SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien
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"Every case is important" . . . . . "No case is more important than any other."—United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Tuesday, 05 March 2024
TIME: 9:00 A.M.

This Department uses Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in-court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building. If the doors to the Old Courthouse are locked, please see the deputies at the metal detector next door at 191 North First Street.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit

photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULI Khalsa NG
LINE 1	20CV361652	Gurmail Singh a.k.a. Gurmail Singh Bath; Harpal Singh Chahal vs Bhupinder (Bob) Dhillon et al	**Defendants' Special Motion to Strike Complaint Pursuant to *Code of Civil Procedure*, § 425.16.** The special motion to strike the complaint is GRANTED in its entirety. SEE ATTACHED TENTATIVE RULING.
LINE 2	23CV413113	Steven Trinh et al vs Del Toro Loan Servicing, Inc. et al	**Demurrer of Defendant SGS E, Inc. to the First and Third Causes of Action in Plaintiffs' Second Amended Complaint.** Defendant SGLC's demurrer to the first cause of action [rescission] in plaintiffs Trinh and MFAS's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code of Civil Procedure***, § 430.10, subd. (e)] is OVERRULED. Defendant SGLC demurrer to third of action [violation of ***Business and Professions Code***, § 17200 et seq.] in plaintiffs Trinh and MFAS's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code of Civil Procedure***, § 430.10, subd. (e)] is SUSTAINED without leave to amend. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULI Khalsa NG
LINE 3	23CV418969	Art Chan vs Michelle Fang et al	**Demurrer of Defendants Michelle Fang and Artson Group International to Plaintiff's First Amended Complaint.** Defendant Fang's demurrer to plaintiff Chan's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend. Defendants Artson Group and Fang's demurrer to plaintiff Chan's FAC is otherwise OVERRULED. SEE ATTACHED TENTATIVE RULING.
LINE 4	23CV425839	Austin Tagele vs Dennis Ingols	**Motion of Defendant to Strike Plaintiff's Complaint Pursuant to *Code Of Civil Procedure*, § 425.16; Request for Entitlement of Attorney's Fees and Costs; Request to Declare Plaintiff to Be a Vexatious Litigant.** The motion is GRANTED and the complaint is STRICKEN in its entirety. Defendant is given leave to file an application for attorney's fees and costs. The request of defendant to declare plaintiff to be a vexatious litigant is TAKEN UNDER SUBMISSION. NO FORMAL TENTATIVE RULING. The parties should use the Tentative Ruling Protocol if they wish to appear and argue the matter on the merits.
LINE 5	23CV426542	Ravi Pisupati vs General Motors, LLC et al	**Motion of Defendant General Motors LLC To Strike Portions of the Plaintiff's Complaint.** Plaintiff attempted to file a First Amended Complaint which was rejected by the Clerk. No opposition has been filed to the motion. This Court is inclined to GRANT the motion to strike with 10 days leave to amend and deem the filing of the proposed First Amended Complaint to have been filed and served this date. Defendant will have 20 days leave within which to RESPOND. NO FORMAL TENTATIVE RULING. The parties should use the Tentative Ruling Protocol if they wish to appear and argue on the merits.
LINE 6	23CV426542	Ravi Pisupati vs General Motors, LLC et al	**Demurrer of Defendant General Motors LLC to the 4th and 5th Causes of Action of the Plaintiff's Complaint.** Plaintiff attempted to file a First Amended Complaint which was rejected by the Clerk. No opposition has been filed to the motion. This Court is inclined to SUSTAIN the demurrers with 10 days leave to amend and deem the filing of the proposed First Amended Complaint to have been filed and served this date. Defendant will have 20 days leave within which to RESPOND. NO FORMAL TENTATIVE RULING. The parties should use the Tentative Ruling Protocol if they wish to appear and argue on the merits.

LINE #	CASE #	CASE TITLE	TENTATIVE RULI Khalsa NG
LINE 7	21CV381541	Michael Yelavich et al vs Kho Liep Chok et al	**Motion for Summary Judgment/Adjudication by Defendants Kho Liep Chok and Ya Hui Tu.** Defendants Kho Liep Chok and Ya Hui Tu's motion for summary adjudication of the first cause of action [wrongful injury to tree] is DENIED. Accordingly, defendants Kho Liep Chok and Ya Hui Tu's motion for summary adjudication of the second cause of action [negative easement] is GRANTED. SEE ATTACHED TENTATIVE RULING.
LINE 8	22CV401891	Zowie Mason et al vs Aurelia Amezcua et al	**Motion of Defendants for Summary Judgment.** CONTINUED by stipulation to 21 May 2024 at 9:00 AM in Department 20.
LINE 9	20CV372199	Janine Mattos vs Impec Group, Inc.	**Motion of Plaintiff to Compel Defendant to Pay Expert Deposition Witness Fees.** The motion of plaintiff to compel defendant to pay the expert witness fees of Dr. Reading in the amount of $666.66 is GRANTED. Defense counsel is to pay that sum, less any credits of sums heretofore paid, within three days of the filing and service of this Order. SEE ATTACHED TENTATIVE RULING.
LINE 10	23CV415992	Kurt Cocking vs Intuitive Surgical, Inc. et al	**Motion of Plaintiff to Compel Discovery.** The motion is not opposed. "A failure to oppose a motion may be deemed a consent to the granting of the motion." (California ***Rules of Court***, rule 8.54(c).) The motion is GRANTED. Defendant shall provide code compliant responses without objections within 10 days of the filing and service of this order. The request of plaintiff for monetary sanctions is GRANTED. Defendant and counsel shall pay to the plaintiff the sum of $1394.95 within 10 days of the filing and service of this order. Plaintiff should serve a notice of entry of order. NO FORMAL TENTATIVE RULING.
LINE 11	23CV415992	Kurt Cocking vs Intuitive Surgical, Inc. et al	**Motion of Plaintiff to Request for Admissions to be Admitted.** The motion is not opposed. "A failure to oppose a motion may be deemed a consent to the granting of the motion." (California ***Rules of Court***, rule 8.54(c).) The motion is GRANTED. The request for admissions will be deemed ADMITTED. Plaintiff should serve a notice of entry of order. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULI Khalsa NG
LINE 12	20CV369408	Anil Bhatnagar et al vs City of Milpitas et al	**Motion of Plaintiff for Order Enforcing the Orders of This Court Dated 17 August 2023 and 31 August 2023 and Request for Costs and Sanctions.** No opposition papers have been filed. This Court is considering the imposition of terminating sanctions. NO TENTATIVE RULING. The parties are to appear either in person or via the Zoom Virtual Platform.
LINE 13	21CV378054	C2 Skincare, Inc. et al vs Clarissa Shetler et al	**Motion by Joint Stipulation for Application to Court for Approval of Settlement Agreement of Shareholder Derivative Suit.** This Court will APPROVE the settlement. This Court finds that the settlement is presumptively fair since the settlement is reached through arm's-length bargaining; investigation and discovery are sufficient to allow Counsel and the Court to act intelligently; Counsel is experienced in similar litigation; and the percentage of objections is small. (***Dunk v. Ford Motor Co.*** (1996) 48 Cal. App. 4th 1794, 1802.) Counsel should submit a proposed order to this Department via the e-filing queue for execution. NO FORMAL TENTATIVE RULING.
LINE 14	21CV380356	Zenith Insurance Company et al vs Valley Fabrication, Inc. et al	**Motion of Ex Parte Application of Cross-Defendants Willoughby Farms, Inc. and David Willoughby to Stay Entire Action.** SEE ATTACHED TENTATIVE RULING.
LINE 15	22CV408055	Jon Eckfeld vs Robert Alan Chaney; Gary Richard Bartmann And Related Cross-Complaint	**Motion of Defendant Robert Alan Chaney to Consolidate This Case with Case Number 23CV423996.** No opposition has been filed to this motion. The Court notes that on 02 April 2024, the motion of Robert Chaney and Mary Chaney to consolidate this case with case number 23CV423996 (note the incorrect case number) is pending in Department 3. The motion is GRANTED and the cases will proceed under the lower case number all future dates in Department 3 are VACATED. NO FORMAL TENTATIVE RULING.
LINE 16	23CV426482	Santa Clara Valley Open Space Authority vs Edgar Andrade; Sulema Lesley Andrade; Zanker Road Resource Management LTD; Zanker Road Resource Recovery, Inc.	**Motion of Plaintiff Santa Clara Valley Open Space Authority for Immediate Possession of Property.** Plaintiff seeks an order from this Court requiring defendants to immediately turn over their 4.6 acre rural residential property for the creation of open space. Defendants oppose the motion. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULI Khalsa NG
LINE 17	22CV402218	Dolores Mattson vs Adi De La Zerda; Adi De La Zerda And Related Cross-Complaint.	**Status on Compromise of Disabled Person's Claim.** On 09 January 2024, this Court approved the settlement negotiated by the parties. The order was signed on 18 January 2024. $42,000.00 was to be preserved for any claim of United Healthcare. Has the transfer of shares taken place? The parties are asked to please status this matter for the Court. NO FORMAL TENTATIVE RULING.
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
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LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 20CV361652 **Gurmail Singh Khalsa, et al. v. Bhupindar (Bob) Singh Dhillon, et al.**
DATE: 5 March 2024 **TIME: 9:00 am** **LINE NUMBER: 01**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 22 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Defendants' Special Motion to Strike Complaint.

I. Statement of Facts.

Plaintiffs Gurmail Singh Khalsa (aka Gurmail Singh Bath) ("Khalsa") and Harpal Singh Chahal ("Chahal") (collectively, "Plaintiffs") filed this Complaint on 10 January 2020.[1]

This is a defamation action involving an election in the Sikh community. The Sikh Gurdwara-San Jose ("Gurdwara") is a California nonprofit religious organization that provides religious, educational and cultural services to residents of San Jose and surrounding cities. (Complaint at ¶ 33.) The specific purpose of the Gurdwara, as stated in its Articles of Incorporation, is to "promote social, cultural and inter-religious understanding based on service, peace, love, justice, truth and harmony…and to promote brotherhood and bond of friendship among the Sikh community and general public." (Id. at ¶ 34.)

According to its 2016 By-Laws, the Gurdwara consists of a general body of members, sub-committees, an advisory panel, a priest and the Parbandhak Committee. (Complaint at ¶ 36.) For all intents and purposes, the Parbandhak Committee are the directors and include the executive officers of the Gurdwara. (Ibid.)

Defendants Sukhdev Singh Bainiwal, Dr. Gurinder Pal Singh, Bhupindar (Bob) Singh Dhillon ("Dhillon"), Hardev Singh Takhar, Rajinder Singh Manger, Sohan Singh Dhanota, Pritam Singh Grewal, Surjit Singh Bains, Kirpal Singh Atwal, Bahadur Singh Deol, Narinder Kaur Maheru, Narinderpal Singh, Dr. Balbir Singh Bains, Dharam Singh Dhillon, Harparminder Singh Powar, Gurbux Singh Dhillon, Kuldip S. Shergill, Gurpreet Singh Sethi, Dr. Harjinder Singh Ladhar, Pritpal Kaur, and Sharanjit K. Bandal collectively form the current Parbandhak Committee of the Gurdwara ("Current Parbandhak Committee"). (Complaint at ¶ 24.)

An election was scheduled for the next Parbandhak Committee on 22 September 2019. (Complaint at ¶ 37.) The election however has been enjoined by the Superior Court of California. (Ibid.) Two slates of candidates

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Cal. Rules of Court, Rule*** 3.714(b)(1)(C) and (b)(2)(C).

were competing for the election: (1) the "Current Parbandhak Committee" which includes 21 individual defendants in this action; and (2) the "Sadh Sanghat Slate" comprised of 21 individuals, including the Plaintiffs. (Id. at ¶ 38.)

The elections process became heated. (Complaint at ¶ 39.) The Sadh Sanghat Slate advocated for greater transparency and improvement in process towards establishing a progressive management model, while the existing Current Parbandhak Committee, seen as the old guard or establishment, became excessively confrontational in a desperate bid to hold power. (Ibid.)

As a consequence, in September 2019, the Current Parbandhak Committee published numerous false, defamatory, and libelous statements about Plaintiffs. (Complaint at ¶ 40.) These statements, mostly concerning Plaintiffs' alleged criminal activity, were disseminated to the public via an Election Manifesto and other information, which were mailed to the homes of voters for the election, and also through newspaper publications and electronic media outlets. (Id. at ¶¶ 40-42, 44-46, 49-50, 52-53.)

In October 2019, Plaintiffs contacted defendants, through their counsel, to demand retraction of the false libelous statements and, with few exceptions, did not receive any response. (Complaint at ¶¶ 43, 47-48, 51, 54.)

Plaintiffs thereafter filed the operative complaint against defendants alleging causes of action for:

(1) Defamation – Libel [against all defendants];

(2) Defamation – Libel Per Se [against all defendants];

(3) False Light [against all defendants];

(4) Intentional Interference With Contractual Relations [by plaintiff Chahal against all defendants]; and

(5) Intentional Interference with Contractual Relations [by Plaintiffs against all defendants].

On 25 June 2020, all defendants except Harparminder Singh Powar and Gurpreet Singh Sethi (collectively, "Defendants"), filed a special motion to strike to the complaint in its entirety. Following oral argument, the court submitted the matter. On 16 December 2020, the court denied the special motion to strike finding that Defendants did not prevail on the first prong in demonstrating that the complaint arose from protected activity.

On 11 February 2021, Defendants filed a notice of appeal challenging the trial court's ruling denying the special motion to strike. On 10 April 2023, the Sixth District Appellate Court, in an unpublished opinion, reversed the trial court's ruling on the special motion to strike. (See ***Khalsa v. Dhillon*** 2023 Cal.App.Unpub. LEXIS 2062 ("***Opinion***").) In doing so, the appellate court concluded the complaint arose from protected activity. (***Id***. at pp. 9-18.) The Sixth District declined to consider whether Plaintiffs could establish a probability of success on the merits of their claims in the second prong. Instead, the Court of Appeal remanded that issue along with evidentiary objections submitted on both sides for decision by the trial court. The court now addresses the second prong of the motion and the evidentiary objections in this order.

On 12 January 2024, the parties filed a stipulation to allow for supplemental briefing on both sides to be considered by the court in ruling on the second prong of the anti-SLAPP motion.

II. Plaintiffs' Evidentiary Objections.

In its prior order, this court sustained Plaintiffs' evidentiary objections in their entirety. According to the opinion from the Court of Appeal, Defendants took issue with the rulings as the trial court did not explain the grounds for sustaining the objections. (See ***Opinion*** at p. *8 ["Defendants contend on appeal that the trial court abused its discretion in summarily sustaining those objections in their entirety, without any explanation"].) Nevertheless, the Sixth District declined to address Plaintiffs' evidentiary objections since the complaint arose from protected activity. (***Ibid***. ["We need not address plaintiffs' evidentiary objections, however, because we conclude the complaint, read in conjunction with the unchallenged evidence, alleges protected activity."].)

On remand, the appellate court's opinion left the door open as to whether the trial court should rule on Plaintiffs' evidentiary objections, and if so, shall specify the grounds for such rulings. (***Id***. at pp. *19-20 ["The trial

court may revisit its ruling on plaintiffs' evidentiary objections, and if it does so shall specify in its order the grounds for the exclusion of any evidence."].)

But, this court's prior order addressed those objections *only* in connection with the first prong of the anti-SLAPP motion. As stated above, the Sixth District determined that the instant complaint arises from protected activity. Therefore, this court also declines to consider Plaintiffs' evidentiary objections as they are not material to the outcome of this motion for reasons explained below.

III. Defendants' Evidentiary Objections.

In its prior order, this court declined to rule on Defendants' evidentiary objections submitted with the reply papers. On remand, the Sixth District directs the court to rule on these objections in connection with whether Plaintiffs can demonstrate a probability of success on their claims. (See ***Opinion*** at p. *19 ["On remand, the trial court shall rule on defendants' evidentiary objections and determine whether plaintiffs are likely to prevail on their claims."].)

A. Khalsa Declaration.

Defendants object on various grounds to the Khalsa Declaration at paragraphs 4, 5, 7, 9(c), 12(a), and 15. The court does not find these objections to be meritorious and thus the objections are OVERRULED.

As to the Khalsa Declaration at paragraphs 9 and 9(a), the objections are SUSTAINED on hearsay grounds.

As to the Khalsa Declaration at paragraphs 10(d) and 11, the objections are SUSTAINED as the cited portions are speculative and constitute legal conclusions.

B. Chahal Declaration.

Defendants raise multiple objections to the Chahal Declaration at paragraphs 6, 7, 9, 10, and 13. The court however does not find these objections to be persuasive and thus the objections are OVERRULED.

C. Jasjeet Singh Chela Declaration.

Defendants object to the Declaration of Jasjeet Sing Chela, a non-party, on grounds the declaration lacks foundation and does not constitute credible evidence. The court however finds these objections lacking in merit and thus the objections are OVERRULED. (See ***Xu v. Huang*** (2021) 73 Cal.App.5th 802, 815 [in the anti-SLAPP context, courts neither weigh credibility nor compare the weight of the evidence but accept as true the evidence favorable to the plaintiff].)

IV. Plaintiffs' Objections to Defendants' Supplemental Briefing Evidence.

In their supplemental briefing, Plaintiffs object to the following portions of Defendants' supplemental briefing: (1) Dhillon's Second Supplemental Declaration and Exhibits; and (3) Lambert Declaration.

Here, the court considers *only* the objection raised to the Dhillon Supplemental Declaration at Paragraph 6, Page 3, lines 4-9 and Exhibit 4 which provides:

> "Plaintiffs sponsored several advertisements publicizing their campaign slate. A true and correct copy of an example of one such advertisement that was published in the Quomantry Amristar Times September 18-24, 2019 edition is attached as Exhibit 4. The Quomantry Amristar Times is a Punjabi newspaper published in California with wide circulation in other states like New York, New Jersey, Washington, Oregon, Arizona, Texas and Michigan. I saw the advertisement at the time it was published."

Plaintiffs argue such evidence is untimely as Defendants were not granted permission by the remand order from the Court of Appeal to submit new material. Even so, as stated above, the parties entered into a stipulation to allow for supplemental briefing in advance of the hearing to address the second prong on the special motion to strike. The stipulation does not preclude either side from submitting new evidence in support of their position on the anti-

SLAPP motion. And presumably the parties could have specified that no new evidence would be considered and yet they declined to do so here. Therefore, the court does not find the new material to be untimely.

As to the other objections, the court does not find them to be meritorious and thus the objections to this portion of the Dhillon Supplemental Declaration are OVERRULED.

The court declines to rule on Plaintiffs' remaining objections to Defendants' supplemental briefing as they are not material to the outcome of the motion for reasons articulated below.

V. Defendants' Request for Judicial Notice.

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

Here, Defendants submit supplemental briefing requesting judicial notice ("RJN") of the following:

(1) The Register of Actions for Case No. C1628501 (Ex. A);

(2) The Complaint filed in ***Doe v. Bath, et al.*** (Case No. 2014-1-CV-267808) (Ex. B);

(3) The Employment Discrimination Complaint filed by plaintiff Khalsa in the United States District Court for the Northern District of California (Case No. 00703521) (Ex. C).

Plaintiffs object to the request for judicial notice primarily because these exhibits involve different facts and parties that are not relevant to the current action. (See Plaintiffs' Supplemental Briefing Objections to RJN.) This court also does not find the exhibits to be material in resolving issues raised by the second prong of the special motion to strike for reasons explained below. (See ***Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*** (1998) 18 Cal.4th 739, 748, fn. 6 [a court need not take judicial notice of a matter unless it "is necessary, helpful, or relevant"].)

Therefore, the request for judicial notice is DENIED.

VI. Plaintiffs' Request for Judicial Notice.

Plaintiffs also submit supplemental briefing requesting judicial notice of the following:

(1) Defendants' Memorandum of Points and Authorities ISO Special Motion to Strike (Ex. A);

(2) Defendants' Evidentiary Objections ISO Reply to Special Motion to Strike (Ex. B);

(3) This Court's 16 December 2020 Order on the Special Motion to Strike in this case (Ex. C).

The court finds judicial notice of these exhibits is not warranted as the court must necessarily consider them in reaching its final decision on the second prong of the special motion to strike.

Consequently, the request for judicial notice is DENIED.

VII. Special Motions to Strike in General.

Code of Civil Procedure section 425.16 provides for a "special motion to strike" when a plaintiff's claims arise from certain acts constituting the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (**Code of Civil Procedure**, § 425.16, subdivisions. (a) & (b)(1).)

"Consistent with the statutory scheme, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must identify 'all allegations of protected activity' and show that the challenged claim arises from that activity. [Citations.] Second, if the defendant makes such a showing, the 'burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.' [Citation.] Without resolving evidentiary conflicts, the court determines 'whether the plaintiff's showing, if accepted by

the trier of fact, would be sufficient to sustain a favorable judgment.' [Citation.]" (***Bel Air Internet, LLC v. Morales*** (2018) 20 Cal.App.5th 924, 934.)

VIII. Analysis.

A. First Prong: Protected Activity.

"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 (***Collier***).) That section provides that an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement 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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (**Code of Civil Procedure**, § 425.16, subdivision (e).) "These categories define the scope of the anti-SLAPP statute by listing acts which constitute an 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' " (***Collier****, supra,* at p. 51, citing **Code of Civil Procedure**, § 425.16, subdivision (e).)

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.' [Citations.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.]" (***Park v. Board of Trustees of California State University*** (2017) 2 Cal.5th 1057, 1062-1063 (***Park***).)

"[A] claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (***Park****, supra,* 2 Cal.5th at p. 1060.) To determine whether the speech constitutes the wrong itself or is merely evidence of a wrong, "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (***Id****.* at p. 1063.)

"In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (***Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*** (2005) 133 Cal.App.4th 658, 670.) "[I]f the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (***Baharian-Mehr v. Smith*** (2010) 189 Cal.App.4th 265, 271.)

As stated above, the Sixth District Court of Appeal concluded this action arises from protected activity. Having done so, the burden shifts to Plaintiffs to establish a probability of success on the merits of their claims.

B. Second Prong: Probability of Success on the Merits.

"If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. [Citation.]" (***Simmons v. Bauer Media Group USA, LLC*** (2020) 50 Cal.App.5th 1037, 1043.)

The second step has been described as a "summary-judgment-like procedure." (***Sweetwater Union High School Dist. v. Gilbane Building Co.*** (2019) 6 Cal.5th 931, 940 (***Sweetwater***).) "The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the

plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (***Ibid***.) Thus, "claims with the requisite minimal merit may proceed." (***Ibid***.)

"As to the second step inquiry, a plaintiff seeking to demonstrate the merit of the claim, 'may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence.' [Citations.]" (***Sweetwater****, supra,* 6 Cal.5th at p. 940.)

1. Fourth Cause of Action: Intentional Interference with Contractual Relations.

"[I]n California, the law is settled that 'a stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract.' [Citation.] To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. [Citation.] To establish the claim, the plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his or her action. [Citation.]" (***Reeves v. Hanlon*** (2004) 33 Cal.4th 1140, 1148.)

The fourth cause of action alleges in relevant part:

> ¶ 83: There was at all relevant times a valid contract Plaintiff Chahal and a real estate investment company in which Plaintiff Chahal was a CEO. Plaintiff Chahal also operated a taxi business and an insurance agency.
>
> ¶ 84: Defendants and their co-conspirators' intentional acts of publishing or causing to be published patently false and disparaging statement about Plaintiff Chahal was designed to induce a breach or disruption of his contractual relationships.
>
> ¶ 85: The false published statements have caused an actual disruption of these contractual relationships as investors' confidence in Plaintiff Chahal has declined significantly. Specifically, Plaintiff Chahal was forced to close his taxi business, his insurance agency suffered, and he was fired from his position as the CEO of the real estate business. (See Complaint at ¶¶ 83-85.)

Here, the opposition papers fail to consider whether Plaintiffs can establish a probability of success on the merits of the interference claim in the fourth cause of action. (See ***Allen v. City of Sacramento*** (2015) 234 Cal.App.4th 41, 52 [court is not required to examine undeveloped claims or supply arguments for the litigants]; ***Collins v. Hertz Corp.*** (2006) 144 Cal.App.4th 64, 75 [It is a party's "duty to direct the court to evidence that supports their claims. It is not the court's duty to rummage through the papers to construct or resuscitate their case."]; see also ***Shaw v. Los Angeles Unified School Dist.*** (2023) 95 Cal.App.5th 740, 754 ["When they do not furnish legal argument with citation to authority on a particular point, we may treat the point as forfeited and pass it without consideration."].) In fact, Plaintiffs, in opposition, state they will be focusing on the defamation and libel causes of action. (See OPP at pp. 9:21-10:16.) And, even though plaintiff Chahal submits a declaration in opposition, this evidence does not substantively address the claim for interference with contractual relations. Therefore, Plaintiffs do not demonstrate a probability of success on the merits of the fourth cause of action.

Accordingly, the special motion to strike the fourth cause of action is GRANTED.

2. Fifth Cause of Action: Intentional Interference with Contractual Relations.

Although the fifth cause of action is identified as "Intentional Interference with Contractual Relations," it appears, in substance, to be a claim for interference with prospective advantage. (See ***Parnham v. Parnham*** (1939) 32 Cal.App.2d 93, 96 ["It is not what a paper is named, but what it is that fixes its character."].)

"The elements of the tort of interference with prospective economic advantage are '(1) a relationship between the plaintiff and some third party with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) a wrongful act, apart from the interference itself, by the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.' [Citations.]" (***Salma v. Capon*** (2008) 161 Cal.App.4th 1275, 1290.)

The fifth cause of action alleges in pertinent part:

¶ 90: There was at all relevant times an economic relationship between Plaintiff and individual members and corporate partners, which had and has the probability of future economic benefit to Plaintiffs.

¶ 91: Defendants' intentional acts of publishing or causing to be published false and disparaging statement about Plaintiffs was designed to disrupt Plaintiffs' economic relationships.

¶ 92: As a direct and proximate result of the aforementioned acts, Plaintiffs have been damaged in accordance with proof at the time of trial but believed to be in excess of $10,000,000. (See Complaint at ¶¶ 90-92.)

Similar to the fourth cause of action, the opposition papers fail to consider whether Plaintiffs can establish a probability of success on the merits of the interference claim in the fifth cause of action. Again, Plaintiffs, in opposition, concede they will be focusing on the defamation and libel causes of action. (See OPP at pp. 9:21-10:16.) Therefore, Plaintiffs do not carry their burden of demonstrating a probability of success on the merits of the fifth cause of action.

Consequently, the special motion to strike the fifth cause of action is GRANTED.

3. First Cause of Action: Defamation – Libel.

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (***Smith v. Maldonado*** (1999) 72 Cal.App.4th 637, 645.)

As relevant here, "[l]ibel is a type of defamation based on written or depicted communication." (***Balla v. Hall*** (2021) 59 Cal.App.5th 652, 675 (***Balla***).) More specifically, the **Civil Code** provides that:

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (**Civil Code**, § 45.)

The defamation allegations are primarily set forth in paragraphs 56-60 as follows:

¶ 56: Defendants either directly or indirectly through unknown co-conspirator(s), published the above listed false statements about Plaintiffs. These statements are patently false. The statements were untrue when made and were known to be untrue by Defendants and/or their unknown co-conspirators who made them and/or repeated them. The statements were malicious, in that they were made with actual knowledge or reckless disregard of their falsity and were made with the intent to injure Plaintiffs.

¶ 57: The statements made by Defendants and/or their unknown co-conspirators are not privileged under either a qualified or an absolute privilege.

¶ 58: The statements were available to view by any member of the public as they were circulated in print media and on the internet.

¶ 59: As a direct and proximate result of the making of the untrue statements, Plaintiffs have and continue to sustain damages, loss of business, and injury to reputation. Defendants directly or indirectly made false and disparaging statements to maximize the financial injuries and embarrassment and humiliation for Plaintiffs. The aforesaid defamatory statements have harmed Plaintiffs' reputation. Such false and defamatory statements tend to injure and have injured Plaintiffs in their occupation, their future business and employment prospects. Plaintiffs have had to incur substantial expense, in order to redress the harm they have suffered, all to Plaintiffs' general and actual damages, including exemplary and punitive damages, in an amount which far exceeds the jurisdictional minimum of this court, and which will be proven at trial.

¶ 60: As a direct and proximate result of the aforementioned acts, Plaintiffs have been damaged in an amount to be proven at trial but believed to be in excess of $10,000,000. (Complaint at ¶¶ 56-60.)

(a) Legal Sufficiency.

Here, the court finds the defamation claim to be legally sufficient based on the aforementioned allegations and prior allegations incorporated into the first cause of action. (See Complaint at ¶¶ 40-42, 44-46, 49-50, 52-53, 55; Exs. A, B1-B2, and C.) These prior facts set forth the alleged defamatory statements in print media which include the Election Manifesto and newspaper publications identified as the "Sanjhi Soch" and the "Kafla." (Id. at ¶ 40.) Many of the defamatory statements concern alleged criminal and/or unethical conduct on the part of Plaintiffs. Defendants do not challenge the legal sufficiency of this claim in their reply papers or supplemental briefing.

(b) Evidence.

As to the evidence, Plaintiffs submit separate declarations signed under penalty of perjury in support of their claim for defamation. (See Khalsa Decl. at ¶¶ 5-8, 9(a)-13; Chahal Decl. at ¶¶ 1-13.) In doing so, Plaintiffs identify the alleged defamatory statements, particularly those involving criminal acts, as being false and ultimately causing them to suffer personal humiliation, ridicule, and emotional distress.

Even if these statements are actionable, Defendants contend Plaintiffs are limited purpose public figures and fail to provide evidence demonstrating such statements were made with actual malice.

"The characterization of 'public figure' falls into two categories: the all-purpose public figure, and the limited purpose or 'vortex' public figure. The all-purpose public figure is one who has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes and contexts. The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues." (***Ampex Corp. v. Cargle*** (2005) 128 Cal.App.4th 1569, 1577 (***Ampex Corp.***).)

Three elements must be present in order to characterize a plaintiff as a limited purpose public figure: (1) there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants; (2) the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy. (***Ampex Corp.,*** *supra,* 128 Cal.App.4th at p. 1577.)

Public figures (or limited purpose public figures) must prove by clear and convincing evidence that an allegedly defamatory statement was made with knowledge of falsity or reckless disregard for truth. (***Ampex Corp.,*** *supra,* 128 Cal.App.4th at p. 1577.)

"Whether or not one is a limited purpose public figure is a question of law for courts to decide." (***Rudnick v. McMillan*** (1994) 25 Cal.App.4th 1183, 1190.)

Here, Defendants assert there is an existing public controversy which finds support in the Sixth District's opinion holding that the challenged statements were "made 'in the context of an ongoing controversy, dispute or discussion' regarding the Committee election." (See **Opinion** at p.*13.) Defendants also argue that Plaintiffs undertook voluntary actions to influence the election and that, in furtherance of their campaigns, they published advertisements seeking to persuade voters to choose their slate. (See Defendants' Supp. Brief at p. 4:22-24; see also Second Supp. Dhillon Decl. at Ex. 4.) Finally, Defendants contend the alleged statements were germane to Plaintiffs as candidates, again a point reiterated by the appellate court's opinion:

> "Here, the Committee members' statements concerned the Committee election originally scheduled for September 22, 2019. The essence of the statements—that certain candidates had criminal records and had misused funds belonging to the Gurdwara's congregation—directly relates to those candidates' suitability for service on the Committee." (See **Opinion** at p. *12.)

In opposition, Plaintiffs argue they are not public figures or limited purpose public figures but instead private individuals who have not achieved fame or notoriety nor voluntarily injected themselves into any particular public controversy. (See OPP at p. 7:16-22; Plaintiffs' Supp. Brief at p. 14:5-13.) In support, Plaintiffs submit separate declarations attesting to their private individual status.

In his declaration, plaintiff Khalsa provides the following:

> "I am a private individual and have not achieved pervasive fame or notoriety. I have not sought to influence resolution of public issues. I have never held a public office and have never ran for public office. I have not voluntarily injected myself nor have I been drawn into a particular public controversy.

a. I was a teacher of a Junior High and High School in Punjab, India from 1968-1978. I was promoted to Principal at the school from 1978-1980. I immigrated with my family to the United States in 1980.

b. I served as General Secretary of the Fremont Gurdwara on or about 1986-1987. I was one of five members of the Supreme Council (i.e. Board of Directors) from 1987-1992. I was again a candidate in 2008, but was not successful.

c. I worked for the United States Postal Service (USPS) between approximately 1982-2003.

d. I am currently unemployed and previous to my unemployment, I worked as a taxi driver until 2018." (Khalsa Decl. at ¶ 4.)

Similarly, In his declaration, plaintiff Chahal states the following:

"I am a private individual and have not achieved pervasive fame or notoriety. I have not sought to influence resolution of public issues. I have never held a public office and have never ran for public office. I have not voluntarily injected myself nor have I been drawn into a particular public controversy.

a. I worked for the Government of Punjab (India) from 1995-2005, as an Employment Officer when I lived in Gurdaspur, Punjab.

b. I also operated a small taxicab company.

c. I am currently working as an insurance broker." (Chahal Decl. at ¶ 6.)

Despite Plaintiffs' arguments, the court finds the points raised by Defendants, along with the Sixth District's opinion, to be persuasive in concluding that Plaintiffs are limited purpose public figures in connection with the public controversy alleged in this action. Furthermore, as pointed out by Defendants in their supplemental brief, Plaintiffs allege the challenged statements were made with actual malice in support of their claims for defamation. (See Defendants' Supp. Brief at p. 4, fn. 3.) Having done so, such allegations undercut Plaintiffs' position that they were not limited purpose public figures. Specifically, the complaint alleges:

> Defendants either directly or indirectly through unknown co-conspirator(s), published the above listed false statements about Plaintiffs. These statements are patently false. The statements were untrue when made and were known to be untrue by Defendants and/or their unknown co-conspirators who made them and/or repeated them. **The statements were malicious, in that they were made with actual knowledge or reckless disregard of their falsity and were made with the intent to injure Plaintiffs**. (Complaint at ¶ 56, emphasis added.)

Thus, in order to demonstrate a probability of prevailing on the defamation claim, Plaintiffs must show actual malice by way of admissible evidence.

"To prove actual malice, a plaintiff must show that statements were made with ' "knowledge that [they were] false or with reckless disregard of whether [they were] false or not." ' [Citation.] ' "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth," ' and the evidence must be clear and convincing. [Citations.]" (***Balla,*** *supra,* 59 Cal.App.5th at pp. 682-683.)

"The existence of actual malice turns on the defendant's subjective belief as to the truthfulness of the allegedly false statement. [Citations.] Actual malice may be proved by direct or circumstantial evidence. Factors such as failure to investigate, anger and hostility, and reliance on sources known to be unreliable or biased 'may, in an appropriate case, indicate the publisher himself had serious doubts regarding the truth of his publication.' [Citation.] However, any one of these factors, standing alone, may be insufficient to prove actual malice or raise a triable issue of fact. [Citation.]" (***Mitchell v. Twin Galaxies, LLC*** (2021) 70 Cal.App.5th 207, 221 (***Mitchell***).)

In order to successfully defend against an anti-SLAPP motion, a plaintiff must "establish a probability that [he] will be able to produce clear and convincing evidence of actual malice." (***Reed v. Gallagher*** (2016) 248 Cal.App.4th 841, 862.) Put another way, a plaintiff must make a prima facie showing of facts demonstrating a high probability that defendant published the challenged statements with knowledge of their falsity or while entertaining serious doubts as to their truth. (***Ibid***.)

To establish actual malice, Plaintiffs refer the court to paragraph 16 of plaintiff Khalsa's declaration which provides:4

> On or about October 9, 2019, I sent a request through counsel to Defendant Sanjhi Soch Weekly Newspaper and Defendant Boota Singh Basi, the President and Chief Editor of Sanjhi Soch Weekly Newspaper, to demand retraction of the false and libelous statements against both Plaintiffs. On October 20, Defendant Sanjhi Soch published a response to Plaintiffs' demand for retraction on its Facebook page in Punjabi. The translation of Sanjhi Soch's response in English is for me to "roll [the demand letter] and stick it in…" I found this comment to be incredibly offensive and damaging to my reputation. (Khalsa Decl. at ¶ 16.)

Plaintiffs argue such evidence supports malice as Defendants had the opportunity to seek clarification and obtain comments from Plaintiffs, but chose instead to further attack Plaintiffs and ignore them. (See Plaintiffs' Supp. Brief at p. 15:13-15.) Plaintiffs however do not articulate any factors used in proving actual malice in making this argument to the court. (See ***Mitchell,*** *supra,* 70 Cal.App.5th at p. 221 [list of factors used to determine existence of actual malice].) At best, the stray comment referred to in Khalsa's declaration regarding Defendants' failure to retract the alleged defamatory statements may constitute "spite or ill will" which is not enough by itself to establish actual malice. (See ***Annette F. v. Sharon S.*** (2004) 119 Cal.App.4th 1146, 1169 ["Actual malice may not be inferred solely from evidence of personal spite, ill will, or bad motive."].) Nor does any such comment rise to the level of clear and convincing evidence necessary for actual malice to support a claim for defamation. Without evidence of actual malice, Plaintiffs cannot demonstrate a probability of prevailing on their claim for defamation.

Accordingly, the special motion to strike the first cause of action is GRANTED.

4. Second Cause of Action: Defamation – Libel Per Se.

" 'A statement is defamatory when it tends "directly to injure [a person] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office … peculiarly requires, or by imputing something with reference to his office … that has a natural tendency to lessen its profits." [Citation.] Statements that contain such a charge directly, and without the need for explanatory matter, are libelous per se if … a listener could understand the defamatory meaning without the necessity of knowing extrinsic exculpatory matter.' [Citation.] If the false statement is not libelous per se, a plaintiff must prove special damages. [Citation.]" (***Balla****, supra,* 59 Cal.App.5th at pp. 675-676.)

The second cause of action is almost identical to the first cause of action except that it includes paragraph 67 which alleges:

> ¶ 67: Defendants' published statements concerning Plaintiffs are defamatory per se because, for one, Defendants' publications falsely accuse Plaintiffs of having criminal backgrounds. This is patently false, baseless and untrue. Defendants' published statements caused and continue to cause Plaintiffs special harm. (Complaint at ¶ 67.)

Since the first cause of action did not survive the anti-SLAPP motion, so too does the second cause of action for libel per se fail based on reasons stated above. (See Complaint at ¶ 64 [Plaintiffs' libel per se claim requires a showing that statements were made with actual malice].)

Consequently, the special motion to strike the second cause of action is GRANTED.

5. Third Cause of Action: False Light.

" ' "False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." ' [Citation.] To establish a false light claim based on a defamatory publication, a plaintiff 'must meet the same requirements' as for a defamation claim. [Citation.]" (***Balla****, supra,* 59 Cal.App.5th at p. 687.)

"In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. [Citation.] Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (***Fellows v. Nat'l Enquirer*** (1986) 42 Cal.3d 234, 238-239.)

Furthermore, "[w]hen a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (***Eisenberg v. Alameda Newspapers, Inc.*** (1999) 74 Cal.App.4th 1359, 1385, fn. 13; see ***Mitchell,*** *supra,* 70 Cal.App.5th at p. 224 ["Because we conclude Mitchell's defamation claim survives the anti-SLAPP motion, his false light claim stands as well."].)

The false light allegations are primarily asserted in paragraphs 74-78 as follows:

¶ 74: Defendants made public disclosures and published purported "facts" about Plaintiffs.

¶ 75: The "facts" disclosed – as set forth herein – were false and portrayed Plaintiffs in a false light.

¶ 76: The false light in which Plaintiffs were placed would be highly offensive to a reasonable person. It is especially offensive to Plaintiffs who have worked hard to build their good reputation.

¶ 77: Defendants acted negligently in failing to ascertain whether the publicized "facts" placed Plaintiffs in a false light.

¶ 78: This public disclosure caused Plaintiffs to sustain damage to their reputation. (See Complaint at ¶¶ 74-78.)

As stated above, the false light claim stands and falls for the same reasons as the defamation claim. Thus, the special motion to strike the third cause of action is GRANTED.

IX. Conclusion and Order.

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

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

---oooOooo---

Calendar Line 2

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
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(For Clerk's Use Only)

CASE NO.: 23CV413113 **Steven Trinh, et al. v. Del Toro Loan Servicing, Inc., et al.**
DATE: 05 March 2024 **TIME: 9:00 am** **LINE NUMBER: 2**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 22 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

---oooOooo---

Order On Demurrer Of Defendant SGLC Inc. To Plaintiffs' First Amended Complaint.

I. Statement of Facts.

Every On or about 26 June 2012, plaintiff MFAS Direct Services, LLC ("MFAS") purchased the real property located at 2012 Biarritz Place, San Jose ("Subject Property") via grant deed. (Second Amended Complaint ("SAC"), ¶14.) Plaintiff Steven Trinh ("Trinh") is the managing member of plaintiff MFAS (collectively, "Plaintiffs"), and the Subject Property is his primary residence. (*Id.* at ¶¶2-3.)

On or about 12 June 2018, plaintiff MFAS obtained a loan secured against the Subject Property in the amount of $2,000,000.00 at an interest rate of 9.00%. (SAC, ¶15.) The promissory note ("Note") refers to the beneficiary with the language, "SEE ATTACHED LENDER VESTING ADDENDUM," but no addendums are attached. (*Id.* at ¶16.)

A deed of trust ("Deed of Trust") was concurrently executed as security for the Note and recorded. (SAC, ¶17.) The Deed of Trust lists Stewart Title as the trustee and again identifies the beneficiary with the language, "SEE ATTACHED LENDER VESTING ADDENDUM," but no addendums are attached to the Deed of Trust. (*Ibid.*) The escrow documents executed by Lotus Escrow from May to June 2018 also refer to the Beneficiary with a similar reference to an addendum that is not attached. (*Id.* at ¶17.)

Since the inception of the loan in June 2018, several parties contacted plaintiff Trinh purporting to be the lender on the loan. (SAC, ¶19.) In or around September 2020, Michael Goodman of defendant SGLC first reached out to plaintiff Trinh to tell him his monthly payment was late. (*Id.* at ¶20.) Over the next three years, plaintiff Trinh asked Mr. Goodman and Mr. Pukini (of defendant Calpac) to provide him with the signed copies of the original loan documents, and Plaintiffs did not know who the lender was during this time. (*Id.* at ¶¶21, 49.)

Josh Pukini was plaintiff Trinh's point of contact with defendant Calpac and corresponded with plaintiff Trinh for several years about the loan's status. (SAC at ¶49.) Since the inception of the loan in 2018, plaintiff Trinh sent several written requests to defendant Calpac seeking information regarding the loan execution documents. (*Id.* at ¶¶50-51.)

In 2021, plaintiff Trinh attempted to refinance with Bank of the West and Caliber at lower interest rates, but both entities denied the applications because there was no beneficiary listed on the loan documents. (SAC, ¶22.) On or about 14 January 2021, Mr. Goodman again contacted plaintiff Trinh and, for the first time, said that he was the

lender on the loan. (*Id.* at ¶23.) Plaintiff Trinh asked Mr. Goodman for the signed loan documents, but Mr. Goodman did not provide them. (*Ibid*.)

In or around October 2022, the federal government forced AB Capital, LLC (defendant Calpac's principal) into involuntary bankruptcy due to fraud. (SAC, ¶24.) Plaintiff Trinh learned that defendant Calpac frequently originated loans and sold ownership of the loans to several different investors while representing to each investor that it owned 100 percent of the loan. (*Ibid*.)

In or around January 2023, Mr. Goodman informed plaintiff Trinh that the loan maturity date was 01 June 2020 and that the maturity date had to be extended to avoid default. (SAC, ¶24.) On or about 14 January 2023, Mr. Goodman provided plaintiff Trinh with what he said were the fully executed loan documents, but the documents were not signed by the lender or the loan broker. (*Id.* at ¶25.) Plaintiff Trinh did not tender the amount to extend the loan's maturity date. (*Id.* at ¶26.)

On 22 February 2023, Plaintiff Trinh requested a payoff demand from the loan servicer, defendant Del Toro. (SAC at ¶27.) The statement plaintiff Trinh received said the total amount to pay off the loan was $2,111,662.00. (*Id.* at ¶28.) Plaintiff Trinh disputes this amount. (*Ibid*.) On 06 March 2023, counsel for plaintiff Trinh submitted a request to defendant Del Toro asking for a list of beneficiaries on the loan. (*Id.* at ¶29.) Fourteen parties were on the list, and defendant SGLC was not among them. (*Ibid*.) Plaintiff Trinh's account is more than 90 days past due. (*Id.* at ¶30.)

Plaintiffs had no reason to be suspicious about who the beneficiary was on their loan at origination. (SAC, ¶32.) In typical, non-nefarious loan transactions, the borrower receives the funds, receives the original loan documents back and expects to pay back an identifiable beneficiary either via personal funds, refinance or selling the property. (*Ibid*.) Plaintiffs had no reason to believe this loan was anything different until 2021 when they could not secure a refinance due to there being "no beneficiary." (*Id.* at ¶33.) Plaintiffs had been asking for loan documents as a matter of course for several years, and defendants failed to provide them. (*Ibid.*) Plaintiffs did not have notice, constructive or otherwise, of any potential claims. (*Ibid*.)

Defendant SGLC did reach out to Plaintiffs in September 2020, but Plaintiffs did not even know SGLC had an alleged beneficiary interest in the loan until January 2021. (SAC, ¶34.) Plaintiffs did not learn of the beneficiary until January 2023 when they finally received the paperwork. (*Ibid.*) Defendants concealed, whether fraudulently or innocently, the beneficiary issue by failing to provide the loan documents. (*Id*. at ¶37.) Plaintiffs did not repudiate the contract and continued to make payments. (*Ibid.*) When Plaintiffs discovered the true facts, they immediately filed suit. (*Ibid.*)

During the loan origination process, defendant Calpac led Plaintiffs to believe they were taking out a $2,000,000.00 loan at a 9% interest rate, and that there was a single, identifiable beneficiary that had authority to collect, make demands such as extending the maturity date, and commence foreclosure actions if appropriate. (SAC, ¶40.) Plaintiffs were just a part of defendant Calpac's many fraudulent loan origination schemes. (*Ibid.*) Plaintiffs discovered that there are supposedly 14 beneficiaries on the loan who likely believe they all possess a 100% interest. (*Ibid.*) Plaintiffs dispute the validity of the Deed of Trust, asserting there is no valid beneficiary. (*Ibid.*)

Plaintiffs discovered facts that entitled them to recission when defendant SGLC finally transmitted the original signed loan documents in January 2023. (SAC, ¶43.) Plaintiffs received $2,000,000.00 under the contract and have paid approximately $817,629.14 towards the loan. (*Id*. ¶44.) Plaintiffs are willing and able to tender the remaining $1,058.117.10 received as value under the loan. (*Ibid.*)

On 17 March 2023[1], plaintiffs Trinh and MFAS filed a complaint against defendants Del Toro, SGLC, and Calpac.

On 17 May 2023, plaintiffs Trinh and MFAS filed an FAC against defendants Del Toro, SGLC and Calpac, asserting causes of action for:

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

(1) Rescission (against all defendants)

(2) Violation of 12 U.S.C. §2605, et seq. (against defendant Calpac)

(3) Unfair Competition—Violation of Business & Professions Code §17200, et seq. (against all defendants)

On 30 June 2023, defendant Del Toro filed a demurrer to plaintiffs Trinh and MFAS's FAC.[2]

On 30 June 2023, defendant SGLC filed a demurrer to the first and third causes of action of plaintiffs Trinh and MFAS's FAC.

At the hearing on 09 November 2023, the court sustained defendant SGLC's demurrer to the first and third causes of action of plaintiffs Trinh and MFAS's FAC.[3]

On 9 November 2023, plaintiffs Trinh and MFAS filed the operative SAC against defendants Del Toro, SGLC and Calpac, asserting causes of action for:

(1) Rescission (against all defendants)

(2) Violation of 12 U.S.C. §2605, et seq. (against defendant Calpac)

(3) Unfair Competition—Violation of Business & Professions Code §17200, et seq. (against all defendants)

On 12 December 2023, defendant SGLC filed a demurrer to the first and third causes of action of plaintiffs Trinh and MFAS's SAC.

II. Demurrers in General

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See ***Williams v. Beechnut Nutrition Corp.*** (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (***Code Civ. Proc.***, § 430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (***Ankeny v. Lockheed Missiles and Space Co.*** (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (***Yolo County Dept. of Social Services v. Municipal Court*** (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (***Committee on Children's Television, Inc. v. General Foods Corp.*** (1983) 35 Cal.3d 197, 213 (***General Foods***).) "It 'admits the truth of all material factual allegations in the complaint . . .; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (***Id.*** at pp. 213-214; see ***Cook v. De La Guerra*** (1864) 24 Cal. 237, 239 ["[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to."].)

III. Analysis

A. Defendant SGLC's demurrer to the first cause of action [rescission] of the SAC is OVERRULED.

In demurring to the first cause of action, defendant SGLC argues the claim is barred by the statute of limitations and that SAC's new allegations must be disregarded to the extent they conflict with Plaintiffs' prior pleadings.

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[2] Court records show that plaintiff Trinh submitted a request for dismissal as to defendant Del Toro on 26 October 2023.

[3] On 15 January 2024, the court signed the order sustaining the demurrer to first and third causes of action of the FAC, and that order was filed on 17 January 2024.

1. Statute of Limitations

Defendant SGLC contends that the rescission claim is barred by the statute of limitations because Plaintiffs had notice that the Note and the Deed of Trust did not identify a beneficiary at the time plaintiff Trinh executed the documents in 2018. (Dem., pp. 3-4.)

"The defense of statute of limitations may be asserted by general demurrer if the complaint shows on its face that the statute bars the action." (***E-Fab, Inc. v. Accountants, Inc. Services*** (2007) 153 Cal.App.4th 1308, 1315 (***E-Fab***), internal quotations and citation omitted.) However, for the statute of limitations defense to be raised on demurrer, "the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred." (***Id.*** at pp. 1315-1316.) "In assessing whether plaintiff's claims against defendant are time-barred, two basic questions drive our analysis: (a) What statute of limitations govern the plaintiff's claims (b) When did the plaintiff's causes of action accrue?" (***Id.*** at p. 1316.)

Code of Civil Procedure section 337, subdivision (c), states that the statute of limitations is "within four years" for: "An action based upon the rescission of a contract in writing. The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time shall not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Where the ground for rescission is misrepresentation under Section 359 of the Insurance Code, the time shall not begin to run until the representation becomes false."

Here, the SAC alleges: "Plaintiffs discovered facts that entitled them to rescission when Defendant SGLC finally transmitted the original signed loan documents in January 2023." (SAC, ¶43.) However, as argued by defendant SGLC, this allegation is contradicted by other allegations within the SAC and exhibits attached to it. The SAC further alleges: "The Note listed the Beneficiary as 'See Attached Vesting Lender Addendum' ('**Exhibit A**'). However, no addendums were attached to the Note" (*Id.* at ¶16), and "A Deed of Trust was concurrently executed as security for the Note and recorded in the Santa Clara County Recorder's Office as Document No. 23953474 ('**Exhibit B**'). The Deed listed the Trustee as Stewart Title, but again listed the Beneficiary as 'See Attached Vesting Lender Addendum.' No addendums were attached to the Deed of Trust." (*Id.* at ¶17.) Exhibits A and B attached to the SAC each contain plaintiff Trinh's signature, dated 04 June 2018.

"It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing. [Citations.]" (***Stewart v. Preston Pipeline Inc.*** (2005) 134 Cal.App.4th 1565, 1588-1589 (***Stewart***), internal quotation marks omitted.) The lack of a named beneficiary on the Note and Deed of Trust are facts apparent from the face of the documents and the SAC's allegations. Plaintiffs executed the documents in June 2018, and did not file their complaint until 17 March 2023, more than four years later. Based on these facts alone, it would appear that the first cause of action does not withstand demurrer because the statute of limitations defect affirmatively appears on the face of the SAC. (***E-Fab***, *supra*, 153 Cal.App.4th at p. 1315.)

In opposition, Plaintiffs argue that its claims against defendant SGLC are not time-barred due to its delayed discovery of its claims and the Defendants' fraudulent concealment. (Opp., pp. 4-6.)

"In order to rely on the discovery rule for delayed accrual of a cause of action, a plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made an earlier discovery despite reasonable diligence. [Citation.]" (***Fox v. Ethicon Endo-Surgery, Inc.*** (2005) 35 Cal.4th 797, 808 (***Fox***), internal punctuation omitted, italics original; see also Weil & Brown, et al., **Cal. Prac. Guide: Civ. Proc. Before Trial** (The Rutter Group 2023), § 6:180, p. 6-65 (***Weil & Brown***).)

"In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to show diligence; conclusory allegations will not withstand demurrer." (***Fox***, *supra*, 35 Cal.4th at p. 808.) When plaintiff has "notice of facts sufficient to arose the suspicions of a reasonable [person]", the plaintiff "*may not sit idly by for at that point the statute of limitations begins to run*." (***Czajkowski v. Haskell & White, LLP*** (2012) 208 Cal.App.4th 166, 179, italics original, internal quotation marks and citations omitted.)

Similarly, "[w]hen a plaintiff relies on a theory of fraudulent concealment, delayed accrual, equitable tolling, or estoppel to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts that, if proved, would support the legal theory. [Citation.]" (***Mills v. Forestex Co.*** (2003) 108 Cal.App.4th 625, 641 (***Mills***); see also ***Weil & Brown***, *supra*, § 6:180.5, p. 6-66.)

Plaintiffs argue that plaintiff Trinh requested the signed copies of the loan documents for years and his requests were ignored. (Opp., p. 5:11-13, citing SAC, ¶21.) The SAC specifically alleges that Trinh requested the signed loan documents from Mr. Goodman of defendant SGLC on or about 14 January 2021, and Mr. Goodman did not provide them. (SAC, ¶23.)

The SAC further alleges that on or about 14 January 2023, Mr. Goodman did provide the loan documents, but they were not signed by the lender or the loan broker.[4] (*Id.* at ¶25.) Plaintiffs present authority in support of their theory: "where a party fraudulently conceals the existence of a cause of action against him, or fraudulently conceals material facts that induces a person not to prosecute a known cause of action, the statute of limitations is tolled and the fraudulent person is estopped from pleading the statute of limitations." (***Snyder v. Boy Scouts of Am.*** (1988) 205 Cal.App.3d 1318, 1323 (***Snyder***), quoting and citing ***Bank of America v. Williams*** (1948) 89 Cal.App.2d 21, 25.) The ***Synder*** decision describes limits to the equitable tolling rule:

> The statute will be tolled where the plaintiff establishes the substantive elements of fraud and an excuse for the discovery of the facts. The requisite showing is made when plaintiff establishes that he was not at fault for failing to discover the cause of action and had no actual or presumptive knowledge of the facts sufficient to put him on inquiry. [Citation.] Where fraud is established the statute is tolled only for so long as the plaintiff remains justifiably ignorant of the fact upon which the cause of action depends; discovery or inquiry notice of the facts terminates the tolling. [Citation.]

(***Snyder***, supra, 89 Cal.App.2d at p. 1323.)

In reply, defendant SGLC argues that equitable tolling does not apply here because plaintiff Trinh signed the documents in 2018 and Plaintiffs must therefore be imputed with the knowledge of the documents' contents as of that date, including the absence of a named lender. (Reply, p. 2:25-28.) The court finds this argument compelling because, as cited by defendant SGLC, "the law effectively presumes that everyone who signs a contract has read it thoroughly, whether or not that is true." (***Roldan v. Callahan & Blaine*** (2013) 219 Cal.App.4th 87, 93, citing ***Stewart***, *supra*, 134 Cal.App.4th at p. 1588.)

Defendant SGLC attempts to cast doubt upon Plaintiffs' allegations that they were justifiably ignorant of their claims until January 2023, asserting that the loan documents Plaintiffs received then are the same as those publicly recorded on 04 June 2018. (Reply, pp. 2:12-3:14.)

However, on demurrer, "the question of plaintiff's ability to prove [all material factual allegations in the complaint] or the possible difficulty in making such proof does not concern the reviewing court." (***General Foods***, *supra*, 35 Cal.3d 197, 213.) As Plaintiffs point out, "[w]hether the conduct of a party lulls another into a false sense of security and whether another relied thereon to his prejudice are questions of fact and not of law." (***Lovett v. Point Loma Development Corp.*** (1968) 266 Cal.App.2d 70 at p. 76, citing ***Industrial Indem. Co. v. Industrial Acci. Com.*** (1953) 115 Cal.App.2d 684.)

Similarly, where a claim involves fraudulent concealment, courts generally do not require specific allegations, and instead look to whether the allegations provide the defendant with sufficient notice of the claims allege against them. (See ***Alfaro v. Community Housing Improvement System & Planning Assn.*** (2009) 171 Cal.App.4th 1356, 1384-1385; see also ***Jones v. ConocoPhillips Co.*** (2011) 198 Cal.App.4th 1187, 1200.) The SAC here sufficiently apprises defendant SGLC of the fraudulent concealment allegations

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[4] The court notes that the copies of the loan documents attached to the SAC as Exhibits A and B do not contain signature lines for the lender or the broker. The last page of the Note attached as Exhibit A states: "This loan was brokered by CALPAC MANAGEMENT, INC., BRE License No. 01856406, a company licensed by the California Bureau of Real Estate."

against it by alleging that plaintiff Trinh requested the applicable loan documents two years before SGLC finally provided them.

In sum, the court cannot say as a matter of law that Plaintiffs have failed to plead around the statute of limitations defense that would otherwise bar the claim. Whether Plaintiffs justifiably relied to their detriment upon defendant SGLC's fraudulent concealment is a question of fact.

2. Sham Pleading Doctrine

Defendant SGLC further argues that the allegations of the SAC should be disregarded under the sham pleading doctrine to the extent that they contradict Plaintiffs' prior pleadings. (Dem., pp. 5-6.)

"Under the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment. [Citations and footnote omitted.] A noted commentator has explained, 'Allegations in the original pleading that rendered it vulnerable to demurrer or other attack cannot simply be omitted without explanation in the amended pleading. The policy against sham pleadings requires the pleader to explain satisfactorily any such omission.'" (***Deveny v. Entropin**, Inc.* (2006) 139 Cal.App.4th 408, 425-426.)

In ***Owens v. Kings Supermarket*** (1988) 198 Cal.App.3d 379, 384, the court wrote:

> It is axiomatic that the function of a demurrer is to test the legal sufficiency of the pleading by raising questions of law. [Citation.] It is also well established that, when reviewing a judgment entered following the sustaining of a demurrer without leave to amend, the appellate court must assume the truth of the factual allegations of the complaint. (*Ibid.*) However, an exception exists where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint.

Here, Defendant SGLC points out that the SAC includes new allegations related to delayed discovery and tolling. (See SAC, ¶¶31-37.) In this court's opinion, the SAC does not seek to avoid defects by omitting or altering facts alleged in prior pleadings. (***Owens***, *supra*, 198 Cal.App.3d at p. 384.) Instead, the SAC includes additional facts in response to court's prior order on demurrer. Moreover, SGLC does not assert that the SAC omits allegations from prior pleadings that must be explained.

Rather, Defendant SGLC argues the sham pleading doctrine applies essentially for the same reasons it argues that Plaintiffs' claims are time-barred. The court disagrees, for the reasons addressed previously. (See ***Hahn v. Mirda*** (2007) 147 Cal.App.4th 740, 751 ["The purpose of the [sham pleading] doctrine is to enable the courts to prevent an abuse of process… The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts"].)

Accordingly, defendant SGLC's demurrer to the first cause of action in plaintiff Trinh and MFAS's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code of Civil Procedure,*** § 430.10, subd. (e)] for rescission is OVERRULED.[5]

B. Defendant SGLC's demurrer to the third cause of action [violation of *Business & Professions Code*, § 17200 et seq.] of the SAC is SUSTAINED without leave to amend.

Defendant SGLC demurs to the third cause of action, asserting that SAC does not allege anything that remotely falls within actionable conduct under the Unfair Competition Law ("UCL"). (Dem., pp. 6-12.)

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[5] In light of the court's conclusion that the demurrer should be overruled as to this cause of action, the court need not address Plaintiffs' argument that the demurrer is procedurally improper for failing to raise its "successors and assigns" argument in its prior demurrer. (See Opp., p. 4:4-11.) While Plaintiffs' present this argument toward the entirety of the demurrer, the "successors and assigns" argument only addresses the first cause of action.

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

The "unfair" standard is intentionally broad, allowing courts maximum discretion to prohibit new schemes to defraud." (See ***Motors, Inc. v. Times Mirror Co.*** (1980) 102 Cal.App.3d 735, 740.) The test to determine if conduct is "unfair" under the UCL is as follows:

> When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

(***Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co****.* (1999) 20 Cal.4th 163, 187.)

However, the ***Cel-Tech*** court expressly limited this application to business competitor cases, leaving the possibility for a different test involving consumer cases. Plaintiffs Trinh and MFAS are not alleging "unfair" business practice as a business competitor of defendant SGLC. Instead, plaintiffs Trinh and MFAS are consumers. Whether the same test applies in consumer cases is not clear. Some appellate courts apply the ***Cel-Tech*** test, while others apply an older test. Under the older tests, "An 'unfair' business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. [T]he court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." (***Cel-Tech***, *supra*, 20 Cal.4th at p. 184.)

The Sixth Appellate District appears to endorse the older test. (See ***Linear Technology Corp. v. Applied Materials, Inc.*** (2007) 152 Cal.App.4th 115, 134-135 (***Linear***).) "When an unfair competition claim is based on an alleged fraudulent business practice—that is, a practice likely to deceive a reasonable consumer—'a plaintiff need not plead the exact language of every deceptive statement; it is sufficient for [the] plaintiff to describe a scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme.'" (***Id.*** at p. 134, quoting and citing ***General Foods***, *supra*, 35 Cal.3d at pp. 212-213.) "Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires consideration and weighing of evidence from both sides and which usually cannot be made on demurrer. [Citations.]" (***Linear***, *supra*, 152 Cal.App.4th at pp. 134-135, internal punctuation omitted.)

In demurring, defendant SGLC initially contends the UCL claim fails because the SAC does not allege injury in fact. (Dem., p. 7, citing ***Lagrisola v. North American Financial Corp.*** (2023) 96 Cal.App.5th 1178.) In opposition, Plaintiffs assert the SAC alleges injury by describing how they were unable to refinance the loan at a lower rate due to the loan documents. (Opp., p. 8; SAC, ¶22.) Defendant SGLC further argues the claim fails because no unlawful conduct is alleged, nor does the SAC allege that the failure to include the Addendum listing the lender(s) was intentional. (Dem., p. 9.)

Defendant SGLC asserts that the unfairness factors in consumer cases are: "(1) The consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided. [Citations.]" (***Camacho v. Automobile Club of Southern California*** (2006) 142 Cal.App.4th 1394, 1403 (***Camacho***).) In opposition, Plaintiffs argue that SAC alleges an unfair business practice by "tethering" the claim to the causes of action for rescission and violation of the Real Estate Settlement Procedures Act, 12 U.S.C. 2601, *et seq*. (Opp., p. 8.)

Here, as defendant SGLC points out, Plaintiffs did not actually amend the third cause of action in response to the prior demurrer, which was sustained. The UCL cause of action in the SAC, as in the FAC, makes no reference to wrongful conduct by demurring defendant SGLC. (SAC, ¶¶55-61.) In opposition, Plaintiffs point to several allegations elsewhere in the SAC which they contend support the UCL claim against defendant SGLC. (Opp., p. 8, citing SAC, ¶¶9, 15, 20, 22-24, 29.) None of these allegations cited by Plaintiffs are among the new allegations added to the SAC at paragraphs 31-37.) Plaintiffs also point to "a documented fraudulent scheme which benefits Calpac to Plaintiffs' detriment…." (Opp., p. 8:20-21.) This argument does not assert wrongful conduct *by demurring defendant SGLC*. As in the FAC, the third cause of action in the SAC does not allege facts sufficient to establish that defendant SGLC's conduct violated the UCL.

A plaintiff has the burden to show in what manner they can amend a pleading and how that will change its legal effect. (***Goodman v. Kennedy*** (1976) 18 Cal.3d 335, 349.) Plaintiffs have not met that burden here. Further, Plaintiffs have already had the opportunity to amend this cause of action in response to a demurrer but they have not adequately addressed this deficiency. (See *City of Stockton v. Sup. Ct. (Civic Partners Stockton, LLC)* (2007) 42 Cal.4th 730, 747 [stating that leave to amend is liberally allowed where the plaintiff has not previously had the opportunity to amend in response to a demurrer].)

Accordingly, defendant SGLC's demurrer to the third cause of action [violation of ***Business and Professions Code***, § 17200 et seq.] in plaintiffs Trinh and MFAS's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code of Civil Procedure***, § 430.10, subd. (e)] is SUSTAINED without leave to amend.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The trial setting conference currently set at 11:00 AM on 28 May 2024 shall REMAIN AS SET. The parties should meet and confer and agree upon a trial date about one year following that Trial Setting Conference date.

In the interim, the parties should commence discovery and discuss alternate resolution.

VI. Order

Defendant SGLC's demurrer to the first cause of action [rescission] in plaintiffs Trinh and MFAS's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code of Civil Procedure***, § 430.10, subd. (e)] is OVERRULED.

Defendant SGLC demurrer to third of action [violation of ***Business and Professions Code*** § 17200 et seq.] in plaintiffs Trinh and MFAS's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code of Civil Procedure***, § 430.10, subd. (e)] is SUSTAINED without leave to amend.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

---oooOooo---

Calendar Line 3

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV418969 **Art Chan v. Artson Group International Trade, Inc., et al.**
DATE: 5 March 2024 **TIME: 9:00 am** **LINE NUMBER: 03**

'his matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 04 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Defendants' Demurrer
to Plaintiff's First Amended Complaint.

I. Statement of Facts.

Defendant Artson Group International Trade, Inc. ("Artson Group") was formed in 2004 at the direction of plaintiff Art Chan ("Chan"). (First Amended Complaint ("FAC"), ¶10.) Before defendant Artson Group's formation, defendant Michelle Fang agreed to be plaintiff Chan's business partner. (FAC, ¶11.)

Defendant Artson Group purchased three commercial property leases in China as well as equipment which it used for its business operations in China. (FAC, ¶12.)

From 2004 until 2012, plaintiff Chan served as President of defendant Artson Group. (FAC, ¶13.) While President of defendant Artson Group, plaintiff Chan brought in B&N Industries, Inc. ("BNI") as a customer for defendant Artson Group. (FAC, ¶14.)

In 2012, defendant Fang terminated plaintiff Chan's employment with defendant Artson Group. (FAC, ¶15.)

In 2014, defendant Artson Group sued BNI for unpaid invoices in San Mateo County Superior Court ("Underlying Action"). (FAC, ¶16.) BNI acknowledged it owed the invoices, but did not know to whom payment should be made since plaintiff Chan and defendant Fang made competing claims to the money. (FAC, ¶17.) After the court granted plaintiff Chan's motion to intervene in the Underlying Action, plaintiff Chan filed a cross-complaint against Artson Group and Fang. (FAC, ¶18.) The Underlying Action was settled by the parties on or about 13 August 2015, pursuant to a written Stipulation for Settlement. (FAC, ¶19.)

Pursuant to the Stipulation for Settlement, BNI agreed to pay 50% of the agreed upon settlement amount to Artson Group/ Fang and 50% to Chan. (FAC, ¶20.) Additionally, Artson Group and Chan were to enter into a legal contract in China to sell the three commercial property leases and equipment; and split the proceeds 50/50. (FAC, ¶21.)

The Stipulation for Settlement did not set forth a deadline to sell the property leases or equipment, but stated that the Artson Group was entitled to recover reasonable expenses advanced to the property (not to exceed $10,000RMB per month) until the leases were sold. (*Id.*) At the time the parties entered into the Stipulation for Settlement, the only tenants at the property were Artson Group and Chan. (FAC, ¶22.) Pursuant to the Stipulation for Settlement, Chan agreed to return the Company car (located in China) to Artson Group. (FAC, ¶23.)

The Underlying Action was dismissed on 25 August 2015. (FAC, ¶24.)

In January 2017, defendants Artson Group and Fang sent a text message to plaintiff Chan requesting Chan return the company car. (FAC, ¶25.) Chan proposed several options for returning the vehicle and requested the contract(s) to sell the property leases be presented to him and signed at the same time the car was returned. (*Id.*) Defendants replied stating the contract(s) to sell the property leases would be sent to Chan within a reasonable time after the car was returned. (*Id.*)

After January 2017, Chan made numerous requests to defendants to provide instructions on how to return the vehicle, but defendants did not respond. (FAC, ¶26.)

On 30 June 2018, Chan received a picture from a former [Artson Group] employee which showed that a company had moved into the property's facilities. (FAC, ¶27.) It is at this point that Chan first had reason to believe defendants would not perform as promised under the Stipulation for Settlement. (FAC, ¶28.) Chan tried to obtain additional information regarding the tenant but the tenant refused to provide any information. (FAC, ¶29.) Without Chan's knowledge or consent, defendants subleased the properties rather than selling the property leases as required. (FAC, ¶30.)

Chan retained an attorney in China and on 9 July 2020, Chan filed a lawsuit in China which sought to enforce the terms of the Stipulation for Settlement. (FAC, ¶32.) On 29 October 2021, the court in China found it had no jurisdiction to enforce the Stipulation for Settlement and dismissed the case, a ruling which was affirmed in appellate decisions of 21 March 2022 and 7 September 2022, respectively. (FAC, ¶¶34 – 36.)

On 13 July 2023[1], plaintiff Chan filed a complaint against defendants Artson Group and Fang asserting a single cause of action for breach of written settlement agreement.

On 12 December 2023, defendants Artson Group and Fang filed a demurrer to plaintiff Chan's complaint.

On 5 February 2024, pursuant to a stipulation by the parties, the court issued an order granting plaintiff Chan leave to file a FAC and allowing defendants Artson Group and Fang to file an updated demurrer to plaintiff Chan's FAC.

On 5 February 2024, plaintiff Chan filed the operative FAC which now asserts causes of action for:

(1) Breach of Settlement Agreement

(2) Breach of Covenant of Good Faith and Fair Dealing

(3) Unjust Enrichment/ Restitution

On 20 February 2024, defendants Artson Group and Fang filed the motion now before the court, a demurrer to plaintiff Chan's FAC.

II. Analysis.

A. Defendant Artson Group's demurrer to plaintiff Chan's FAC is OVERRULED.

Defendant Artson Group demurs to the entirety of plaintiff Chan's FAC on the ground, among others, that plaintiff Chan cannot maintain any cause of action against defendant Artson Group because defendant Artson Group's existence as a corporate entity has terminated.[2] Defendant Artson Group requests the court take judicial

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C).)

[2] Specifically, defendant Artson Group demurs on the ground that there is a defect or misjoinder of parties. A demurrer may be made on the ground that there is a defect or misjoinder of parties. (Code Civ. Proc. §430.10, subd. (d).) "Demurrers on this ground lie only where it appears on the face of the complaint (or matters judicially noticed) that: some third person is a 'necessary' or 'indispensable' party to the action; and hence must be joined before the action may proceed [or] plaintiffs lack sufficient unity of interest [CCP §378]; or there is no common question of law or fact as to the defendants [CCP §379]." (Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶7:79, p. 7(I)-41.) Despite asserting this

notice of its termination in 2017 based upon the results of a business search of the California Secretary of State's website. Plaintiff Chan opposes the request for judicial notice.

In *El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1367, the court took judicial notice of a ***certificate*** issued by the California Secretary of State. Here, defendant Artson Group has not offered a certificate issued by the California Secretary of State. In *Belen v. Ryan Seacrest Productions, LLC* (2021) 65 Cal.App.5th 1145, 1160, fn. 2, the court took judicial notice of information contained within a statement of information filed with the California Secretary of State.

> Per Evidence Code section 452, subdivision (c), we judicially note the statement of information filed with the California Secretary of State that provides Ryan Seacrest is the chief executive officer, secretary, and chief financial officer of RS Enterprises. (See *Elmore v. Oak Valley Hospital Dist.* (1988) 204 Cal.App.3d 716, 722 [251 Cal. Rptr. 405] [a statement filed with the Secretary of State becomes a document of which a court can properly take judicial notice].)

Here, however, this court is not presented with a statement filed with the California Secretary of State. Instead, this court is asked to take judicial notice of business entity information from the California Secretary of State's website. Without discussing the propriety of judicial notice, the court in *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1215 took judicial notice of "business entity detail from the California Secretary of State's Web site reflecting that, as of October 7, 2016, NHV's status was 'ACTIVE.'" Since defendant Artson Group's request is essentially the same, the court will grant defendant Artson Group's request for judicial notice that business entity detail from the California Secretary of State's website reflects defendant Artson Group's status is "Terminated," and the inactive date is "09/19/2017."[3] Defendant Artson Group asserts that it was dissolved in 2017.

In opposition, plaintiff Chan maintains defendant Artson Group may still be sued relying upon Corporations Code section 2011, subdivision (a)(1) which states:

> Causes of action against a dissolved corporation, whether arising before or after the dissolution of the corporation, may be enforced against any of the following: …
>
> (A) Against the dissolved corporation, to the extent of its undistributed assets, including, without limitation, any insurance assets held by the corporation that may be available to satisfy claims.
>
> (B) If any of the assets of the dissolved corporation have been distributed to shareholders, against shareholders of the dissolved corporation to the extent of their pro rata share of the claim or to the extent of the corporate assets distributed to them upon dissolution of the corporation, whichever is less.
>
> A shareholder's total liability under this section may not exceed the total amount of assets of the dissolved corporation distributed to the shareholder upon dissolution of the corporation.

The court cannot determine at the demurrer stage whether there remain any undistributed assets. Plaintiff's FAC suggests there are, namely the three property leases and equipment. Consequently, a cause of action may still be enforced against defendant Artson Group despite its dissolution.

Accordingly, defendant Artson Group's demurrer to plaintiff Chan's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

B. Defendant Fang's demurrer to plaintiff Chan's FAC is SUSTAINED.

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ground as the basis for demurrer, the court understands defendant Artson Group to demur generally on the ground that plaintiff cannot assert any cause of action against it.

[3] On the balance of defendants' request for judicial notice and on plaintiff Chan's request for judicial notice, the requests for judicial notice are DENIED as unnecessary. (See *Duarte v. Pacific Specialty Insurance Company* (2017) 13 Cal.App.5th 45, 51, fn. 6—denying request where judicial notice is not necessary, helpful or relevant.)

Defendant Fang demurs to plaintiff Chan's FAC on the basis that plaintiff Chan has not alleged any wrongful conduct on her part. The alleged breach of contract is based upon the "fail[ure] to prepare and execute a contract or contracts in China to sell the three leases to the Property (and equipment)" and "fail[ure] to pay Chan 50% of the subleases," but earlier in the FAC, the obligation to do is placed upon defendant Artson Group. (See FAC, ¶¶21 and 38 – 39.) The same purported breaches make up the second and third causes of action. (See FAC, ¶¶48, 52, and 54.)

In opposition, plaintiff Chan contends defendant Fang's liability rests upon the alter ego allegations against her. "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) "[T]wo conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone." (*Tucker Land Co. v. State of California* (2001) 94 Cal.App.4th 1191, 1202.) Defendant Fang acknowledges the alter ego allegations found at paragraphs 6 - 7 of plaintiff Chan's FAC but contends these allegations are not sufficiently specific to support an alter ego theory.

The question here is whether plaintiff Chan's FAC alleges sufficient facts to impose liability under an alter ego theory. Looking to a few examples of the past, in *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 749 (*Vasey*), plaintiff brought an unlawful detainer and breach of contract action against the defendant corporation ("CDC") and the two individuals associated with that corporation. The defendants defaulted and the lower court entered judgment against the individual defendants. The appellate court overturned the judgment as to the two individual defendants finding that the plaintiff's complaint, "asserted a bare conclusory allegation that the individual and separate character of the corporation had ceased and that CDC was the alter ego of the individual defendants." (*Vasey*, *supra*, 70 Cal.App.3d at p. 749; emphasis added.) "In order to prevail in a cause of action against individual defendants based upon disregard of the corporate form, the plaintiff must plead and prove [1] such a unity of interest and ownership that the separate personalities of the corporation and the individuals do not exist, and [2] that an inequity will result if the corporate entity is treated as the sole actor." (*Id.*)

Vasey states the two pleading requirements to sue upon an "alter ego" theory and, by way of example, shows us that pleading only one of those two requirements in general "bare conclusory" terms is insufficient to withstand even a default judgment. In *Stodd v. Goldberger* (1977) 73 Cal.App.3d 827 (*Stodd*), we get to see an example of a sufficiently pleaded complaint under the "alter ego" theory. In *Stodd*, a California corporation, M.I.I. Corporation ("M.I.I."), entered into a joint venture agreement with Goldco, a limited partnership for the ownership and operation of a hotel. The same three general partners who made up Goldco also owned M.I.I. When the venture failed, M.I.I filed for bankruptcy. The trustee in bankruptcy then brought suit against Goldco and its three individual general partners. In its first cause of action, the trustee sought "to disregard M.I.I.'s corporate existence and, on the theory of alter ego, establish defendants' personal liability for all of M.I.I.'s debts and recover from defendants damages in the approximate sum of $2,542,000.00." (*Stodd*, *supra*, 73 Cal.App.3d at p. 832.)

"To support the alter ego doctrine it is alleged that there is a unity of ownership between defendants and M.I.I., that defendants dominated and controlled M.I.I., that M.I.I. was created and operated by defendants pursuant to a fraudulent scheme to defraud M.I.I.'s creditors and that adherence to the fiction of M.I.I.'s separate existence would sanction a fraud and promote injustice." (*Id.*)

The defendants made and the trial court granted its motion for judgment on the pleadings (functionally the same as a demurrer) as to the alter ego cause of action. The trial court granted plaintiff 15 days' leave to amend, noting that amendment would permit plaintiff to prove that corporate assets were converted, transferred and deal with to the injury of the corporation and its creditors. However, "[p]laintiff declined to avail himself of the opportunity to amend."

In granting plaintiff leave to amend, the court was not saying that "conversion or transfer of corporate assets to the injury of the corporation" is a necessary allegation to invoke the alter ego doctrine. The *Stodd* court held that the allegations of alter ego appeared to be sufficient as plead. However, a trustee in bankruptcy is not the real party in interest and does not have standing to sue unless it can plead and prove some direct injury to the corporation

itself. "In the absence of any such allegation, the asserted cause of action belongs to each creditor individually, and plaintiff (trustee in bankruptcy) is not the real party in interest." (*Id.* at p. 833.)

With respect to the pleading requirements for the alter ego doctrine, the *Stodd* court again reiterated the two basic allegation requirements for the alter ego doctrine noting however, that "the conditions under which a corporate entity may be disregarded vary according to the circumstances in each case." (*Id.* at p. 832.)

In *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415, the court wrote, "To recover on an alter ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor. [Citation.] An allegation that a person owns all of the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity. [Citation.]"

In *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 155, the court wrote:

> "In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used. [Citation.]" [Citations.]

There is a non-exclusive list of factors which the court must consider in reaching a determination on the application of the alter ego doctrine. No one factor will govern the determination. The trier of fact must look to all the circumstances. The court in *Claremont Press Publishing Co. v. Barksdale* (1960) 187 Cal.App.2d 813, 817 held, "Whether the facts are sufficient to warrant disregard of the corporate entity is largely a question for the trial court."

Here, however, even if the court were to find that plaintiff Chan has alleged a unity of ownership and interest between defendants Artson Group and Fang such that the separate personalities of the corporations and the shareholder do not exist, plaintiff Chan has not made any allegation that an inequity will result if the corporate entity is treated as the sole actor.

Accordingly, defendant Fang's demurrer to plaintiff Chan's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend.

C. Defendants Artson Group and Fang's demurrer to the first cause of action in plaintiff Chan's FAC is OVERRULED.

Defendants Artson Group and Fang demur additionally to the first cause of action [breach of contract][4] on the ground that it is barred by the applicable statute of limitations. A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading [and matters of which the court may properly take

[4] Defendants assert the second cause of action for breach of the covenant of good faith and fair dealing and third cause of action for unjust enrichment is similarly barred by the applicable statute of limitations.

judicial notice]. (*Id.*, at pp. 1315-1316.)[5] When evaluating whether a claim is time-barred, the court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*Id.*, at p. 1316.)

Defendants assert, without opposition from plaintiff Chan, that the statute of limitations for a breach of written contract cause of action is four years. (See Code Civ. Proc., §337.) "[A] cause of action for breach of contract ordinarily accrues at the time of breach regardless of whether any substantial damage is apparent or ascertainable." (*Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 246.) "Ordinarily, a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted." (*Waxman v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1954) 123 Cal.App.2d 145, 149.)

In the FAC, plaintiff Chan alleges the breach occurred no later than 30 June 2018 when plaintiff Chan received a picture from a former [Artson Group] employee which showed that a company had moved into the property's facilities. (FAC, ¶27.) By his own allegation, it is at this point that plaintiff Chan first had reason to believe defendants would not perform as promised under the Stipulation for Settlement. According to defendants, plaintiff Chan had until 30 June 2022 to assert a claim for breach of contract, but did not do so until commencing this action on 13 July 2023.

In opposition, plaintiff Chan contends this simple analysis fails to take into account his allegations concerning equitable tolling. Equitable tolling applies "occasionally and in special situations" "to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." (*Addison v. State of California* (1978) 21 Cal.3d 313, 319; see also *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (*McDonald*).)

> Equitable tolling "halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct." [Citation.] The doctrine "focuses primarily on the plaintiff's excusable ignorance of the limitations period. [Citation.] [It] is not available to avoid the consequences of one's own negligence." [Footnote. Citation.]

(*Sagehorn v. Engle* (2006) 141 Cal.App.4th 452, 460 – 461 (*Sagehorn*).)

Equitable tolling requires "a showing of three elements: 'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.' [Citations.]" (*McDonald*, *supra*, 45 Cal.4th at p. 102.) "When a plaintiff relies on a theory of fraudulent concealment, delayed accrual, equitable tolling, or estoppel to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts which, if proved, would support the theory." (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 641.)

The court in *Sagehorn* distinguished the concept of equitable tolling from the concept of equitable estoppel. With equitable tolling, the focus is on the plaintiff's excusable ignorance. With equitable estoppel, the focus is, "on the actions of the defendant. That doctrine looks to 'the defendant's representations or other conduct that prevents the plaintiff from suing before the statute of limitations has run. When the [trial court] is satisfied that this has occurred, the defendant will be estopped from pleading a statute of limitations defense.'" (*Sagehorn*, *supra*, 141 Cal.App.4th at p. 461, fn. 6.)

The equitable tolling doctrine "applies when an injured person has several legal remedies and, reasonably and in good faith, pursues one." (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 923 (*Collier*); internal punctuation omitted.) "The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore the filing of the first claim must alert the defendant in the second claim of the

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[5] See also *Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 992-993: "'[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense.'" (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191 [213 Cal. Rptr. 3d 850]; accord, *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [151 Cal. Rptr. 3d 827, 292 P.3d 871] [application on demurrer of affirmative defense of statute of limitations based on facts alleged in a complaint is a legal question subject to de novo review]; *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 224 [115 Cal. Rptr. 3d 274] ["'It must appear clearly and affirmatively that, upon the face of the complaint [and matters of which the court may properly take judicial notice], the right of action is necessarily barred.'"].)

need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second. As an example, a workers' compensation claim equitably tolls a personal injury action against that same employer for injuries sustained in the same incident. But under ordinary circumstances that workers' compensation claim would not equitably toll a personal injury action against a third party who might also be liable for the injury." (*Collier*, *supra*, 142 Cal.App.3d at pp. 924 – 925.) "The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second. Yet the two 'causes of action' need not be absolutely identical. [Footnote.] The critical question is whether notice of the first claim affords the defendant an opportunity to identify the sources of evidence which might be needed to defend against the second claim." (*Id.* at p. 925.)

Here, plaintiff Chan has alleged that on 9 July 2020, he filed an action in China to enforce the terms of the Stipulation for Settlement which is what plaintiff Chan is trying to do here. The action in China remained pending until 7 September 2022 when the appellate court in China affirmed the dismissal. The court finds the allegations here sufficient to raise the doctrine of equitable tolling. As such, it does not appear clearly and affirmatively from the face of the FAC that the first cause of action is barred.

Defendants also demur to the first cause of action for breach of contract on the ground that it is uncertain, ambiguous, and unintelligible. "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.) While it is not entirely clear, the court understands defendants to point out allegations in the FAC which establish that plaintiff Chan himself did not perform because he did not return the company vehicle as required under the Stipulation for Settlement. In other words, defendants seemingly contend plaintiff Chan has not alleged the second element above. Yet, this very allegation is found at paragraph 40 of the FAC. It is also supported by plaintiff Chan's earlier allegation that he sought instructions from defendants on how to return the vehicle, but defendants did not respond. This is a factual allegation which supports an alleged excuse for nonperformance.

> "'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.'" (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 848, fn. 3 [222 Cal. Rptr. 3d 360]; accord, *Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135 [146 Cal. Rptr. 3d 173].) "'A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.'" (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822 [245 Cal. Rptr. 3d 378], quoting *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616 [17 Cal. Rptr. 2d 708].)

(*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.)

In short, the court is not persuaded by defendants' assertion that the first cause of action for breach of contract is so incomprehensible that defendants cannot reasonably respond.

Accordingly, defendants Artson Group and Fang's demurrer to the first cause of action in plaintiff Chan's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is OVERRULED.

D. Defendants Artson Group and Fang's demurrer to the second cause of action in plaintiff Chan's FAC is OVERRULED.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest.2d Contracts, § 205.) "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658; see also CACI No. 325.)

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. [Citation.] The covenant thus cannot 'be endowed with an existence independent of its contractual underpinnings.' [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those

incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 – 350 (*Guz*).)

"The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. [Citation.] 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' [Citation.] … 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.'" (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031 – 1032.)

In *Guz*, *supra*, 24 Cal.4th at p. 327, the California Supreme Court stated, "[W]here breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." Defendants argue essentially that plaintiff Chan's second cause of action alleges the same exact breach alleged in the first cause of action. The court does not entirely agree. "The obligation [of good faith] is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts." (Rest.2d Contracts, § 205, comment (e).)

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

(Rest.2d Contracts, § 205, comment (d).)

Plaintiff Chan has alleged here that instead of entering into a contract to sell the property leases in China, defendant Artson covertly subleased the property and while there is no deadline for the contract, defendant is essentially acting without diligence to accomplish what was contemplated.

Accordingly, defendants Artson Group and Fang's demurrer to the second cause of action in plaintiff Chan's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of implied covenant of good faith and fair dealing is OVERRULED.

E. Defendants Artson Group and Fang's demurrer to the third cause of action in plaintiff Chan's FAC is OVERRULED.

In *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793, the court wrote, "[T]here is no cause of action in California for unjust enrichment. "The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." [Citations.] Unjust enrichment is "'a general principle, underlying various legal doctrines and remedies,' " rather than a remedy itself. [Citation.] It is synonymous with restitution."

In *McBride v. Houghton* (2004) 123 Cal.App.4th 379 (*McBride*), the court wrote, "Unjust enrichment is not a cause of action, however, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution. Unjust enrichment has also been characterized as describing the result of a failure to make restitution. [¶] In reviewing a judgment of dismissal following the sustaining of a general demurrer, we ignore erroneous or confusing labels if the complaint pleads facts which would entitle the plaintiff to relief. Thus, we must look to the actual gravamen of [plaintiff's] complaint to determine what cause of action, if any, he stated, or could have stated if given leave to amend. In accordance with this principle, we construe [plaintiff's] purported cause of action for unjust enrichment as an attempt to plead a cause of action giving rise to a right to restitution."

> There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. [Citations.]

> Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory (an election referred to at common law as "waiving the tort and suing in assumpsit"). [Citation.] In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment. [Citation.]

(*McBride*, *supra*, 123 Cal.App.4th at pp. 387 – 388; internal citations and punctuation omitted.)

Significantly, "there is no particular form of pleading necessary to invoke the doctrine of restitution." (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1315 [internal quotation marks omitted].) As the *McBride* court instructs, the court should overlook the labels given by the plaintiff and instead focus on whether there is a basis for restitution.

Here, plaintiff Chan has alleged essentially that, pursuant to the Stipulation for Settlement, he is entitled to equitable co-ownership of the property leases. Until the property leases are sold, plaintiff Chan is equitably a co-tenant. "All cotenants have an equal right to possession of the whole property." (*Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 382.) "[O]ne tenant in common may let [or, in this case, sublet] the entire premises to a third party, and that all a cotenant out of possession is entitled to is to be let into possession with the lessee of his cotenant to enjoy his moiety, or to compel his cotenant to account for the rents received." (*In re Knox' Estate* (1942) 52 Cal.App.2d 338, 351; see also *Dabney-Johnston Oil Corp. v. Walden* (1935) 4 Cal.2d 637, 656—"where [one cotenant] receives rents from third persons for the use of the land, he must account to his cotenants for their share," et al. See also 12 Witkin, Summary of California Law (11th ed. 2018) Real Property, §48—"if the tenant in possession leases the property to a third person, an action by the other tenant against the lessor, requiring the lessor to account for rents collected from the third person, is proper.") Without looking at the labels given by plaintiff Chan, the court reasonably construes the allegations of plaintiff Chan's FAC to give rise to a basis for restitution.

Accordingly, defendants Artson Group and Fang's demurrer to the third cause of action in plaintiff Chan's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for unjust enrichment is OVERRULED.

III. Order.

Defendant Fang's demurrer to plaintiff Chan's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend.

Defendants Artson Group and Fang's demurrer to plaintiff Chan's FAC is otherwise OVERRULED.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV381541 **Michael Yelavich, et al. v. Kho Liep Chok, et al.**
DATE: 05 March 2024 **TIME: 9:00 am** **LINE NUMBER: 7**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 04 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Defendants Kho Liep Chok and Ya Hui Tu's Motion for Summary Adjudication.

I. Statement of Facts.

Plaintiffs Michael Yelavich and Linda Yelavich ("Plaintiffs") are a married couple who have owned the property located at 1677 Blaney Avenue in San Jose since 1985. (First Amended Complaint ("FAC"), ¶1.) Near the boundary line with the adjoining residential property located at 1689 Blaney, there existed a beautiful, mature camphor tree with a trunk solely on Plaintiffs' property. (*Id.* at ¶¶1-2.)

In 1997, Young Ho Choi owned the property at 1689 Blaney, and he built a small white fence on his property to mark an agreed easement area around the camphor tree which Young Ho Choi agreed would be preserved to protect the camphor tree. (FAC, ¶3.) The fence was part of an agreement between Plaintiffs and Young Ho Choi never to damage or kill the camphor tree. (*Ibid.*)

Since 1997, Young Ho Choi maintained and preserved the camphor tree, including by not mowing or trampling the roots inside the white fence, nor cutting back the tree limbs or roots. (FAC, ¶4.) Although there is no writing creating an easement, the verbal agreement between Plaintiffs and Young Ho Choi created an easement, memorialized by monument by the location of the little white fence designating the area the overhanging limbs would not be damaged. (*Ibid.*)

On or about 20 April 2010, defendants Kho Liep Chok and Ya Hui Tu[1] ("Defendants") bought the property at 1689 Blaney formerly owned by Young Ho Choi. (FAC, ¶5.) Defendants acquired title with actual and/or inquiry notice and "subject to" the existing, visible little white fence and negative easement right for the overhanging camphor tree limbs. (*Ibid.*) The negative easement area was marked by the openly visible little white fence. (*Ibid.*) Plaintiffs told Defendants of the negative easement both before and after the Defendants bought their home. (*Ibid.*)

When Plaintiffs bought their home in 1985, the camphor tree was a material selling point. (FAC, ¶7.) No dispute has arisen before concerning the location of the fence or the duty of the adjoining property owner to respect the obligation not to damage the tree. (*Ibid.*) On or about 09 November 2020, Defendants caused damage to the

[1] Defendant Ya Hui Tu is also referred to as "Emily" in the parties' papers.

camphor tree, mutilating and fatally injuring it. (*Id.* at ¶8.) Defendants acted unreasonably when they damaged the tree, and experts inform Plaintiffs that the tree will not live. (*Ibid.*)

On 01 April 2021[2], Plaintiffs filed a complaint against Defendants asserting causes of action for:

1. Damages for Wrongful Injury to Tree
2. Damages to Negative Easement

On 29 July 2021, Plaintiffs filed the operative FAC against Defendants asserting causes of action for:

1. Damages for Wrongful Injury to Tree
2. Damages to Negative Easement

On 21 October 2021, Defendants filed an answer to the FAC.

On 12 December 2023, Defendants filed the motion now before the court, a motion for summary adjudication of the first and second causes of action of Plaintiffs' FAC.

II. Motions for Summary Judgment and Summary Adjudication, in General

Any party may move for summary judgment. (***Code Civ. Proc.***, § 437c, subdivision (a); ***Aguilar v. Atlantic Richfield Co***. (2001) 25 Cal.4th 826, 843 (***Aguilar***).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (***Code Civ. Proc.***, § 437c, subdivision (c); ***Aguilar,*** *supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (***Aguilar,*** *supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (***Aguilar,*** *supra,* 25 Cal.4th at p. 850; see ***Evid. Code,*** § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (***Aguilar,*** *supra,* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (***Code Civ. Proc.***, § 437c, subdivision (p)(2); see also ***Aguilar,*** *supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier 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 p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (***Id.*** at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (***Aguilar,*** *supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (***Id.*** at p. 843.)

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (***California Bank & Trust v. Lawlor*** (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

III. Analysis.

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[2] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C).)

A. Defendants Kho Liep Chok and Ya Hui Tu's request for judicial notice is GRANTED.

In support of the motion for summary adjudication, Defendants request judicial notice of the FAC. ***Evidence Code*** section 452, subdivision (d) states that the court may take judicial notice of '[r]ecords of any court of this state." This section of the statute has been interpreted to mean that the trial court may take judicial notice of the existence of the court's own records. ***Evidence Code*** section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (***People v. Woodell*** (1998) 17 Cal.4th 448, 455.) The request for judicial notice in support of Defendants' motion for summary adjudication is GRANTED insofar as the court takes notice of the court records' existence, but not necessarily the truth of any matters asserted therein.

B. Defendants Kho Liep Chok and Ya Hui Tu's evidentiary objections.

In support of the motion for summary adjudication, Defendants filed objections to evidence submitted by Plaintiffs in support of their opposition to the motion. As the court did not deem the evidence material to its disposition, the court declines to rule on Defendants' evidentiary objections in support of their motion for summary adjudication. "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).)

C. Defendants Kho Liep Chok and Ya Hui Tu's motion for summary adjudication of the first cause of action [wrongful injury to tree] is DENIED.

In the first cause of action, Plaintiffs seek damages arising from the alleged loss of the subject camphor tree. (FAC, ¶11.) The FAC alleges that "damages to the property and to the tree must be trebled pursuant to ***Civil Code*** section 3346." (*Id.* at ¶12.) ***Civil Code*** section 3346, subdivision (a), provides as follows in pertinent part:

> For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure for damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment….

"The owner of [a] tree based on the location of its trunk is the owner of the branches and roots of the tree. The owner of the neighboring property has the right to cut off the overhanging branches or the undercutting roots at the property line, but must act reasonably in doing so." (6 **Miller & Starr**, Cal. Real Estate 4th (2023) § 17:8, p. 17-27, [citing ***Booska v. Patel*** (1994) 24 Cal.App.4th 1786, 1791 (***Booska***)].)

In ***Booska*** (cited by both parties), a Monterey pine tree stood on the plaintiffs' land, and the tree's roots extended into the defendants' yard. (***Booska***, *supra*, 24 Cal.App.4th at p. 1788.) The defendants hired a contractor to excavate along the length of his yard and cut the roots down to approximately three feet deep. (*Ibid.*) The complaint alleged this was done negligently, and the plaintiffs had to remove the tree at their expense because it was unsafe and a nuisance. (*Ibid.*) The complaint alleged causes of action for negligence, destruction of timber, and nuisance. (*Ibid.*) The defendants moved for summary judgment, arguing they had an absolute right to sever the roots on their own property. (*Ibid.*) The trial court granted the motion, agreeing with the defendants that "landowners acting solely on their own property were absolutely privileged to sever roots of a neighbor's tree." (***Id.*** at pp. 1788-1789.)

The appellate court reversed, finding the existence of disputed factual issues as to whether the defendants acted unreasonably in severing the roots and whether plaintiffs used their property unreasonably. (***Booska***, *supra*, 24 Cal.App.4th at p. 1792.) "No person is permitted by law to use his property in such a manner that damage to his neighbor is a foreseeable result." (***Id.*** at p. 1791, quoting and citing ***Parks v. Atwood Crop Dusters, Inc.*** (1953) 118 Cal.App.2d 368, 372.) "It bears repetition that the basic policy of this state … is that everyone is responsible for any

injury caused to another his want of ordinary skill in the management of his property … The proper test to be applied to the liability of the possessor of land … is whether in the management of his property he has acted as a reasonable person in view of the probability of injury to others." (***Ibid.***, internal punctuation omitted, quoting and citing ***Sprecher v. Adamson Companies*** (1981) 30 Cal.3d 358, 371.)

Here, the Defendants proffer the following facts in support of their motion for summary adjudication of the first cause of action: There is no written easement.[3] The white fence by the tree was approximately 8-9 inches in height and was built as a neighborly gesture to protect the sprinkler head from the lawn mower.[4] The former owner who built the fence denies that he ever entered into agreement which gave the owners of 1677 S. Blaney Avenue an easement of any kind.[5] Defendants Kho Liep Chok and Ya Hui Tu purchased 1689 S. Blaney Avenue is 2010, and the purchase agreement and disclosure statement do not mention the camphor tree or any kind of easement between the former owners and plaintiffs Michael and Linda Yelavich.[6]

The issues with the subject camphor tree go back to 2014 when the Defendants were about to begin an extension on their home.[7] The tree is planted very close to the property line, so the Defendants contacted plaintiff Michael Yelavich and told him about the extension and the need to prune the camphor tree back closer to the property line.[8] In response, Plaintiffs attorney sent Defendants a letter on 24 November 2014 insisting that they "cease and desist from the threatened destruction of roots and limbs" of the tree.[9]

On 29 December 2014 and on 15 January 2015, Defendants' counsel sent letters to Plaintiffs' counsel stating that the branches of the tree needed to be trimmed so that the frame and roof of the addition could be completed.[10] The 29 December 2014 letter stated: "In respect to the roots and branches from your tree extending on to my clients' property, my clients would like to work with you in a reasonable manner to resolve the issues concerning the tree and my client's addition… My clients would like to provide you with the opportunity to trim your tree in the manner you see fit so long as the branches over the property line are removed to the extent they are over the property line and interfere with construction of my client's addition. We request that you trim the branches of the tree. If you do not do so within ten (10) days of the date of this correspondence, we will presume that you are refusing to do so and my clients will proceed to trim the branches so that they can continue with construction of the addition."[11]

The 13 January 2015 letter from Defendants' counsel to Plaintiffs' counsel documented attempts to meet and confer via telephone and stated that defendant Michael Yelavich threatened to sue and shoot the Defendants as well as their contractor and arborist.[12] The letter further stated that more than 10 days had passed since the prior letter, that Plaintiffs had not trimmed the tree, and that Defendants were "proceeding to have the portion of the tree on their property trimmed."[13] The Plaintiffs did not respond to the letter and did not trim the camphor tree, and the Defendants had the tree trimmed without incident.[14] While digging the foundation for the addition, the Defendants'

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[3] See Separate Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Adjudication ("Defendants' SSUF"), Fact No. 2.

[4] *Id.* at Fact No. 3.

[5] *Ibid.*

[6] *Id.* at Fact No. 4.

[7] *Id.* at Fact No. 5.

[8] *Ibid*.

[9] *Id.* at Fact No. 6.

[10] *Id.* at Fact. No. 7.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] *Id.* at Fact No. 8.

contractor discovered that there were many shallow roots from the camphor tree on their property, extending into the area that was necessary to excavate for the new foundation.[15] Defendant Kho Liep Chok states: "To minimize the impact to the tree, I asked the contractor not to use an excavator and instead to use a hand tool to remove the dirt for the foundation, which took a lot of extra time and caused extra expense."[16] In November of 2020, the Defendants had the camphor tree trimmed back to allow clearance to the side of their house, and the Plaintiffs filed their initial complaint soon thereafter.[17]

Defendants argue that because they did not actually trespass on Plaintiffs' property, there is no liability under ***Civil Code*** section 3346. It appears that Defendants interpret the first cause of action as one exclusively for treble damages under ***Civil Code*** section 3346. (See Notice of Motion, p. 2, lns. 3-4.) However, this argument is misplaced because this cause of action is not one for trespass on Plaintiffs' property but rather one for damage to the tree itself. (See FAC, ¶¶ 11-12 [alleging damage to tree].) The FAC's prayer for relief separately requests damages for the injury to the tree and treble damages under ***Civil Code*** section 3346. (FAC, p. 7, lns. 11-15.) Thus, although the first cause of action mentions a request for treble damages, the underlying cause of action is for unreasonable damage to Plaintiffs' tree.

Defendants assert that they only cut portions of the tree that encroached onto their own property. They rely on ***Booska*** for the proposition that cutting a neighbor's tree over one's own property line is not a trespass, "because the tree itself is a trespasser." (Mot., p. 5, lns. 24-26.) However, the ***Booska*** decision does not discuss trespass at all. There, the defendants relied upon language from older decisions (including ***Bonde v. Bishop*** (1952) 112 Cal.App.2d 1 and ***Grandona v. Lovdal*** (1866) 70 Cal. 161) discussing nuisance and encroachment claims to assert that they had an "absolute right" to sever roots extending onto their land. (***Booska***, *supra*, 24 Cal.App.4th at p. 1788-1791.) The ***Booska*** court expressly rejected the defendants' arguments, finding that the defendants failed to address the issue of negligence in their summary judgment motion. (***Id.*** at p. 1791.) Thus, Defendants misinterpret the first cause of action, and their reliance on arguments rejected by ***Booska*** is misguided.

As discussed above, the *Booska* court explained that the right of a landowner to cut the portions of the roots or branches of a neighbor's tree that encroach onto the landowner's property is tempered by the maxim that a person may not exercise their rights to their property in a way that injures the rights of another. (***Booska***, *supra*, 24 Cal.App.4th at p. 1791.)

Thus, to succeed on summary adjudication, Defendants must establish that they acted reasonably in cutting the portions of the tree. While the Defendants' evidence refers to an arborist, there is no indication of an arborist's report concerning the risk of harm to the tree or ways such risk might have been diminished. Defendants imply that cutting the roots of a neighbor's tree is reasonable so long as it is done by hand tools rather than power tools, but Defendants offer no legal authority or evidence in support of this position.

In the court's view, the evidence Defendants rely upon does not affirmatively establish that their conduct was reasonable. Even if Defendants had met their initial burden, Plaintiffs proffer evidence in opposition to show that they requested (and offered to pay for) an arborist's report prior to the start of the construction, and that this request was refused.[18] Plaintiffs' evidence further indicates that jackhammers rather than hand tools were used for excavation work.[19] As this evidence disputes whether the Defendants acted reasonably in cutting back the subject tree, it presents a triable issue of material fact.

Accordingly, defendants Kho Liep Chok and Ya Hui Tu's motion for summary adjudication of the first cause of action [wrongful injury to tree] is DENIED.

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[15] *Id.* at Fact No. 9.

[16] *Ibid*., Declaration Kho Liep Chok in Support of Defendants' Motion for Summary Adjudication, ¶9.

[17] *Id.* at Fact No. 10.

[18] See Separate Statement in Opposition to Motion for Summary Adjudication, Response by Plaintiffs ("Plaintiffs' UMF"), Fact No. 5.

[19] *Ibid.*

D. Defendants Kho Liep Chok and Ya Hui Tu's motion for summary adjudication of the second cause of action [negative easement] is GRANTED.

In the second cause of action, Plaintiffs seek damages in relation to their claim of a negative easement protecting the area around the subject camphor tree. (FAC, ¶¶13-18.) Plaintiffs assert that the negative easement was created by their agreement with the prior owners of Defendants' property, and that Defendants acquired titled to 1689 Blaney subject to the negative easement. (*Id.*, ¶¶14-15.)

***Civil Code*,** section 887.010, defines an easement as "a burden or servitude upon land, whether or not attached to other land as an incident or appurtenance, that allows the holder of the burden or servitude to do acts upon the land."

> As easement is an *interest in the land of another,* which entitles the owner of the easement to a *limited use or enjoyment* of the other's land. An easement may be affirmative, allowing the doing of acts, or it may be negative, preventing acts from being performed on the property. It may be created by grant, express or implied, or by prescription.

(***Wolford v. Thomas*** (1987) 190 Cal.App.3d 347, 354, italics original, internal quotation marks and citations omitted.)

"The law is well settled in California, that the deed is the final and exclusive memorial of the intention and rights of the parties. [Citations.]" (***Wing v. Forest Lawn Cemetery Asso.*** (1940) 15 Cal.2d 472, 479.) "The burden is upon the party claiming the easement to prove all the elements essential to establish such a title." (***Matthiessen v. Grand*** (1928) 92 Cal.App. 504, 509, citing ***Costello v. Sharp*** (1924) 65 Cal.App. 152, 157.)

In the case of an equitable easement or restrictive covenant, there should be some written evidence indicating what property was affected by the restrictions. (***Citizens for Covenant Compliance v. Anderson*** (1995) 12 Cal.4th 345, 358; see also ***Riley v. Bear Creek Planning Committee*** (1976) 17 Cal.3d 500, 510; ***Werner v. Graham*** (1919) 181 Cal. 174, pp. 184-185.) Easements are subject to the Statute of Frauds. (***Hayward v. Mohr*** (1958) 160 Cal.App.2d 427, 432; see also ***Civil Code***, section 1624.)

Here, the Defendants point to the following fact in support of their motion for summary adjudication of the second cause of action: At his deposition, plaintiff Michael Yelavich testified under oath that he had no written proof of an easement and relied solely on the fact that the little white fence had been erected by the former owner.[20] (Mot., p. 8.) As addressed previously, Defendants also proffer evidence that the former owner of their property, Mr. Choi, denies that there ever was an easement regarding the tree.[21] Based on the authorities above, by establishing that there is no written evidence of the claimed negative easement, Defendants meet their initial burden.

In opposition, Plaintiffs admit that there never was a formal, written, or recorded easement.[22] Plaintiffs also assert that the alleged agreement between plaintiff Michael Yelavich and defendant Kho Liep Choi was a "verbal, hand-shake agreement."[23] Plaintiff further contend that even if there was no easement, the Defendants did not have the right to just hack back and damage the tree without considering less damaging alternatives.[24]

While Plaintiffs argue that Defendants had notice of an agreement to protect the tree, they do not direct the court to authority supporting their position that such notice operates to create the negative easement alleged

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[20] *Id.* at Facts No. 11, 22.

[21] *Id.* at Fact No. 3.

[22] See Plaintiffs' UMF, Facts No. 11, 22.

[23] *Id.*, Fact No. 3; Declaration of Michael Yelavich in Opposition to Motion for Summary Adjudication, p. 2, lns. 10-11.

[24] See Separate Statement in Opposition to Motion for Summary Adjudication, [Plaintiffs "Additional" Material Facts], Fact No. 4.

in the FAC. (Opp., pp. 10-11; see also ***Kim v. Sumitomo Bank*** (1993) 17 Cal.App.4th 974, 979 [court need not consider points unsupported by legal authority].) Plaintiffs do not meet their burden in opposing the motion as to this cause of action.

Accordingly, defendants Kho Liep Chok and Ya Hui Tu's motion for summary adjudication of the second cause of action [negative easement] is GRANTED.

IV. Order.

Defendants Kho Liep Chok and Ya Hui Tu's motion for summary adjudication of the first cause of action [wrongful injury to tree] is DENIED.

Accordingly, defendants Kho Liep Chok and Ya Hui Tu's motion for summary adjudication of the second cause of action [negative easement] is GRANTED.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 20CV372199 **Janine Mattos vs Impec Group, Inc.**

DATE: 05 March 2024 **TIME: 9:00 am** **LINE NUMBER: 09**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 04 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Plaintiff to Compel Defendant to Pay Expert Deposition Witness Fees.

I. Statement of Facts.

This complaint was filed on 14 October 2020.[1]

Plaintiff, a non-English speaking Colombian immigrant, was hired by defendant as a custodian to perform janitorial services at San Jose State University predominantly in the kitchen areas of University dormitory halls. Has been employed at Impec Group, Inc. since 20 May 2019. From 11 March to 26 May 2020, she performed janitorial services at San José State University which holds a contract with defendant.

After she became pregnant, plaintiff's physician wrote a note dated 15 May 2020 with work restrictions not to lift greater than 35 pounds, no climbing or bending, and requesting assignment two lighter duties. On 21 May 2020, she gave this note to Jacinto Malfavon, her supervisor. This gentleman told plaintiff that she needed to get a revised note from the doctor, stating that there were too many restrictions.

Wanting to keep working, she contacted her doctor and on 26 May 2020, her physician wrote a new note with restrictions no lifting greater than 35 pounds and please assign the plaintiff to lighter duties. She gave that new note to her supervisor who, on the same day, told her not to come in to work on the following Monday.

On to June 2020, the supervisor called plaintiff and she expressed a desire to return to work. The supervisor refused, telling her that she could not work with those restrictions. Plaintiff was not given a new

[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil ***Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

work assignment until 20 July 2020. Between 26 may 2020 and 20 July 2020, the plaintiff did not work and did not receive any pay because of defendant's failure to find a new position

The complaint alleges causes of action for:

1. Sex Discrimination (***Government Code***, § 12940(a); FEHA);

2. Pregnancy Discrimination (Sex Discrimination (***Government Code***, § 12940; FEHA);

3. Failure to Prevent Discrimination (Sex Discrimination (***Government Code***, § 12940(k); FEHA); and

4. Failure to Accommodate (***Government Code***, § 12940(m).)

On 13 May 2021 the parties filed a stipulated protective order which this Court executed on 10 May 2021.

II. Motion To Compel Defendant to Pay Expert Witness Fees.

The parties agreed to depose plaintiff's expert, Dr. Reading, on 27 April 2023 at 3:00 PM via the Assume virtual platform. On the day in question, the doctor's office emailed counsel for plaintiff saying that Dr. Reading was on his way back from court and should be available at 3:30 PM. Defense counsel canceled the deposition rather than wait 30 minutes.

The deposition was actually taken on 02 May 2023 in a session that lasted about 40 minutes consisting of 55 questions.

Dr. Reading sent to defense counsel a bill in the amount of $666.66 and defense counsel refuses to pay. Counsel for plaintiff seeks an order from this Court directing defense counsel to pay this invoice.

Also discussed in the moving papers is the court reporter fee of $500.00 that defense counsel sent to Dr. Reading for the canceled deposition and the videographer fee of $330.00 for the same canceled deposition.

III. Analysis.

Code of Civil Procedure, § 2034.40 states: "A party desiring to depose an expert witness. . . . . .shall pay the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed in the deposition subpoena, or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, regardless of whether the expert is actually deposed by any party attending the deposition."

In his declaration opposing the motion, defense counsel said that after being told that the doctor was stuck in traffic and not expected to be available until 3:30 PM, he did not feel it was reasonable to have everybody wait until Dr. Reading could begin the deposition. He sent to counsel for plaintiff a check in the amount of $166.66, representing the difference between the $500 or court reporter cancellation fee and Dr. reading's expert witness fee in the amount of $666.66.

Defense counsel also seeks $1,350.00 in sanctions for the drafting of the opposition papers.

The motion of plaintiff to compel defendant to pay the expert witness fees of Dr. Reading in the amount of $666.66 is GRANTED. Defense counsel is to pay that sum, less any credits of sums heretofore paid, within three days of the filing and service of this Order.

Counsel for plaintiff is to file notice of entry of the order.

As an aside and not a part of the formal order in this case, this Court wonders if there is some bad blood going on between counsel in this matter given what seems to be a fairly contentious history to this litigation, at least

in front of this Court. The parties are reminded to review the common wisdoms cited in the banner at the top of this Court's tentative ruling page.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

All trial dates are to REMAIN AS SET.

VI. Order.

The motion of plaintiff to compel defendant to pay the expert witness fees of Dr. Reading in the amount of $666.66 is GRANTED. Defense counsel is to pay that sum, less any credits of sums heretofore paid, within three days of the filing and service of this Order.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

161 North First Street, San Jose, CA 95113
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(For Clerk's Use Only)

CASE NO.: 23CV426482 Santa Clara Valley Open Space Authority vs Edgar Andrade
DATE: 05 March 2024 TIME: 9:00 am LINE NUMBER: 16

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 04 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Motion of Plaintiff Santa Clara Valley Open Space Authority for Immediate Possession of Property.

I. Statement of Facts.

Plaintiff filed this eminent domain complaint on 17 November 2023.[1]

Plaintiff alleges that on 05 October 2021, defendants purchased a vacant parcel adjacent to a 60-acre landholding in the Coyote Valley. The defendants sought permission to construct a single-family house covering 8,465 ft.² (the appraiser describes it as 4.648 acres), two accessory dwelling units, two garages covering 3,160 ft.², a driveway, and multiple covered patios on the property.

Plaintiff alleges that it identified the Coyote Valley as one of the highest priority landscapes for conservation in the Authority's 2014 Santa Clara Valley Green Print for the purpose of protecting agriculture, wildlife habitat and connectivity, climate resilience, and nature-based tourism. In recent years, $120 million in public and private funds have been expended to conserve the Coyote Valley.

The complaint finally alleges that the Proposed Development would effectively eliminate agricultural use of the Property, contributing to the loss of high-quality farmland, in addition to disrupting the Santa Teresa Blvd. scenic corridor and interfering with the safe passage for wildlife across Coyote Valley. The Proposed Development exemplifies the "intense development pressure" that the Legislature found Coyote Valley has been subjected to. (A.B. 948.) Public Resources Code section 35153 authorizes the OSA to exercise eminent domain to acquire "lands in agricultural production" that, like the Property, are "threatened by imminent conversion to developed uses."

On the same date, plaintiff filed a Lis Pendens on the property.

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil ***Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

II. Motion For Immediate Possession.

To ensure that Coyote Valley is not irreversibly damaged, the OSA made numerous attempts to purchase the Andrades' vacant parcel at fair market value. The Andrades refused to negotiate a sale of the Property and instead pressed forward with development of the residential compound. Plaintiff seeks an order from this Court requiring defendants to immediately turn over their 4.6 acre rural residential property for the creation of open space.

Defendants oppose the application.

III. Analysis.

A. Defendant's Evidentiary Objections.

Defendants have filed evidentiary objections to the declaration of Ms. Mackenzie. This Court has a simple view of objections to the evidence filed in support of various motions.

In connection with this motion, this Court is asked to rule on evidentiary objections. There is no legal basis requiring a court to rule on an evidentiary objection made in connection with a motion other than one for summary judgment or an anti-SLAPP motion. This Court believes there is none, and therefore this Court will decline to do so.

To the extent that plaintiff seeks to exclude portions of the transcript from evidence, the Court will not make such an evidentiary ruling in connection with a discovery motion or other routine law and motion matter. (See ***People v. Morris*** (1991) 53 Cal.3d 152, 188 (holding that a motion in limine is a motion brought before the trial court for the purpose of excluding evidence).)

In ***Reid v. Google, Inc.*** (2010) 50 Cal.4th 512, the California Supreme Court recognized that rulings must be made on evidentiary objections in summary judgment motions and on anti-SLAPP motions. That court also recognized that it has become a common practice for litigants to flood trial courts with inconsequential written evidentiary objections, without focusing on those that are critical.[2]

Motions must be supported by evidence, if the motion cannot stand solely on judicially noticed facts. *See* ***Olson Prtshp v. Gaylord Plating Lab*** (2d Dist. 1990) 226 Cal.App.3d 235, 242 n. 7. This evidence, including declarations must be attached to the notice of motion, if possible, and served with the motion papers. (***Code of Civil Procedure***, §§ 1005(b), 1010; Cal. ***Rules of Court***, rule 3.1113(j).)

Therefore, this Court will decline to rule on the specific evidentiary objections. Nevertheless, this Court has considered them.

B. *Code of Civil Procedure*, § 1255.010.

Code of Civil Procedure, § 1255.010 states:

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[2] "We recognize that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical. Trial courts are often faced with "innumerable objections commonly thrown up by the parties as part of the all-out artillery exchange that summary judgment has become. (citation omitted.) Indeed, the ***Biljac*** [***Associates v. First Interstate Bank*** (1990) 218 Cal.App.3d 141] procedure itself was designed to ease the extreme burden on trial courts when all too often litigants file blunderbuss objections to virtually every item of evidence submitted. (citations omitted); see also ***Nazir v. United Airlines, Inc.*** (2009) 178 Cal.App.4th 243, 248, 254 & fn. 3, [employer filed 324 pages of evidentiary objections, consisting of 764 specific objections, which the Court of Appeal characterized as the "poster child" for abusive objections].) To counter that disturbing trend, we encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count. Otherwise, they may face informal reprimands or formal sanctions for engaging in abusive practices. At the very least, at the summary judgment hearing, the parties—with the trial court's encouragement—should specify the evidentiary objections they consider important, so that the court can focus its rulings on evidentiary matters that are critical in resolving the summary judgment motion." (internal punctuation modified) (***Reid v. Google, Inc.*** (2010) 50 Cal.4th 512, 532-533.)

"(a) At any time before entry of judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, or summary of the basis for, the appraisal. The statement or summary shall contain detail sufficient to indicate clearly the basis for the appraisal, including, but not limited to, all of the following information:

(A) The date of valuation, highest and best use, and applicable zoning of the property.

(B) The principal transactions, reproduction or replacement cost analysis, or capitalization analysis, supporting the appraisal.

(C) If the appraisal includes compensation for damages to the remainder, the compensation for the property and for damages to the remainder separately stated, and the calculations and a narrative explanation supporting the compensation, including any offsetting benefits.

(c) On noticed motion, or upon ex parte application in an emergency, the court may permit the plaintiff to make a deposit without prior compliance with subdivision (b) if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit to be made is not less than the probable amount of compensation that the plaintiff, in good faith, estimates will be awarded in the proceeding. In its order, the court shall require that the plaintiff comply with subdivision (b) within a reasonable time, to be specified in the order, and also that any additional amount of compensation shown by the appraisal required by subdivision (b) be deposited within that time."

The OSA has deposited either $900,000.00 or $950,000.00[3] with the State Treasury as probable compensation. Plaintiff asserts that because the Andrades invested only $200,000 in the purchase of the land, the $900,000 OSA has deposited as probable compensation for the land would be $100,000 more than the $800,000 purchase price, giving the Andrades a 50% profit on their investment in only two years.

In support of the position that plaintiff is entitled to immediate possession of the property in question, the OSA cites ***Israni v. Superior Court*** (2001) 88 Cal.App.4th 621, 638 for the proposition that courts consider the immediacy and importance of a public agency's need in granting immediate possession. In ***Israni***, a condemnation action, the trial court granted a city's ex parte application for an order of immediate possession of property that was being leased by a veterans group as a homeless service center. The trial court subsequently denied the property owner's application to vacate the order. The Court of Appeal found that the property owner was given due process in the condemnation proceeding. As for the sense of urgency, the Court of Appeal noted that the 10-year lease term of the property was about to expire and had not been renewed. The trial court had an ample basis from which to conclude that the city had an ongoing need to provide the specific homeless services, which would have been seriously disrupted by any change in possession of the property.

Defendants here indicate that they wish to challenge the right of the OSA to exercise a right to condemn the property. The Eminent Domain Law includes procedural safeguards that ensure a prompt, if not final, adjudication of the right to take issue before judgment is entered following trial on the compensation issue. The owner may request that the right to take issue be heard in a bifurcated proceeding, and the matter is entitled to priority on the civil trial calendar. (***Code of Civil Procedure***, §§ 1260.010, 1260.110; ***Mt. San Jacinto Community College Dist. v. Superior Court*** (2005) 126 Cal.App.4th 619, 632-633.)

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[3] The discrepancy is in the figures stated in the moving Points and Authorities and with the declaration of Andrea Mackenzie and the appraiser asserting the figure of $950,000 which includes such as a land survey, preliminary site and home plans, and engineering work as submitted in the Santa Clara County Planning Development Application submitted by an engineering company on 05 October 2021.

Plaintiff argues that the adequacy of the probable compensation deposited by the plaintiffs or offered by the plaintiffs prior to the eminent domain action is not at issue in this motion, citing ***Redevelopment Agency of City of San Diego v. Mesdaq*** (2007) 154 Cal.App.4th 1111, 1125.[4] Plaintiff concludes by asserting that the amount of compensation, measured by the fair market value of the property on the date of value, is an issue reserved for trial. See ***Code of Civil Procedure***, § 1263.310; see also ***Metropolitan water District of Southern California v. Campus Crusade for Christ, Inc.*** (2007) 41 Cal.4th 954, 971. At the trial, according to plaintiff, the Andrades will have a full opportunity to present evidence through appraisers and other experts of the fair market value of the Property. (See, e.g., ***Code of Civil Procedure***, §§ 1258.210-1258.300, 1260.210-1260.250.) Neither party has the burden of proof on the amount of just compensation. (Id. § 1260.210(b); see also ***Department Of Transportation v. Salami*** (1991) 2 Cal.App.4th 37,45.)

Defendants oppose the motion, claiming that plaintiff failed to establish, by substantive admissible evidence, an urgent or "overriding" need for prejudgment possession or that it will suffer a hardship if possession is denied or limited. Since the County formally suspended the development application on 04 October 2023, there is no longer any urgency.

Defendants also assert that they are going to dispute the entitlement of plaintiff to exercise eminent domain in the first place. Additionally, defendants claim the moving papers have not showed that plaintiff would suffer a hardship if this motion were denied and if there is any hardship, it would not outweigh hardship suffered by the defendants.

Defendants further assert that plaintiff here in this eminent domain action is entitled to take possession of property by right only after entry of Judgment and the amount of the Judgment is paid. (***Code of Civil Procedure***, § 1268.210.)

Finally, defendants state that ***Code of Civil Procedure***, § 1255.410 requires a motion for prejudgment possession "…shall state the date which the plaintiff is seeking to take possession of the property." Here, OSA's motion fails to state the date it is seeking to take possession.

This Court concludes that this motion should be denied because plaintiff has not shown by a preponderance of the evidence that it would suffer harm if the immediate possession of the property was not given. This Court believes that the defendants are entitled to go through the established eminent domain procedures to determine if the property is subject to a taking in the first place as well as the issue of proper compensation.

The motion of plaintiff Santa Clara Valley Open-Space Authority for immediate possession of defendants property is DENIED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The Case Management Conference currently set for 28 May 2024 shall REMAIN AS SET.

VI. Order.

The motion of plaintiff Santa Clara Valley Open-Space Authority for immediate possession of defendants property is DENIED.

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[4] Disapproved on other grounds by ***Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC*** (2011) 52 Cal.4th 1100).

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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