SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

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

DATE: May 2, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

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

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

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

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

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

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

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website here:
https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	23CV428298	MADALEINE HAYES et al vs ARSENIA NAUGHTON	Defendant's Motion to Stay or Dismiss is DENIED. Defendant's Demurrer is SUSTAINED and OVERRULED, IN PART. Scroll to line 1 for complete ruling. Court to prepare formal order.
2	21CV375332	Chris Wilson vs SoundHound Inc. et al	Defendant's Demurrer to the Fifth Amended Complaint is OVERRULED. Scroll to line 2 for complete ruling. Court to prepare formal order.
3	22CV400012	Pacific States Environmental Contractors, Inc. vs Steleco LLC et al	Third Party Elizabeth Wong's Motion to Quash DPR Construction's Deposition Subpoena for Google's Production of Business Records is DENIED. There can be no dispute that Elizabeth Wong is an owner and has documents in her possession, custody, or control related to these lawsuits. The document requests are tailored to obtain documents related to the project, which documents are likely to be contained in Elizabeth Wong's gmail account given the evidence of other correspondence related to the project that was sent and received at that email address. While the consumer notice was served on Ms. Wong's counsel and she is not a party to the superior court litigation, any objection to service on her counsel rather than by personal service was plainly waived when that counsel responded to Google on her behalf. The subpoenaing party has also sought these communications from both parties and non-parties, thus Ms. Wong's argument that other less restrictive means have not been tried is incorrect. The Court finds substantial justification for this motion, and therefore fees are DENIED. Court to prepare formal order.
4-5	23CV422810	Isaiah Clapp et al vs City Heights at Pellier Park Homeowners Association et al	Defendant's demurrer is SUSTAINED with 20 days leave to amend; Defendant's motion to strike is DENIED as moot. Scroll to lines 4-5 for complete ruling. Court to prepare formal order.
6	21CV381190	Nayoung Lee vs Raul Arias et al	Defendant Cesario Cruz Mendoza's Motion to Compel Plaintiff's Responses to Special Interrogatories (Set Two), Supplemental Interrogatories, and Supplemental Requests for Production of Documents is GRANTED. Plaintiff does not dispute that she served no responses to these discovery requests. Plaintiff instead argues Defendant should have participated in an IDC, denies liability so is not entitled to damages related discovery, already has medical records, and produced inadequate responses to Plaintiff's discovery. Not one of these arguments is a basis for Plaintiff to choose not to respond to discovery. Plaintiff sued Defendant, and Defendant denies liability; this is not surprising, it is lawsuit. Nor is it a basis for Plaintiff to refuse to produce damages discovery. Informal discovery responses are not mandatory, and if Plaintiff is unhappy with Defendant's discovery responses, Plaintiff's recourse is meet and confer and, if that fails to resolve the issues, file a motion to compel. Plaintiff is ordered to produce complete, verified, code compliant responses to these discovery requests without objections and to produce the requested documents within 20 days of service of the formal order, which order the Court will prepare.
7	23CV414587	Lauren Robb et al vs Sunrun, Inc.	Defendant's motion to compel arbitration is GRANTED. The May 21, 2024 case management conference is VACATED. A status conference regarding the arbitration is set for January 9, 2025 at 10:00 a.m. in Department 6. Scroll to line 7 for complete ruling. Court to prepare formal order.
8	22CV393712	Illinois National Insurance Co. vs Accellion, Inc.	Plaintiff's motion to continue trial setting conference is DENIED. The court is currently setting trials in 2025. There is no reason the parties cannot meet and confer and select a trial date that permits remaining discovery and mediation to be completed well before trial. This order will be reflected in the minutes.

9	22CV398160	Roger Swanson et al vs Drew Parrish et al	Defendants' Motions for Sanctions against Roger Swanson and Michelle Swanson are GRANTED. Notices of these motions with this hearing date was served on Plaintiffs by U.S. mail on March 19, 2024. Plaintiffs did not file oppositions. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) And these motions are meritorious. Plaintiffs initiated this lawsuit on May 9, 2022. Other than serving the lawsuit, Plaintiffs have done little to participate in their case. They failed to respond in any way to relevant discovery requests; failed to respond in any way to a motion to compel those responses; and failed to comply in any way with the Court's December 21, 2023 order—even after appearing at a February case management conference where Defendants indicated they would provide additional time for such compliance before filing a motion for terminating sanctions. Now, Plaintiffs failed even to oppose Defendants' motion for terminating sanctions. The Court finds Plaintiffs' failure to participate in their own lawsuit, including by unequivocally violating the Court's simple, straightforward discovery order, warrants terminating sanctions. The Court therefore dismisses this case with prejudice. Plaintiffs are further ordered to pay the earlier ordered $860 in sanctions and an additional $560 for Defendants' preparation and filing of these motions for terminating sanctions within 20 days of service of this formal order, which the Court will prepare.
10	22CV402927	JANE DOE vs DOE 1 et al	Defendant San Jose Unified School District's motion for terminating sanctions is GRANTED. A notice of motion with the original hearing date and time was served on Plaintiff by U.S. mail on March 5, 2024. Plaintiff filed no opposition and did not appear at that hearing date. In fact, Plaintiff has not participated in her lawsuit for over a year, including failing to respond to discovery, failing to appear and show cause why the case should not be dismissed, failing to comply with the Court's January 19, 2024 order compelling Plaintiff to produce discovery and pay sanctions, and failing even to respond to Defendants' motion for terminating sanctions. Plaintiff's lack of participation in this lawsuit even in the face of lesser sanctions makes clear that no sanction other than dismissal with prejudice is now appropriate. Accordingly, this action is dismissed with prejudice. Court to prepare formal order.
11	23CV419688	SENTHIL SANTHANAM vs KIA AMERICA, INC. et al	Defendant's Motion to Set Aside Default is GRANTED. A notice of motion with this hearing date was served by electronic mail on March 20, 2024. Plaintiffs did not file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion pursuant to Code of Civil Procedure section 473(b), and Plaintiff will suffer no prejudice. Accordingly, default is set aside, and Defendant is ordered to file an answer within 10 days of service of the formal order, which order the Court will prepare.
12	24CV429014	GREGORY MALLEY vs 28TH STREET BART LLC	Specially appearing Defendant 28th Street Bart LLC's motion to expunge lis pendens and for attorneys' fees is GRANTED. Scroll to line 12 for complete ruling. Court to prepare formal order.

Calendar Line 1
Case Name: *Pisamai Cuesta & Madaleine Hayes v. Arsenia Naughton*
Case No.: 23CV428298

Before the Court is Defendant, Arsenia Naughton's motion to stay or dismiss the Plaintiff's complaint pursuant to Code of Civ. Proc. § 410.30(a). Alternatively, Defendant demurrers to the complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from alleged breach of a lease agreement. According to the complaint, on June 12, 2022, the parties entered into a written lease agreement for a commercial space located in Angeles City, Philippines and owned by Defendant ("Property"). (Complaint ¶ 1) Both parties are residents in the State of California and the lease agreement was signed in California. The lease agreement contains a choice-of-law provision stating "[t]his agreement is to be governed under the laws located in the State or Country where the premises is located." (Complaint Ex. A.)

Plaintiffs fully performed their obligations under the lease agreement including timely deposit of the required "advance payment" and regular rent payments to Defendant. (Complaint ¶¶ 7, 8.) Defendant breached the lease agreement by leasing the Property to another tenant during the term of the agreement and without Plaintiffs' consent. Defendant has refused to grant Plaintiffs access to or occupancy of the Property since the commencement of the lease. The third-party tenant has since taken occupancy of the Property. (Complaint ¶¶ 11, 12)

Plaintiffs filed this action on December 20, 2023, alleging (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, and (3) unjust enrichment. Defendants move to dismiss the action for lack of subject matter jurisdiction under Code of Civil Procedure section 430.10(a), or, in the alternative demurrer to the complaint.

II. Applicable Law

Defendant argues the Court must apply the law of the Philippines. California applies the principles set forth in section 187 of the Restatement Second of Conflict of Laws ("Rest. §187") to determine the enforceability of contractual choice-of-law provisions. (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464–466 (*Nedlloyd*), citing Rest. § 187, subd. (2).) Under Rest. §187, the parties' choice of law generally governs unless (1) it conflicts with a state's fundamental public policy,

and (2) that state has a materially greater interest in the determination of the issue than the contractually chosen state. (*Nedlloyd, supra*, 3 Cal.4th at pp. 465–466.)

"[T]he proper approach under Restatement §187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. [Fn. omitted.] If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. [Fn. omitted.] If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a 'materially greater interest than the chosen state in the determination of the particular issue ….' (Rest., § 187, subd. (2).) If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy." (*Nedlloyd, supra*, at p. 466; see also, *Pitzer College v. Indian Harbor Ins. Co.* (2019) 8 Cal. 5th 93.) Thus, if the party opposing the application of the choice of law provision can establish "both that the chosen law is contrary to a fundamental policy of California and that California has a materially greater interest in the determination of the particular issue," then the court will not enforce the provision. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 917.)

Here, Section I of the lease agreement identifies the leased premises as a "commercial space, with an area of 398 SQ FT, more or less, specifically located at 222 Fields Avenue, Balibago, Angeles City; Philippines." Section VIII of the lease agreement provides: "GOVERNING LAW. This Agreement is to be governed under the laws located in the State or Country where the Premises is located." The parties thus agreed the laws of Philippines governs the lease agreement. Plaintiffs contend the scope of this provision is limited to causes of action requiring interpretation or enforcement of the contract at issue. However, "[t]he phrase 'governed by' is a broad one signifying a relationship of absolute direction, control, and restraint. Thus, the clause reflects the parties' clear

contemplation that 'the agreement' is to be completely and absolutely controlled by [Philippines'] law. No exceptions are provided." (*Nedlloyd, supra*, at 469.)

However, applying *Nedlloyd's* choice-of-law analysis, for Philippines law to apply, Defendant, as the party advocating application of the Philippines' laws, has the burden to establish either (1) Philippines has a substantial relationship to the parties or their transaction or (2) another reasonable basis for the parties' choice of law. (*Washington Mut. Bank, FA v. Superior Court*, (2001) 24 Cal. 4th 906, 917.) Defendant fails to meet that burden. That the property is located in Philippines is insufficient. While Philippine law may govern real properties located in the Philippines, Defendant fails to show how the Philippines has a substantial relationship to the parties' transaction or dispute since the dispute does not involve or pertain to transfer of title, ownership interest, construction, or operation of the property. Defendant presents no other reasonable basis for the parties' choice of Philippine laws. Neither party is domiciled in Philippines or has their principal place of business in the Philippines. Instead, the complaint alleges the parties reside in California, and the lease agreement was executed in California.

Since neither of the tests from Rest. § 187 is met, "that is the end of the inquiry, and the court need not enforce the parties' choice of law." (*Nedlloyd*, *supra*, at 466.)

III. Motion to Stay or Dismiss – Forum Non Conveniens

A defendant may move to stay or dismiss an action on grounds of inconvenient forum. (Code Civ. Pro. § 418.10(a)(2).) The doctrine of forum *non conveniens* is codified in Code of Civil Procedure, section 410.30. (*Animal Film, LLC v. D.E.J. Prods., Inc.* (2011) 193 Cal.App.4th 466, 471.) Code of Civil Procedure, section 410.30, subdivision (a) provides: "[w]hen a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." (Code Civ. Pro. § 410.30(a).)

"In applying the traditional forum non conveniens analysis, the trial court must engage in a two-step process, on which the defendant bears the burden of proof. [Citation.] In the first step, the court must determine whether a suitable alternative forum exists. [Citation.] If the court finds that a suitable alternative forum exists, it must then balance the private interests of the litigants and the

interests of the public in retaining the action in California. [Citation.]" (*Animal Film, supra*, 193 Cal.App.4th at p. 472.)

An alternate forum is suitable if the defendant is subject to its jurisdiction and the cause of action is not barred by the statute of limitations. (*Guimei v. General Electric Co.* (2009) 172 Cal. App. 4th 689, 696.) "So long as there is jurisdiction and no statute of limitations bar, a forum is suitable where an action 'can be brought,' although not necessarily won." (*Shiley Inc. v. Superior Court* (1992) 4 Cal.App.4th 126, 132.)

In balancing the private and public interests of the litigation, the court will consider (1) the ease of access to sources of proof, (2) the cost of obtaining attendance of witnesses, (3) the availability of compulsory process for attendance of unwilling witnesses, (4) the enforceability of the ensuing judgment, (5) avoidance of overburdening local courts with congested calendars, (6) protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and (7) weighing the competing interests of California and the alternate jurisdiction in the litigation. (*Nedlloyd, supra*, at 64-67.)

Here, Defendant points to the Property's location in the Philippines, but fails to show (1) Philippine law provides a remedy for Plaintiffs' claims, (2) the action will not be barred by a statute of limitations, and (3) how private or public interest factors weigh in favor of staying or dismissing this action. In fact, public and private interests weigh *against* dismissal since the parties and witnesses reside in California, the lease agreement was executed in California, and a monetary judgement can be enforced in California.

The Court also agrees with Plaintiff that this action is transitory, which further supports denying Defendants' motion to dismiss. "To determine whether an action is local or transitory, the court looks to the 'main relief' sought. Where the main relief sought is personal, the action is transitory. Where the main relief relates to rights in real property, the action is local. [Citation.]" (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 482, fn. 5.) "It is the rule that 'where the main relief sought is personal, the fact that title or possession of real property is incidentally involved does not change its character as a Transitory action.'" (*Central Bank v. Superior Court* (1973) 30 Cal.App.3d 913, 918; *Peiser v. Mettler* (1958) 50 Cal.2d 594, 604.) Ordinarily,

the proper county for trial of a transitory action is the county in which the defendants or some of them reside. (Code Civ. Proc., § 395; *Cholakian & Associates v. Superior Court* (2015) 236 Cal.App.4th 361, 368.)

Here the complaint seeks monetary damages for breach of contract, breach of implied covenant of good faith and fair dealing, and unjust enrichment. While lease of real property is incidentally involved, the action is transitory since the relief sought is monetary and personal. (*Peiser v. Mettler* (1958) 50 Cal.2d 594, 601–602 [cause of action for damages for breach of contract is clearly a transitory cause of action].) Therefore, the proper venue for this action is the county in which the defendant resides, i.e., Santa Clara.

Defendant's motion for dismissal or stay of the complaint pursuant to Code of Civil Procedure section 410.30(a) is DENIED.

V. Demurrer

A. Legal Standard

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

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

notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

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

Defendant demurrers to the complaint's causes of action for (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, and (3) unjust enrichment.

B. Analysis

1. Breach of Contract

Defendant demurs to this claim pursuant to Code of Civil Procedure section 430.10(a), arguing the Court does not have subject matter jurisdiction since the leased Property is in Philippines. Subject matter jurisdiction refers to the court's power to hear and resolve a particular dispute or cause of action. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196; *Donaldson v. National Marine, Inc*. (2005) 35 Cal.4th 503, 512.) The California Constitution confers broad subject matter jurisdiction on the superior courts. (Cal. Const., art. VI, § 10.) Each superior court has general subject matter jurisdiction, meaning that it can adjudicate all cases brought before it, with some exceptions for courts of limited jurisdiction. (Code Civ. Proc., §§ 85 et seq.; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020); *Long v. Forty Niners Football Co., LLC* (2019) 33 Cal.App.5th 550, 556.) A demurrer based on "subject matter jurisdiction" is that the trial court cannot render a judgment. (Code Civ. Proc., § 430.10(a).)

A claim of inconvenient forum is not a basis for a demurrer. (*Miller-Leigh LLC v. Henson* (2007) 152 Cal.App.4th 1143, 1150.) Such a finding would necessarily require the consideration of extrinsic evidence, which is not permissible on demurrer. (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905.)

Accordingly, Defendant's demurrer to the first cause of action for breach of contract is OVERRULED.

B. Breach of Covenant of Good Faith and Fair Dealing

The elements of a breach of the implied covenant of good faith and fair dealing include the existence of a contractual relationship between the parties, an implied duty, breach, and causation of damages. 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 that was made. The covenant thus cannot be endowed with an existence independent of its contractual underpinnings. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349-350.)

Defendant contends the complaint fails to allege a viable claim because (1) Defendant did not interfere with Plaintiffs' rights to receive the benefits from their leased portion of the property, (2) no allegations are pleaded showing how leasing the second building to a third party interfered with Plaintiffs' right to receive benefit for their leased portion, (3) Plaintiffs are not entitled to any benefits from the second building that was leased to the third-party tenant.

In opposition, Plaintiffs contend Defendant's factual assertions do not pertain to matters or defects that appear on the face of the complaint and are instead matters for trial. The Court agrees. Plaintiffs plead the existence of a contractual relationship between the parties, implied duty on both parties to refrain from actions that would injure the other's right to receive benefits from the contract, Defendants' breach of this duty, and causation of damages. (Complaint, ¶¶ 6-13, 16-18).

Accordingly, Defendant's demurrer to the second cause of action for breach of implied covenant of good faith and fair dealing is OVERRULED.

C. Unjust Enrichment

There appears to be a split of appellate authority as to whether California recognizes an independent cause of action for unjust enrichment. (See *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 ("There is no cause of action in California for unjust enrichment[;]" it "is a general principle, underlying various legal doctrines and remedies, rather than a remedy

itself.") (internal quotations omitted); *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117 (same); *Elder v. Pacific Bell Telephone Co*. (2012) 205 Cal. App. 4th 841 ("This allegation satisfies the elements for a claim of unjust enrichment: receipt of a benefit and unjust retention of the benefit at the expense of another." (internal citations and quotations omitted); *Lectrodryer v. Seoulbank* (2000) 77 Cal. App. 4th 723 (affirming judgment for plaintiff on unjust enrichment claim).

However, this Court falls under the Sixth Appellate District, and that court of appeal unequivocally held in a 2020 decision:

> [Plaintiff's] complaint includes a cause of action entitled unjust enrichment. Summary adjudication of that claim was proper because California does not recognize a cause of action for unjust enrichment. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 [131 Cal. Rptr. 2d 347] [the phrase "unjust enrichment" does not describe a theory of recovery; it is a general principle underlying various legal doctrines and remedies].)

(*Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal. App. 5th 323, 336.) Accordingly, Defendant's demurrer to this cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

Calendar Line 2
Case Name: *Chris Wilson v. Soundhound, Inc., et al.*
Case No.: 21CV375332

Before the Court is Defendants SoundHound, Inc., SoundHound AI, Inc. ("SoundHound AI"), and Keyvan Mohajer's ("Mohajer") (collectively, "SoundHound" or "Defendants") demurrer to Chris Wilson's fifth amended complaint ("5AC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from Wilson's alleged wrongful termination. According to the allegations of the 5AC, Wilson was employed by SoundHound from November 29, 2011, to August 30, 2019. (5AC, ¶ 19.) SoundHound is a digital voice application company that enables humans to speak naturally to their smartphones and other devices. (5AC, ¶ 19.) Wilson was initially hired as a Principal Engineer and later he was promoted to Architect. (5AC, ¶ 20.) He created a significant amount of SoundHound's intellectual property, and he was an integral employee. (*Ibid*.)

Over the course of his seven-and-a-half-year employment, Wilson received 170,000 shares in stock option grants, in addition to his annual base salary and cash bonuses. (5AC, ¶¶ 21-23.) The total value of his vested stock options in 2019 totaled approximately $4.8 million to $5.9 million in equity. (5AC, ¶ 23.)

On May 10, 2019, without advanced notice or good cause, SoundHound placed Wilson on a leave of absence, and in September 2019, terminated his employment. (5AC, ¶ 24.) The termination was the culmination of an unlawful retaliation campaign against Wilson for exercising his privacy rights under the California Constitution by refusing to sign an intrusive digital data agreement with SoundHound, whereby the company sought to monitor all professional and personal communications of all employees on any device at any time. (*Ibid*.) After the termination, SoundHound refused to permit Wilson to exercise the equity on the terms agreed to in his written and oral employment contracts. (5AC, ¶ 25.)

Wilson initiated this action on January 24, 2021, and on February 6, 2023, he filed his amended complaint, which asserted: (1) wrongful termination in violation of public policy; (2) retaliation; (3) detrimental reliance; (4) violation of the covenant of good faith and fair dealing; (5)

fraud and deceit; (6) declaratory relief and specific performance; (7) reformation and partial recission; (8) injunctive relief; (9) breach of fiduciary duty; (10) violation of penal code sections 484 & 496; and (11) failure to maintain wage statements. SoundHound filed a demurrer to the fourth, tenth, and eleventh causes of action. On June 9, 2023, the Court issued its order sustaining the demurrer to the amended complaint.

On June 20, 2023, Wilson filed his third amended complaint ("TAC") which asserted the same causes of action. On July 19, 2023, SoundHound filed a demurrer to the fourth, tenth, and eleventh causes of action. On October 27, 2023, the Court issued its order (the "Order") sustaining the demurrer to the fourth and tenth causes of action with leave to amend and overruling the demurrer as to the eleventh cause of action.

On January 4, 2024, Wilson filed his 5AC, asserting, (1) wrongful termination in violation of public policy; (2) retaliation; (3) detrimental reliance; (4) fraud and deceit; (5) violation of the covenant of good faith and fair dealing; (6) declaratory relief and specific performance; (7) reformation and partial recission; (8) injunctive relief; (9) breach of fiduciary duty; (10) violation of penal code sections 484 & 496. On February 27, 2024, SoundHound filed the instant demurrer, which Wilson opposes.

II. Legal Standard

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

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual

allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendants demur to the fourth and tenth causes of action on the ground they fail to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

A. Sham Pleading

Generally, after an amended pleading is filed, the original pleading is superseded. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.) Courts will assume the truth of the factual allegations in the amended pleading for purposes of demurrer. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383 (*Owens*).) However, under the sham pleading doctrine, "admissions in an original complaint… remain within the court's cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff's case will not be accepted.'" (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061.) The purpose of the doctrine is to "enable the courts to prevent an abuse of process." (*Hanh v. Mirda* (2007) 147 Cal.App.4th 740, 751.) "[W]here 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," the court may examine the prior complaint to ascertain whether the amended pleading is merely a sham. (*Owen, supra,* 198 Cal.App.3d at p. 383.)

"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." (*Ibid.*) A pleading cannot be summarily dismissed if the sham pleading doctrine applies as the pleader must be given the opportunity to provide an explanation for the incompatible pleadings. (See *Owens*, *supra*, 198 Cal.App.3d at 384 [pleader must be given

opportunity to explain inconsistency]; see also *Deveny v. Entropin, Inc*. (2006) 139 Cal.App.4th 425-426 [sham pleading doctrine is inapplicable where pleader offers plausible explanation for amendment].)

Defendants argue the 5AC is a sham pleading because Plaintiff omitted paragraph 43 from 5AC, which alleged Wilson "was aware of the risk that the company that might fail before reaching a liquidity event or could be financially unsuccessful enough that a liquidity even would provide little to no value." (TAC, ¶ 43.) The Court identified paragraph 43 from the TAC as a contradictory allegation because it demonstrated Wilson's knowledge that the liquidity event was not guaranteed, thus, his knowledge that he may never get to exercise his stock options. In response, Wilson contends the allegation is not material to his fraud claim. (Opp. 5:5-7.) However, it appears that such knowledge is relevant to his fraud claim and its absence is to avoid the defects identified in the Order. Thus, the sham pleading doctrine applies and the Court will read the allegation into the 5AC.

SoundHound argues Wilson's allegations contradict each other as he alleges SoundHound represented to him that he could only exercise his options during a liquidity event; he could exercise his options in advance of a liquidity event; he could exercise them as soon as they vested; and he could exercise them within 30 days of his termination in the absence of a liquidity event. (See 5AC, ¶¶ 30, 33-34, 74.)

Wilson alleges he agreed with SoundHound that he would paid a below market rate salary in exchange for stock options that "he would be able to exercise in advance of or at the time of liquidity events." (5AC, ¶ 30.) Liquidity events include going "through an IPO, a sale of the company or another liquidity event." (5AC, ¶ 33.) Wilson consistently alleges throughout the pleading that the stock options were vested but they could only be exercised during the occurrence of a liquidity event. Allegations regarding the option to exercise the stock options in the absence of a liquidity event refer to his options after termination, which is after the relevant time of the alleged misrepresentations. Thus, Wilson allegations as to when he could exercise his stock options are not contradictory.

SoundHound further argues Wilson's allegations about whether he could exercise his stock options are contradictory because Wilson alleges he was not in a financial position to exercise them absent liquidity events. (MPA, p. 9: 21-25.) However, Wilson alleges the purpose of exercising the

stock options during a liquidity event was to avoid having to pay money to cash it out, which is consistent with his allegations that the stock options were part of his compensation. (See 5AC, ¶¶ 14-17, 21-23, 37.) Wilson's theory is that he was unable to exercise *all* of his stock options during a liquidity event, which would not require him to pay to cash it out. Thus, his allegations are not contradictory.

B. Fourth Cause of Action- Fraud and Deceit

To state a claim for fraud, a plaintiff must plead: (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792 (*West*.) "Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (*Id*. at 793 [citation and quotation marks omitted].)

Wilson received stock option grants on the following dates:

(1) December 12, 2011: 40,000 shares at $2.43 per share;

(2) July 10, 2014: 40,000 shares at $5.18 per share;

(3) July 28, 2015: 40,000 shares at $7.72 per share;

(4) September 3, 2016: 20,000 shares at $12.01 per share;

(5) September 6, 2017: 20,000 shares at $12.10 per share; and

September 3, 2018: 10,000 shares at $14.47 per share. (5AC, ¶ 31.)

Wilson alleges Mohajer represented to him that he would be able to liquidate his stocks during the occurrence of *any and all* liquidity events. (5AC, ¶¶ 30, 34 [emphasis added].) He further alleges he was given the opportunity to exercise only 10% of his options during a liquidity event on October 17, 2018. (5AC, ¶¶ 35-37.) Thus, he was unable to exercise the remaining 90% of his stock options.

(5AC, ¶ 36.) As Wilson alleged in the TAC, a liquidity event was not certain (see TAC, ¶ 43), but it was necessary for Wilson to exercise his options. Therefore, the representations did not pertain to a past or existing material fact. Thus, Wilson cannot state a claim for fraudulent misrepresentation on this basis. However, Wilson's claim is also based on concealment.

The elements of fraud based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiffs, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiffs, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damages. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198 (*Jones*).)

"To maintain a cause of action for fraud through nondisclosure or concealment of facts, there must be allegations demonstrating that the defendant was under a legal duty to disclose those facts. (*Los Angeles Memorial Coliseum Commission, et al. v. Insomniac, Inc. et al.* (2015) 233 Cal.App.4th 803, 831.) "There are four circumstances in which nondisclosures or concealment may constitute actionable fraud: (1) where the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. (*LiMandri v. Judkins* (1997) 52 CalApp.4th 326, 336, quoting *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651.)

Wilson alleges SoundHound, including Mohajer as the Chief Executive Officer, had a duty to disclose facts regarding his compensation and possible loss of that compensation as part of the employer-employee relationship. (5AC, ¶ 118.) SoundHound is incorrect that the Court determined it did not owe Wilson a duty. However, the Order states: "Wilson *fails to allege* SoundHound had a duty to disclose any facts to him..." (Order, 7:21-22 (emphasis added).) SoundHound fails to argue it does not have a duty, thus the argument is waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When [a party] fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."]

Wilson alleges Mohajer "actively engaged in a campaign to represent to [him] that there was no risk he would be stripped of the opportunity to exercise vested stock options at liquidity events." (5AC, ¶ 49.) He alleges SoundHound concealed the facts regarding his compensation and the possible loss of it, including denying Wilson the ability to exercise those options at liquidity events, with the intent to persuade him, to his detriment, to continue his employment with SoundHound. (5AC, ¶¶ 115, 119-120.) Wilson began his employment on November 29, 2011, and he alleges that every time he received stock options, Mohajer would confirm his ability to exercise the stock options, while concealing the possibility that he would lose the stock options if he left the company, or that he would need to come up with a significant cash outlay to exercise his options. (5AC, ¶ 32.) He further alleges if he knew his stock options could be taken away, he would not have continued working at SoundHound and he has suffered damages as a result. (5AC, ¶¶ 49, 123-124.)

SoundHound contends Wilson's knowledge that a liquidity event could not take place means he was aware of the material facts, however, the aforementioned knowledge is not the same as knowledge of the possibility that his ability to exercise all of his stock options could be taken from him. Therefore, Wilson alleges sufficient facts to state a claim for fraudulent concealment, and the demurrer to the fourth cause of action is OVERRULED.

C. Tenth Cause of Action-Violation of Penal Code Sections 484 and 496

Penal Code section Section 484 defines theft, i.e., the taking of money, labor, or real or personal property of another, to include theft by false pretense. (Pen. Code, § 484, subd. (a); *People v. Gomez* (2008) 43 Cal.4th 249, 255, fn. 4.) "Penal Code section 496, subdivision (a) … makes receiving or buying property 'that has been obtained in any manner constituting theft' a criminal offense punishable by imprisonment. Section 496, subdivision (c) ... provides that any person 'who has been injured by a violation of [section 496, subdivision (a)] … may bring an action for three times the amount of actual damages, if any, sustained by plaintiff, costs of suit, and reasonable attorney's fees." (*Bell v. Feibush* (2013) 212 Cal.App.4th 1041, 1043.) "[T]he elements required to show a violation of section 496, subdivision (a), are simply that (i) property was stolen or obtained in a manner constituting theft, (ii) the defendant knew the property was stolen or obtained, and (iii) the defendant received or had possession of the stolen property." (*Switzer v. Wood* (2019) 35 Cal.App.5th

116, 126 (*Switzer*).) Statutory causes of action must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*).)

SoundHound argues this claim fails because it relies on the same facts as the fraud claim which fails as well, but this argument is without merit as the demurrer to the fraud claim has been overruled.

Wilson alleges SoundHound retained stock that should have been provided to him and in doing so, they knowingly received and deliberately withheld stock from him, and that said funds have therefore been stolen from him or obtained in a manner constituting theft. (5AC, ¶ 144.) Wilson further alleges the requirement of a release of claims in return for Wilson's ability to convert his shares and sell them constituted theft of personal property because the proceeds from the sale of stock was taken from him. (5AC, ¶ 142.)

It does not appear that the parties dispute the fact that stock options constitute personal property. However, SoundHound argues Wilson fails to allege how it obtained the stock through false pretenses and its knowledge at the time the stocks were withheld.

On April 26, 2022, SoundHound, Inc. merged with Archimedes Tech SPAC Partners Co. and created SoundHound AI. (5AC, ¶ 80.) As a result, all outstanding shares of SoundHound, Inc., including Wilson's exercised shares, were cancelled in exchange for the right to receive shares of SoundHound AI. (*Ibid*.) He alleges his vested stock options were stripped from him at the time of the merger in a manner constituting theft, and after he only had 3,000 shares remaining from the October 17, 2018, liquidity event. (5AC, ¶¶ 80, 142.) As part of the merger, on May 1, 2022, SoundHound AI's transfer agent sent Wilson a release agreement (the "Release Agreement"), which it claims was necessary to receive the new shares to replace the cancelled SoundHound, Inc. shares. (5AC, ¶ 81.) The Release Agreement would have required Wilson to release all claims against SoundHound, Inc., which would have released claims asserted in this matter. (*Ibid*.) Wilson provided a modified agreement, which did not release his claims and SoundHound AI refused to accept it, as the price paid for the new stock dropped from $18.14 to $2.77. (5AC, ¶ 82.) On May 16, 2022, SoundHound AI provided an acceptable modified Release Agreement, which caused a 15-day delay in Wilson's ability to sell his stock at prices ranging from $5.41 to $5.45 and resulted in a loss of $212,015. (5AC, ¶ 83.) Wilson alleges, upon information and belief, that the demand for release of claims was intentional and

designed to trick him into releasing his claims or extort a release from Plaintiff. (5AC, ¶ 84.) On this basis, Wilson alleges SoundHound knowingly received and deliberately withheld stock from him in a manner constituting theft and as a result, he has suffered harm. (5AC, ¶¶ 145-146.) Wilson alleges sufficient facts to state this claim. Thus, the demurrer to the tenth cause of action is OVERRULED.

Calendar Lines 4-5
Case Name: *Isaiah Clapp & Diana Clapp v. City Heights at Pellier Park Homeowners Assn. et.al*.
Case No.: 23CV422810

Before the Court is Defendant City Heights at Pellier Park Homeowners Association's ("Association") motion to strike portions of and demurrer to Plaintiffs' verified complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from condominium-owners' dispute with the Association over repair of water pipes in the common areas. According to the allegations of the verified complaint, Plaintiffs are the record owners and residents of the condominium unit located at 175 W. Saint James St., Unit 105, San Jose, California ("Property"). (Complaint, ¶ 1.) The Property is part of a common interest development ("CID") managed by the Association in accordance with its Governing Documents. (Complaint, ¶¶ 2-3.) Defendant Christopher Gunnucio is the President of the Association's Board of Directors; Defendant Richard Dudley is the Vice President; Defendant David Pandori is the Secretary; Defendant Steven Reichner is the Treasurer; Defendant Catherine Pandori is a former volunteer director of the Association and the spouse of Defendant David Pandori. (Complaint, ¶ 4.) Plaintiff Isaiah Clapp is also a member of the Board of Directors. (Complaint, ¶ 5.)

Plaintiffs allege their Property was damaged by water leaks that occurred in June of 2022, August of 2022, November of 2022, and August of 2023. Damage from the June 2022, August 2022, and August 2023 occurrences were caused by pinhole leaks in common area pipes, while damage in November 2022 was caused by back flow waste from the pipes. (Complaint, ¶¶9-12.) The Association hired plumbers to repair the pipes, which consisted of removing and replacing the affected section of a long pipe by cutting and welding new pipes into old pipes. (Complaint, ¶ 21.)

The Association also retained a plumbing expert, a licensed engineer, to investigate the status of the common area pipes who drafted a report recommending replacement of the common area water pipes since they were originally installed with too much welding flux. (Complaint, ¶ 22.) The Board of Directors did not accept the recommendation and suppressed it from disclosure to Plaintiffs and the membership. (Complaint, ¶¶ 23, 47.) The Board of Directors also refused to reimburse Plaintiffs for their damages, refused Plaintiff Isaiah Clapp's demand to add plumbing repairs to the agenda of

meetings of the Board of Directors, and refused to include his remarks about common area pipes in the official minutes of meetings of the Board. (Complaint ¶¶ 19, 20, 47.)

On September 13, 2023, Plaintiffs filed their verified complaint against the Association and its officers for (1) trespass, (2) nuisance, (3) waste, (4) negligence, (5) breach of fiduciary duty, (6) breach of contract, (7) declaratory relief.

II. Legal Standard

A. Demurrer

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).) A demurrer for uncertainty will be sustained only where the complaint is so deficient that the defendant cannot reasonably respond – i.e., the defendant cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against them. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).)

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

found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. Motion to Strike

Motions to strike are used to reach defects or objections to pleadings that are not challengeable by demurrer, such as words, phrases, and prayers for damages. (Code Civ. Proc. §§ 435, 436, & 437.) The proper procedure to attack false allegations in a pleading is a motion to strike. (Code Civ. Proc. § 436(a).) In granting a motion to strike made under Code of Civil Procedure section 435, "[t]he court may, upon a motion made pursuant to Section 435 [notice of motion to strike whole or part of complaint], or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc. § 436(a).) Irrelevant matters include immaterial allegations that are not essential to the claim or those not pertinent to or supported by an otherwise sufficient claim. (Code Civ. Proc. § 431.10.) The court may also "[s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc. § 436 (b).) The grounds for moving to strike must appear on the face of the pleading or by way of judicial notice. (Code Civ. Proc. § 437.)

III. Analysis

A. Demurrer

The Association demurrers to the third cause of action for waste and the sixth cause of action for breach of contract.

1. Waste

Under California law, "[w]aste is conduct (including both acts of commission and of omission) on the part of the person in possession of land which is actionable at the behest of, and for the protection of the reasonable expectations of, another owner of an interest in the same land." (*Cornelison v. Kornbluth*, (1975)15 Cal. 3d 590, 597-98; See also *Avalon Pacific-Santa Ana, L.P. v. H.D. Supply Repair & Remodel, LLC*, (2011) 192 Cal. App. 4th 1183, 1212 (*Avalon*).) "Waste will be found only when the market value of property is permanently diminished or depreciated." (*Smith v. Cap Concrete, Inc.*, (1982)133 Cal. App. 3d 769, 777.) In this context, "[p]ermanent does not inflexibly mean eternal; instead, 'permanent' means a degree of

irremediableness sufficient to cause injury to a reversion interest that will not become a possessory interest until the end of the lease term." (*Avalon, supra,* 192 Cal.App.4th at 1212.)

The Association contends the complaint fails to state a cause of action for waste because (1) Plaintiffs are suing for damage to their unit i.e., separate interest and not for damage to the common areas, and (2) the Association has no ownership or possessory interest in their unit. The complaint alleges:

- Plaintiffs have an ownership interest in both their own separate interest and the common areas. (Complaint ¶ 35)
- The Association has actual, exclusive control over the common area pipes, which are owned in common by the members. (Complaint ¶ 36)
- Defendants are committing tortious waste by making improper repairs to common area pipes when they leak, and by refusing to formulate and implement a comprehensive plan to replace the common area pipes. (Complaint ¶ 37)
- As a direct and proximate result of the mismanagement, Plaintiffs have specifically suffered a permanent diminution of value of their unit and further the entirety of City Heights has suffered and will continue to suffer a permanent diminution of value. (Complaint ¶ 38)

Apart from damage to their unit and its diminution in value, Plaintiffs allege that the Association's localized repair of leaking pipes, instead of implementing a comprehensive plan to replace the common area pipes, have resulted in permanent diminution in value of the entirety of the City Heights. However, conclusory allegation is insufficient to allege that the City Heights' value was permanently diminished. And, Plaintiffs fail to allege that the Association's conduct resulted in permanent and substantial damage to the common areas. (See *Avalon Pac.-Santa Ana, L.P.*, *supra*, 192 Cal.App.4th at 1215 (requiring permanent and substantial damage for a waste claim).)

Accordingly, the Association's demurrer to the third cause of action for waste is SUSTAIN WITH LEAVE TO AMEND within 20 days from the service date of the final order.

2. Breach of Contract

Courts have construed CC&Rs as forming a contract between the Association and its condominium owners. (See *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490,

512 [CC&Rs as contract between homeowner and homeowners association with respect to installation of common area lighting]; *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1054 [CC&Rs as contract between neighboring property owners prohibiting the use of a residential property for business activities]; *Franklin v. Marie Antoinette Condominium Owners Assn.* (1993) 19 Cal.App.4th 824, 828, 833-834 [CC&Rs as a contract between homeowner and homeowners association with respect to homeowners association's obligation to maintain and repair common area plumbing].

"To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach and resulting damage. [Citation.] If the action is based on alleged breach of written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 308 [citations omitted].) Alternatively, a plaintiff may plead the legal effect of the contract rather than its precise language. (See *McKell v. Washington Mutual, Inc*. (2006) 142 Cal.App.4th 1457, 1489.)

Here, the Association contends Plaintiffs' claim is barred by the business judgment rule and related policy of judicial deference toward decisions made by the directors of a homeowner's association. Additionally, the Association contends the cause of action is uncertain since it lacks specificity as to which provision of the CC& Rs was breached and/or supports Plaintiffs' claim.

In opposition, Plaintiffs argue (1) it is immaterial that their claim is for breach of contract instead of breach of covenant because CC&Rs are interpreted as contracts, (2) defendant knows or can reasonably infer what document is at issue since the complaint identifies the CC&R by its name and recording date, (3) the business judgment rule insulates individual directors from personal liability and not the Association itself, and (4) the affirmative defense of judicial deference is not a ground for demurrer.

"The common law business judgment rule has two components—one which immunizes [corporate] directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest. A hallmark of

the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors." (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn*. (1999) 21 Cal. 4th 249, 257 (*Lamden*).) "The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal. App. 4th 1020, 1045. (*Boyle*).) A court will not substitute its judgment for the board of directors' judgment if the latter's good faith decisions can be attributed to any rational business purpose. (*Ibid*.)

An exception to the business judgment rule's presumption exists in circumstances which inherently raise an inference of conflict of interest and the rule does not shield actions taken without reasonable investigation, with improper motives, or as a result of a conflict of interest. However, a plaintiff must allege sufficient facts to establish these exceptions. (See *Lauckhart v. El Macero Homeowners Assn*., (2023) 92 Cal. App. 5th 889 (*Lauckhart*).) In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. [Citation.] Interference with the discretion of directors is not warranted in doubtful cases." [Citation.] (*Lauckhart, supra,* 92 Cal. App. 5th at 907.) "[T]he failure to sufficiently plead facts to rebut the business judgment rule or establish its exceptions may be raised on demurrer, as whether sufficient facts have been so pleaded is a question of law. [Citations.]" (*Boyle, supra*, 178 Cal.App.4th at 1045–1046.)

Based on the same rationale, our Supreme Court in *Lamden* adopted a rule of judicial deference to community association board decision-making that applies when owners in common interest developments seek to litigate decisions entrusted to the discretion of their associations' board of directors. (21 Cal. 4th at 253) "Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed

expertise." (*Ibid*.) The Supreme Court explained that judicial deference to the associations' economic decisions and business judgments is appropriate in view of "the competence possessed by owners and directors of common interest developments to make the detailed and peculiar economic decisions necessary in the maintenance of those developments." (*Lamden, supra*, 21 Cal.4th at 270–271.) Some courts have narrowly construed the *Lamden* rule. In *Affan v. Portofino Cove Homeowners Assn*. (2010) 189 Cal. App. 4th 930, 940, the court narrowly applied the rule to decisions concerning ordinary maintenance. (See also *Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal. App. 4th 103, 122.) However, most courts have broadly applied the Lamden rule beyond decisions concerning ordinary maintenance e.g., decisions regarding violation of the CC&Rs, maintenance/control/management of the common areas, adoption of rules and imposition of fees. (See *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 875; *Harvey v. The Landing Homeowners Assn*. (2008) 162 Cal.App.4th 809, 820; *Watts v. Oak Shores Community Assn*. (2015) 235 Cal.App.4th 466, 473.)

Here, Plaintiffs' opposition chiefly focuses on the first component of the business judgment rule while the Association's demurrer is based on the second component, i.e., insulating the board's decisions made in good faith. Nevertheless, Plaintiffs contend the allegations in paragraphs 37, 47, and 57 of their complaint sufficiently defeats the application of the business judgment rule. The Court is not persuaded.

In paragraph 37 of the complaint Plaintiffs allege Defendants are committing waste by making improper repairs to common area pipes and by refusing to formulate and implement a comprehensive plan to replace the common area pipes. In paragraph 47, they allege Defendants "acted willfully by: (i) suppressing the Plumber's Report from publication in the records of the Board; (ii) ignoring the history of leaks from the common area pipes into the Flooded Closet; (iii) refusing to permit Plaintiff ISAIAH from adding a discussion about plumbing repair to the Board meeting agenda; (iv) refusing to allow the inclusion of Plaintiff ISAIAH's remarks about common area pipes made in his capacity as a Board Member, during Board meetings, in the official minutes of those meetings." In paragraph 57, Plaintiffs allege that based on the willful conduct by the individual defendants, the business judgment rule defense will not avail them. None of these paragraphs or any other paragraphs in the complaint

allege the Association's unreasonable failure to investigate, improper motives, conflict of interest, bad faith, or fraud. As pleaded, the complaint fails to allege any exceptions to the application of the business judgment rule and fails to rebut its presumption.

Additionally, while the complaint identifies the CC&Rs by name and date, it fails to allege what provisions of this document were breached by the Association. The complaint vaguely alleges the CC&R requires the Association to compensate an owner for damages that arise from the common area, if the Association has been grossly negligent. Plaintiffs argue the Association can reasonably infer what document and what provision they are using in support of their claim. This is insufficient. Plaintiff must at the minimum allege which specific provision of the CC&R they are using to support their claim and plead the terms of this provision in the body of the complaint.

Accordingly, the Association's demurrer to the sixth cause of action for breach of contract is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

B. Motion to Strike

The Association moves to strike the complaint's allegations and prayers for punitive damages and attorney's fees. Considering the Court's ruling on the demurrer, the Association's motion to strike is DENIED as moot.

Calendar Line 7
Case Name: *Lauren Robb et al vs Sunrun, Inc.*
Case No.: 23CV414587

Before the Court is Defendant's motion to compel arbitration. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiffs purchased a home that included a solar energy system originally installed by Vivint Solar Developer, LLC, which was acquired by Defendant Sunrun Inc. 2020. When Plaintiffs purchased the home, they assumed the agreement governing that solar energy system. Plaintiffs do not dispute that they signed the transfer agreement knowing what the agreement was for or that the transfer agreement incorporates all the terms and conditions of the customer agreement. Nor do Plaintiffs dispute that the customer agreement they assumed includes this arbitration clause:

> Most customer concerns can be resolved quickly and amicably by calling Our customer service department at (877) 404-4129. If Our customer service department is unable to resolve Your concern, You and We agree to resolve any Dispute (as defined below) through binding arbitration or small claims court instead of courts of general jurisdiction. BY SIGNING BELOW, YOU ACKNOWLEDGE AND AGREE THAT (1) YOU ARE HEREBY WAIVING THE RIGHT TO A TRIAL BY JURY; AND (II) YOU MAY BRING CLAIMS AGAINST US ONLY IN YOUR INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IS ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. You and We agree to arbitrate all disputes, claims and controversies arising out of or relating to (i) any aspect of the relationship between You and Us, whether based in contract, tort, statute or any other legal theory; (ii) this Agreement or any other agreement concerning the subject matter hereof; (iii) any breach, default, or termination of this Agreement; and (iv) the interpretation, validity, or enforceability of this Agreement, including the determination of the scope or applicability of this Section 5 (each, a "***Dispute***"). Prior to commencing arbitration, a party must

first send a written "Notice of Dispute" via certified mail to the other party. The Notice of Dispute must describe the nature and basis for the Dispute and the relief sought. If You and We are unable to resolve the Dispute within thirty (30) days, then either party may commence arbitration. The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules and Procedures (*available at:* http://www.jamsadr.com/rules-streamlined-arbitration, the "***JAMS Rules***") and under the rules set forth in this Agreement. The arbitrator shall be bound by the terms of this Agreement. No matter the circumstances, the arbitrator shall not award punitive, special, exemplary, indirect, or consequential damages to either party. If You initiate arbitration, You shall be responsible to pay $250. All attorneys' fees, travel expenses, and other costs of the arbitration shall be born by You and Us in accordance with JAMS Rules and applicable law. The arbitration shall be conducted at a mutually agreeable location near Your Property. Judgment on an arbitration award may be entered in any court of competent jurisdiction. Nothing in this Section 5 shall preclude You or We from seeking provisional remedies in aid of arbitration from a court of competent jurisdiction.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDING IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING

TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY. YOU HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDING IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

Plaintiffs seem to argue they are not bound by this arbitration provision because Vivint is known to engage in fraudulent activity, Plaintiffs were forced to assume the agreement or risk losing earnest money put towards the purchase of the home, and Defendant waived arbitration through delay. As explained below, none of these arguments has merit.

II. Legal Standard

In a motion to compel arbitration, the Court must determine "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." (*Bruni v. Didion* (2008) 160 Cal. App. 4th 1272*,* 1283 (citations omitted).) In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]" (*Bruni,* 160 Cal. App. 4th at 1282 (citations omitted).)

"[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68–69.) Similarly, "'[p]arties to an arbitration agreement may agree to delegate to the arbitrator, instead of a court, questions regarding the enforceability of the agreement.'" (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 239 .) "Under California law, it is presumed the judge will decide arbitrability, unless there is clear and unmistakable evidence the parties intended the arbitrator to decide arbitrability." (*Nelson v. Dual Diagnosis Treatment Center, Inc.* (2022) 77 Cal. App. 5th 643, 654 (internal citations and quotations

omitted).) "The answer to "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943 [131 L. Ed. 2d 985, 115 S. Ct. 1920] (*First Options*), original italics.) "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally … should apply ordinary state-law principles that govern the formation of contracts." (*Id*. at p. 944.) (*Nelson v. Dual Diagnosis Treatment Center, Inc.* (2022) 77 Cal. App. 5th 643, 654.)

"There are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. [Citation.] Second, the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability." (*Tiri, supra*, 226 Cal.App.4th at p. 242; see also *Rent-A-Center, supra*, 561 U.S. at pp. 68, 69, fn. 1.) The "clear and unmistakable" test reflects a "*heightened* standard of proof" that reverses the typical presumption in favor of the arbitration of disputes. (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 787 (*Ajamian*)." (*Aanderud v. Superior Court* (2017) 13 Cal. App. 5th 880, 892.) "To be effective, any attempted delegation cannot be equivocal or ambiguous. Instead, the issue of arbitrability presumptively remains with the court except "where 'the parties *clearly and unmistakably* provide otherwise.'" (*Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125, 1130 (*Brennan*); accord, *Dennison, supra*, 47 Cal.App.5th at p. 209.) "[C]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." (*First Options, supra*, 514 U.S. at p. 939.) (*Nelson v. Dual Diagnosis Treatment Center, Inc.* (2022) 77 Cal. App. 5th 643, 655.)

Even an arbitration agreement can be unenforceable if it is unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Unconscionability consists of both procedural and substantive elements. The prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of procedural unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. (*Armendariz,* 24 Cal.4th at 114.) The procedural element tests the circumstances of contract negotiation and formation and focuses on "oppression" or "surprise" due to unequal bargaining power. (See *Armendariz,* 24 Cal.4th at 114.) "Oppression"

occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form. (*Pinnacle Museum Tower Ass'n v. Pinnacle Mkt.Dev. (US), LLC* (2012) 55 Cal.4th 223, 247, citing *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179.) Substantive unconscionability relates to the fairness of the terms of the arbitration agreement and assesses whether they are overly harsh or one-sided. (*Armendariz, supra*, 24 Cal.4th at p. 114; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.)

Code of Civil Procedure section 1281.2 states: "the court shall order a matter to arbitration if it determines that there is an agreement to arbitrate and (1) the agreement has not been waived or (2) the agreement has not been revoked." (*Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) "[A] party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) There is a presumption against waiver, and "when allocation of a matter to arbitration. . .is uncertain, we resolve all doubts in favor of arbitration." (*Cinel*, 206 Cal.App.4th at 1389; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.)

"In determining a waiver, a court can consider (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been *substantially* invoked and the parties were *well into preparation of the lawsuit* before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party." (*St. Agnes medical Center v. PaciviCare of California* (2003) 31 Cal.4th 1187, 1196 (emphasis added; internal citations and quotations omitted).)

III. Analysis

First, although the arbitration provision appears to be governed by California law ("**NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDING IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW"),** whether analyzed under state or federal law, the arbitration agreement contains a clear delegation clause. The agreement states: "You and We agree to arbitrate all disputes, claims and controversies arising out of or relating to . . . (iv) the interpretation, validity, or enforceability of this Agreement, including the determination of the scope or applicability of this Section 5." Accordingly, Plaintiffs' arguments regarding duress, fraudulent inducement, and unconscionability should be determined by the arbitrator.

However, even if the Court were to address these issues, the agreement is not unconscionable. Plaintiffs did not have to assume the agreement at the time they purchased the home. Not signing the transfer agreement would not have prevented them from purchasing the home, and they admit they considered options and decided to "mitigate damages" by signing the agreement. But even if Plaintiffs were correct that there was procedural unconscionability, there must also be substantive unconscionability, and there is none here. The fact that Plaintiffs are required to pay $250 to initiate an arbitration means that is the cap; it does not mean Defendant would pay nothing to initiate an arbitration. Nor does it require Plaintiffs to pay if Defendants initiate an arbitration—Defendants would have to pay the going rate, and the balance of the arbitration terms are entirely mutual in scope.

Defendant also did not engage in litigation activity consistent with waiver. The few cases where courts have found waiver involved substantial litigation activity and near or actual commencement of trial. While it appears the parties have been engaged in informal discussions and information exchange for the past 13 months, this falls well short of the type of activity courts have found to be consistent with waiving arbitration.

Accordingly, Defendant's motion to compel arbitration is GRANTED. This case is stayed pending the outcome of arbitration proceedings. The May 21, 2024 case management conference is VACATED. A status conference regarding the arbitration is set for January 9, 2025 at 10:00 a.m. in Department 6.

Calendar Line 12
Case Name: *GREGORY MALLEY vs 28TH STREET BART LLC*
Case No.: 24CV429014

Before the Court is specially appearing Defendant 28th Street Bart LLC's motion to expunge *lis pendens* and for attorneys' fees. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff alleges he was part of an LLC that has since refused to pay him distributions he believes he is entitled to under the LLC agreement or to provide him with adequate information regarding the LLC's activities relative to particular property. In this lawsuit, Plaintiff seeks a declaration that he is entitled to these distributions and preliminary relief preventing transfer of the property. Plaintiff recorded a *lis pendens* on the property, which defendant seeks to have expunged.

The parties hotly dispute virtually every aspect of Plaintiff's allegations, including how Plaintiff came to be involved in the project, whether Plaintiff is even a member of the LLC, and various other issues ancillary to the present motion, such as Plaintiff's real estate credentials and actual financial contributions to the LLC.[1] The Court here is focused on the allegations in the complaint to determine whether Plaintiff even asserts a valid real property claim, and thus need not reach these other matters on this motion.

II. Legal Standard

Code of Civil Procedure section 405.30 provides:

> At any time after notice of pendency of action has been recorded, any party, or any nonparty with an interest in the real property affected thereby, may apply to the court in which the action is pending to expunge the notice. . . Evidence or declarations may be filed with the motion to expunge the notice. The court may permit evidence to be received in the form of oral testimony, and may make any orders it deems just to provide for discovery by any party affected by a motion to expunge the notice. The claimant shall have the burden of proof under Sections 405.31 and 405.32.

(Code Civ. Proc. § 405.30.)

[1] Defendant's motion is accompanied by a request for judicial notice concerning some of these issues. The Court need not take judicial notice of the complaint in this case, since it is the subject of this motion, and the other matters for which Defendant seeks judicial notice are not relevant to this motion. Thus, Defendant's request for judicial notice is denied.

"A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice." (*Urez Corp. v. Superior Court* (1987) 190 Cal. App. 3d 1141, 1144.) "A lis pendens may be filed by any party in an action who asserts a 'real property claim.'" (Code Civ. Proc., § 405.20; *Campbell v. Superior Court* (2005) 132 Cal.app.4th 904, 917-918 (internal citations omitted).) "Section 405.4 defines a 'Real property claim' as 'the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property ….'" (*Kirkeby v. Superior Court* (2004) 33 Cal. 4th 642, 647.) Whether plaintiff has asserted a real property claim is determined from the causes of action set forth in the pleadings. (*Kirkeby v. Superior Court* (2004) 33 Cal. 4th 642, 648 ("Review involves only a review of the adequacy of the pleading and normally should not involve evidence from either side, other than possibly that which may be judicially noticed as on a demurrer." (internal citations omitted).)

A lis pendens clouds the title, effectively preventing transfer of the property until the litigation is resolved, thus it is to be applied narrowly. (*BGJ Associates LLC v. Superior Court* (1999) 75 Cal.App.4th 952, 966-67.) Thus, "[u]nlike most other motions, when a motion to expunge is brought, the burden is on the party opposing the motion to show the existence of a real property claim." (*Kirkeby v. Superior Court* (2004) 33 Cal. 4th 642, 647, citing Code Civ. Proc., § 405.30.) "[A] motion for expungement may be based on the substantive grounds that the underlying action does not contain a real property claim (§ 405.31), or the real property claim lacks probable validity (§ 405.32). (*J&A Mash & Barrel, LLC v. Superior Court* (2022) 74 Cal. App. 5th 1, 16.)

"[T]he court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." (Code Civ. Proc. § 405.32.) "Probable validity" means "more likely than not that the claimant will obtain a judgment against the defendant on the claim." (*Mix v. Superior Court* (2004) 124 Cal. App. 4th 987, 993, citing Code of Civ. Proc., § 405.3.) It is Plaintiff's burden as the party opposing the motion to expunge to demonstrate by a preponderance of the evidence that he has a real property claim.

III. Analysis

Relying on *Kirkeby*, Plaintiff argues he asserts a real property claim because seeks to avoid a fraudulent transfer. The Plaintiff in *Kirkeby* asserted they still owned the subject property because it was fraudulently conveyed to another party. If the plaintiff in *Kirkeby* succeeded in proving the subject property was wrongfully conveyed, that plaintiff would have regained title to the property. Thus, the *lis pendens* was properly maintained.

Here, Plaintiff does not allege a conveyance has taken place because no conveyance—fraudulent or otherwise—has taken place. Plaintiff also concedes that even if successful on his distribution claims, he would not obtain title in whole or in part to the property *subject* to the *lis pendens.* Thus, at best, Plaintiff's reliance on *Kirkeby* is premature.

Despite the name of his claims, what Plaintiff really alleges are damages claims. If Plaintiff succeeds on every one of his claims, he would not have an ownership interest in the property. Nor can Plaintiff tie up the property via *lis pendens* to make sure he can collect on a later judgment. If Plaintiff's complaint were permitted to be read as a real property claim, a *lis pendens* would be proper in virtually every claim for money damages where the defendant owned real property valuable enough to satisfy a potential money judgment. That is not the law.

IV. Attorneys' Fees

Code of Civil Procedure section 405.38 provides:

> The court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust.

Applying this standard, the Court finds that fees are appropriately awarded to Defendant for this motion. The hourly rate charged for this case type and location and the number of hours spent preparing and supporting this motion is reasonable. Plaintiff is accordingly ordered to pay Defendant's $11,241 in attorneys' fees within 30 days of service of this formal order.