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: February 15, 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:

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FOR YOUR NEXT HEARING DATE: Please do NOT file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**.

Where to call:408-882-2430
When to call: Monday through Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	23CV419921	Ewing Irrigation Products, Inc., a Nevada corporation vs New Sky Tree Service Inc., a California corporation et al	Parties are ordered to appear for examination.
2	21CV389474	TYLER KAWAMOTO vs ADRIENNE KAWAMOTO et al	Defendants' Adrienne Kawamoto's and Stuart Kawamoto motion for judgment on the pleadings is GRANTED WITH 20 DAYS LEAVE TO AMEND. Please scroll down to lines 2-3 for full tentative ruling. Court to prepare formal order.
3	21CV389474	TYLER KAWAMOTO vs ADRIENNE KAWAMOTO et al	Plaintiff Tyler's request for leave to file a verified answer to the verified cross-complaint is DENIED WITHOUT PREJUDICE. Please scroll down to lines 2-3 for full tentative ruling. Court to prepare formal order.
4	23CV415279	BIJAN HAGHIGHI et al vs The Perfect Finish, Inc. et al	Defendant's Demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Please scroll down to line 4 for full tentative ruling. Court to prepare formal order.
5	23CV425003	Haki Dervishi et al vs Google, LLC, a California Limited Liability Company	Google's Demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Please scroll down to line 5 for full tentative ruling. Court to prepare formal order.
6	23CV425842	JANESH CHHABRA et al vs GENERAL MOTORS, LLC, a limited liability company et al	General Motor's Motion to Strike Plaintiff's Punitive Damages Claim is SUSTAINED WITHOUT LEAVE TO AMEND. A notice of motion with this hearing date and time was served by electronic mail on December 15, 2023. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiffs also fail to properly allege or to convey how Plaintiffs could properly allege any claim that would entitle Plaintiffs to punitive damages. Thus, General Motor's motion to strike is well taken and appropriately granted without leave to amend. Court to prepare formal order.
7	23CV425842	JANESH CHHABRA et al vs GENERAL MOTORS, LLC, a limited liability company et al	General Motor's Demurrer to Plaintiff's Fourth and Fifth Causes of Action is SUSTAINED WITHOUT LEAVE TO AMEND. A notice of motion with this hearing date and time was served by electronic mail on December 15, 2023. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiff also fails to state a claim for fraud or to articulate how such a claim could be amended to survive demurrer given the alleged fraudulent misrepresentation is based on an EPA estimate, thus, making it appropriate to sustain the demurrer to the fourth cause of action without leave to amend. Plaintiffs also fail to allege a viable UCL claim or to state how such claim could be amended to survive demurrer. Accordingly, Defendant's demurrer to that claim is also appropriately sustained without leave to amend. Court to prepare formal order.

8	23CV421366	Wells Fargo Bank, N.A. vs Bertha Barron	Plaintiff's Motion for Summary Judgment must be continued and re-noticed. Code of Civil Procedure section 437c provides that a notice of motion and supporting papers for a summary judgment motion "shall be served on all other parties to the action at least 75 days before the time appointed for hearing. If the notice is served by mail, the required 75-day period of notice shall be increased by 5 days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days." Plaintiff served an amended notice with this February 15, 2024 hearing date on Defendant by mail on December 29, 2023; that is insufficient notice. Unless waived by the parties, this notice requirement is mandatory. (Code Civ. Proc. §437c(a)(2); *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1207-1208.) Accordingly, the motion is continued to Thursday, May 15 at 9 a.m. in Department 6. Plaintiff is ordered to promptly give notice of this new hearing date and time, so that the Court may properly consider the merits at the next court date. A mere continuance is insufficient; Plaintiff must also serve proper, timely notice. (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1262-1268.) This order will be reflected in the minutes.
9	21CV382331	Becky Edwards et al vs Tesla, Inc. et al	The Court reviewed the parties' joint statement. It appears to the Court that the parties are in the same position they were during the last hearing when the parties requested time to meet and confer and design a protocol based on prior cases. Now it appears Tesla's position is once again that Plaintiffs have everything they need in reviewable form, so no such protocol is needed, and Plaintiffs' position is that they need access to Tesla's proprietary software to meaningfully understand the data they have received. Based on the information before the Court, if Plaintiffs can review the crash data for this particular crash, they do not need more—other than perhaps a deposition or other further written discovery regarding that data. If the Court is misunderstanding what is needed, Plaintiffs will need to provide an expert declaration setting forth what is missing and how Tesla's software is necessary to fill the gaps, and Tesla may need to respond with a declaration from a Tesla employee with personal knowledge of the collection, production, and viewability of the data produced. With these preliminary thoughts in mind, the parties are ordered to appear for argument.
10	21CV384678	Tuan Ngo et al vs Hung Vu	Defendant's Motion to Set Aside Default and Default Judgment is DENIED. Please scroll down to line 10 for full tentative ruling. Court to prepare formal order.

11	22CV403128	Maritza Bolanos vs Lily Li	Defendant Lily C. Li's Motions to Compel Responses to Form Interrogatories (Set One), Special Interrogatories (Set One), Request for Production of Documents (Set One), and for Sanctions originally came on for hearing before the Court on December 7, 2023. Pursuant to California Rule of Court 3.1308, the Court issued a tentative ruling continuing these motions to February 6, 2024 for lack of notice. On February 6, 2024, the Court mistakenly believed Defendant had still failed to serve notice, however, proof of service of the new hearing date illustrating service by electronic mail on January 9, 2024 is now in the court file (it had not been processed out of e-filing by the time of the hearing.) The Court therefore briefly continued these motions to February 15, 2024 to review the notice for and the merits of the motions. Plaintiff has thus now had three chances to respond to these motions and completely failed to do so. Accordingly, Request for Production of Documents (Set One) is GRANTED. Defendant served these requests on June 9, 2023, attempted to meet and confer by letter dated August 3, 2023, and granted a one week extension for Plaintiff to respond. To date, Plaintiff has served no responses. Plaintiff's objections are waived. Plaintiff is ordered to serve verified, code compliant written responses without objections, to produce all requested documents in Plaintiff's possession, custody, or control, and to pay Defendant $750 in sanctions within 20 days of service of this formal order. Court to prepare formal order.
12	22CV403128	Maritza Bolanos vs Lily Li	Defendant Lily C. Li's Motions to Compel Responses to Form Interrogatories (Set One) is GRANTED. Defendant served these requests on June 9, 2023, attempted to meet and confer by letter dated August 3, 2023, and granted a one week extension for Plaintiff to respond. To date, Plaintiff has served no responses. Plaintiff's objections are waived. Plaintiff is ordered to serve verified, code compliant written responses without objections, and to pay Defendant $750 in sanctions within 20 days of service of this formal order. Court to prepare formal order.
13	22CV403128	Maritza Bolanos vs Lily Li	Defendant Lily C. Li's Motions to Compel Responses to Special Interrogatories (Set One) is GRANTED. Defendant served these requests on June 9, 2023, attempted to meet and confer by letter dated August 3, 2023, and granted a one week extension for Plaintiff to respond. To date, Plaintiff has served no responses. Plaintiff's objections are waived. Plaintiff is ordered to serve verified, code compliant written responses without objections, and to pay Defendant $750 in sanctions within 20 days of service of this formal order. Court to prepare formal order.

Calendar Lines 2-3
Case Name: *Tyler Kawamoto v. Adrienne Kawamoto, et al.*
Case No.: 21CV389474

Before the Court is (1) defendants Adrienne Kawamoto's and Stuart Kawamoto[1] motion for judgment on the pleadings against plaintiff Tyler Kawamoto[2] and (2) plaintiff Tyler's request for leave to file a verified answer to the verified cross-complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a property dispute between family members. In April 2007, Tyler's father and his mother Adrienne, as joint tenants, gifted property located at 2960 Sierra Road in San Jose (the "Property") to Tyler and his wife, Leticia Kawamoto. (SAC, ¶ 10.) On April 30, 2007, Tyler and Leticia paid Tyler's parents $350,438.87 for the Property, and they continued to make mortgage payments of $1,500 per month. (SAC, ¶¶ 11-12.)

On June 6, 2008, Tyler's father passed away. (SAC, ¶ 13.) On November 12, 2008, Adrienne travelled from Hawaii to speak with Tyler and Leticia and informed them they would no longer have to make payments on the Property. (SAC, ¶ 14.) Tyler and Leticia made the last payment on or about November 12, 2008. (SAC, ¶ 15.) Tyler alleges, upon information and belief, that Adrienne was well provided for by her husband, and she decided to make gifts to her children. (SAC, ¶ 16.)

Around the end of 2008, Adrienne bought a house in Roseville for Tyler's brother, Craig. (SAC, ¶ 17.) She also bought Craig a Mini Cooper and BMW X-5. (*Ibid*.) A little later, Craig and his wife relocated to Hawaii to live with Adrienne and took the vehicles with them. (SAC, ¶ 18.) As a result of some friction in Hawaii, Craig and his wife returned to California but left the vehicles behind. (*Ibid*.)

In 2013, Adrienne called Tyler and asked if he wanted the BMW X-5, which she subsequently gifted to him in late 2013/2014. (SAC, ¶ 19.) Tyler was extremely close with Adrienne and he was a signatory on her bank account. (SAC, ¶ 20.) Everything was quiet through the end of 2019 and Tyler continued to have a close relationship with Adrienne. (SAC, ¶ 21.)

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[1] Stuart is a party as an individual and as the trustee of the Adrienne Miu Kee Jeong Kawamoto Irrevocable Grantor Trust.
[2] As all the individuals in the matter share a surname, the Court will refer to each of them by their first names for purposes of clarity. No disrespect is intended. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 131, 1136, fn. 1.)

Towards the very end of 2019, Adrienne wanted Tyler to co-sign on a condominium she was purchasing for Tyler's brother, Stuart. (SAC, ¶ 22.) Tyler was fearful of being unable to pay on the debt should Stuart default. (SAC, ¶ 23.) Unfortunately, that interfered with the close bond between Tyler and Adrienne. (SAC, ¶ 24.)

On May 2021, Tyler and Leticia received a letter from Adrienne's lawyer stating that she wanted a buyout of the Property, which she had previously gifted to them. (SAC, ¶ 25.) The proposed buyout was $500,000. (*Ibid*.) Extensive efforts were made at informal resolution between Tyler and Adrienne, to no avail. (SAC, ¶ 26.) On October 26, 2021, Tyler received notice from the Santa Clara Recorder's Office that Adrienne had transferred her interest in her share of the Property to Stuart, as trustee of her irrevocable trust. (SAC, ¶ 31.)

Tyler initiated this action on October 6, 2021, and on October 28, 2021, Tyler filed his FAC, asserting: (1) breach of contract; (2) implied covenant of good faith and fair dealing; (3) estoppel; (4) unjust enrichment; (5) fraud, deceit, concealment, intentional misrepresentation; (6) breach of imposition of resulting trust; (7) fraudulent transfer; (8) quiet title; and (9) equitable relief. On March 29, 2022, Defendants filed a demurrer to the FAC. On July 15, 2022, the Court issued its order (the "Order") sustaining the demurrer in its entirety.

On August 1, 2022, Tyler filed his SAC, asserting: (1) promissory estoppel; (2) breach of contract; (3) implied covenant of good faith and fair dealing; (4) fraud, deceit, concealment, intentional misrepresentation; (5) fraudulent transfer; (6)n unjust enrichment; and (7) quiet title. On March 15, 2023, Defendants filed the instant motion, which Plaintiff opposes.

II. Request for Judicial Notice

A. Defendants' Request

Defendants request judicial notice of Tyler's SAC, filed on August 1, 2022; and The Order.

The SAC is the subject of the instant motion, thus it is not necessary to take judicial notice of it. It is appropriate for the Court to take judicial notice of the Order. (Evid. Code, § 452, subd. (d).) Thus, the request for judicial notice of item 1 is DENIED and the request for item 2 is GRANTED.

B. Tyler's Request

Tyler requests judicial notice of the of November 30, 2023 register of actions in this matter.[3]

Courts have taken judicial notice of a docket or register of actions. (See *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 961 [taking judicial notice of "superior court docket"]; *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 872, fn. 3 [taking judicial notice of "superior court's public record docket entries"]; *In re Estevez* (2008) 165 Cal.App.4th 1445, 1452, fn.4 [taking judicial notice of "docket (register of actions) entries)"]; *County of Los Angeles v. American Contractors Indemnity Co.* (2011) 198 Cal.App.4th 175, 178, fn 4 [taking judicial notice of "electronic docket"].) Therefore, the Court will GRANT Plaintiff's request. However, with respect to court records, the law is settled that "the court will not consider the truth of the documents' contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.)

C. Court's Motion

It appears the exhibits to the SAC have been mistakenly left out. It is well established that amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884.) However, the parties reference Exhibit A, which is the April 17, 2007 Grant Deed regarding the Property throughout their papers. Additionally, Plaintiff's counsel Dianna L. Albini attached it to her declaration in support of the opposition. (Albini Decl., ¶ 2, Exh. A.) It appears the exhibit is the same as the one in the FAC. Moreover, the parties do not dispute the authenticity of the grant deed.

The Court may take judicial notice of property records under Evidence Code section 452, subdivision (c) and (h). (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved of on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 ["a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon *the legal effect* of the recorded document,

[3] In the future, the Court asks plaintiff's counsel to submit a proper request for judicial notice, rather than including the request in a footnote of the opposition papers.

when that effect is clear from its face" (emphasis added)].) Thus, the Court, on its own motion, will take judicial notice of the April 17, 2007 grant deed.

III. Motion for Judgment on the Pleadings

A. Legal Standard

A motion for judgment on the pleadings is the functional equivalent of a general demurrer. (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 548; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999; *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254 (*Shea*).) A defendant can move for judgment on the pleadings on the grounds that (1) the court has no jurisdiction of the subject of the cause of action alleged in the complaint and/or (2) the complaint does not state sufficient facts to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(i)-(ii).) "The grounds for the motion must appear on the face of the complaint, and in any matters subject to judicial notice. [Citation.] The court accepts as true all material factual allegations, giving them a liberal construction, but it does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts. [Citations.]" (*Shea, supra,* 110 Cal.App.4th at p. 1254; *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.) The general rule is that statutory causes of action, which includes alleged violations of the Song-Beverly Act, must be pleaded with particularity. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

Defendants move for judgment on the pleadings as to each cause of action on the grounds they fail to allege sufficient facts. (Code Civ. Proc., § 438.)

B. Analysis

1. 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.) 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,* 198 Cal.App.3d at 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. (*Owens*, 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].)

In the FAC, Tyler alleged he and Leticia had 50% ownership interest in the Property while Adrienne had the other 50% ownership interest. He alleged Adrienne transferred her 50% ownership interest to them in November 2008, when she informed them they did not have to make payments on the Property anymore. (FAC, ¶ 14.) In the SAC, it appears Tyler alleges he paid his parents for the Property by making a payment of $350,438.87 on April 30, 2007. (SAC, ¶ 11.) While he does not clearly allege this in the SAC, Tyler articulates in his opposition that there was an oral promise ("April 2007 Oral Promise") by his parents to sell their joint tenancy to him and Leticia, which resulted in the $350,438.87 payment. This is inconsistent with the allegations in the FAC. Moreover, it is inconsistent with the allegations in the SAC because Tyler characterizes the April 30 payment as a down payment and he alleges he relied on Adrienne's statement in November 2008 that he and Leticia did not have to make any payments on the Property but if he and Leticia were the sole owners of the Property, then it is unclear to the Court why Tyler would have relied on Adrienne's statements.

Nevertheless, the sham pleading doctrine analysis requires Plaintiff have an opportunity to explain the incompatible pleading. (See *Owens, supra,*198 Cal.App.3d at p. 384.) Here, Defendants

raised this point in the reply, thus, Tyler has not been given that opportunity. Therefore, the sham pleading doctrine cannot be applied at this time.

2. First and Second Causes of Action: Promissory Estoppel and Breach of Contract

To allege a cause of action for breach of contract, a plaintiff must allege (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921 (*Bushell*).) The elements of a breach of oral contract are the same as those for a breach of a written contract. (*Stockon Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453.) Mutual assent or consent is necessary for the formation of a contract. (Civ. Code, §§ 1550, 1565.) For a meeting of the minds to exist, parties must agree on all material contract terms. (*Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1430.) Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 119, p. 144.)

a. Statute of Frauds

The Court addressed the statute of frauds and promissory estoppel issue in the Order and determined that Tyler stated the elements of promissory estoppel, except for injury. In the SAC, Tyler alleges he has been injured because he and Leticia ceased their mortgage payments after Adrienne's statements, and but for her statements, Tyler and Leticia would have paid off their mortgage by now.

"The doctrine of promissory estoppel is set forth in section 90 of the Restatement of Contracts. It provides : 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 637.) "California recognizes the doctrine. 'Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance of his promise, if justice can be avoided only by its enforcement." (*Ibid*.) The elements required for promissory estoppel in California are … (1) a promise

clear and unambiguous in its terms; (2) reliance by the party to whom the promise was made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d. 885, 890.)

Defendants rely on *Carlson v. Richardson* (1968) 267 Cal.App.2d 204, where the plaintiffs entered an oral agreement for the sale of real property. (*Id*. at p. 206.) The seller assured them over three years that he would perform on the agreement, and in reliance, the plaintiffs passed up opportunities to purchase other properties, which increased in price as time passed. (*Ibid*.) The court reasoned that the alleged loss of opportunities to purchase other land did not amount to a change in position and allegations that the property increased in value did not establish unjust enrichment as the increase resulted from market conditions, not any act or omission by the plaintiffs. (*Id*. at 208.) However, the court determined the fact that the plaintiffs purchased property nearby as a temporary residence while a house was being built on the disputed property could amount to a serious change in position in reliance on the contract. (*Ibid*.) Under *Carlson*, Tyler's allegations that he did not make mortgage payments and the market value of the Property increased are insufficient to support a substantial change in his position. Tyler's allegation that Adrienne will be unjustly enriched by the $350,438.87 payment also fails because that payment occurred before Adrienne's statements in 2008, and Tyler fails to allege sufficient facts to support the April 2007 Oral Promise. Tyler accordingly fails to allege injury to support promissory estoppel, and the statute of frauds applies.

b. Gift of Real Property

The two basic elements of a gift are (1) the intention of the donor to make a voluntary transfer to the donee and (2) a delivery, actual or constructive, by the donor to the done or to someone on his behalf. (*Berl v. Rosenberg* (1959) 169 Cal.App.2d 125, 131.)

Here, the grant deed specifically states the Property was granted to (1) Craig and Adrienne and (2) Tyler and Leticia, as Joint Tenants, each having 50% ownership. Tyler alleges Craig and Adrienne's 50% ownership interest was gifted to him and Leticia upon the payment of $350,438.87 plus $25,000 in mortgage payments. (SAC, ¶ 52.) This would mean the gift occurred in November 2008 when Tyler and Leticia stopped making mortgage payments which again raises the issue of Adrienne's alleged promise. The Court previously addressed this argument in the Order when it stated, "it is not persuaded

that [her statements] constituted a transfer of her property interest." (Order, p. 7:5-7.) The Court declines to depart from this analysis. Thus, Tyler fails to allege sufficient facts that a gift of real property occurred.

c. Statute of Limitations

The statute of limitations for an action not based on a writing is two years. (Code Civ. Proc., § 339.) However, the claim "shall not be deemed to have accrued *until the discovery* of the loss or damage suffered by the aggrieved party thereunder." (*Ibid*.)

Tyler alleges the breach occurred in very late 2019 and was not discovered until October 21, 2021 when Adrienne granted her interest to Stuart. (SAC, ¶ 54.) Complaint was filed in October 2021, which is within the statute, and the demurrer cannot be sustained on this basis. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315. (*E-Fab*) [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"].)

However, the statute of frauds applies to the alleged oral promise and Tyler fails to allege sufficient facts to support the application of promissory estoppel.

Thus, the motion for judgment on the pleadings as to the first and second causes of action is GRANTED with 20 days leave to amend from service of this formal order.

3. Third Cause of Action: Implied Covenant of Good Faith and Fair Dealing

"The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties." (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.) "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. The covenant thus cannot be '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 National, Inc.* (2000) 24 Cal.4th 317, 349-350 [citations omitted].)

"The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract…[it] rests upon the existence of some specific contractual obligation."

(*Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1204.) "In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which frustrates the other party's rights to the benefits of the contract." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1153.) A breach of implied covenant good faith and fair dealing involves something beyond breach of the contractual duty itself. (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 528; see also *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54.) "Where breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." (*Guz, supra*, 24 Cal.4th at p. 327; see also *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1644 fn.3.)

Here, it appears Tyler's claim is based on the alleged breach of contract. Thus, he fails to state an independent basis for the breach of the implied covenant. (*Howard,* 187 Cal.App.4th at 528 [a breach of implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty].) Tyler also fails to address this argument in his opposition, thus conceding the merits. (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].) Instead he offers arguments based on the April 2007 Oral Promise. Thus, the motion for judgment on the pleadings as to the third cause of action is GRANTED with 20 days leave to amend from service of this formal order.

4. Fourth Cause of Action: Fraud/Deceit/Concealment/Intentional Misrepresentation

The elements of fraud, which gives rise to the tort for deceit, are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 638 .)

Tyler alleges fraud based on Adrienne's statements in November 2008. (SAC, ¶¶ 86-87.) However, Tyler alleges when Adrienne made the representations, they were true. (SAC, ¶ 86 ["TYLER is informed and believes, and on that basis alleges, that when ADRIENNE made the representations alleged above, in 2008 they were true"].) This is insufficient to support Tyler's claim. (*Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 159 ["to maintain an action for deceit based on

false promise, one must specifically allege and prove, among other things, that the *promisor did not intend to perform at the time he or she made the promise*, and that it was intended to deceive or induct the promise to do or not do a particular thing"] [emphasis added].)

In the opposition, Tyler contends the claim is based on the April 2007 Oral Promise, however, this is not alleged in the SAC. Tyler also fails to allege intent to defraud him. (*Lazar,* 12 Cal.4th at p. 638.) Thus, the motion for judgment on the pleadings as to the fourth cause of action is GRANTED with 20 days leave to amend from service of this formal order.

5. Fifth Cause of Action: Fraudulent Transfer

Claims for fraudulent transfer are governed by the California's Uniform Voidable Transfer Act ("UVTA"), Civil Code sections 3439 et seq., formerly known as the Uniform Fraudulent Transfer Act. The purpose of the UVTA is to prevent debtors from placing, beyond the reach of creditors, property that should be made available to satisfy a debt. (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071.) "A transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay, or defraud any creditor, or (2) without receiving reasonably equivalent value in return, and either (a) was engaged in or about to engage in a business transaction for which the debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they came due." (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 928.) To state a cause of action for fraudulent transfer under section 3439.04, subdivision (a)(1), "it is sufficient to allege that defendant made the transfer with 'actual intent to hinder, delay, or defraud any creditor of the debtor.'" (*Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1401.)

In the Order, the Court noted it was unclear whether the parties had a creditor/debtor relationship. no such relationship was alleged, and it was therefore unclear how the UVTA applied. (Order, 12:20-23.) In the SAC, Tyler alleges Adrienne is the debtor and he is the creditor. (SAC, ¶ 99.)

Civil Code section 3439.01, defines a "creditor" as "a person that has a claim, and includes an assignee if a general assignment for the benefit of creditors, as defined in Section 493.010 of the Code of Civil Procedure, of a debtor." (Civ. Code, § 3439.01, subd. (c).) A "debtor" is "a person that is liable

on a claim." (Civ. Code, § 3429.01, subd. (d).) A claim is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." (Civ. Code, § 3439.01, subd. (b).)

Tyler does not allege he is entitled to payment, but rather seems to claim title. Thus, it is unclear how Adrienne is a debtor to Tyler.

Additionally, "Injury-in-fact is an essential element of a claim under the [UVTA]." (*Fidelity National Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 845.) That is, a creditor is not injured unless the transferred property- which the creditor could subject to repayment of the debt- is beyond the creditor's reach. (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80.)

Tyler alleges Adrienne transferred the Property to Stuart, as the trustee of her trust after her demand to Tyler and Leticia for $500,000 and negotiations started regarding the Property. (SAC, ¶ 101.) However, even if the parties do have a creditor/debtor relationship, Stuart is a party to this action in his capacity as the trustee, therefore, it does not appear the Property has been transferred beyond Tyler's reach. (*Mehrtash, supra,* 93 Cal.App.4th at 80.) Tyler's argument in opposition is based on the purported April 2007 Oral Promise, however, as the Court stated above, Tyler fails to allege sufficient facts in support of the agreement. Thus, the motion for judgment on the pleadings as to the fifth cause of action is GRANTED with 20 days leave to amend from service of this formal order.

6. Sixth Cause of Action: Unjust Enrichment

While some courts have recognized a cause of action for unjust enrichment (see *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 197; *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 717), other courts have stated that, while unjust enrichment is not a cause of action in California it is synonymous with restitution or quasi-contract—a valid basis for a cause of action. (See *O'Grady v. Merchant Exchange Productions, Inc*. (2019) 41 Cal.App.5th 771, 791 ["even if unjust enrichment does not describe a cause of action, the term is "synonymous with restitution," which can be a theory of recovery…This is accepted even by the courts which do not consider unjust enrichment a proper cause of action"].)

The elements for unjust enrichment are the receipt of a benefit and the unjust retention of the benefit at the expense of another. (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593

(*Peterson*); see also *First Nationwide Savings v. Perry (*1992) 11 Cal.App.4th 1657, 1662 ["A person is enriched if the person receives a benefit at another's expense. Benefit means any type of advantage"].)

Tyler alleges he paid $350,428.00 plus $25,000 in mortgage payments, and it would be unjust to allow Adrienne to be enriched in the amount of $500,000. (SAC, ¶ ¶ 110-111.) As noted in the Order, "Tyler fails to allege Adrienne actually received such a sum or that she had unjustly retained the sum to his disadvantage." (Order, 10:15-17.) Similarly here, Tyler fails to allege Adrienne has actually received $500,000 or unjustly retained $500,000 to his disadvantage. (*Peterson,* 164 Cal.App.4th at 1593.) Tyler fails to respond to these arguments in his opposition, thereby conceding the merits. (*Sehulster Tunnels,* 111 Cal.App.4th at p. 1345, fn. 16 [failure to address point is "equivalent to a concession"].) Thus, the motion for judgment on the pleadings as to the sixth cause of action is GRANTED with 20 days leave to amend from service of this formal order.

7. Seventh Cause of Action: Quiet Title

"To maintain an action to quiet title a plaintiff's complaint must be verified and must include (1) a description of the property including both its legal description and its street address or common designation; (2) the title of plaintiff as to which determination is sought and the basis of the title; (3) the adverse claims to the title of the plaintiff against which a determination is sought; (4) the date as of which a determination is sought and, if other than the date the complaint is filed, a statement why the determination is sought as of that date; and (5) a prayer for determination of plaintiff's title against the adverse claims." (Code Civ. Proc., § 761.020.) The purpose of a quiet title action is to settle all conflicting claims to the property and to declare each interest or estate to which the parties are entitled. (*Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 284.) "Quieting title is the relief granted once a court determines that title belongs in plaintiff… [T]he plaintiff must show he has a substantive right to relief before he can be granted any relief at all." (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 216.)

Tyler alleges he is the transferee grantee, and successor in interest in all Adrienne's rights, title, and interest to the property because he paid $350,438.87 for the Property and the remainder was gifted to him after his father passed in 2008. (SAC, ¶¶ 122-123.) He further alleges that from December 2008 until the unlawful conveyance to Stuart, Tyler and Leticia owned the Property as joint tenants with right of survivorship ("JTWROS"). (SAC, ¶ 124.) Adrienne's acts constitute a breach of conditions and thus

her estate has terminated and become void and the land reverted back to Tyler and Leticia as JTWROS, without any claim, right, title, or interest in favor or Adrienne. (SAC, ¶ 126.)

First, the SAC is not verified. (Code Civ. Proc., § 761.020 ["the complaint ***shall be verified***…"] [emphasis added].) Moreover, as stated above, the statute of frauds applies, and promissory estoppel is not applicable. The Court has also rejected Tyler's assertion that Adrienne's statements in 2008 constitute a transfer of her interest in the Property, and the SAC fails to allege an oral agreement. Thus, the motion for judgment on the pleadings as to the seventh cause of action is GRANTED with 20 days leave to amend from service of this formal order.

IV. Motion for Leave to File Verified Answer

Tyler requests leave to file a verified answer to the verified cross-complaint.

A. Request for Judicial Notice

Tyler requests judicial notice of the register of actions in this matter, dated September 9, 2022. Courts have taken judicial notice of a docket or register of actions. (*First American Title Co.,* 108 Cal.App.4th at 961 [taking judicial notice of "superior court docket"]; *Truong,* 156 Cal.App.4th at 872, fn. 3 [taking judicial notice of "superior court's public record docket entries"].) Therefore, Tyler's request is GRANTED. However, with respect to all court records, the law is settled that "the court will not consider the truth of the documents' contents unless it is an order, statement of decision, or judgment." (*Joslin,* 184 Cal.App.3d at 375.)

B. Legal Standard

Section 473, subdivision (a)(1) of the Code of Civil Procedure states in pertinent part: "[t]he court may ... , in its discretion after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars ...." (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760.) In considering a motion for leave to amend, "courts are bound to apply a policy of great liberality in permitting amendments … at any stage of the proceedings, up to and including trial." (*Id.* at p. 761.) "[I]t is a rare case" in which a court will be justified in denying a party leave to amend his pleadings. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

However, the policy of liberality in permitting amendments should be applied only where no prejudice is shown to the adverse party. (*Atkinson*, 109 Cal.App.4th at 761.) Where an amendment

would require substantial delay in the trial date and substantial additional discovery; would change not only the specific facts and causes of action pled, but the tenor and complexity of the complaint as a whole; and where no reason for the delay in seeking leave to amend is given, refusal of leave to amend is not an abuse of discretion. (*Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 486–488 (*Magpali*) [affirming denial of request to amend made during trial].) "Even if a good amendment is proposed in proper form, unwarranted delay in presenting it may – of itself – be a valid reason for denial," which "may rest upon the element of lack of diligence in offering the amendment after knowledge of the facts, or the effect of the delay on the adverse party." (*Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939–940 [trial court appropriately denied request to amend answer made during trial]; see also *P & D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345 [plaintiff did not seek leave to amend until after trial readiness conference, amendment would require additional discovery and might prompt a demurrer or other pretrial motion, and plaintiff's explanation for the delay was inadequate]; *Miles v. City of Los Angeles* (2020) 56 Cal.App.5th 728, 739 ["plaintiffs waited until four and a half years into the litigation to assert a federal claim, admittedly doing so only after the court indicated its intent to grant summary judgment"].)

C. Analysis

The SAC was filed on August 1, 2022 and served on August 8, 2022. On September 9, 2022, Tyler filed for default judgment against Defendants, however default was not entered. The same day, defense counsel Sean O'Neill, submitted a declaration in support of the automatic 30-day extension of time to file a responsive pleading, pursuant to Code of Civil Procedure section 430.31, subd. (a)(2).

Tyler contends defense counsel's declaration was false because he only met and conferred as to the defaults. However, O'Neill states he was unable to meet and confer with plaintiffs' counsel regarding defendant's objections to the first amended complaint.[4] Tyler further contends there is no prejudice to Defendants as they are technically in default, however, no default has been entered against them.

[4] The declaration refers to plaintiff's first amended complaint, however, due to the filing dates, it appears O'Neill's statements pertain to the SAC.

The verified Cross-Complaint was filed on May 4, 2022 and on May 16, 2022, Tyler filed his unverified answer to the verified Cross-Complaint.

California Rule of Court 3.1324(a), provides, a motion to amend a pleading before trial must:

(1) Include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous or amendments;

(2) State what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located; and

(3) State what allegations are proposed to be added to the previous pleading, if any and where, by page, paragraph, and line number, the additional allegations are located.

Here, the proposed verified answer added paragraphs 1 to 34 and affirmative defenses 21 and 22. However, the motion does not identify a list of items to be deleted and added with references to where those deletions and additions are located. Therefore, Tyler fails to comply with California Rule of Court 3.1324(a).

California Rule of Court 3.1324(b), provides, a separate declaration must accompany the motion and must specify:

(1) The effect of the amendment;

(2) Why the amendment is necessary and proper;

(3) When the facts giving rise to the amended allegations were discovered; and

(4) The reason why the request for amendment was not made earlier.

Plaintiff's counsel, Bryan Barnet Miller submits a declaration, stating leave is proper because a verified answer is required if a complaint or cross-complaint is verified. (Miller Decl., ¶ 5.) He further states the effect is minimal as Defendants are technically in default, no trial date has been set, and liberality in pleading is the rule rather than the exception. (Miller Decl., ¶ 6.) However, the declaration fails to explain why the request was not made earlier. Tyler filed an answer in May 2022, so it is unclear how the events of the SAC and the alleged defaults against Defendants impacted the cross-complaint when he had already filed an answer. Therefore, Miller's declaration fails to comply with Rule 3.1324(b). Thus, the motion is DENIED without prejudice.

Calendar Line 4
Case Name: *Bijan Haghighi, et.al. v. The perfect finish, Inc., et.al*.
Case No.: 23CV415279

Before the Court is Defendant's, Martha Espinosa demurrer to Plaintiffs' Bijan Haghighi and Laleh Haghighi operative complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This dispute involves Plaintiffs' ability to collect on a default judgment. According to the allegations of the Complaint, on January 14, 2022, Plaintiffs obtained a default judgment against Emil Eshagh and The Perfect Finish Inc. ("Perfect Finish") in the amount of $50,733.28, for breach of contract, fraud, and other causes of action. Emil Eshagh was/is involved in the operation of The Perfect Finish. (Complaint, ¶ 11.) Plaintiffs had contracted Perfect Finish to design, build, and install kitchen and bathroom cabinets. (Complaint, ¶ 9.)

On May 1, 2023, during a debtor's exam, Mr. Eshagh claimed (1) Earthlime Inc. was the proper defendant, (2) he intended to appeal the default judgment, (3) he had signing authority on Earthlime's bank accounts, and (4) he used his brother's car. (Complaint, ¶¶ 14, 15.)

Consequently, Plaintiffs filed this suit on May 3, 2023, alleging causes of action for fraud, fraudulent conveyance, conspiracy to commit fraud, and piercing the corporate veil.

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.)

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant

allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"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*.)

III. Plaintiffs' Representation

Bijan Haghighi appears to have filed the Complaint on his own behalf and on behalf of his wife, Laleh Haghighi. The Haghighi's opposition to this demurrer is similarly framed. Business and Professions Code section 6125 prohibits any person to practice law in California unless the person is an active member of the State Bar. "Since the passage of the State Bar Act in 1927, persons may represent their own interests in legal proceedings, but may not represent the interests of another unless they are active members of the State Bar." (*Hansen v. Hansen* (2003) 114 Cal.App.4th 618.) While Mr. Haghighi can represent his own interest in this action, he cannot represent the interests of his wife without being an active member of the State Bar. Therefore, the Court's ruling herein is limited to Mr. Haghighi's rights and interests under the Complaint.

The Court will consider Ms. Espinosa's demurrer unopposed as it pertains to Laleh Haghighi and GRANT Laleh Haghighi leave to file her own amended complaint.

IV. Analysis

Ms. Espinosa demurrers to the complaint on the grounds (1) cause of action for fraud is barred by the doctrine of res judicata, (2) the complaint fails to state facts sustaining causes of action for fraudulent conveyance, conspiracy to commit fraud, and piercing the corporate veil.

A. Fraud

The doctrine of res judicata precludes relitigating certain matters which have been resolved in a prior proceeding under certain circumstances. (*Brinton v. Bankers Pension Services, Inc*. (1999) 76 Cal.App.4th 550, 556.) Res judicata, or claim preclusion, prevents relitigating the same cause of

action in a second suit between the same parties or parties in privity with them. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) The decision in a prior proceeding is res judicata when it is final and on the merits; the successor action is based on the same cause of action as the former one; and the parties to the former proceeding are the parties in the successor action or are in privity with them. (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82-83; *Levy v. Cohen* (1977) 19 Cal.3d 165, 171.) "And, without a doubt, "final" means after an appeal is concluded or the time within which to appeal has passed." (*McKee v. National Union Fire Ins. Co.* (1993) 15 Cal.App.4th 282, 287.)

Here, Ms. Espinosa is not a named defendant in Plaintiff's fraud cause of action. Furthermore, there is no allegation that Ms. Espinosa represents the interests of Perfect Finish and Mr. Eshagh, or any indication that her demurrer is filed on their behalf as well. Therefore, Ms. Espinosa does not have standing to raise the statute of limitation and res judicata challenges on behalf of Mr. Eshagh and/or The Perfect Finish.

Accordingly, Ms. Espinosa's demurrer to the first cause of action for fraud is OVERRULED.

B. Fraudulent Conveyance

Generally, a "fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim." (*Kirkeby v. Superior Court of Orange County* (2004) 33 Cal.4th 642, 648, quoting *Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13.) Fraudulent transfer requires: (1) transfer made or obligation incurred by a debtor; (2) with actual intent to hinder, delay, or defraud any creditor of debtor; (3) without receiving a reasonably equivalent value in exchange for the transfer or obligation: (a) debtor was engaged or was about to engage in a business or a transaction for which remaining assets were unreasonably small in relation to the business or transaction or (b) intended to incur, or believed or reasonably should have believed that debtor would incur, debts beyond ability to pay as they became due; and (4) injury to the creditor. (Civ. Code §§ 3439.04(a), 3439.05.)

A transfer can be invalid either because of actual fraud, (Civ. Code § 3439.04(a)), or constructive fraud (Civ. Code § 3439.04(b), 3439.05). "[I]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] Thus, the policy of liberal construction of the pleadings … will not ordinarily be invoked to sustain a pleading defective in any material

respect. [Citation.] This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered. (Citation omitted.)." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal. 4th 979, 993.)

The Complaint does not allege any facts with particularity regarding alleged fraudulent conveyance by any Defendant. The Complaint only pleads general and conclusory allegations against all Defendants. There is no specificity, for example, as to who engaged in the acts, what their actions were, what was conveyed and to whom, or when the actions took place. The general and conclusory allegations do not sufficiently support a claim for fraudulent conveyance.

Accordingly, Ms. Espinosa's demurrer to the second cause of action for fraudulent conveyance, is SUSTAINED WITH LEAVE TO AMEND with 20 days from the service of the final order.

C. Conspiracy to Commit Fraud

Civil conspiracy is a legal doctrine that imposes liability on persons who did not actually commit a tort but acted in concert with another tortfeasor. To support this claim, Plaintiffs must allege "(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct." (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1022.) A conspiracy "must be activated by the commission of an actual tort." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 511.) Where fraud is alleged to be the object of the conspiracy, the claim must be pleaded with particularity." (*Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 211.)

The Complaint fails to allege facts to support the formation and operation of a conspiracy between the Defendants. The fraud claim is based only on the conclusory allegation that Defendants "conspired to commit fraud by agreeing to engage in fraudulent business practices, misrepresentations, and concealment of assets …" (Complaint, ¶ 31.)

Accordingly, Ms. Espinosa's demurrer to the third cause of action for conspiracy to commit fraud, is SUSTAINED with LEAVE TO AMEND within 20 days from the service date of the final order.

D. Pierce the Corporate Veil

The alter ego doctrine traditionally is applied to pierce the corporate veil so that a shareholder may be held liable for the debts or conduct of the corporation. When a judgment debtor is a corporation, the judgment creditor cannot reach the assets of the individual shareholders due to limitations on liability imposed by corporate law. Traditional piercing of the corporate veil is justified as an equitable remedy when the shareholders have abused the corporate form to evade individual liability, circumvent a statute, or accomplish a wrongful purpose. [citations] There are, however, two general requirements: "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." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) Factors for the trial court to consider include the commingling of funds and assets of the two entities, identical equitable ownership in the two entities, use of the same offices and employees, disregard of corporate formalities, identical directors and officers, and use of one as a mere shell or conduit for the affairs of the other. (*Id*. at pp. 538-539.)

The Complaint lacks any alter ego allegations. The Complaint vaguely and conclusively alleges (1) Defendants used the corporate entities of The Perfect Finish and Earthlime Inc. as a shield to avoid personal liability, and (2) Defendants' use of corporate entities was a sham and abuse of corporate form. (Complaint ¶¶ 34, 35.) This is insufficient to defeat a demurrer.

Accordingly, Ms. Espinosa's demurrer to the fourth cause of action for piercing the corporate veil is SUSTAINED with LEAVE TO AMEND within 20 days from the service date of the final order.

Calendar Line 5
Case Name: *Haki Dervishi, et al. v. Google, LLC*
Case No.: 23CV425003

Before the Court is defendant Google LLC's demurrer to plaintiffs Haki Dervishi and Neshad Asllani, M.D. ("Dr. Asllani") complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action involves alleged discrimination. Dervishi is a California resident who was born in the Republic of Kosovo and he maintains close family and business ties to Kosovo and Albania. (Complaint, ¶ 1.) Dr. Asllani is a Kosovo resident, doctor, and human rights activist, who has documented human rights violations in the Western Balkans for the past 30 years. (Complaint, ¶ 3.)

Plaintiffs allege Google discriminated against the Albanian language by excluding it on Google platforms and failing to support it on Google Ads and Google Adsense. (Complaint, ¶¶ 9-12.) In 2014, the Director of Google Adriatic visited the Republic of Kosovo and he stated that the Albanian language would be accepted by Google within two years as an official "supported" language. (Complaint, ¶ 13.) Since then, Google has not taken any steps for the inclusion of the Albanian language as a "supported" language, or its inclusion by Google Ads and Google Adsense. (*Ibid*.)

Plaintiffs initiated this action on October 31, 2023, with the filing of the Complaint for discrimination. On December 18, 2023, Google filed the instant demurrer, which Plaintiffs oppose.

II. Legal Standard for 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).)

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.)

A. First Cause of Action: Discrimination

Plaintiffs do not cite any statutory basis for their claim. However, the Unruh Civil Rights Act applies to all California businesses and provides that all persons in California are "free, equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).)

1. <u>Standing</u>

"In light of its broad preventive and remedial purposes, courts have recognized that '[s]tanding under the Unruh Civil Rights Acts is broad.'" (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025 [citations omitted].) At the same time, courts have acknowledged that "'a plaintiff cannot sue for discrimination in the abstract, but must actually suffer the discriminatory conduct.'" (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175 [citations omitted].) "In essence, an individual plaintiff has standing under the Act if he or she has been the victim of the defendant's discriminatory act." (*Ibid.* ["plaintiff must be able to allege injury—that is, some 'invasion of the plaintiff's legally protected interests'"].)

"'The focus of the standing inquiry is on the plaintiff, not on the issues he or she seeks to have determined; he or she must have a special interest that is greater than the interest of the public at large and that is concrete and actual rather than conjectural or hypothetical.'" (*Osborne v. Yasmeh* (2016) 1

Cal.App.5th 1118, 1127.) A plaintiff who only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing. (*Id*. at 1133.)

Plaintiffs allege Dr. Asllani documented the alleged discrimination on behalf of others, namely Albanian residents in Kosovo and Albania. (Complaint, ¶ 5.) Plaintiffs also allege on a recent visit Dervishi became aware that the Albanian language was being omitted from various internet platforms on Google. (Complaint, ¶¶ 2, 11.) As for harm, Plaintiffs claim the alleged discrimination has caused and will continue to cause damage to the Albania and Kosovo economies and to their citizens. (Complaint, ¶ 12.)

The Complaint does not allege that Plaintiffs suffered from the alleged discrimination. (*Osborne,* 1 Cal.App.5th at 1133.) Plaintiffs submit declarations with their oppositions with facts regarding how the alleged discrimination impacts them personally. However, those facts are not alleged in the Complaint, and a demurrer tests only the legal sufficiency of the *pleading.* (*Committee on Children's Television,* 35 Cal.3d at 213-214.) Moreover, courts have consistently found that the Unruh Civil Rights Act is limited to discrimination that takes place within California's borders. (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [the Unruh Act "by its express language applies only within California"]; see also *Warner v. Tinder, Inc.* (2015) 105 F.Supp.3d 1083, 1099.) Here, Plaintiffs allege the discrimination took place in Albania and Kosovo. Therefore, Plaintiffs fail to establish standing.

2. <u>Sufficiency of the Allegations</u>

The Unruh Civil Rights Act is a public accommodations statute that focuses on discriminatory behavior by business establishments. (*Stamps v. Super. Ct.* (2006) 136 Cal.App.4th 1441, 1452.) "The Act expresses a state and national policy against discrimination on arbitrary grounds." (*Angelucci,* 41 Cal.4th at p. 167.) "Its provisions were intended as an active measure that would create and preserve a nondiscriminatory environment in California business establishments by 'banishing' or 'eradicating' arbitrary, invidious discrimination by such establishments." (*Ibid.* [citations omitted].) "The Act stands as a bulwark protecting each person's inherent right to 'full and equal' access to 'all business establishments.'" (*Ibid.* [citations omitted].) "In enforcing the Act, courts must consider its broad remedial purpose and overarching goal of deterring discriminatory practices by businesses."

(*White, supra,* 7 Cal.5th at p. 1025.) Courts have consistently held that "the Act must be construed liberally in order to carry out its purpose." (*Ibid.* [internal citations omitted].)

Civil Code 51, section (h), provides, "nothing in this section shall be construed to require the provision of services or documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law, including Section 1632." (Civ. Code, § 51, subd. (h).)

This limitation of Civil Code section 51, subdivision (h) evinces that the Legislature contemplated and addressed the possibility of discrimination claims based on non-English languages, and expressly excluded such claims. Plaintiffs allege Google discriminates against Albanians by failing to include and officially support Albanian on its platforms, and they seek to compel Google to include the language as an officially supported language. However, the Unruh Civil Rights Act does not require Google to provide such services, and Plaintiffs do not allege that Google is required to provide services or documents in Albanian pursuant to any federal, state, or local laws. Thus, Plaintiffs fail to allege sufficient facts to state this claim, and the demurrer to the first cause of action is SUSTAINED with 20 days leave to amend.

Calendar Line 10
Case Name: *Tuan Ngo et al vs Hung Vu*
Case No.: 21CV384678

Before the Court is Defendant's Motion to Set Aside Default and Default Judgment and to Quash Service of Summons. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiffs filed this action on June 23, 2021 seeking to quiet title on their property which had a lien against it for a $200,000 loan. Plaintiffs claim they were supposed to be the recipients of the funds, but that after Defendant increased the interest rate from 1% to 5%, they declined to move forward with the loan, and the loan was never funded. Defendant claims the loan agreement was made between Plaintiff Van Tu's brother and Defendant in 2015.

In the course of researching a possible refinance of the property, Plaintiffs discovered the short form deed for $200,000 was filed against their property and filed this lawsuit to quiet title. On August 13, 2021, Plaintiff's obtained an order to serve Defendant by publication in the San Jose Post-Record. On May 24, 2022, default was entered against Defendant, and on February 27, 2023, judgment for quiet title was entered after an evidentiary hearing before Hon. Sunil Kulkarni.

Defendant claims he was in Vietnam at the time of the service by publication and therefore had no actual or constructive notice of the lawsuit. He further claims he only found out about the lawsuit on October 16, 2023 when he discovered the judgment after investigating the status of the lien in anticipation of filing a lawsuit to obtain repayment on the loan (which was supposed to be repaid by 2016.) Defendant moved to set aside the default and default judgment on December 4, 2023. Defendant's argument appears to rest on whether service by publication was proper.

II. Legal Standard

"[A] default judgment may be set aside for lack of service of process under Code of Civil Procedure 473(d)." (*Id.*) Section 473 codified the courts' general common-law power to control their own judgments. (*Olivera v. Grace* (1942) 19 Cal. 2d 570.) The underlying purpose behind the statute is to prevent injustice and to enable litigants to have their cases heard on merits. (*Frank E. Beckett Co. v. Bobbitt* (1960) 180 Cal. App. 2d Supp. 921.) This provision is remedial and should be liberally

construed to bring about trial on merits whenever possible. (*A & S Air Conditioning v. John J. Moore Co.* (1960) 184 Cal. App. 2d 617.)

A default judgment entered against a defendant that was not served with summons in the manner prescribed by statute is void and must be vacated. (*Calvert v. Al Binali* (2018) 29 Cal.App.5th 954, 961-962; *OC Interior Servs., LLC v. Nationstar Mtg., LLC* (2017) 7 Cal.App.5th 1318, 1330-1331; *In re D.R.* (2019) 39 Ca.App.5th 583, 590 (judgment is void for lack of personal jurisdiction over party when there is no proper service of process on or appearance by party.) Under Code of Civil Procedure section 473(d), the court must set aside a default judgment that is valid on its face but void as a matter of law due to improper service. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.) An order denying relief to set aside a default judgment where there has been improper service is also void. (*Calvert v. Al Binali* 29 Cal.App. 5th 954, 955.) Where there has been failure to comply with the statutory requirements for service, a defendant's actual notice of the lawsuit is irrelevant. (See *Abers v. Rohrs*(2013) 217 Cal.App.4th 1199, 1206; *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 414-415.)

Where a defendant moves to quash based on improper service of the summons and complaint, the burden is on the plaintiff to prove the validity of service by a preponderance of the evidence. (See *Boliah v. Superior Court (Bijan Fragrances, Inc*.) (1999) 74 Cal.App.4th 984, 991.) Plaintiff's filing of a proof of service creates a rebuttable presumption that service was proper, so long as the proof of service complies with applicable statutory requirements. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1442; see also *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205; see also Evid. Code § 647; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750 (a registered process server's declaration of service establishes a presumption that the facts stated in the declaration are true; *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 414-413 (where a defendant challenges the court's personal jurisdiction on the ground of improper service of process, the plaintiff has the burden of proving the facts required for effective service.

"A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with statutory requirements for service of summons." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466.) Notice does not substitute for proper service; until statutory requirements are satisfied, the court

lacks jurisdiction over a defendant. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808 (*Ruttenberg*).) The statutory provisions regarding service of process are liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant; substantial compliance is sufficient. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1436.) Substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute. (*Id.* at 1439.)

Code of Civil Procedure, section 415.50, provides:

> (a) A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that either:
>
> (1) A cause of action exists against the party upon whom service is to be made or he or she is a necessary or proper party to the action.
>
> (2) The party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property.

(Code Civ. Proc., § 415.50, subd. (a).)

III. Analysis

Defendant argues Plaintiffs failed to satisfy the requirements for service by publication because they knew he lived in Vietnam and they failed to ask others about where he might be. However, the record demonstrates that Plaintiffs diligently sought to serve Defendant at the address in the lien and were told unequivocally that Defendant had not lived there for at least three years. Plaintiffs then conducted a skip trace to locate another address for Defendant, and no other address could be located. The evidence in the record is that Defendant had a relationship with one of the Plaintiff's now deceased brother—not with either Plaintiff. While Defendant claims Plaintiffs should have nevertheless known of a mutual friend that might be able to locate him, this is purely speculative and not supported by any admissible evidence. Thus, the Court finds service was proper and denies Defendant's motion to quash.

The Court further finds that Defendant was out of the country at the time service by publication was effected and therefore did not receive actual notice of the lawsuit. As a result, Code of Civil Procedure 473.5 applies. However, under that section, the court has discretion to deny relief (see, e.g., *Tucker v. Tucker* (1943) 59 Cal. App. 2d 557), and it is Defendant's burden to demonstrate that he has a meritorious defense. (*In re Cardenas* (1961) 194 Cal. App. 2d 849 (petition to vacate judgment was insufficient where it contained no affidavit of merits; *Thompson v. Sutton* (1942) 50 Cal. App. 2d 272 (a party seeking relief under this section has the burden to show that he has a good defense to the action.)

The Court finds Defendant failed to meet that burden. The cancelled checks Defendant submits plainly show the $200,000 was given to Plaintiff's brother, not to Plaintiffs. Thus, there is no evidence that Plaintiffs ever received the $200,000. Further, the document explicitly states that the $200,000 was to be paid in full by 2016. It is now 2024. Thus, whether the written document containing Plaintiffs' signatures or an oral agreement with Plaintiff's brother are the basis for Defendant's claim to the $200,000, the statute of limitations have run.

Accordingly, Defendant's motion to set aside default and default judgment is DENIED.