SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: October 26, 2023 TIME: 9:00 A.M.

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

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

***New information* (please read)**: To set future motion hearings, you no longer need to file your motion before receiving a hearing date. Phone lines are now open for you to call and reserve a hearing date *before filing and serving* your motion. Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve your date. This will obviate the need to file and serve a separate amended notice at a later time. Please note: if your motion papers are not filed within five business days of reserving the hearing date, the date will be released to other cases.

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV415326	Ari Law, P.C. v. David W. Affeld, A Professional Corporation et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 2	23CV415326	Ari Law, P.C. v. David W. Affeld, A Professional Corporation et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 3	23CV416778	LoanDepot.com, LLC v. Fangwoan Chen	Click on LINE 3 or scroll down for ruling.
LINE 4	19CV349792	Division of Labor Standards Enforcement v. Capital Mailing Services, Inc. et al.	Click on LINE 4 or scroll down for ruling in lines 4-5.
LINE 5	19CV349792	Division of Labor Standards Enforcement v. Capital Mailing Services, Inc. et al.	Click on LINE 4 or scroll down for ruling in lines 4-5.
LINE 6	21CV375894	C.N. v. The Church of Jesus Christ of Latter-Day Saints et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 7	21CV375894	C.N. v. The Church of Jesus Christ of Latter-Day Saints et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 8	23CV412215	Roman Robertson v. DGDG 12, LLC et al.	Click on LINE 8 or scroll down for ruling.
LINE 9	23CV414144	Meilinda Huang v. Alison Hu et al.	This matter has been reassigned to a complex litigation department. The motion to compel arbitration will be heard on **January 10, 2024 at 1:30 p.m. in Department 19**. In addition, the court vacates the November 3, 2023 OSC hearing regarding plaintiff's failure to appear at the initial CMC and instead sets this for a case management conference on **November 8, 2023 at 2:30 p.m. in Department 19**.

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LINE 10	19CV343120	The Village of Copper Basin Community Association v. Steven Brown et al.	Motion for attorney's fees and costs: notice is proper, and the motion is unopposed. The court finds that the amount of the requested fees and costs is reasonable, and the court GRANTS the motion and the accompanying request for judicial notice. The court will sign the proposed order on file. At the same time, the court takes judicial notice of the fact that Judge Kirwan granted a very similar motion for attorneys' fees last year in this case. The court fully expects the present motion to be the final such motion in this case, given the absence of any ongoing contested litigation.
LINE 11	2015-1-CV-287601	WestMed College v. Daniel Vasin	Motion to vacate dismissal and enter judgment: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. The court will sign the proposed order and proposed judgment on file.

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Calendar Lines 1-2
Case Name: *Ari Law, P.C. v. Affeld Grivakes LLP, et al.*
Case No.: 23CV415326

This is a defamation action brought by Plaintiff Ari Law, P.C. ("Ari Law") against defendants Affeld Grivakes LLP, David W. Affeld, A Professional Corporation ("David W. Affeld, APC"), and David Affeld ("Affeld") (collectively, "Defendants").

According to the complaint, in March 2023, Defendants "published" oral and written defamatory statements to a former, unidentified client of Ari Law to induce a breach of contract for legal services between Ari Law and that client. (Complaint, ¶ 10.) Defendants' defamatory statements included statements about the quality of Ari Law's legal work and billing practices, which allegedly caused the former client not to pay Ari Law for services rendered. (*Id*. at ¶ 11.)

On June 13, 2023, Affeld and David W. Affeld, APC filed a special motion to strike the complaint under Code of Civil Procedure section 425.16, also known as an "anti-SLAPP" motion. Affeld Grivakes LLP also filed a similar anti-SLAPP motion on the same date. On October 11, 2023, two days before its oppositions to the motions were due, Ari Law filed a request for dismissal of the complaint as to all parties and all causes of action, without prejudice. On October 13, 2023, Ari Law filed a notice of entry of dismissal.

I. REQUEST FOR JUDICIAL NOTICE

As an initial matter, the court GRANTS Defendant Affeld Grivakes LLP's request for judicial notice of the following exhibits:

1. Exhibit 1: Substitution of Attorney – Civil, filed on January 23, 2023 in *Museum Plaza LLC v. Steadfast Insurance Co., et al,* San Francisco Superior Court Case No. CGC09490976 (the "Insurance Action");

2. Exhibit 2: Substitution of Attorney – Civil, filed on January 23, 2023 in *Museum Plaza LLC et al v. Berding & Weil, LLP,* San Francisco Superior Court Case No. CGC-21-596937 (the "Malpractice Action");

3. Exhibit 3: First Amended Complaint in the Insurance Action; and

4. Exhibit 4: First Amended Complaint in the Malpractice Action.

These are all court records, and so the court takes judicial notice of the existence of these documents and their filing dates under Evidence Code section 452, subdivision (d). The court does not take judicial notice of any factual allegations contained in these documents.

II. LEGAL STANDARD

A. Effect of Ari Law's Dismissal

Where a plaintiff voluntarily dismisses an action after an anti-SLAPP motion is filed, the court loses jurisdiction to rule on the motion. (*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 879 (*Ellis*) [citing *Pfeiffer Venice Properties v. Bernard* (2002)

101 Cal.App.4th 211, 216, 218–219].) Indeed, there is nothing left to be stricken. Nevertheless, the trial court still retains jurisdiction to "entertain a motion brought by defendants for attorney fees and costs." (*Ellis, supra*, 178 Cal.App.4th at pp. 876, 881.) To do so, the court must consider the merits of the motion, but only to determine if the defendant would have prevailed and would have been awarded fees and costs for the motion. (See *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 679; *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1456-1457.)

B. General Standards for Anti-SLAPP Motions

When a special motion to strike is filed, the initial burden rests with the moving party to demonstrate that the challenged pleading arises from protected activity. (Code Civ. Proc., §425.16(e); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) "A defendant meets his or her burden on the first step of the anti-SLAPP analysis by demonstrating the acts underlying the plaintiff's cause of action fall within one of the four categories spelled out in [Code of Civil Procedure] section 425.16, subdivision (e)." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51.) If the defendant meets that burden, the plaintiff then "must demonstrate that the [challenged claims are] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Soukop v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260, 291.) This is sometimes referred to as the burden of showing a "probability of prevailing."

III. MERITS OF THE DEFENDANTS' MOTION TO STRIKE

As a preliminary matter, the court notes that Affeld, David W. Affeld, APC, and Affeld Grivakes, LLP filed nearly identical memoranda in support of their respective motions to strike. Accordingly, the court will address these motions together.

A. First Prong: Threshold Showing that the Challenged Claim Arises from Protected Activity

Defendants maintain that the claims arise from protected activity under Code of Civil Procedure section 425.16, subdivision (e)(2), which encompasses "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." The court agrees.

In *Pech v. Doniger* (2022) 75 Cal.App.5th 443, the plaintiff was an attorney who alleged that the legal advice provided by defendants (also attorneys) to their mutual clients interfered with plaintiff's fee agreement and caused the clients to terminate plaintiff's services. The Court of Appeal held that the defendants' legal advice was protected activity because it concerned proposed litigation and the clients' obligations under their agreement agreement, and the defendant-attorneys provided advice in preparation for litigation. (*Id*. at p. 462.) Similarly, in *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, the plaintiff-attorney sued defendant-attorney for solicitation of plaintiff's client. The *Taheri* Court held that defendant's communications with the client concerned pending litigation and therefore constituted protected activity under section 425.16, subdivision (e)(2). (*Id*. at p. 489, see also *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479-481 ["[A]ll communicative acts performed

by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute."].)

The present situation parallels the facts of these cases. Defendants note that the allegedly defamatory statements that they made in March 2023 that purportedly criticized Ari Law's legal work and billing practices were legal advice that fell under the protected pre-litigation activity of section 425.16(e)(2), just as in the foregoing cases. Defendants also note that they replaced Ari Law as counsel on exactly the same date (January 23, 2023) in the Insurance Action and the Malpractice Action. (RJN, Exhs. 1-2; see also Decl. of David W. Affeld, p. 1.) Accordingly, the claims set forth in the now-dismissed complaint are directed to protected activity under Code of Civil Procedure section 425.16, subdivision (e)(2).

B. Second Prong: Ari Law's Probability of Prevailing

In order to demonstrate a probability of prevailing, the non-moving party must produce admissible evidence sufficient to overcome any privilege or defense that the defendant has asserted. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.) Ari Law has not filed an opposition to this motions to strike and therefore fails to meet its burden as a matter of law.

The court also observes that Defendants advanced anticipatory arguments in their opening briefs that essentially negate any probability of Ari Law actually meeting its burden. While it is not necessary for the court to address all of the anticipatory arguments, the court finds persuasive Defendants' argument that the litigation privilege is an absolute bar to the causes of action for defamation, misrepresentation, negligence, and interference with contract.

The litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212; see also Civil Code, § 47.) The privilege is absolute and applies regardless of whether the communication was made with malice or the intent to harm. (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1302.) The litigation privilege extends not only to statements made during litigation or official proceedings but also to prelitigation communications. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.)

As noted above, Defendants allegedly "published" their defamatory statements to the clients on March 2023, *well after* Defendants took over the representation of the clients in January 23, 2023. (Complaint, ¶ 10; RJN, Exhs.1-2.) Thus, the communications concerning Ari Law's performance on the clients' ongoing cases were directly connected to, or logically related to and made during, the course of litigation proceedings.

IV. CONCLUSION

Because the court finds that Defendants would have prevailed on the merits of their anti-SLAPP motions, Defendants are entitled to their respective attorney's fees and costs incurred solely in preparing and filing the motion. (See, e.g., *Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, 138 [explaining that postjudgment fees and costs incurred in collecting on the judgment for anti-SLAPP fees and costs may be recoverable on noticed motion]; *Lafayette Morehouse, Inc. v. Chronicle Pub. Co.* (1995) 39 Cal App 4th 1379, 1383 [noting that Code of Civil Procedure section 425.16, subdivision (c),

intended to allow only for the recovery of the fees and costs incurred on the special motion to strike, not the entire litigation].)

The motions to strike are moot, but the court determines that Defendants may promptly file a motion for attorney's fees and costs.

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Calendar Line 3
Case Name: *LoanDepot.com v. Fangwoan Chen*
Case No.: 23CV416778

I. BACKGROUND

This is an action for breach of contract and common counts brought by plaintiff LoanDepot.com ("LoanDepot") against a former employee, defendant Fangwoan Chen ("Chen").[1] The complaint filed on May 31, 2023 is a form complaint that lacks narrative allegations. It does allege, on the "Breach of Contract" attachment, that the action is based on Chen's "[f]ailure to repay received, unearned, advance in commissions" in the apparent amount of $58,237.41.

Attached to the complaint as Exhibit A is a copy of a December 14, 2020 offer of employment letter from LoanDepot to Chen, signed by Chen (only). Paragraph 8 of the letter states:

> Agreements and Policies. This offer is contingent upon all agreements being acknowledged and agreed upon via the company's HRIS tool, Workday, prior to your first day of employment. Agreements could include: Arbitration Agreement, Employee Confidentiality, Workday Product and Intellectual Property and a Non-Solicitation Agreement. Also, you must abide by LD Holdings' policies and procedures, including all policies contained in LD Holdings' Employee Handbook, which you can find on the company's intranet.

(Exhibit A at p. 2; underlining in original.)

Nothing in the complaint or Exhibit A alleges or establishes that any or all of the agreements referenced in Paragraph 8 of Exhibit A were actually "acknowledged and agreed upon."

Currently before the court is Chen's demurrer to the complaint, filed on June 27, 2023. Plaintiff's opposition, labeled a "response," was filed on August 28, 2023.

II. DEMURRER TO THE COMPLAINT

A. General Standards

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

[1] Although plaintiff's name is stylized in marketing materials as "*loanDepot.com*," the court will use a capital "L" to avoid unnecessary confusion, as a lower-case "l" otherwise looks like an upper-case "I."

Facts appearing in exhibits attached to a complaint are given precedence over inconsistent allegations in the complaint. (See *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505 (*Barnett*) ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."]; *Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 288 [citing and quoting *Barnett*].)

In ruling on a demurrer, the court considers only the pleading under attack, any attached exhibits, and any facts or documents for which judicial notice is properly requested. The court cannot consider extrinsic evidence in ruling on a demurrer. Accordingly, the court has not considered the opening and reply declarations of counsel Daniel Ray Bacon, the exhibits attached to his declarations, or any arguments that depend upon this extrinsic evidence. In filing these papers, counsel betrays a lack of understanding of the relevant legal standards for a demurrer.

B. Analysis of the Demurrer

As an initial matter, Chen has not complied with Code of Civil Procedure section 430.41, subdivision (a), which requires the demurring party to meet and confer with the party that filed the pleading before bringing a demurrer. The parties "shall meet and confer in person or by telephone" and the demurring party "shall" file a declaration with the demurrer describing those efforts. The Bacon declaration does not describe any meet-and-confer efforts prior to June 27, 2023, and LoanDepot's opposition states that none took place. Nevertheless, as a failure to comply with section 430.41 is not itself a sufficient basis to overrule or sustain a demurrer on its own (see Code Civ. Proc., § 430.41(a)(4)), the court will consider the merits.

Chen's demurrer is based on the assertion that Plaintiff is barred from bringing this lawsuit because "a pre-litigation mandatory arbitration provision is a part of the contracts between the parties and thus this action cannot be maintained because it lacks jurisdiction in this court." (Defendant's Notice of Demurrer at p. 1:6-8.)

The problem with this assertion is that the complaint and its attached exhibit do not establish that the parties entered into an agreement with an arbitration provision, much less establish that the court lacks jurisdiction over this lawsuit. Chen's argument is entirely dependent upon extrinsic evidence that cannot be considered on a demurrer.

The court notes that in its "reply"/opposition, LoanDepot argues that "this is a motion to compel arbitration." (Opposition at p. 1:24.)[2] LoanDepot goes on to state that "[t]he Contract attached to the complaint does not mention arbitration. However, subsequent agreements do mention arbitration. Plaintiff therefore agrees to arbitration. Upon the suit being filed, Defendant immediately filed a Demurrer . . . LoanDepot.com filed a Demand for Arbitration and Defendant Chen has responded." (Opposition at p. 2:18-24.)

The current demurrer is not properly noticed as a petition to compel arbitration. If the parties both agree to proceed with arbitration, then the parties may file a stipulation and order to do so. The fact that the parties have agreed to contractual arbitration does not mean that this

[2] Plaintiff's opposition lacks page numbers.

court lacks subject matter "jurisdiction"; it simply means that either side can seek an order from the court to *enforce* the agreement in which both sides have waived the right to a jury trial. (See *Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, 768.) In any event, the matter immediately before the court is a demurrer, and it cannot be sustained because it depends entirely upon extrinsic evidence.

The court observes that if the meet-and-confer discussion required by statute had actually occurred between the parties, there likely would have been no need for this misguided demurrer.

The demurrer is OVERRULED.

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Calendar Lines 4-5
Case Name: *Division of Labor Standards Enforcement v. Capital Mailing Services, et al.*
Case No.: 19CV349792

I. BACKGROUND

A. The Parties and Pleadings

This is a civil enforcement action brought by the Division of Labor Standards Enforcement ("DLSE"), a division of the California Department of Industrial Relations. The main action is brought against defendants Capital Mailing Services, Inc. ("CMS"), Perice Sibley ("Sibley"), and Prosper Equity, Inc. (two separate entities, a Wyoming corporation and a Virginia corporation) by DLSE to enforce judgments for unpaid wages obtained by former CMS employees. This case was consolidated with Case No. 20CV269589, a lawsuit originally filed in Placer County and later transferred to this county, on July 7, 2020.

The original complaint in this action was filed on June 13, 2019. A First Amended Complaint ("FAC") was filed on December 6, 2019. A Second Amended Complaint ("SAC") was filed on July 7, 2020. (The SAC added the Virginia version of Prosper Equity, Inc. as a defendant for the first time.) On August 13, 2020, CMS, Sibley, and Prosper Equity, Inc. (Virginia) filed a "verified" answer to the SAC.[3]

DLSE filed the operative Third Amended Complaint ("TAC") on February 5, 2021, after this court (Judge Kirwan) granted a motion for leave to amend. The TAC states claims for: (1) Alter Ego Liability (against CMS and Sibley); (2) Fraudulent Transfer of Property (the "Elmwood Court" property, against Sibley and both Prosper Equity, Inc. corporations); (3) Fraudulent Transfer of Property (the "University Avenue" property, against Sibley and both Prosper Equity, Inc. corporations); and (4) Breach of Fiduciary Duty and Illegal Distributions in Violation of Corporations Code § 316 (against Sibley). Any answer to the TAC was due within 20 days of service. (See Code Civ. Proc., § 412.20(a)(3).) None of the defendants filed a timely answer to the TAC.

The TAC alleges that Sibley is the sole director, officer, and owner of CMS. (TAC at ¶ 3.) It further alleges that in February and March 2016, Sibley drained CMS's bank accounts and transferred those funds to her other, non-CMS assets. (TAC at ¶¶ 11-16.) This caused mass layoffs at CMS, with a large number of CMS employees eventually obtaining judgments for unpaid wages against CMS. These judgments have been transferred to DLSE, which then filed the present action.

The TAC alleges that Prosper Equity, Inc. (Virginia) (hereinafter, "PEV") "holds title to real property in Santa Clara County that is subject to this action to avoid fraudulent transfers." (TAC at ¶ 5.) The TAC alleges that in December 2015, Sibley transferred real property located at 215 Elmwood Court, Los Gatos, California, Assessor Parcel No. 409-06-007 to her father, Hiram Sibley, for no consideration. (This is the "Elmwood Court" property.) It also alleges that in March 2016, Sibley transferred real property located at 461 University Avenue, Los Gatos, California, Assessor Parcel No. 529-07-097 to Hiram Sibley for no consideration. (This is the "University Avenue" property.) (See TAC at ¶¶ 8 and 13.)

[3] The answer was verified only by attorney Mark Ellis on behalf of the three defendants.

Attached to the TAC as Exhibits A and B are copies of the recorded grant deeds evidencing these transfers. The TAC further alleges that in January 2017, Hiram transferred the Elmwood Court property and the University Avenue property to either the Virginia or Wyoming version of Prosper Equity, Inc. for no consideration. (TAC at ¶ 16.) Attached to the TAC as Exhibit C are copies of the recorded grant deeds for these transfers, which appear to show that both properties were transferred to the Wyoming corporation (at a Wyoming address). Among other things, the TAC asks the court to void the transfers of these two properties "to Hiram Sibley and his successor entities." The TAC alleges that Hiram Sibley "died in 2017." (TAC at ¶ 17.)

On April 15, 2021, DLSE filed a dismissal of claims against Sibley "as Administrator of the Estate of Hiram A. Sibley only" but kept her as a defendant in her individual capacity. On February 17, 2023, PEV retained separate counsel in this case—it had previously been represented by the same counsel as CMS and Sibley. On June 5, 2023, DLSE filed a partial dismissal of the second cause of action as to "Void Transfer 3920 Stone Leigh Ct., Placer SAC, #SCV0043232."

There is a cross action, a cross-complaint filed by CMS and Sibley on January 14, 2021. The cross-complaint states seven causes of action against several cross-defendants: (1) Indemnity (against all cross-defendants); (2) "Implied Contractual Indemnity" (against Eric Kozlowski and The Presort Center of Fresno LLC); (3) Equitable Indemnity (against all cross-defendants); (4) Apportionment of Fault (against all cross-defendants); (5) Declaratory Relief (against all cross-defendants); (6) Contribution (against all cross-defendants); and (7) Conversion (against Andrew Cody, Eric Kozlowski, Salt Creek Media, Inc., Redstone, and The Presort Center of Fresno LLC).

B. Relevant Motion Practice in this Case

On August 31, 2021, this court (Judge Kirwan) heard three separate demurrers to portions of the cross-complaint by cross-defendants Redstone Print & Mail, Inc. ("Redstone"), Cherie Kindel ("Kindel"), and Andrew Cody ("Cody"). The court sustained those three (essentially identical) demurrers without leave to amend as to the first, third, fourth, fifth, and sixth causes of action, based on the cross-complaint's failure to demonstrate any basis upon which the demurring parties could be liable for causing the injury that is alleged in DLSE's complaint: *i.e.*, the unlawful withdrawal of CMS's funds by Sibley for her personal use, thereby depriving numerous employees of their employment and wages. The court overruled all three demurrers as to the seventh cause, which is unrelated to the underlying action by DLSE. (See August 31, 2021 Order.)

On October 5, 2021, the court (Judge Arand) heard two more demurrers to the cross-complaint by dross-defendant Bank of the West ("Bank") and cross-defendant Eric Kozlowski ("Kozlowski"). The Bank demurred to the first, third, fourth, fifth, and sixth causes of action, and Kozlowski demurred to the first, second, third, fourth, fifth, sixth, and seventh causes of action. In a December 29, 2021 order, the court sustained both demurrers without leave to amend as to the first, third, fourth, fifth, and sixth causes of action, and it overruled Kozlowski's demurrer to the seventh cause of action.

On December 20, 2022, the court (Judge Kirwan) signed an order granting two separate motions for summary judgment by Redstone and Cody as to the seventh cause of action for

conversion, the only remaining cause of action against them in the cross-complaint. The court found that the seventh cause was insufficiently pled because it was based on allegations made solely on information and belief and was time-barred under the three-year statute of limitations for conversion (Code Civ. Proc., § 338, subd. (c)(1)).[4] The court entered judgment in Redstone and Cody's favor on January 24, 2023.

On June 29, 2023, PEV filed a belated answer to the TAC, more than two and a half years after the deadline to file an answer to the TAC. (See Code Civ. Proc., § 471.5(a).) This was followed by two unauthorized amendments—an "amended" answer filed on July 10, 2023 and a second amendment (labeled as a "notice of errata," but attempting to add a new paragraph 13) filed on July 31, 2023.

On July 6, 2023, the court (the undersigned) heard DLSE's motion for summary judgment or, in the alternative, summary adjudication, directed at the TAC. The court denied DLSE's motion for summary judgment for failure to meet the initial burden and proceeded to consider the alternative motion for summary adjudication. The court granted summary adjudication as to the first cause of action, establishing that CMS was an alter ego of Sibley. The court denied summary adjudication as to the second and third causes of action for avoidance of fraudulent transfers, as the only argument made in the motion—that DLSE was entitled to adjudication pursuant to the Uniform Voidable Transfer Act ("UVTA")—had no support in the TAC, as there were no claims under the UVTA in the TAC.. The court granted summary adjudication of the fourth cause of action, holding that Sibley breached her fiduciary duties as Director of CMS.[5]

On July 10, 2023, DLSE made an ex parte application for leave to file a fourth amended complaint that would, for the first time, allege statutory claims—violations of the UVTA. This court (the undersigned) denied that extremely late application. On July 12, 2023, the court issued an order on an ex parte application by PEV, allowing it to withdraw its then-pending motion for summary judgment. That order informed PEV that it had to file its new, proposed motion for summary judgment by no later than August 11 and that before filing the motion, it had to "ensure that it has an answer to the third amended complaint on file." The court will therefore consider the answer to the TAC filed on June 29, 2023 but not the unauthorized amendments.

Currently before the court are three motions. The first is a motion for summary adjudication by Kozlowski, directed to the cross-complaint's seventh cause of action for conversion, the only claim still alleged against him. This motion was originally filed on April 18, 2023 and then continued to the current hearing date at the request of PEV.[6] Sibley and CMS filed an opposition on October 12, 2023.

The second motion is one for summary adjudication as to all remaining causes of action in the TAC (the second and third), brought by Plaintiff DLSE. This motion was filed on August 10, 2023. The court advanced the hearing on this motion to October 26 in an order

[4] The court takes judicial notice of the December 20, 2022 order on its own motion, pursuant to Evidence Code section 452, subdivision (d).
[5] The court takes judicial notice of the July 6, 2023 order pursuant to Evidence Code section 452, subdivision (d).
[6] See July 14, 2023 order on PEV ex parte application, as to which the court takes judicial notice.

issued on September 20, 2023.[7] Sibley and CMS filed a timely opposition to this motion on October 12, and PEV filed an opposition on October 16 (the date by which all of PEV's opposition material had to be submitted pursuant to the court's October 2, 2023 order giving PEV additional time). The court has not considered any material filed by PEV in opposition to DLSE's motion *after* October 16. "A trial court has broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 765.)

The third motion is one for summary judgment/adjudication by PEV as to all remaining claims in the TAC. This motion was filed and served on August 11, 2023. DLSE's opposition to this motion was filed on October 9, 2023.

As Kozlowski's motion was filed first, the court addresses it first.[8]

II. KOZLOWSKI'S MOTION FOR SUMMARY ADJUDICATION

A. General Standard for Summary Judgment/Adjudication

The pleadings limit the issues presented for summary judgment/adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion."]; see *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444 ["A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion."].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Automobile Association* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."]) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve

[7] The motion was served on October 10 via electronic service and overnight mail, establishing proper service for an October 26 hearing date. (See August 10 proof of service; Code Civ. Proc., §§ 437c(a)(2), 1010.6.) A second purported service by email on August 24 was not valid under section 437c(a)(2). (See August 24 proof of service.)

[8] It may or may not be a calendaring error by the court, but this case appears as only two lines (lines 4-5) on the court's law and motion calendar for October 26, 2023: DLSE's motion and Kozlowski's motion. PEV's motion is not officially on the court's calendar, but because this third motion was noticed for today and briefing is complete, the court addresses it here.

any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

"Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise additional theories of liability. '[S]ummary judgment cannot be denied on a ground not raised by the pleadings. [Citations.]'" (*Nativi v. Deutsche Bank National Trust Co*. (2014) 223 Cal.App.4th 261, 290 (*Nativi*), internal citation omitted; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["[a] party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings"].) The burden of a defendant or cross-defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint or cross-complaint. A moving party need not refute liability on some theoretical possibility not included in the pleadings. A motion for summary judgment must be directed to the issues raised by the pleadings. The papers filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings. Declarations in opposition to a motion for summary judgment are no substitute for amended pleadings. (*County of Santa Clara v. Atlantic Richfield Co*. (2006) 136 Cal.App.4th 292, 332-333. (*County of Santa Clara*).)

Neither party can rely on its own pleadings (even if verified) as evidence to support or oppose a motion for summary judgment or summary adjudication. (See *College Hospital, Inc. v. Sup Ct*. (1994) 8 Cal.4th 704, 720, fn. 7; *Roman v. BRE Properties, Inc*. (2015) 237 Cal.App.4th 1040, 1054; *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 182.) The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252.)

As a cross-defendant moving for summary judgment, Kozlowski's burden is the same as a moving defendant's burden. "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.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at 850.)

B. The Grounds for Kozlowski's Motion

Kozlowski asserts that the cross-complaint's "Seventh Cause of Action for Conversion is without merit as to Eric Kozlowski, entitling him to relief as a matter of law." (April 28,

2023 Notice of Motion at p. 2:15-16.) As it targets the only remaining cause of action in the cross-complaint, the motion is a motion for summary judgment, regardless of its label.

"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) "To prove a cause of action for conversion, the plaintiff must show the defendant acted intentionally to wrongfully dispose of the property of another." (*Duke v. Superior Court* (2017) 18 Cal.App.5th 490, 508.) "[C]onversion is a strict liability tort. It does not require bad faith, knowledge, or even negligence; it requires only that the defendant have intentionally done the act depriving the plaintiff of his or her rightful possession." (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1158.)

Conversion is subject to a three-year statute of limitations. (See *AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639 [under Code of Civil Procedure section 338, subdivision (c), which applies to the conversion of personal property, there is a three-year limitations period].) "Code of Civil Procedure section 338, subdivision (c)(1), creates a three-year limitations period for 'actions for the specific recovery of personal property.' In most cases, the act of wrongfully taking the property triggers the statute of limitations." (*Eleanor Licensing LLC v. Classic Recreations LLC* (2018) 21 Cal.App.5th 599, 612, internal citations omitted.)

In his motion, Kozlowski largely repeats the arguments made by former cross-defendants Redstone and Cody against the seventh cause of action, which is (along with the rest of the cross-complaint) unchanged from December 2022, when Redstone and Cody's motions were granted. Kozlowski argues that, as Judge Kirwan previously ruled, the seventh cause of action fails to state a claim for conversion adequately and is also time-barred. (See Memo. of points and authorities at pp. 4:14-6:16.) He also argues that Sibley and her alter ego CMS have no evidence that he converted any property.

The motion is supported by two declarations. The first is from Kozlowski, who generally denies the allegations in the cross-complaint's seventh cause of action and states that he was never at CMS's 2424 Del Monte Street location in Sacramento after "being escorted out by CMS's employees on February 26, 2016." (Kozlowski Decl. at ¶ 5.)

The second declaration is from counsel Sean Fredkin, who authenticates Exhibits 1-17 in Kozlowski's Appendix of Exhibits supporting the motion. Exhibit 16 is a copy of the February 1, 2012 commercial lease between KJKSC Enterprises LP and CMS for the 2424 Del Monte Street premises that CMS used as offices, signed by Andrew Cody on behalf of CMS. Paragraph 7.4(c) of this lease states that "Any personal property of Lessee not removed on or before the expiration date or any earlier termination date shall be deemed to have been abandoned by Lessee and may be disposed of or retained by Lessor as Lessor may desire." Exhibit 17 is a copy of a "Global Mutual Release of All Claims," signed by Sibley on behalf of CMS and CMS's landlord (KJKSC Enterprises LP) in May 2016. Paragraph 2 of this release states that the parties were in an unlawful detainer suit regarding "the premises located at 2424 Del Monte St., West Sacramento, County of Yolo" but that as a result of the release, the suit would be dismissed with prejudice. The release further states in Paragraph 9H that "Landlord and Tenant agree and acknowledge that the lease for the property located at 2424 Del Monte

St., West Sacramento, County of Yolo is voluntarily terminated and the Tenant shall release complete and full possession of the subject property to the landlord by 5/4/2016."

C. Sibley/CMS's opposition

Sibley and CMS's opposition argues that the seventh cause of action sufficiently states a claim for conversion (contrary to Judge Kirwan's December 20, 2022 order) and that Sibley can raise a triable issue of material fact as to the running of the statute of limitations through a submitted declaration.

Sibley's declaration is the only evidence submitted in support of the opposition. This declaration attempts to expand the allegations in the cross-complaint greatly, including by attempting to add a "delayed discovery" argument. (See Sibley Decl. at ¶ 14.) This is ineffective and does not raise any triable issue of material fact. Sibley and CMS are bound by the cross-complaint on this motion, and the motion cannot be denied based on theories not alleged in the cross-complaint. Declarations submitted in opposition to a motion for summary judgment or adjudication cannot function as amendments of the pleading.

The only other evidence cited in Sibley and CMS's opposing separate statement is the cross-complaint. Again, parties cannot rely on their pleadings as evidence in support of or in opposition to motions for summary judgment or adjudication.

D. Analysis of Kozlowski's motion

The court GRANTS Kozlowski's motion for summary judgment for the following reasons.

First, Sibley and CMS made no effort to amend the cross-complaint after the prior motions by former cross-defendants Redstone and Cody were granted. Therefore, they cannot reasonably have expected a different result here. As an initial matter, Kozlowski's argument that the seventh cause of action fails to adequately state a claim for conversion against him is correct. As Judge Kirwan previously determined:

> The Conversion claim in the January 14, 2021 Cross-Complaint alleges (at ¶¶ 66-69 generally) that in February of 2016 CMS had "a substantial amount of equipment, machines, copiers, paper, envelopes, and other various chattel typically found within a printing business of its size." It further alleges at ¶ 67 "on information and belief" only that after CMS' March 4, 2016 shutdown the various cross-defendants "intentionally removed" CMS' "equipment, machines, copiers, paper, envelopes, and other various chattel" from its 2424 Del Monte Street address in West Sacramento and "took possession of, prevented Cross-Complainant from having access to, or destroyed said equipment, machines, copiers, paper, envelopes, and other various chattel." There are no allegations that any specific cross-defendant converted any specific property.
>
> The conversion claim is therefore based solely on allegations that cross-defendants converted "equipment, machines, copiers, paper, envelopes, and other various chattel" located at CMS' 2424 Del Monte Street address after March 4, 2016. It cannot be construed as based on any activity before March 4, 2016 and does not, contrary to arguments made in the oppositions, include any allegations of

misappropriation of trade secrets or of theft of client lists, money, software or other intangible property. Such arguments cannot raise a triable issue of material fact.

(December 20, 2022 Order at pp. 5:14-6:3.)

> The Conversion cross-claim fails to state a proper claim against any Cross-Defendant. A plaintiff/cross-complainant may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe that the allegations are true, and thus a pleading made on information and belief is insufficient if it merely asserts the facts so alleged without alleging such information that leads the plaintiff to believe that the allegations are true. (*Gomes v. Countrywide Home Loans, Inc*. (2011) 192 Cal.App.4th 1149, 1158-1159.) To properly plead an allegation on the basis of information and belief, a plaintiff must allege the facts or information that led him or her to infer or believe the truth of the ultimate factual allegation. (*Id*.; see also *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 100, 1106 ["where factual allegations are based on information and belief, the plaintiff must allege 'information that 'lead[s] [the plaintiff] to believe that the allegations are true.'"].) As the seventh cross-claims fails to allege any such information as to any cross-defendant, the claim is insufficient as a matter of law.

(*Id*. at pp. 6:22-7:6, footnote omitted.) This same analysis for cross-defendants Redstone and Cody applies to cross-defendant Kozlowski.

Second, Kozlowski's argument that the seventh cause of action is time-barred is also correct. Kozlowski's evidence is sufficient to establish, as Redstone and Cody did previously, that the conversion cross-claim is subject to a three-year statute of limitations under Code of Civil Procedure section 338(c)(1).

The commercial lease and the release agreement (Kozlowski Exhibits 16 and 17) establish that any "equipment, machines, copiers, paper, envelopes, and other various chattel" left at the 2424 Del Monte Street location after May 4, 2016 was abandoned by CMS and cannot be the basis of a conversion claim. This evidence also establishes that CMS affirmatively consented to the abandonment (contrary to what is alleged in the conversion claim), knew that the landlord would own any property left at the 2424 Del Monte Street location after May 4, 2016, and could not reasonably have believed otherwise *for the ensuing three years* (*i.e.*, until August 2019, as Sibley now claims) or at any time after the May 2016 release was signed. "[T]he law is well settled that *there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property*." (*Chen v. PayPal, Inc*. (2021) 61 Cal.App.5th 559, 576, citing *Farrington v. A. Teichert & Son, Inc*. (1943) 59 Cal.App.2d 468, 474, emphasis added.) The foregoing evidence establishes that the only viable timeframe during which a conversion of "equipment, machines, copiers, paper, envelopes, and other various chattel" left at the 2424 Del Monte Street location could have occurred was from March 4, 2016 to May 4, 2016. As there are no allegations in the cross-complaint supporting an exception to the three-year statute of limitations, "the claim for a conversion became time-barred before this action was filed on June 13, 2019." (See December 20, 2022 Order at pp. 10:15-11:4.)

When the burden shifts to Sibley and CMS, they are unable to raise any triable issue as to the adequacy of the allegations in the seventh cause of action or the determination that, as

alleged, it became time-barred well before the cross-complaint was filed. To be entitled to the benefit of the delayed discovery rule, a plaintiff must specifically plead the time and manner of discovery and show the following: 1) Plaintiff had an excuse for late discovery; 2) Plaintiff was not at fault in discovering facts late; 3) Plaintiff did not have actual or presumptive knowledge to be put on inquiry; and 4) Plaintiff was unable to make earlier discovery despite reasonable diligence. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319, 1324-1325.) The allegations in the seventh cause of action do not meet this standard.

The only opposition evidence, the declaration from Sibley, cannot amend the cross-complaint to add a delayed discovery theory or expand the allegations of the seventh cause of action. (See *Nativi, supra*, 223 Cal.App.4th at 290; *County of Santa Clara, supra*, 136 Cal.App.4th at 332-333.)

E. Evidentiary Objections

With the opposition to Kozlowski's motion, Sibley and CMS have submitted objections to some of the evidence in support of the motion. The court will not consider these objections, as they do not comply with Rule of Court 3.1354. The rule requires the filing of two documents, evidentiary objections and a separate proposed order on the objections, and both must be in one of the two approved formats set forth in the Rule. Both documents must be filed at the same time as the objecting party's opposition or reply papers. (Rule of Court 3.1354(a).) The court is not required to rule on objections that do not fully comply with the rule. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)

III. DLSE'S MOTION FOR SUMMARY ADJUDICATION

A. The Basis for DLSE's Motion

As DLSE's motion "for summary adjudication" seeks a final adjudication of the two remaining claims in the TAC, it is properly considered one for summary judgment, regardless of the label given to it. "'The nature of a motion is determined by the nature of the relief sought, not by the label attached to it.'" (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193 [trial court had discretion to treat motion for reconsideration as motion for new trial] [internal citation omitted]; see also *Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 930.) The current motion does not seek adjudication of any issue of duty or a claim for damages, it seeks (for the second time) judgment/adjudication of the second and third causes of action in the TAC. The motion must therefore comply with Code of Civil Procedure section 437c, subdivision (f)(2).

B. Compliance with Statutory Requirements

1. Code of Civil Procedure Section 437c(f)(2)

Section 437c(f)(2) states: "A motion for summary adjudication may be made by itself *or as an alternative to a motion for summary judgment* and shall proceed in all procedural

respects as a motion for summary judgment. *A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion*." (Emphasis added.)

There is no requirement that a party obtain leave of court before filing a second motion for summary judgment (as PEV incorrectly argues), but the moving party must meet its burden in any subsequent motion to establish "newly discovered facts or circumstances or a change of law" permitting the second attempt, as section 437c(f)(2) requires. (See *Bagley v. TRW, Inc*. (1999) 73 Cal.App.4th 1092, 1096-1097 (*Bagley*); *Schachter v. Citigroup, Inc*. (2005) 126 Cal.App.4th 726, 737-739 (*Schachter*).) At the same time, the moving party in these circumstances does not also have to satisfy Code of Civil Procedure section 1008 (as Sibley and CMS argue).[9] Section 1008 and section 437c(f)(2) are separate and distinct.

2. Analysis

The court previously denied DLSE's motion for summary judgment and then considered and denied its alternative motion for summary adjudication as to the TAC's second and third causes of action. The court noted that the TAC "does not state claims for violation of the Uniform Voidable Transfer Act ('UVTA'), Civil Code sections 3439, et seq. No reference to any section of the UVTA is made in the second and third cause of action or anywhere else in the entirety of the TAC." (July 6, 2023 order at p. 18:3-5.) As DLSE's arguments for summary adjudication of the second and third causes of action were based almost exclusively on the UVTA, the court expressly found that "DLSE has failed to meet its initial burden of showing that there is no defense to the *common law claims* set forth in the second or third cause of action." (*Id*. at pp. 18:22-19:2, emphasis in original.)

The memorandum in support of DLSE's current motion and the two supporting declarations make no mention of the prior motion or the court's prior ruling. The order is briefly referenced in two (identical) undisputed material facts (nos. 51 and 101) and in DLSE's separate statement and in its request for judicial notice. The court ultimately concludes that this does not satisfy DLSE's burden under section 437c(f)(2).

Only in its reply, responding to arguments made in the oppositions, does DLSE address the issue at all. It first suggests that section 437c(f)(2) does not apply because it has styled this motion as one for "summary adjudication" of all remaining claims in the TAC. As explained above, DLSE may not evade section 437c(f)(2) through artful labeling. DLSE also claims that the current motion is not based on the same issues as the prior motion. This is unpersuasive. DLSE's first motion argued that Sibley's transfer of the Elmwood Court and University Avenue properties should be voided as a fraudulent transfer for the purposes of avoiding creditors, including the judgment creditor former employees of CMS. The current motion makes the same argument. Sections of the prior memo are repeated almost verbatim in the current one, with citations to the UVTA omitted but still citing cases that interpret and apply the UVTA to support its argument. (See, e.g., *Menick v. Goldy* (1955) 131 Cal.App.2d 542; *Wood v. Kaplan* (1960) 178 Cal.App.2d 227.)

[9] (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1099 [citing *Bagley* and *Schachter* with approval on this point].)

DLSE has amended its pleading several times in this case. The operative TAC was filed on February 5, 2021. No reasonable person could read the TAC and conclude that the second and third causes of action alleged a violation of the UVTA or any other type of statutory claim. It is "black letter" law that summary judgment and summary adjudication cannot be granted or denied based on issues not raised by the pleadings. DLSE's prior attempt to move for summary adjudication of the TAC's second and third causes of action based on an issue (the UVTA) clearly not raised by its pleading and its current attempt at a do-over do not demonstrate or establish any "newly discovered facts or circumstances or a change of law supporting the issues" asserted in this motion. The court ultimately agrees with defendants that the current motion is barred by section 437c(f)(2).

DLSE's contention in its reply that any refusal to consider its second attempt would be "contrary to the legislative intent underlying" section 437c is not persuasive. (Reply at p. 5:3.) On the contrary, "'[i]n matters of statutory construction, we may not ignore restrictions the Legislature has inserted.' . . . [T]he Legislature enacted a specific limitation on the parties out of a concern for abuse of the summary adjudication process, and the burden such motions can impose on a party's resources . . . . The defendants, as parties to this case, were expressly bound by the requirements of section 437c(f)(2). Their motion, however, violated that provision because it failed to establish newly discovered facts or circumstances or a change of law." (*Schachter*, *supra,* 126 Cal.App.4th at 737-739, internal citations omitted.) Declining to consider this motion is entirely consistent with the Legislature's express intent in enacting section 437c(f)(2).[10]

As DLSE's motion does not satisfy the requirements of section 437c(f)(2), it is DENIED.

In light of this ruling, it is not necessary for the court to address the additional issues raised by this motion or to rule on the associated requests for judicial notice. It is also not necessary for the court to rule on any of the evidentiary objections submitted by the parties in connection with this motion. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c, subd. (q).)

[10] Even if the court were to consider the merits, it would likely find that central dispute between the parties regarding the second and third causes of action—that Sibley acted *with fraudulent intent* when she transferred the Elmwood Court and University Avenue properties to her father—raises material factual issues that cannot be decided by the court as a matter of law. For example, the parties vigorously dispute whether one or both transfers were supported by adequate consideration, and they submit competing evidence on this question. This is a dispute that must necessarily be resolved by the trier of fact.

IV. PEV'S MOTION FOR SUMMARY JUDGMENT/ADJUDICATION[11]

A. Requests for Judicial Notice

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking judicial notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

1. PEV's Initial Request

PEV has submitted a request for judicial notice of 22 documents, submitted as Exhibits 1-5, 7, 9-11, 13-19 and 21-26 to PEV's Index of Evidence. These documents are authenticated by declarations from counsel Simon Mazzola and John Kessler of PEV. PEV asserts that this material is subject to judicial notice under Evidence Code section 452, subdivisions (c), (d), and (h). As an initial matter, with the limited exception of recorded deeds, section 452(h) does not apply to any of the documents submitted. (See *Gould v. Md. Sound Indus*. (1995) 31 Cal.App.4th 1137, 1145 (*Gould*) ["Judicial notice under Evidence Code section 452, subdivision (h), is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."].)

Judicial notice of Exhibits 1 and 2, copies of the death certificates for Hiram Sibley and Nancy Sibley issued by the Santa Clara County Health Department, is GRANTED pursuant to Evidence Code section 452(c). These documents have limited relevance to the issues before the court, as these estates are not parties to this case.

Judicial notice of Exhibits 3 and 4, copies of September 26, 2016 transfers of title for the Elmwood Court and University Avenue properties from Hiram Sibley to a "Prosper Equity, Inc." located at 1712 Pioneer Ave., Cheyanne, WY 82001, recorded on January 27, 2017, is GRANTED pursuant to Evidence Code section 452(h). As the validity of these transfers is central to the disputes in this case, the court will take judicial notice of the fact that the documents were recorded *but not* their legal effect. (See *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1118; see also *Yvanova v. New Century Mortg. Corp*. (2016) 62 Cal.4th 919, 924, fn. 1 [a court may properly take judicial notice of existence and contents of recorded documents but not of disputed or disputable facts stated therein].) Judicial notice of Exhibits 15 and 16, copies of the purported transfers of these properties from Perice Sibley to Hiram Sibley, recorded on December 22, 2015 and March 10, 2016, is GRANTED subject to the same limitation.

[11] Despite the labels PEV attaches to it, the motion is not a "second" or "amended" motion. No prior motion for summary judgment/adjudication by PEV has been addressed this case, and parties have no ability to "amend" motions without prior leave of court.

Judicial notice of Exhibit 5, an alleged copy of PEV's April 21, 2016 articles of incorporation in Virginia, is DENIED. (See *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 607-608 [applications and supporting documents filed by private parties with Department of Insurance were not official acts of department subject to judicial notice]; *Hughes v. Blue Cross of N. Cal*. (1989) 215 Cal.App.3d 832, 856, fn. 2, citing Evid. Code, § 452(c) [Statement of Information, although on file with a government agency, not subject to judicial notice as an official act under subdivision (c) because it was prepared by private parties, not the Secretary of State]; *People v. Thacker* (1985) 175 Cal.App.3d 594, 598-599 [copies of articles of incorporation, statement by domestic corporation, and notice of issuance of shares were materials prepared by private person, merely on file with state agencies, and not official acts].) Judicial notice of Exhibit 17, a purported copy of the February 3, 2017 articles of incorporation for "Prosper Equity, Inc." in *Wyoming* is DENIED for the same reason.

Judicial notice of Exhibit 7, a copy of DLSE's TAC, is GRANTED pursuant to Evidence Code section 452(d). The TAC is noticed as to its existence and filing date but not as to the truth of its contents. Judicial notice of Exhibits 19 (DLSE's original complaint) and 26 (a copy of DLSE's SAC) is GRANTED pursuant to section 452(d) and subject to the same limitation.

Judicial notice of Exhibit 9, a copy of a notice of hearing and petition filed by DLSE in San Joaquin County Superior Court on November 30, 2020 in the probate proceedings for Hiram Sibley's estate is GRANTED pursuant to section 452(d), but only as to its existence and filing date, not its contents. Judicial notice of Exhibit 10, a copy of a declaration filed by DLSE counsel Evan Adams in the San Joaquin County probate matter, is DENIED. Declarations and deposition transcripts cannot be noticed as to the truth of their contents. (See *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81 [truth of contents of court records cannot be judicially noticed]; *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057 [court may take judicial notice of existence of declaration but not of facts asserted in it]; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 [court may not notice the truth of declarations or affidavits filed in court proceedings].) The existence and filing of this declaration are irrelevant to the material issues before the court.

Judicial notice of Exhibit 11, a copy of an April 7, 2021 minute order from the probate department of the San Joaquin County Superior Court denying DLSE's petition to file a late creditor's claim, is GRANTED pursuant to Evidence Code section 452(d). The order is not noticed as to the correctness of its interpretation of law. (See *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [a written trial court ruling has no precedential value]; *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 [there is no "horizontal stare decisis"].) Court orders also cannot be noticed as to the truth of the stated factual findings. (See *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565; *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749; *Kilroy v. State of Calif*. (2004) 119 Cal.App.4th 140, 145-148; *Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 437-438.) But the order may be considered as part of the parties' collateral estoppel argument. (See *Hawkins v. SunTrust Bank* (2016) 246 Cal.App.4th 1387, 1393; *Barri, supra*, 437-438.)

Judicial notice of Exhibit 13, a copy of the creditor's claim filed by DLSE in the probate department of the San Joaquin County Superior Court, is DENIED. The claim could only be noticed under section 452(d) as to its existence and filing date (the latter of which is

not apparent from the face of the document) and these points are irrelevant to the issues before the court. Judicial notice of Exhibit 14, a copy of a January 18, 2023 order of the probate department of the Santa Clara County Superior Court in the matter of Nancy Sibley's estate, is GRANTED pursuant to section 452(d). Again, the order is not noticed as to correctness of its legal rulings or the truth of any stated factual findings. Judicial notice of Exhibit 24, a copy of a February 4, 2022 order of the probate department of the Santa Clara County Superior Court regarding the filing of estate taxes, and judicial notice of Exhibit 25, a copy of a January 26, 2023 order of the San Joaquin County Superior Court expanding the powers of special administrator John Kessler, are GRANTED pursuant to section 452(d), subject to the same conditions.

Judicial notice of Exhibit 18, copies of the "amended" answers filed by PEV on July 10 and July 31, 2023, is DENIED as irrelevant to the issues before the court. The court has only considered the answer properly filed on June 29, 2023. PEV did not seek, and was not granted, leave to file amended answers.

Judicial notice of Exhibits 21-23, copies of DLSE's separate statement, supporting memorandum, and appendix of exhibits from its prior motion for summary judgment, is DENIED. At most, these documents could only be judicially noticed as to their existence and filing date (March 16, 2023) and these facts have no relevance to the issues before the court on PEV's motion.

2. DLSE's Request

With its opposition, DLSE has submitted a request for judicial notice of 15 documents pursuant to Evidence Code section 452, subdivisions (c), (d), and (h). Parts of the request unnecessarily duplicate the request made by PEV. With the exception of one document, section 452(h) has no application here. (See *Gould*, *supra*.)

Judicial notice of Exhibits 1-4, copies of documents prepared by private parties and placed on file with state authorities, is DENIED for the same reason as PEV's Exhibits 5 and 17, discussed above.

Judicial notice of Exhibits 5-7 and 10, copies of pleadings filed in this action (including the operative TAC) and in a related action in Yolo County, is GRANTED pursuant to section 452(d). These documents are only noticed as to their existence and filing dates. Judicial notice of Exhibits 9, 13 (the same document as PEV's Exhibit 25), and 14, copies of orders issued by this court, the probate department of the Santa Clara Superior Court, and a judgment issued by the Yolo County Superior Court in an action involving Sibley and CMS—but not PEV—is GRANTED pursuant to section 452(d). These orders are judicially noticed as to their contents but not as to the correctness of legal rulings or factual findings.

Judicial notice of Exhibits 8, 11, and 12 (copies of a request for entry of default in this action and papers filed by parties in the Santa Clara County probate action), is DENIED. At most, these documents could be judicially noticed as to their existence and filing dates, but these points are not relevant to the issues in this motion.

Judicial notice of Exhibit 15, a copy of a federal tax lien on the University Avenue property recorded in San Mateo County, is GRANTED pursuant to Evidence Code section 452, subdivisions (c) and (h).

B. The Basis for PEV's Motion

As noted above, parties may not rely on additional evidence submitted with their reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) Accordingly, while it has considered the reply brief, the court has not considered any of the additional evidence and declarations submitted by PEV with that reply brief on October 20, 2023. The court has also not considered the request for judicial notice (of material attached to these unauthorized declarations) submitted with the reply brief.[12]

PEV moves for summary judgment or adjudication of the TAC's second and third causes of action on two grounds: (1) that the second and third causes of action are barred by the statute of limitations set forth in Code of Civil Procedure section 366.2; and (2) that the second and third causes of action are barred by the collateral estoppel/res judicata effect of an order from the probate department of the San Joaquin County Superior Court. (See August 11, 2023 Notice of Motion.) The notice of motion also appears to suggest that the second and third causes of action are time-barred by Probate Code sections 9100 and 9103. These two Probate Code sections do not provide any basis for summary judgment or adjudication of claims in this matter. These statutes simply set forth the time requirements for filing a creditor's claim in a probate proceeding. They are not applicable in a civil case.

PEV's supporting memorandum[13] and separate statement of undisputed material facts ("UMFs") make clear that both of the foregoing grounds for summary judgment depend upon PEV's Exhibit 11, which is the April 27, 2021 minute order from the San Joaquin County Superior Court in the matter of Hiram Sibley's estate.

[12] Contrary to the assertion in counsel's reply declaration, Code of Civil Procedure section 437c does not authorize the submission of a reply separate statement. The fact that DLSE chose to list "supplemental" material facts in its opposing separate statement—as permitted by section 437c(b)(3)—does not authorize the submission of additional evidence with PEV's reply.

[13] PEV's papers, including its opposition to DLSE's motion, do not comply with Rules of Court 2.108 and 3.1113. To the extent that compliance with the rule would have resulted in overlong papers, papers in excess of page-limits filed without prior permission are considered in the same manner as late-filed papers. (See Rule of Court 3.1113(g).) "A trial court has broad discretion to under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.) The court previously admonished PEV's counsel about this in its July 6, 2023 order. (Order at p. 5, fn. 2.) In addition, the court denied PEV's counsel's request for extra briefing during the October 12, 2023 hearing. That recent history makes these continuous violations by counsel particularly bothersome. Although the court has considered all of PEV's papers again, the court *will refuse* to do so next time, if PEV submits another brief that flouts the California Rules of Court.

C. Analysis of PEV's Motion

PEV's motion for summary judgment/adjudication of the TAC's second and third causes of action is DENIED for failure to meet the initial burden. PEV does not show that the second and third causes of action are time-barred under Code of Civil Procedure section 366.2 or that they are barred by collateral estoppel or res judicata from the April 27, 2021 minute order.

1. Code of Civil Procedure Section 366.2

Section 366.2, subdivision (a), states: "If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply." Section 366.2, subdivision (b) also states that the limitations period set forth in subsection (a) "shall not be tolled or extended for any reason except as provided in" Code of Civil Procedure sections 12, 12a, and 12b, and various Probate Code sections.

Section 366.2 is not a statute of limitations that applies to claims against specific property; it is only applicable to claims brought against a person, who is deceased, or the person's estate. DLSE's second and third causes of action in this civil lawsuit have never been alleged against Hiram Sibley, Nancy Sibley, or either of their estates. Therefore, section 366.2 does not bar these claims against Sibley, CMS, and PEV.

A careful reading of PEV's Exhibit 11, a copy of the April 7, 2021 minute order of the San Joaquin County Superior Court in the matter of the Estate of Hiram Sibley, does not alter this analysis. The order is solely concerned with whether DLSE should be allowed to make a late claim against Hiram Sibley's estate in that probate proceeding, pursuant to Probate Code section 9103. The court denied that application, finding it barred by section 366.2. The order makes no ruling as to any of DLSE's claims in the TAC in this action, which had been filed before the order was issued but was not considered by the San Joaquin court, and which have never been alleged against Hiram Sibley's estate. The April 7, 2021 order has no effect—and does not purport to have any effect—on causes of action for common law fraudulent transfer against Sibley, CMS, or PEV. The fact that DLSE did not bring any claim against the estate of Nancy Sibley (PEV UMF no.11) also does not establish that DLSE's common law fraudulent transfer claims, which have never been alleged against that estate, are time-barred.

The TAC's second and third causes of action are common law fraudulent transfer claims. The statute of limitations for a common law fraudulent transfer claim is three years (Code Civ. Proc., § 338(d)), and the cause of action accrues when the judgment against the debtor is secured. (See *PGA West Residential Assn., Inc. v. Hulven Internat. Inc.* (2017) 14 Cal.App.5th 156, 170.) PEV has not established that these causes of action are time-barred under section 338(d).

2. Collateral Estoppel

As noted above, collateral estoppel precludes the relitigation of an issue if: (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the

issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; *and* (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. Even if the minimal requirements for application of collateral estoppel are satisfied, courts will not apply the doctrine if considerations of policy or fairness outweigh the doctrine's purposes as applied in a particular case, or if the party to be estopped had no full and fair opportunity to litigate the issue in the prior proceeding. (See *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82; *Bridgeford v. Pacific Health Corp*. (2012) 202 Cal.App.4th 1034, 1042-1043.)

The April 27, 2021 minute order from the San Joaquin County Superior Court in the matter of Hiram Sibley's estate does not have any collateral estoppel or res judicata effect on the TAC's second or third causes of action against the defendants in this case. The sole issue decided in that order was whether DLSE would be permitted to file a late claim against the estate, with the probate court determining that DLSE's application to bring a late claim was barred by Code of Civil Procedure section 366.2. That issue is not "identical" to the allegations of the second or third causes of action. Whether the defendants' transfers of the Elmwood Court and University Avenue were fraudulent was not actually litigated or necessarily decided in the April 27, 2021 minute order. The absence of a claim against Nancy Sibley also does not have any collateral estoppel or res judicata effect on the TAC's second and third causes of action.

Even if PEV had established the minimal requirements for the application of collateral estoppel based on the April 27, 2021 minute order, the court would not apply the doctrine here, as considerations of fairness to the former employees and judgment creditors of CMS would outweigh the doctrine's purpose in this case.

D. Evidentiary Objections

As PEV's motion is denied for failure to meet the initial burden, it is not necessary for the court to rule on DLSE's objections to the declarations of John Kessler and Simon Mazzola in support of the motion, or to rule on PEV's objections to DLSE's opposing separate statement, submitted with PEV's reply. (See Code Civ. Proc., § 437c, subd. (q).)

V. CONCLUSION

The court GRANTS Kozlowski's motion, DENIES DLSE's motion, and DENIES PEV's motion.

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Calendar Lines 6-7
Case Name: *C.N. v. The Church of Jesus Christ of Latter-Day Saints et al.*
Case No.: 21CV375894

Plaintiff C.N. brings these two motions to compel against defendant Phil Stewart. The first motion seeks to compel answers to deposition questions; the second seeks to compel further responses to requests for admissions and Form Interrogatory No. 17.1. The court GRANTS in part and DENIES in part the first motion; the court GRANTS the second motion in its entirety.

The court addresses the second motion first.

1. Requests for Admissions / Form Interrogatory No. 17.1

C.N.'s requests for admissions focus on whether Stewart was a mandated reporter from 2001 to 2004 (Nos. 1-4) and whether Stewart contacted law enforcement or child protective services regarding "John Zoe," C.N.'s abuser (No. 5). This information is discoverable and is not shielded from disclosure by the Fifth Amendment privilege against self-incrimination, as the court finds that there is no possibility of criminal prosecution arising out of any responses to these discovery requests.

Stewart argues that the statute of limitations for a violation of the mandated reporter statute (Penal Code section 11166) is not the "five years" set forth in Penal Code section 801.8, subdivision (a), but rather an indefinite period, because it is a "continuing offense" under section 11166, subdivision (c):

> (c) A mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect as required by this section is guilty of a misdemeanor punishable by up to six months confinement in a county jail or by a fine of one thousand dollars ($1,000) or by both that imprisonment and fine. If a mandated reporter intentionally conceals the mandated reporter's failure to report an incident known by the mandated reporter to be abuse or severe neglect under this section, the failure to report is a continuing offense until an agency specified in Section 11165.9 discovers the offense.

The court disagrees with Stewart that this "continuing offense" language means that there is potentially no end to the limitations period. First, even if what happened in this case could be considered a "continuing offense" by Stewart, there are no circumstances under which it could reasonably be argued that the offense "continued" until long after C.N. reached the age of majority—i.e., until long after "an agency specified in Section 11165.9" possessed jurisdiction over the offense. Once C.N. turned 18, that is the latest possible date upon which the limitations period would have started running, and it is the court's understanding that C.N. turned 18 well over a decade ago. Second, in order for this "continuing offense" language to apply, Stewart would need to have had more than a "reasonable suspicion" of abuse or neglect, which is the normal standard for mandated reporters to make a report. Rather, the statute requires that he "intentionally conceal[ed]" a failure to report an incident "known by the mandated reporter to be abuse or severe neglect." In other words, a "continuing offense" requires *actual knowledge*, not just a reasonable suspicion, and there is no evidence that Stewart had actual knowledge of Zoe's abuse here. For these reasons, the court finds that there

is no possibility of a criminal prosecution of Stewart under Penal Code section 11166. The limitations period has long passed.

For similar reasons, the court rejects Stewart's argument that because C.N.'s complaint insinuates that he may have been "a co-conspirator or aider and abettor" of Zoe's crimes, he potentially faces ongoing criminal jeopardy for conspiracy to commit child molestation or aiding and abetting child molestation. (Opposition at p. 8:6-7.) Both aiding/abetting and conspiracy require actual knowledge of the crime—not just a "reasonable suspicion"—and again, there is no evidence that Stewart had actual knowledge of Zoe's molestation of C.N. Indeed, both aiding/abetting and conspiracy require much more: they require *advance* actual knowledge of the crime, not just knowledge after the fact. A conviction for aiding and abetting requires a finding that "*[b]efore or during* the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime" and "did in fact aid and abet the perpetrator's commission of the crime." (CALCRIM 401, emphasis added.) Conspiracy requires a finding that the defendant affirmatively *agreed* with one or more other defendants to commit the alleged crime. (See Pen. Code, § 182; CALCRIM 415.) Here, even if we were to construe C.N.'s civil complaint as broadly as possible, there is no hint of an allegation that Stewart *knowingly aided or abetted Zoe* in molesting C.N. either "[b]efore or during the commission of the crime," or that Stewart *knowingly and affirmatively agreed with Zoe* to the molestation of C.N. before it actually happened. These necessary elements of the hypothetical crimes with which Stewart imagines he could be charged are completely absent.

The discovery sought here—which goes to whether Stewart was a mandated reporter 19-22 years ago and whether he acted upon a "reasonable suspicion" of child abuse or neglect—focuses on what Stewart did *after* he received reports of suspicious activity from other adults who were present in Zoe's home. The court finds that answers to this discovery will not tend to incriminate Stewart in any way, except for a violation of Penal Code section 11166, for which the limitations period has passed. The court finds no connection between the requested discovery and any potential liability for knowingly aiding, abetting, or conspiring to commit child molestation. In addition, the court does not construe anything in the complaint to allege that Stewart actually *knew* about any molestation before it occurred.

The court orders Stewart to provide substantive responses to RFA Nos. 1-5 and Form Interrogatory No. 17.1 within 15 days of notice of service of the court's order.

2. Deposition Testimony

A party who invokes the privilege against self-incrimination must generally do so on a question-by-question basis. (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1555.) The court sees that there are a lot of deposition questions as to which Stewart invoked Evidence Code section 940. Having reviewed the questions and answers set forth in the parties' separate statements, the court finds that Stewart invoked the privilege far too liberally and must answer the majority of the questions that were posed. For the reasons set forth above, Stewart must answer questions about his employment, his responsibilities at the Church, his status as a mandated reporter, his interactions with Zoe before any reports of suspicious activity with C.N. were received, his interactions with C.N.'s mother before any reports of suspicious activity were received, his communications with the adults who were housed with Zoe, his knowledge of any "church court proceedings," and his knowledge of the Church and Church policies generally.

The only questions as to which the court would not compel answers are those that appear to be directed to the notion that Stewart knew about Zoe's criminal behavior before anything happened with C.N., or that are directed to the notion that Stewart engaged in an affirmative and knowing "cover-up" of criminal behavior. The court does not understand the basis of these questions—it is not clearly set forth in the papers—and so if the parties are able to provide further illumination at the hearing, the court is willing to hear it. On their face, they seem to seek evidence of greater criminal culpability for Stewart than a violation of section 11166, and so they raise more potential concerns—albeit still extremely remote and hypothetical—under the Fifth Amendment. These questions are: Items 12, 27 (at a minimum, this needs to be rephrased), 37, 38, and 44.

With the exception of the foregoing five items, the court grants the motion to compel further deposition testimony.

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Calendar Line 8
Case Name: *Roman Robertson v. DGDG 12, LLC et al.*
Case No.: 23CV412215

Defendant DGDG 12, LLC ("Defendant") moves to compel arbitration, pursuant to an agreement with plaintiff Roman Robertson ("Robertson"). Robertson does not oppose resolving this case in arbitration, but he opposes arbitrating with the American Arbitration Association ("AAA"). The arbitration agreement he signed expressly allows either party to select arbitration with either AAA or National Arbitration and Mediation ("NAM"), but Robertson argues that the inclusion of AAA renders the arbitration provision unconscionable, because AAA does not guarantee him the right to conduct discovery.

The court finds Robertson's position to be devoid of merit and GRANTS the motion to compel.

The party challenging a contractual arbitration provision bears the burden of proving that it is both procedurally and substantively unconscionable. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126.) This may be done on a sliding scale, where the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required, and vice versa. (*Id.* at pp. 125-126.)

In this case, Robertson argues that the arbitration provision is procedurally unconscionable because it was presented in a contract of adhesion. The court concludes that this constitutes a showing of procedural unconscionability, though a relatively minimal one. (See *Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, 132 [the fact of an adhesion contract is insufficient to make an agreement unconscionable on its own]; *Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 402 [same].) Robertson advances no other evidence to show surprise (e.g., fine print, indecipherable jargon) or oppression (e.g., undue pressure from the drafting party's salespersons).

At the same time, Robertson fails to show any substantive unconscionability whatsoever. Substantive unconscionability focuses on whether the contractual provision is unduly harsh or one-sided. One of the hallmarks of substantive unconscionability is a lack of mutuality, where the provisions apply unequally to the parties. (*Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, 968-969.) Here, Robertson shows nothing that is unduly harsh or one-sided in the language of the arbitration provision itself. The fact that it includes two of the most well-known dispute resolution providers in the country (AAA and NAM) is not in and of itself a harsh or one-sided outcome. On this basis alone, Robertson's objection to the *language of the arbitration provision itself* must be rejected.

Robertson provides no authority for the proposition that a facially neutral arbitration provision may still be substantively unconscionable if one of the arbitration providers named in the provision allows for less discovery than is customary in litigation. Indeed, Robertson cites no cases at all to support this novel claim. Nevertheless, even if the court were to consider this hypothesis, the court would reject it under these facts. First, the AAA rules that Robertson cites do not bar discovery in any way—they simply make discovery subject to the discretion of the arbitrator:

R-22. Exchange of Information between the Parties

(a) *If any party asks or if the arbitrator decides on his or her own*, keeping in mind that arbitration must remain a fast and economical process, *the arbitrator may direct*

1) specific documents and other information to be shared between the consumer and business, and

2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing.

(AAA Arbitration Rules, Rule 22; italics added.) There is nothing unfair about this facially neutral rule, which applies to both sides. In addition, there is nothing one-sided about allowing a neutral arbitrator to decide what the scope of discovery should be in the arbitration proceedings. That is what an arbitrator is supposed to do. The notion that an arbitrator will retain discretion about the scope of discovery in the case is not something that "shocks the conscience." (*Pinnacle Museum Tower Association v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246.) Rather it is one of the fundamental characteristics of arbitration. In fact, the arbitration provision that Robertson signed explicitly advises him in all capital letters that "DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT." The notion that AAA rules provide for a scope of discovery in arbitration that is more limited than in litigation is not unconscionable; *it is what is to be expected*. Arbitration is supposed to be a speedier and more efficient dispute resolution mechanism than litigation.

Robertson's motion does not even specify what discovery he would seek in this case that he believes will be curtailed by the AAA rules. This is yet another reason why he has failed to meet his burden of showing unconscionability.[14]

In its reply brief, Defendant suggests a number of other options that the parties could agree to: (1) arbitration with NAM instead of AAA, (2) arbitration with court-ordered discovery, (3) statutory appointment of an arbitrator. The court expresses no opinion regarding these last-minute alternatives, but it encourages the parties to meet and confer regarding any alternatives that might be mutually agreeable. In the meantime, the court rejects Robertson's arguments in opposition to this motion. The arbitration provision is not unconscionable.

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[14] The court rejects Robertson's even weaker argument that the selection of AAA by Defendant violates the implied covenant of good faith and fair dealing. Defendant's selection of AAA is *expressly permitted* by the signed agreement between the parties. As such, it cannot violate any supposedly implied covenant.