, and thus, an indispensable party. (*Id.* at p. 5.) In their Opposition, Plaintiffs argue that no other Defendants (in the instant action) assert misjoinder, and that Defendants fail to adequately explain the misjoinder issue. (Opposition, p. 4.) In their Reply, Defendants argue Plaintiffs fail to cite authority for the proposition that Pereira's former spouse is not required to be a party to the action. (Reply, pp. 1-2.)

"Code of Civil Procedure section 389 governs the joinder of parties and provides, in pertinent part: "(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties *subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason*

of his claimed interest. If he has not been so joined, the court shall order that he be made a party." (Code Civ. Proc., § 389, subd. (a), emphasis added.)[8]

"Where the plaintiff seeks some type of affirmative relief, which if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party." (*Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 501.)

Here, Defendants contend that the missing party is Plaintiff Pereira's former spouse, who is listed on the deed Plaintiffs are seeking to rescind as a co-owner at the time of the sale. (See Request for Judicial Notice in Support of Demurrer to Complaint ("RFJN"), Ex. G.) An owner of the property has been held to be an indispensable party within the meaning of section 389. (See *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1308-1309 [record owner of the property is an indispensable party to any action seeking to cancel the deed by which it acquired the property]; see also *Washington Mutual Bank v. Blechman* (2007) 157 Cal.App.4th 662, 668 ["When a party seeks to set aside and vacate a trustee's sale in a foreclosure proceeding, there can be no doubt that the parties to the sale transaction are indispensable parties."].)

Plaintiffs' argument that "no other answering party" has asserted a misjoinder claim is irrelevant and skirts the issue at hand. Further, Plaintiffs' contention that Defendants fail to explain the defect in joinder is without merit. Defendants clearly assert that Plaintiff Pereira's former husband iss an indispensable party as a co-owner of the property.

Given that Plaintiffs have failed to make any argument as to how Pereira's former husband is not an indispensable party, the demurrer is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if a plaintiff has not had an opportunity to amend the complaint in response to a demurrer, leave to amend is liberally allowed as a matter of fairness].)

2. Family Court Order

Defendants also argue a Family Court order in this County prevented Plaintiff Pereira from acquiring "sole ownership" of the Subject Property. (Demurrer, p. 6.) Plaintiffs argue that the Family Court made no such order and, even if it did, it was an interlocutory order. (Opp., pp. 4-5.) Additionally, Plaintiffs contend Pereira is not claiming any right to "buy" the Subject Property. (*Ibid.*)

In both their demurrer and reply, Defendants focus largely on a separate family court case involving the Subject Property. Defendants' discussion of the Family Court order is inapposite because it denied Pereira's request to *buy* the Subject Property from her former spouse. (See RFJN, Ex. E.) In this case, Plaintiffs are not seeking to purchase the property. The court does not view the request to rescind the deed transferring the house to the Buyers as an attempt at relitigation of the Family Court proceedings. Instead, the Complaint seeks to hold Defendants liable for their own alleged actions.

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[8]All further undesignated statutory references are to the Code of Civil Procedure.

In sum, no adequate showing has been made by Defendants that Plaintiffs are estopped from maintaining their causes of action based on the family court proceedings. Accordingly, the demurrer to the Complaint on the grounds that Plaintiffs cannot "collaterally attack" a previous court order in the Santa Clara County Family Division, is OVERRULED.

3. 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." (See *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.)

Here, Defendants argue it is not clear which Plaintiff is raising which causes of action (§ 430.10, subd. (f)). In Opposition, Plaintiffs contend demurrers for uncertainty are disfavored. In response, Defendants argue the Complaint fails to identify the actual owners of the Subject Property making the pleading uncertain, and it fails to match each cause of action to the appropriate defendant. Lastly, Defendants allege Plaintiffs fail to specify which contract has been allegedly breached, and merely indicates that the escrow holder breached its terms and conditions in the agreement. (Reply, pp. 2-4.)

Defendants provide little in the way of legal authority and explanation as to how the failure to identify which plaintiff is raising which cause of action renders the Complaint uncertain. The court declines to consider Defendants' additional arguments, targeting the entirety of the Complaint, raised for the first time in reply." (See *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010 ["points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before"].)

Accordingly, Defendants' demurrer to the entire Complaint on the ground that the pleading is uncertain [§430.10, subd.(f)] is OVERRULED.

For the benefit of the Plaintiffs in amending their Complaint, the Court will go on to discuss the merits of the remaining arguments.

i. First Cause of Action – Breach of Contract

1. Failure to State a Claim

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and

(4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman (*2011) 51 Cal.4th 811, 821.)

It is well recognized by the Court that, if a contract is written, "the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." (*Otworth v. Southern Pacific Transportation Co.* (1985) 166 Cal.App.3d 452, 459 (*Otworth*) Alternatively, "[i]n an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 199 (*TIG Specialty*)*.)*

Here, Defendants argue that Plaintiffs' claim that the "Listing Agreement" with Buyers created a contract with Fidelity, "clearly defies logic." (Demurrer, pp. 6-7.) Defendants further contend that an escrow company is not a party to a purchase agreement, and more importantly, Plaintiffs fail to allege Pereira's performance or excuse for failure to perform with respect to any alleged contract with Fidelity. (*Ibid.*)

In their Opposition, Plaintiffs allege Pereira performed all her contractual obligations owed to the defendants, "except those she was excused from performing." (Opp. p 4:25-26.) Upon performance, Plaintiffs claim Defendant Fidelity, as escrow holder, was required to fulfill its duties to prevent improper transfer of the Subject Property. However, Plaintiffs fail to address Defendants' first crucial argument – that Fidelity and Pereira did not have an agreement. (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 (*Westside*) [failure to challenge a contention results in the concession of that argument].)

The breach of contract claim here arises from Defendants' alleged breach of the Listing Agreements. (See Complaint, pp. 3-4.) However, Plaintiffs fail to demonstrate "the existence of a contract" between Fidelity and Pereira, a required element of a breach of contract claim. Here, Plaintiffs fail to set out, "verbatim," the terms of the operative purchase agreement, or at the very least, clearly "plead the legal effect" of the agreement. A chronology of events leading up to the alleged breach of contract, without more, is insufficient. Alternatively, Plaintiffs could also have attached a copy of the "Listing Agreement" to the Complaint, for reference. (*Otworth, supra,*166 Cal.App.3d at 459; *TGI Specialty, supra,* 29 Cal.4th at 199.) Plaintiffs' first cause of action falls short in this regard and therefore the demurrer is sustained on that basis.

Accordingly, the demurrer to the first cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

2. Uncertainty

Defendants allege it is not clear what contractual obligations were breached per the Listing Agreement (or any other agreements) and by whom. Specifically, Plaintiffs do not allege or point to any agreement with specific terms/clauses that required Defendants to not close the escrow period or "cancel escrow" once the Buyers were "out of contract." (See Complaint, p. 4:8-14.)

In their Opposition, Plaintiffs allege that given the Buyers' failure to fund escrow, and, despite her written instructions to "cancel escrow," Defendant Fidelity closed escrow.

Although the Complaint references email and written communications between Pereira and Defendants about closing escrow, these documents have not been attached as exhibits.

At this stage of the pleadings, Defendants' demurrer to the first cause of action in Plaintiffs' Complaint on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd.(f)] is OVERRULED. Although Plaintiffs have not adequately pled the terms or legal effect of the operative agreement allegedly between Fidelity and Pereira, the pleading is not "unintelligible." Lack of clarity does not always result in "uncertainty" especially in this instance where Defendants filed a substantive demurrer addressing each of Plaintiffs' cause of action.

ii. Fifth Cause of Action & Sixth Cause of Action: Negligent & Intentional Interference with Prospective Economic Advantage ("NIPEA" & "IIPEA"

1. Failure to State a Claim

To state a cause of action for the tort of NIPEA, Plaintiffs must demonstrate: "(1) the existence of an economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's knowledge (actual or construed) that the relationship would be disrupted if the defendant *failed to act with reasonable care;* (4) the defendant's *failure to act with reasonable care;* (5) actual disruption of the relationship; and (6) economic harm proximately caused by the *defendant's negligence*. (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005, emphasis added; see also CACI, No. 2204.)

As for IIPEA, the Plaintiffs must demonstrate: "(1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff, (2) the defendant's knowledge of the relationship, (3) intentionally wrongful acts designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) economic harm proximately caused by the defendant's action." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.) "Intentionally interfering with prospective economic advantage requires pleading that the defendant committed an independently wrongful act... [a]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1142; see also *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393 [stating that "a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself'"].)

Plaintiffs allege Defendants "knew" Plaintiffs were in an "economic relationship" and Defendants were on "notice" of the improper "recordation of deed." (Complaint, pp 7-8.) The Complaint does not explain the economic relationship or how Defendants could have known about it. In fact, it provides nothing more than conclusory allegations that Defendants "knew that Plaintiffs were in an economic relationship that would probably have resulted in a "future economic benefit to Plaintiffs." (Complaint, ¶¶ 28, 34.) Additionally, Plaintiffs have not

addressed how Defendants' actions "interfered" with any agreement, and whether any alleged "interference" was "wrongful."

In that vein, Defendants argue Plaintiffs fail to adequately demonstrate, with particularity, Fidelity had "knowledge" of the "economic advantage" to Plaintiffs during the escrow period and final recordation of deed. Defendants further point out Plaintiffs' allegations are devoid of facts regarding right to occupancy/use of the property on the part of Plaintiff Cyclone.

Defendants' arguments are well-taken given Plaintiffs have not pled, with sufficient particularity, Defendants' actual contractual obligations per the Listing Agreement. As discussed earlier, Plaintiffs have not adequately pled the terms or legal effect of *any* agreement terms within the Complaint. Alternatively, Plaintiffs have not attached a purchase agreement, which could clarify the contracting parties and their legal obligations. Without more, the Court sustains Defendants' demurrer.

Accordingly, the demurrer to the fifth and sixth causes of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND, for failure to state a claim.

2. Uncertainty

In both their notice of demurrer and demurrer, Defendants argue, as to both the fifth and sixth causes of action, that they are uncertain. Specifically, they allege Plaintiff's claims lack facts demonstrating Defendants would have become aware of the relationship between the two Plaintiffs Pereira and Cyclone, during the alleged breach by Buyers. However, Plaintiffs' alleged evidentiary deficiencies do not render their claims uncertain and "wildly unintelligible," as Defendants' assert. After all, Defendants "reasonably recognized," and addressed each cause of action against them in a substantive demurrer. (*Khoury, supra,* 14 Cal.App.4th at 616.)

Accordingly, the demurrer to the fifth and sixth causes of action is OVERRULED for uncertainty.

iii. Tenth Cause of Action: Rescission of Instruments[9]

1. Failure to State a Claim

Defendants argue the Complaint fails to state any facts supporting a claim for rescission since none of the grounds for rescission are alleged in the Complaint. (Demurrer, p. 8; Complaint, p. 11.) Defendants reassert they are not parties to the purchase agreement and/or deed entered into by Plaintiff Pereira and Buyers. (*Ibid.*)

In their Opposition, Plaintiffs assert generally that deeds are considered written contracts and are therefore subject to the rules applicable to and governing contracts. (See Civ.

[9] In Plaintiffs' operative Complaint, Plaintiffs allege a tenth cause of action for "Recession [sic] of instruments." (Complaint, p. 11.) This court will assume Plaintiffs are making a *rescission* of contract claim. That said, the court admonishes Plaintiffs' counsel to proofread and revise spellings before filing their amended Complaint.

Code § 1040; *Johnston v. City of Los Angeles* (1917) 176 Cal. 479, 485.) Plaintiff contends that a deed "obtained by fraud" is subject to rescission pursuant to Civil Code section 1689. Consequently, Plaintiffs argue they can maintain a claim for recission of the purchase agreement, the escrow agreement, and the deed recorded on August 9, 2022.

"The traditional equitable action to have the rescission of a contract adjudged was recognized in former *Civil Code* 3406." (*4 Witkin, California Procedure* (6th ed. 2023) Pleading § 549.) "The equitable action was abolished in 1961," and "the current remedy is a legal action for restitution based on a completed unilateral rescission." (*Ibid*.) "The following must be alleged in an action for restitution after completed unilateral rescission: (1) the contract or other contractual instrument; (2) the ground for rescission; (3) if the ground is breach of contract, plaintiff's own performance." (*4 Witkin, California Procedure* (6th ed. 2023) Pleading § 550; see also *Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304 (*Runyan*).) "Relief given in rescission cases—restitution and in some cases consequential damages—puts the rescinding party in the status quo ante, returning him to his economic position before he entered the contract." (*Runyan*, *supra*, 2 Cal.3d at p. 316, fn. 15.)

"A party to a contract may rescind the contract in the following cases: (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." (Civ. Code, § 1689, subd. (b)(1).)

Plaintiff seeks to declare "null and void" the "fraudulently procured" deed and to ultimately obtain quiet title to the Subject Property. (Complaint, p. 11.) In their Complaint, Plaintiffs plead that despite the Buyers' failure to perform their obligations under the Listing Agreement, Defendant Fidelity closed escrow and recorded the deed" without Pereira's approval, resulting in the loss of "record title" to the Subject Property. (Complaint, p. 4:3-18.) As the court has highlighted, *supra,* none of these facts demonstrate that Defendants are parties to the alleged Listing Agreement, the escrow agreement, or the deed. The Plaintiffs have not attached the agreements at issue and neither have they adequately pled the terms of these agreements in the Complaint. Consequently, Plaintiffs fail to state sufficient facts for rescission.

Accordingly, the demurrer to the tenth cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND, for failure to state a claim.

2. Uncertainty

Here, Defendants maintain Plaintiffs' Complaint is "wildly uncertain, unintelligible and ambiguous" as to what "instruments" or "contracts" Plaintiff is seeking to rescind from Defendant Fidelity. Defendants, again, contend, they are not parties to the purchase agreement or deed between Plaintiff Pereira and the Buyers, "which are the only two instruments even remotely referenced in the Complaint." (Demurrer, p. 8.)

In their Reply, Defendants concede that the deed in question is the subject of a rescission issue. After all, Plaintiffs refer to a deed with a specific number and recording date. That deed is attached to the request for judicial notice. (See Ex. E.) Rather, Defendants'

contention is that Plaintiffs fail to demonstrate how Defendants are parties to the alleged contracts.

While the cause of action does not specifically state a claim against Defendant Fidelity, it is not "wildly uncertain" which contract or agreement Plaintiffs are attempting to rescind, even if it is referencing another agreement outside the context of both the purchase agreement and deed conveyance.

Accordingly, the demurrer to the tenth cause of action is OVERRULED on the ground of uncertainty.

In accordance with the foregoing, Defendants' demurrer to the first, fifth, sixth, and tenth causes of action, on the ground of failure to state facts sufficient to constitute a cause of action, is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

IV. Conclusion

The demurrer is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND as to the first, fifth, sixth, and tenth causes of action against Defendants Fidelity and Gutierrez.

The Court will prepare the final Order.

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Calendar Line 4
Case Name: KEVIN YOUNG, vs. JUDY CHI-DEE TSAI, ET AL.,
Case No.: 20CV366134

The motion for summary judgment by defendants Judy Chi-Dee Tsai ("Tsai") and Law Office of Judy Tsai (collectively, "Defendants") came on for hearing before the Honorable Amber Rosen on February 20, 2024 at 9:00 a.m. in Department 16. The matter having been submitted, after full consideration of the evidence, the separate statements, and authorities submitted by each party, and arguments made by the parties in their papers and the hearing, the court makes the following rulings:

This is an action for attorney malpractice. According to the allegations of the complaint, in 2013, plaintiff Kevin Young ("Young") began working at plaintiff ABC Wholesale, Inc. ("ABC"), a company founded by his parents. (See complaint, ¶ 8.) Young obtained legal advice regarding the business, including operations and collections, from defendants Judy Chi-Dee Tsai ("Tsai") and the Law Office of Judy Tsai (collectively with Tsai, "Defendants"), as Defendants had provided legal services for his parents and ABC previously. (Id.) In 2017, Young assumed ownership and management of ABC, and he informed Tsai that he was considering transferring his interest in and ownership of ABC, and requested that she assist in the matter, to which Tsai agreed. (See complaint, ¶ 9.)

In 2019, Young went to Tsai's office and sought Tsai's advice and assistance in connection with his exit from and the transfer of ownership of ABC, and Defendants agreed to assist Young and ABC. (See complaint, ¶ 10.) Tsai suggested Bay Area Seafood ("BAS") as a potential buyer and indicated that she had a business relationship with BAS and gave a favorable recommendation of BAS. (Id.) Young continued to consult with Defendants and reached out to other potential buyers, and sought out Defendants' advice regarding those potential buyers. (See complaint, ¶ 11.) Defendants dissuaded Young from entering into an agreement with a Chinese distribution company, telling him that she did not want to deal with Chinese companies and he should not do so. (Id.) Defendants recommended that Young sell ABC to BAS, a food distributor in Hayward, saying that Tsai "knew the people involved," and "they won't try to screw you." (See complaint, ¶ 12.) Young followed Defendants' advice and pursued the merger and sales representative agreement, under the advisement of Defendants. (See complaint, ¶ 13.) When Young raised the subject of the process for the actual merger, Defendants assured him that BAS had ten times the sales volume of ABC and that they would easily be able to organize the merger and fulfill their obligations. (Id.) Defendants assisted in negotiations with BAS, advised Young with regards to the handling and terms of the sale, prepared legal documents to facilitate the sale including a merger agreement and a sales representative agreement, and neither advised Young to conduct any financial or background check on the buyers Tsai selected and recommended, nor advised Young to retain independent counsel, nor notified Young that she was simultaneously representing BAS, nor advised Young of the actual or potential conflict of interest nor obtained any informed written consent to the conflict of interest. (See complaint, ¶¶ 13-14.)

The merger agreement provided that Young would transfer ownership of ABC and its assets in exchange for BAS's purchase of ABC's inventory, valued at $200,000 and an agreement to hire two employees, and relying on Defendants' counsel, Young signed the agreement, relying on Defendants to implement the transaction as his attorneys. (See complaint, ¶ 15.) In April, BAS visited ABC and agreed to the terms of the agreement and signed the papers that

Defendants prepared at her office; Young also signed the Agreement and executed the documents to complete the agreed transactions on May 1, 2019. (See complaint, ¶ 16.)

After the merger date, plaintiffs Young and ABC (collectively, "Plaintiffs") began experiencing problems with BAS' compliance; Young expressed concerns about the merger and representative agreements working out to Defendants, but Defendants dissuaded him from taking any action. (See complaint, ¶ 17.) Plaintiffs later discovered that BAS did not have the capacity and resources to sell food products to their clients as Defendants had indicated and BAS also returned inventory that it was supposed to purchase, and refused to provide the promised accounting of commissions to Young. (See complaint, ¶ 18.) In June 2019, Young again sought advice regarding BAS' lack of full compliance with the agreements relating to the sale of ABC and Defendants now stated that she could not advise him and that he should find another lawyer. (See complaint, ¶ 19.) In July 2019, contrary to Defendants' assurances, BAS failed to fulfill its obligations in the agreement and promises made to Plaintiffs. (See complaint, ¶ 20.)

On July 29, 2019, Young retained different counsel to address the breach of the merger agreement. (See complaint, ¶ 21.) Defendants thereafter sought to dissuade Plaintiffs from pursuing their rights, and refused to provide copies of the files related to the transaction. (See complaint, ¶ 22.) Young later learned that BAS had other problems and breaches in its efforts to merge and that Defendants were aware of the prior problems of BAS and had actually represented BAS in one of the failed mergers, and did not disclose this information or other relevant information to Plaintiffs. (See complaint, ¶ 23.) On August 7, 2019, ABC filed suit against BAS for their breach of the agreement and Young requested copies of the files from Defendants relating to the transaction with BAS. (See complaint, ¶¶ 24-25.) In response, Defendants claimed that she did not have a file and that her "clients," BAS, had all the documents. (See complaint, ¶ 25.) Tsai did not disclose in writing her conflicts in advising/ representing both sides of the transactions, and secure each party-participant's informed consent to such conflicted representation in violation of California Rules of Professional Conduct, Rule 1.7 and applicable authorities. (See complaint, ¶ 26.) As a direct result of the breaches of duty of Defendants, Plaintiffs sustained damages, including the loss of sums that would have been received from the transaction had Defendants conformed to the standard of care. (See complaint, ¶ 27.)

On April 20, 2020, Plaintiffs filed the complaint against Defendants, asserting causes of action for:

Professional negligence;

Breach of fiduciary duty; and,

Breach of contract.

Defendants move for summary judgment, asserting that the complaint lacks merit because: Plaintiffs executed a written release expressly releasing BAS and BAS' attorney from any of the claims arising out the merger agreement and sales representative agreement; Plaintiffs waived all known and unknown claims arising out of the merger agreement and sales

representative agreement; and, Plaintiffs have been fully compensated and made whole for all damages.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co. (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, citing Guz v. Bechtel National Inc. (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (Id. at § 10:241.20, p.10-91, citing Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (Id. at ¶ 10:242, p.10-92, citing Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854-855.)

Defendants' request for judicial notice

In support of their motion, Defendants request judicial notice of the following documents:

the first amended complaint in the underlying action (attached as Exhibit 1);

the second amended cross-complaint in the underlying action (attached as Exhibit 2);

the Stipulation and Order for Dismissal of the underlying action, filed on August 2, 2022 in the Alameda County Superior Court (attached as Exhibit 3); and,

the Request for Dismissal with prejudice of the entire underlying action in the Alameda County Superior Court (attached as Exhibit 4).

Defendants' request for judicial notice is GRANTED. (Evid. Code § 452, subd. (d).)

Whether Defendants are a beneficiary of the Settlement Agreement and whether Plaintiffs waived claims for malpractice

Defendants argue that Plaintiffs' causes of action are waived because Plaintiffs and BAS entered into a settlement agreement in which the parties expressly waived any claims, including claims for attorney malpractice.

The settlement agreement

On July 19, 2022, Plaintiffs and BAS and Antonio Duran entered into a settlement agreement. (See Promm decl. in support of motion for summary judgment, exh. C ("Settlement Agreement").) The Settlement Agreement stated:

A document entitled Agreement for the Merger of the Business of ABC Wholesale with Bay Area Seafood was prepared with an effective date of May 1, 2019 (the "Merger Agreement").

A document entitled Bay Area Seafood/ABC Wholesale Sales Representative Agreement was prepared and dated April 29, 2019 and with an effective date of May 1, 2019.

ABC and Young have filed a lawsuit against BAS and Duran for claims arising out of the Merger Agreement and the Representative Agreement in the Superior Court of California, County of Alameda, Case No. RG19030330. BAS filed cross-complaint against ABC in the same action. The lawsuit is hereinafter referred to as the "Action".

Plaintiffs have also filed a malpractice lawsuit in the Superior Court of California, County of Santa Clara, Case No. 20CV366134 (the "Malpractice Lawsuit") against attorney Judy Tsai arising out of and relating to the Merger Agreement and Representative Agreement.

H. On June 28, 2022, the Parties attended mediation with Thomas

A. Cohen. The Parties now wish to resolve the Action by and

through this Settlement Agreement.

NOW, THEREFORE, for good and valuable consideration, including but not limited to the premises contained herein, the Parties hereby agree as follows:

4. Notice of Settlement and Dismissal of the Action. Within ten (10) days of the Effective Date, Plaintiffs shall file a Notice of Settlement with the Court. Within ten (10) days of Plaintiffs' receipt of the $25,000 initial payment discussed above, Plaintiffs and BAS shall file stipulation and order re: dismissing, with prejudice, Plaintiffs' First Amended Complaint and BAS's Second Amended Cross-Complaint and court shall retain jurisdiction over lawsuit until final payment due under this agreement has been paid. Provided that Defendants pay Plaintiffs the sum of $175,000 as set forth in Section 2 above and there is no uncured default, Plaintiffs shall not file or otherwise attempt to enforce the Judgment referred to above as Exhibit A in anyway including but limited to recording the Judgment or reporting Judgment to credit agencies. Plaintiffs shall instead destroy and dispose of the Judgment.

5. Mutual Release. Plaintiffs, on behalf of themselves and their respective partners, successors, assigns, trustees, agents, brokers, representatives and attorneys hereby release and forever discharge Defendants and their respective officers, directors, employers, managers, members, partners, successors, assigns, agents, brokers, representatives, trustees, and attorneys, of and from any and all claims, actions, controversies, damages, causes of action, liabilities, obligations, costs, losses or demands, of whatever nature, whether it [sic] law or in equity, whether now or heretofore known, unknown, suspected or unsuspected, arising out of the Merger Agreement, the Representative Agreement, and/or the Action. Defendants, on behalf of themselves and their respective officers, directors, employees, managers, members, partners, successors, assigns, agents, brokers, representatives, trustees, and attorneys, hereby release and forever discharge Plaintiffs and their partners, successors, assigns, trustees, agents, brokers, causes of action, liabilities, obligations, costs, losses or demands, of whatever nature, whether it [sic] law or in equity, whether now or heretofore known, unknown, suspected or unsuspected, arising out of the Merger Agreement, the Representative Agreement, and/or the Action.

6. Waiver of Unknown Claims. The Parties each waive any and all rights in connection with the matters released herein until the Effective Date, which each may have under the provisions of California Civil Code section 1542 or any comparable federal or state statute or rule of law. California Civil Code section 1542 provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OF SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELASED PARTY.

(Settlement Agreement, ¶¶ A-D, H, 4-6.)

Defendants fail to meet their initial burden to demonstrate that they were intended third party beneficiaries of the Settlement Agreement and that Plaintiffs waived claims for malpractice.

"In interpreting the settlement agreement, we apply the general rules of contract interpretation." (Belasco v. Wells (2015) 234 Cal.App.4th 409, 420; see also Khavarian Enterprises, Inc. v. Commline, Inc. (2013) 216 Cal.App.4th 310, 318 (stating same); see also Coral Farms, L.P. v. Mahony (2021) 63 Cal.App.5th 719, 726 (stating that "[g]enerally, the interpretation of a settlement agreement is governed by the same rules that apply to other contracts").) "The goal of contractual interpretation is to determine and give effect to the mutual intention of the parties." (Id.) "Thus, 'a 'court's paramount consideration … is the parties' objective intent when they entered into the contract.'" (Khavarian Enterprises, Inc., supra, 216 Cal.App.4th at p.318.)

Defendants contend that Section 5's Mutual Release "is clear, unequivocal and proof of the intent to release Bay Area Seafood's attorney TSAI… [because] by the four corners of this settlement agreement, it seems obvious that ABC and YOUNG's claims against Defendant TSAI are rightfully and logically released as they arise out of the settlement agreement and the merger agreement, and Kevin Young knew, at the time of signing this document, that Defendant TSAI was an attorney for Bay Area Seafood." (Defs.' memorandum of points and authorities in support of motion for summary judgment ("Defs.' memo"), p.17, 1-28, 18:1-2.)

Defendants correctly note that the Settlement Agreement identifies both the underlying case in the Alameda County Superior Court and the instant malpractice case. The underlying case is "referred to as the 'Action,'" and the instant malpractice case is referred to as "the 'Malpractice Lawsuit.'" (Settlement Agreement, ¶¶ C-D.) Section 5 states that "Plaintiffs… hereby release and forever discharge Defendants and their respective… attorneys, of and from any and all claims… arising out of the Merger Agreement, the Representative Agreement, and/or the Action." However, the California Supreme Court has stated that "under California's third party beneficiary doctrine, a third party—that is, an individual or entity that is not a party to a contract—may bring a breach of contract action against a party to a contract only if the third party establishes not only (1) that it is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (Goonewardene v. ADP, LLC (2019) 6 Cal.5th 817, 821.) Thus, to support their assertion that they are intended third parties under the agreement, Defendants must present evidence that a motivating purpose of the contracting parties was to provide a benefit to Defendants, and that permitting Defendants to assert the terms of the Settlement Agreement as a third party beneficiary against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.

In support of their motion, Defendants present only the declaration of their attorney Alexander D. Promm, who attaches: the complaint (attached as Exhibit A); excerpts of the August 19, 2021 deposition of Young (attached as Exhibit B) in which Young states that he knew that Tsai also represented BAS in the preparation, negotiation and execution of the Merger Agreement at

the time of the transaction; the Settlement Agreement (attached as Exhibit C); and excerpts of the July 20, 2023 deposition of Young (attached as Exhibit D) regarding Young's damages. As Defendants have failed to present any evidence that a motivating purpose of the contracting parties was to provide a benefit to Defendants or that permitting Defendants to assert the terms of the Settlement Agreement as a third party beneficiary against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties, Defendants fail to meet their initial burden to establish that they are intended third party beneficiaries of the Settlement Agreement.

Moreover, while the Settlement Agreement identifies both "the Action" and "the Malpractice Lawsuit," the clear intention of the parties is stated in paragraph H of the Settlement Agreement: "The Parties now wish to resolve the Action by and through this Settlement Agreement." (Settlement Agreement, ¶ H (emphasis added).) This is further reinforced by paragraph which indicates that the parties perform certain tasks to accomplish the "Dismissal of the Action." (Settlement Agreement, ¶ 4 (emphasis added).) While the reference to the Malpractice Lawsuit is made in the RECITALS portion, there is no mention of the Malpractice Lawsuit in the AGREEMENT portion of the Settlement Agreement—or anywhere else other than paragraph D of the Settlement Agreement. This does not support Defendants' interpretation of the Settlement Agreement that the release applies to malpractice claims against Defendants.

Defendants fail to meet their initial burden to establish that they are intended third party beneficiaries of the Settlement Agreement and that Plaintiffs waived claims for malpractice.

Defendants' argument regarding damages

Defendants argue that "there remains no damages that Plaintiffs are able to maintain against Defendant Tsai... [because] the attorney's fees [are] accounted for in the stipulated judgment and release…." (Defs.' memo, p.22:3-5.) As previously stated, the Settlement Agreement of the underlying action required that BAS and its owners pay $175,000 to Plaintiffs. However, Defendants present Young's deposition testimony in which he states that, if BAS defaults, they have stipulated to a judgment of $550,000, which would cover "[a]ll the damages that [Young] ha[s] suffered… including attorney's fees." (See Promm decl., exh. D, pp. 83:8-25, 84:1-8.) In support of their motion, Defendants cite to Arciniega v. Bank of San Bernardino (1997) 52 Cal.App.4th 213. (See Defs.' memo, pp.19:21-28, 20:1-28, 21:1-28, 22:1-5.) However, while the Arciniega court stated that "[i]f the injury occurred because of [the attorney's] negligence in handling litigation, the measure of direct damage is the difference between the amount of actual judgment obtained and the judgment that should have been recovered" (Arciniega, supra, 52 Cal.App.4th at p.221), the court did not talk about a stipulated judgment that was not actually filed and conditional on the default of a settlement agreement of a lesser amount that the parties were currently paying or had paid. Per the terms of paragraphs 2 and 4, BAS and its owners have 30 months from July 19, 2022—January 19, 2025—to complete payment, and the stipulated judgment has not yet been filed and will be or has been destroyed and disposed of upon payment of the $175,000. Defendants do not meet their initial burden to demonstrate that there remains no damages that Plaintiffs are able to maintain against Defendant Tsai, or, at the very least, Defendants themselves present a triable issue of material fact as to whether there remains no damages.

Defendants' motion for summary judgment is DENIED in its entirety.

The Court will prepare the final order.

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Calendar Line 5
Case Name: Tricia Nardone et al vs Nationstar MTG LLC et al
Case No.: 18CV338830

Defendant moves for an order expunging the notice of pendency of action ("lis pendens") recorded against the real property commonly described as 7177 Pitlochry Drive, Gilroy, California 95020 ("property"). On August 28, 2023, this Court granted summary judgment and judgment was entered for Defendant on October 2, 2023.

"[O]n a motion to expunge a lis pendens after judgment against the claimant and while an appeal is pending, the trial court must grant the motion unless it finds it more likely than not that the appellate court will reverse the judgment." *Amalgamated Bank v. Superior Court*, 149 Cal.App.4th 1003, 1015 (2007).

In this case, Plaintiffs have not shown that is more likely than not that they will prevail on appeal. Instead, Plaintiffs restate the same arguments made in the motion opposing summary judgment. For the same reasons, the Court finds these arguments unavailing. As such, the Court must grant Defendant's motion. The motion is, therefore, GRANTED.

The awarding of attorney's fees and costs for this motion are mandatory "unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." CCP § 405.38. The Court does not find that Plaintiffs acted with substantial justification given the high bar for defeating the motion and given that Plaintiffs have merely repeated the losing arguments of their opposition to the motion for summary judgment. Plaintiffs shall pay fees and costs to Defendant in the amount of $1260 (3 hours + filing fee) within 10 days of the service of the final order. Defendant shall submit and serve the final order.

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Calendar line 6
Case Name: Julie Magana et al v. Ford Motor Co.
Case No.: 19CV349624

Plaintiffs Julia and Tony Magana ("Plaintiffs") move for reconsideration of the court's July 18, 2022 order compelling arbitration, which was based primarily on the Third District Court of Appeal's decision in *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 (*Felisilda*). At the time, there was no other controlling case law on point. Since then, the Second District Court of Appeal has issued two decisions—one from the Eighth Division (*Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324 (*Ochoa*)), and one from the Seventh Division (*Montemayor v. Ford Motor Co.* (June 26, 2023, B320477) __ Cal.App.5th __ [2023 Cal.App.Lexis 481; 2023 WL 4181909] (*Montemayor*))—both of which expressly disagree with *Felisilda*. More recently, the Third Appellate District Court of Appeal in *Keilar* on August 16, 2023, and, the First Appellate District Court of Appeal in *Yeh* on September 6, 2023, have entered opinions that agree with *Ochoa* and *Montemayor* and disagree with *Felisilda*. Having carefully reviewed these decisions, the court finds that these decisions constitute a "change of law that warrants it to reconsider a prior order." (Code Civ. Proc., § 1008, subd. (c).) In addition, the court finds that *Ochoa* and *Montemayor* are better reasoned than *Felisilda*. Accordingly, the court GRANTS the motion for reconsideration and now DENIES the petition to compel arbitration.

Defendant Ford Motor Co. ("Ford") argues that the motion for reconsideration is both untimely and procedurally defective, and that there has not been a change of law.

Pursuant to Code of Civil Procedure section 1008, subdivision (c), if the court "at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion."

The court may consider several factors in determining whether to exercise its discretion, including the importance of the change of law, the timing of the motion, and the circumstances of the case. *Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 107 ("*Farmers*"); *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 769 ("*Phillips*"). Preliminarily, defendants assert that the motion is procedurally defective because Code of Civil Procedure section 1008, subdivision (c) permits the court on its own motion to enter a different order but does not permit a party to move for reconsideration.

In *Farmers*, the asserted change of law occurred while the motion of plaintiff for class certification was pending, and the change of law was brought to the attention of the court in plaintiff's reply (*Farmers, supra*, 218 Cal.App..4th at p. 99-101). In *Sprint,* years after defendant's motion to compel arbitration of plaintiff's consumer class action was denied, a decision of the United States Supreme Court prompted defendant to renew its motion to compel arbitration based upon the change of law effected by the Supreme Court decision. The change of law in *Farmers* and *Sprint* was brought to the attention of the court by a party; in *Farmer's* during the pending motion for class certification, and in *Sprint*, in a renewed motion to compel arbitration filed years after the initial motion was denied. In both instances, the court exercised its discretion to reconsider the prior order considering the change of law.

Here, the asserted change of law is brought to the attention of the court by plaintiff's motion for reconsideration. The court finds that this is procedurally sufficient to invoke the court's consideration of whether to exercise its discretion pursuant to Code of Civil Procedure section 1008, subdivision (c).

Although Plaintiffs waited several months after both *Ochoa* and *Montemayor* to file her motion, timeliness is irrelevant to the court's authority to reconsider a prior order based on a change of law "*at any time*." (Code Civ. Proc., § 1008, subd. (c), emphasis added.) Defendant asserts that plaintiffs sat on their hands for a year and half doing nothing to advance the case, yet they cite no prejudice to them. Considering the significance of the *Ochoa, Montemayor, Keiler* and *Yeh* decisions and the failure of defendants to show prejudice, the court exercises its discretion to grant reconsideration of the prior order.

Ford also argues that the court "does not have jurisdiction to hear the motion." (Opp. p5.) The court rejects Ford's fundamental misapprehension of a trial court's jurisdiction. As made clear in *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, "Because contractual arbitration 'dr[aws] its vitality from the contract,' a trial court has inherent power to revisit the foundational 'question of whether the parties are bound by a particular arbitration agreement,' just as it may on its own motion revise any other interim ruling in the action pending before it." (*Id.* at p. 237 [quoting *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 56], internal citations omitted.)

Because the court finds that there has been a change of law, the court denies Ford's request for a stay.

As the court now denies arbitration, the court sets a case status review on April 16, 2024 at 10 a.m. Given the age of this case, the court expects the parties to move forward with litigation without delay. Plaintiffs shall prepare the final order.

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Calendar line 7
Case Name: John Hilton v. Ascendis Pharma
Case No.: 21CV377877

Plaintiff brings its fourth discovery motion in which it seeks terminating, sanctions or at least evidence and monetary sanctions.

Defendant, once again and for the third time, does not contest that it has not fully complied with discovery requests. Defendant concedes "its willingness to provide Plaintiff with all responsive documents," states it offered to provide more discovery in December, and admits it still has not done so. See Opp. p5. In the Court's last order of November 1, 2023, the Court found Defendant's discovery violations willful. Defendant once again argues that it has not acted willfully citing its "intent to comply" (Opp, p6) and its production of more than 24,000 pages of discovery. But as is clear from Plaintiff's papers, the discovery produced still does not include some of the most relevant documents. Plaintiff demonstrates that Defendant has, for example, failed to provide emails about Plaintiff and his termination that did not include Plaintiff, as well as email attachments referenced in provided emails, legible copies of already produced documents, and documents relating to Endocrine Rare Disease Group, among others. See North Decl. ¶¶ 17-19. These were all ordered to be provided in the Court's first order of April 2023. Clearly, Defendant has not effectively received the message of this Court that it must provide discovery in a timely manner or face the consequences. Here, the Court has incrementally increased the discovery sanctions from monetary sanctions to evidentiary sanctions. These sanctions have still not resulted in compliance. The Court once again finds the Defendant's failure to comply with its discovery violations willful.

As stated in its previous order, the standard for imposing terminating sanctions is high. Section 2023.030, subdivision (d)(1) expressly authorizes the court to "strik[e] out the pleadings" of any party misusing the discovery process. "Discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party's misconduct." (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223.) Two facts are generally needed before a court orders sanctions: (1) a failure to comply; and (2) the failure must be willful. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102; see also *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1426 [typical requirement of a prior order "provides some assurance that such a potentially severe sanction will be reserved for those circumstances where the party's discovery obligation is clear and the failure to comply with that obligation is clearly apparent"]; *Moofly Productions, LLC v. Favila* (2020) 46 Ca1.App.5th 1, 11 ["[i]n general, a court may not impose issue, evidence, or terminating sanctions unless a party disobeys a court order," citing *New Albertsons*].) Termination sanctions may be imposed by "striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process [and] rendering judgment by default against that party." CCP § 2023.030(d). Terminating sanctions should not be lightly granted, but "'where a violation is willful, preceded by a history of abuse, and the evidence shows that less

severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction. (*Mileikowsky v. Trent Healthsystem* (2005) 128 Cal.App.4th 262, 279-80.)'" *Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 12.

Here, there is a history of abuse and the Court has attempted to impose lesser sanctions, both monetary and evidentiary. They have not been successful. Trial is set for next month, such that the late provision of the discovery is prejudicial to Plaintiff. Discovery was initially propounded in August of 2021, more than three years ago, such that Defendant's excuse that it needs more time is unavailing. Defendant has continued to fail to provide complete discovery despite two prior court orders. Defendant continues to claim it is difficult to procure the documents because they are "electronically stored information from multiple sources," (Adams Decl. ¶ 23), yet provides no explanation or support for this claim. Defendant provides no actual evidence to support its claims that it has tried to obtain the discovery such as explaining searches made or specific efforts undertaken. Defendant has already been sanctioned twice by this Court for the same conduct, requiring monetary fines and evidentiary sanctions.

Accordingly, the Court believes that terminating sanctions are now both appropriate and justified. Defendant's Answer of filed June 16, 2022 is stricken. The Court declines also to impose monetary sanctions. Plaintiff shall submit the final order.

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