SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

Honorable Amber Rosen, Presiding

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

DATE: 11-16-23 TIME: 9 A.M.

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

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

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

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

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV406777 Hearing: Demurrer	Abhinav Bezgam et al vs 18771 Homestead Road, LLC et a	See Tentative Ruling. Court will prepare the final order.
LINE 2	23CV417018 Hearing: Demurrer	ESTATE OF MONTE GARRETT et al vs CITY OF SANTA CLARA et a	See Tentative Ruling. Court will prepare the final order.
LINE 3	23CV417018 Hearing: Demurrer	ESTATE OF MONTE GARRETT et al vs CITY OF SANTA CLARA et a	See Tentative Ruling. Court will prepare the final order.
LINE 4	20CV372905 Motion: Summary Judgment/Adjudication	Ilias Taptelis vs Quality Loan Service Corporation et al	See Tentative Ruling. Court will prepare the final order.

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LINE 5	20CV373069 Motion: Compel FR to Request for Production Set 3	Paul Battaglia vs Nilufer Koechlin	With respect to Defendant's request for production Nos. 1, 6,7, 10, and 12, Plaintiff must "set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of item or category of item." CCP § 2031.230. Defendant's request No. 16 is GRANTED based on Plaintiff's claim that Defendant converted his wine after the parties broke up. See FAC ¶¶ 98-101. Defendant's request for sanctions is excessive, but Plaintiff is ordered to pay sanctions in the amount of $2000. The ordered discovery and sanctions must be provided within 10 days of the final order. Defendant shall submit the final order.
LINE 6	20CV373069 Motion: Compel FRSI set 2	Paul Battaglia vs Nilufer Koechlin	Defendant's request for further responses to Interrogoatories 38 and 39 is GRANTED based on Plaintiff's claim that Defendant converted his wine after the parties broke up. See FAC ¶¶ 98-101. Defendant's request for sanctions is excessive, but Plaintiff is ordered to pay sanctions in the amount of $2000. The ordered discovery and sanctions must be provided within 10 days of the final order. Defendant shall submit the final order.

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

LINE 7	21CV387448 Motion: Compel	SHAHNAWAZ SOROYA vs RAY L. HELLWIG MECHANICAL CO. INC. et al	Defendants have provided good cause to support the taking of two separate physical exams given the nature of the injuries claimed by Plaintiff. Defendants need not wait for the first exam to be conducted to know that a second exam, by a wholly different type of doctor who will exam different physical ailments, need be taken. Defendant has sufficiently complied with the rules concerning the disclosure of diagnostic tests and procedures. Accordingly, Defendants' motion is GRANTED. Defendants shall submit the final order.
LINE 8	20CV372366 Hearing: Motion for Leave to Intervene	California Department Of Fair Employment And Housing et al vs Cisco Systems, Inc. et al	See Tentative Ruling. Plaintiff shall prepare the final order.
LINE 9	20CV372366 Hearing: Motion to proceed using Fictitious name	California Department Of Fair Employment And Housing et al vs Cisco Systems, Inc. et al	See Tentative Ruling. Defendant shall prepare the final order.

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

LINE 10	21CV387639 Hearing: Motion to dismiss Plt Complaint	Elizabeth Chung vs Altva Capital Management Limited et a	The Court will consider Plaintiff's late filed opposition this time but cautions Plaintiff that failure to abide by the rules of CCP may result in her papers being stricken next time. Because Plaintiff's claim is based on the Filbert Global loan with Altva, her claim is derivative, not individual, even taking all of her factual assertions in the complaint as true. As such, the motion to dismiss is GRANTED. The Court grants the motion without prejudice, to allow Plaintiff the opportunity to establish that she may have an individual claim. No further leave of court is required to allow Plaintiff to file an amended complaint. Defendant Altva shall prepare the final order.

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

LINE 11	22CV402205 Hearing: Motion Atty Fees/Costs	MANUEL LEVARIO vs GENERAL MOTORS LLC et al	Plaintiff's unopposed motion for fees and costs of $31,975.93 is GRANTED. Defendant's untimely opposition is sticken, as it was four days late, no leave to file late was sought, and defense counsel had proper notice and knew of the motion months before the opposition was due. There is simply no justification for the late filing other than defense counsel's error. Because Plaintiff has provided evidence of its hours and costs, the time spent on the case was reasonable, and counsel's fees and costs are reasonable, the motion is granted. The court also grants the modest multiplier of 1.1 given the contingent nature of the case. Defendant shall pay Plaintiff the fees and costs within 21 days of the final order. Plaintiff shall submit the final order.
LINE 12	21CV390993 Hearing: Compromise of Minor's Claim	Alejandro Perez Carrillo et al vs Ismael Cisneros et al	The GAL and GAL's attorney shall appear at the hearing so that the Court can ensure the settlement was entered knowingly.

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Calendar Line 1
Case Name: *Bezgam et al. v. 18771 Homestead Road, LLC et al.*
Case No.: 22CV406777

I. Background

Plaintiffs Abhinav Bezgam ("Bezgam"), Alekhya Gampa ("Gampa"), Sujith Perla ("Perla") and Supriya Mohan ("Mohan")(collectively, "Plaintiffs") bring this action against defendants 18771 Homestead Road, LLC ("Homestead"), Vahe Tashjian ("Tashjian"), Aline Whitman ("Whitman"), Compass, Inc. ("Compass"), and Vahe Baronian ("Baronian")(collectively, "Defendants").

A. Plaintiffs

Plaintiffs Bezgam and Gampa are a married couple. (Compl., ¶ 1.) Plaintiffs Perla and Mohan are also a married couple. (*Id.* at ¶ 2.)[1]

B. Defendants

Defendant Tashjian is an individual and a principal and/or controlling member of defendant Homestead, a limited liability company. (Compl., ¶¶ 5, 6.) Whitman is an individual and a manager or member of Homestead. (*Id.* at ¶ 7.) Homestead, Tashjian, and Whitman are considered the "Sellers." (*Ibid.*)

Defendant Baronian is a California real estate agent employed by defendant Compass, a corporation. (Compl., ¶¶ 8-9.)

C. The Properties

There are two properties at issue in this case. Real property at 18771 E. Homestead Road, #1, Sunnyvale, California 95014 ("Property 1") and 18771 E. Homestead Road, #2, Sunnyvale, California 95014 ("Property 2")(collectively, "the Properties"). (Compl., ¶¶ 3-4.)

D. Relevant Factual Background[2]

On or around November 23, 2021, Bezgam and Perla contacted Baronian to inquire about purchasing Property 1 and Property 2, respectively. (Compl., ¶ 21.)

On or around November 25, 2021, Bezgam completed and signed a Residential Purchase Agreement ("RPA 1") to purchase Property 1 from Homestead and Perla completed and signed RPA 2 (collectively with RPA 1, the "RPAs") to purchase Property 2 from Homestead. (Compl., ¶¶ 22-23.)

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[1] The Complaint refers to Bezgam and Gampa jointly as "Bezgam." (Compl., ¶ 1.) Similarly, it refers to Perla and Mohan jointly as "Perla." (*Id.* at ¶ 2.)

[2] The Complaint contains numerous factual allegations. For clarity, the Court details the facts most relevant to the instant demurrer.

The RPAs identify Compass as the broker for both buyer and seller and Baronian as the agent for both buyer and seller. (Compl., ¶ 24.) Baronian signed the RPAs on behalf of Compass as dual broker and for himself as dual agent. (*Ibid*.)

On or around November 27, 2021, Baronian notified Plaintiffs that the "Sellers" (comprised of defendants Homestead, Tashjian, and Whitman), accepted their offers and delivered the RPAS to Plaintiffs signed by Whitman on behalf of Homestead. (Compl., ¶ 25.)

In January 2022, Baronian verbally advised Plaintiffs that there was an opportunity for them to receive discounts on the purchase prices of the Properties. (Compl., ¶ 26.) Thereafter, Plaintiffs had a phone call with Tashjian where he proposed that Plaintiffs pay/release money early toward the purchase price to receive a 17% return on investment. (*Ibid*.) Baronian assured Plaintiffs he had worked with Tashjian for a long time and that he had made money for all of his previous investors. (*Id*. at ¶ 27.)

Following these conversations, Plaintiffs discovered Dutchints Development, LLC, a luxury home developer, had filed for bankruptcy and that Tashjian may have been a member or manager of the LLC. (Compl., ¶ 28.) Baronian confirmed that Tashjian was a partner of the company but told Plaintiffs not to be deterred by this. (*Ibid*.)

In reliance on Baronian's assurances, Plaintiffs contacted Tashjian via email with additional questions about the proposed investment. (Compl., ¶ 29.) Tashjian replied that he was willing to put liens on the Properties as security, but he did not mention that there were other existing liens on the Properties. (*Ibid*.)

Following these conversations, Baronian sent Plaintiffs Addendum No. 2 pertaining to their respective RPAs. (Compl., ¶ 30.) In reliance on Tashjian's representations regarding the proposed investment, Plaintiffs signed Addenda No. 2. (*Id*. at ¶ 33.)

In February 2022, Plaintiffs discovered several existing liens and at least one notice of default pertaining to a loan by an entity, Iron Oaks, on the Properties and emailed Baronian to get information on the existing liens. (Compl., ¶ 35.) Baronian did not reply but forwarded the email to Tashjian who stated there were existing liens, but they had been paid down, a notice of default was due to COVID-19 delays, and the project on the Properties was back on track. (*Ibid*.) Baronian continued to assure Plaintiffs about working with Tashjian. (*Id*. at ¶ 36.)

In reliance on Tashjian and Baronian's assurances Plaintiffs signed the documents required by escrow to release their earnest money deposits, and such funds were released to Sellers. (Compl., ¶ 37.) Plaintiffs then reached out to Iron Oaks and were informed that their loan to Sellers was in default and the Properties would be going up for auction at the end of February. (*Id*. at ¶ 38.) Tashjian told Plaintiffs he was "'taking care of it.'" (*Ibid*.)

In or around the beginning of March 2022, Tashjian informed Bezgam that the return on investment would be reduced from 17% to 15% due to "'the amount of time the funds have been invested'" and Plaintiffs were sent Addendum No. 3, which they signed. (Compl., ¶¶ 40-44.)

On or around March 28, 2022, Plaintiffs met with Tashjian in person and he advised them that the construction for the Properties was going well. (Compl., ¶ 45.) Thereafter,

Tashjian convinced Plaintiffs to invest additional money with the promise of an 18% return and Baronian delivered to Plaintiffs Addendum No. 4, which they signed. (*Id*. at ¶¶ 45-49.)

On or around May 4, 2022, just one month after Tashjian, Homestead, and Baronian had caused Plaintiffs to transfer and release $1,744,000 of funds to Homestead, Iron Oaks notified Plaintiffs that the Properties had been sold to a third party via a Trustee Sale. (Compl., ¶ 50.) Thereafter, Plaintiffs contacted Baronian by phone who admitted he was aware of the sale but that Tashjian said he would inform Plaintiffs. (*Id*. at ¶ 52.) Prior to this phone call, Baronian had not provided Plaintiffs with any information regarding the trustee sale. (*Ibid*.)

Following the call with Baronian, Plaintiffs attempted to contact Tashjian who responded via text message that he was in communication with Randy Mancini, the lender and "holder of the note." (Compl., ¶ 53.) Tashjian assured Plaintiffs their contracts would not be affected; however, Tashjian failed to substantively respond to further requests for communication. (*Ibid*.) Plaintiffs are informed and believe that Tashjian's description of Randy Mancini as the lender and holder of the note was false and intended to mislead Plaintiffs into believing that the Properties were still in Tashjian's control. (*Id*. at ¶ 54.)

From May 6, 2022 through June 13, 2022, Plaintiffs repeatedly contacted Tashjian, but he avoided giving any clear answers or responses. (Compl., ¶ 55.) By June 29, 2022, Plaintiffs had not received any purchase money back from Sellers and Bezgam requested the parties proceed to mediation pursuant to the RPAs. (*Id*. at ¶ 56.) Tashjian agreed to this mediation. (*Ibid*.)

Although mediation has not yet completed, Plaintiffs initiated the instant action, asserting the following causes of action:

1) Breach of Contract [against all Defendants];
2) Fraud – Intentional Misrepresentation [against all Defendants];
3) Negligent Misrepresentation [against Tashjian and Homestead];
4) Fraud – False Promise [against all Defendants];
5) Fraud – Concealment [against all Defendants];
6) Constructive Fraud [against all Defendants];
7) Breach of Fiduciary Duty [against all Defendants]; and
8) Negligence [against Baronian and Compass].

On August 2, 2023, defendants Tashjian and Whitman filed a demurrer to the Complaint. Plaintiffs oppose the motion.

II. Demurrer

Defendants Tashjian and Whitman (hereinafter, collectively "Demurring Defendants") generally demur to the first, second, fourth, fifth, sixth, and seventh causes of action in Plaintiffs' Complaint on the ground they fail to state facts sufficient to constitute a cause of action.

A. Legal Standard

"A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) The only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

B. Plaintiffs' Request for Judicial Notice

In opposition, Plaintiffs request the Court take judicial notice of the following: Plaintiffs' Complaint filed on November 1, 2022.

The request for judicial notice is DENIED. Plaintiffs' request for judicial notice does not indicate why they are requesting the Court take judicial notice of the operative pleading. Moreover, on demurrer, the Court already treats as true the allegations of a well-pleaded complaint. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [judicial notice of pleading is unnecessary where it is the pleading under review on demurrer].) Thus, it is unnecessary to take judicial notice of the Complaint. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining judicial notice where document is unnecessary, unhelpful, or irrelevant].)

C. First Cause of Action – Breach of Contract

Demurring Defendants argue the first cause of action for breach of contract fails to allege that they were parties to the agreement. (Demurrer, p. 6:21-23.)

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

In order to be liable for a breach of a contract, a person must be a party to the contract and consent to the terms of that contract. (See e.g., Cal Civ. Code, §§ 1150, 1580; *Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 789 [consent is an essential element of any contract and must be mutual]; *German Sav. & Loan Soc. v. McLellan* (1908) 154 Cal. 710, 716 ["There can be no contract unless the minds of the parties have met and mutually agreed"]; *Harper v. Goldschmidt* (1909) 156 Cal. 245, 249 ["As an essential of every contract there must be an agreement and meeting of minds"].)

In opposition, Plaintiffs argue the Complaint alleges that Demurring Defendants were "Sellers" of the subject real estate (Compl., ¶ 7) along with conduct and breaches by the "Sellers" (*Id.* at ¶¶ 67-68, 71, 73). (Opposition, p. 4:3-6.) Plaintiffs further contend that if these allegations are insufficient, the Complaint also alleges Defendants were alter egos of Homestead. (*Id.* at p. 4:6-7.)

In this case, Plaintiffs allege that Plaintiffs and Sellers entered into valid contracts (the RPAs). (Compl., ¶¶ 67-68 ["[Plaintiffs] and Sellers entered into a valid contract"].) The Complaint also alleges Defendants and Homestead are "collectively referred to as the 'Sellers.'" (*Id.* at ¶ 7.) Plaintiffs do not attach the relevant contract to the pleading. Thus, the allegations regarding the contract within the Complaint are controlling at the pleading stage. (*Uniwill v. City of Los Angeles* (2004) 124 Cal.App.4th 537, 543 ["it is the allegations of the complaint, and not defendants' interpretation of them, that must control in ruling on a demurrer"].) The Court finds that, for pleading purposes, the Complaint sufficiently alleges that Defendants, as Sellers, entered into contracts with Plaintiffs and thereafter breached those contracts. (See Compl., ¶¶ 67-68, 71 ["Sellers breached the RPAs . . ."]; ¶ 73 ["As a direct result of Sellers' breach of the RPAs, Plaintiffs have suffered damages"]; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [court reviewing propriety of ruling on demurrer is not concerned with the "plaintiff's ability to prove . . . allegations, or the possible difficulty in making such proof"].)

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

D. Second Cause of Action – Fraud-Intentional Misrepresentation

Demurring Defendants contend the second cause of action is insufficient because 1) there are no allegations regarding Whitman's misrepresentations and 2) there are no allegations Tashjian had knowledge of falsity or an intent to defraud.

"The necessary elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108.)

Fraud must be pled with specificity rather than with general and conclusory allegations. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793.) "The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made." (*Ibid*.)

1. Whitman's Misrepresentations

Demurring Defendants argue there are no allegations that Whitman made misrepresentations, had knowledge of falsity, or an intent to defraud Plaintiffs through the RPA process and therefore, the allegations regarding Whitman are not sufficiently specific to state a fraud cause of action. (Demurrer, p. 7:13-15.)

In opposition, Plaintiffs assert that: 1) Whitman is mentioned within the second cause of action; 2) Whitman is mentioned in the general allegations incorporated into the second cause of action; 3) Whitman is considered part of the "Sellers," Defendants, and an alter ego of Homestead; and 4) the Complaint alleges Whitman conspired to commit the wrongful acts alleged. (Opposition, p. 4:15-27.)

As to the first, second, and third argument, the fact that Whitman is mentioned within the Complaint or in the second cause of action is not necessarily helpful. The Complaint's

general allegations and the allegations within the second cause of action are devoid of any facts that Whitman made representations to Plaintiffs. Notably, the Complaint's second cause of action is divided into subsections which include misrepresentations made by various defendants, but does not include a section detailing Whitman's misrepresentations. (See generally Compl., pp. 17-18.) Thus, the Complaint fails to sufficiently allege intentional misrepresentations directly made by Whitman with the requisite specificity.

Plaintiffs next contend that the Complaint's allegations of conspiracy are sufficient to overrule the demurrer to the second cause of action.

Conspiracy is a "legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its preparation." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) Plaintiffs must allege Whitman was aware of the planned intentional misrepresentation and Whitman agreed with defendants and intended that the fraud-intentional misrepresentation be committed. (See 2 CACI 3600 (2023).)

Plaintiffs allege that Defendants "conspired and agreed to commit such wrongful acts orally, in writing, and/or implied by their conduct. The Defendants . . . agreed with another and intended that the acts herein alleged to defraud Plaintiffs, and furthered the conspiracy by cooperation with one another, or lent aid and encouragement to one another, or ratified and adopted the acts of each other in the acts alleged herein. The Defendants each knew all the details of the scheme, and the identities of all other participants in their conspiracy." (Compl., ¶ 83.) An identical allegation appears at Paragraph 93 of the Complaint in connection with misrepresentations made by defendants Baronian and Compass. (See *Id.* at ¶ 93.)

The Court finds these conspiracy allegations are insufficient to allege a conspiracy to commit fraud against Whitman as they contain no factual allegations about Whitman or the nature of such an agreement to defraud. (See e.g., *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1173 [overruled in part on other grounds][demurrer sustained where conspiracy allegations too conclusory]; *AREI II Cases* (2013) 216 Cal.App.4th 1004, 1022 [on demurrer "bare allegations and rank conjecture do not suffice for a civil conspiracy"]; *State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 419 [bare legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient to state cause of action based upon a conspiracy theory].) Further, where fraud is the object of the conspiracy alleged, the claim must be pled with specificity. (*Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 211.) Thus, the conclusory conspiracy allegations are insufficient to state a cause of action against Whitman.

Based on the foregoing, the demurrer to the second cause of action is SUSTAINED with 15 days leave to amend as to defendant Whitman.

2. Tashjian's Intent

Demurring Defendants next argue Plaintiffs fail to allege sufficient facts to establish Tashjian's "knowledge of falsity and intent to defraud" and allege no facts or circumstances suggesting "'defendant['s] intent not to perform the alleged promise when it was made.'" (Demurrer, p. 7:20-21, 26-27, citing *Reeder v. Specialized Loan Serving LLC* (2020) 52 Cal.App.5th 795, 803-804 (*Reeder*).)

In *Reeder*, the plaintiff alleged that "when defendants made their promise that plaintiff would be able to . . . refinance after 10 years, they had no intention of allowing Plaintiff to . . . re-finance." (*Reeder*, *supra*, 52 Cal.App.5th at p. 803 [internal quotes omitted].) The complaint conclusively alleged that defendants made false promises intending to induce plaintiff to enter into a line of credit and plaintiff had a right to rely on the false promises, acted in reasonable reliance on those promises, and entered into the line of credit. (*Id*. at pp. 803-804.) The Court of Appeal, quoting the Supreme Court in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1183, explained that "'[i]t is insufficient to show an unkept but honest promise, or mere subsequent failure of performance.'" (*Id.* at p. 804.) The *Reeder* Court concluded defendants had not alleged *any* facts or circumstances suggesting defendants' intent not to perform the alleged promise when it was made. (*Ibid.*)

Plaintiffs assert that *Reeder* is inapposite because there the plaintiff made only conclusory allegations and alleged no facts suggesting defendants' intent. (Opposition, p. 7:25-26.) Plaintiffs contend they have included extensive allegations, including the following:

1) Tashjian is an established crook being sued for similar misconduct (Compl., Introduction, p. 2:3-5);
2) Baronian and Compass were aware of the accusations and claims against Tashjian and his history of misconduct and failed to advise Plaintiffs of his scheme (Compl., Introduction, p. 2:8-11);
3) Seller and dual agent knew the subject property was already over-encumbered and induced Plaintiffs to pay only to thereafter lose the property in foreclosure (Compl., Introduction, p. 2:15-19);
4) Tashjian has been sued numerous times for alleged breaches of contract, fraud, and other wrongdoings (Compl., ¶ 58);
5) Tashjian appeared in Federal Bankruptcy Court and Plaintiffs believe his assertion of the Fifth Amendment is an acknowledgement of significant wrongdoing. (Compl., Introduction, p. 2:6-7; ¶ 58).

(Opposition, pp. 7:27-8:20.)

In this case, the Complaint alleges significant facts regarding Tashjian's intent to defraud or a reasonable inference of his intent to defraud. (See *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1111-1112 [in reviewing sufficiency of complaint against general demurrer, court treats as true "not only the complaint's material factual allegations, but also facts that may be implied or inferred from those expressly alleged"]; see also Compl., ¶ 29 [Tashjian never mentioned that there were existing liens on the Properties]; ¶ 53 [Tashjian failed to respond to Plaintiffs for several days after they became aware of the trustee sale of the Properties]; ¶ 54 [Tashjian's description of the Properties owner as a lender and holder of the note were false and intended to mislead Plaintiffs into an incorrect understanding that the Properties were still in Tashjian's control]; ¶ 55 [Tashjian avoided giving clear answers when repeatedly contacted by Plaintiffs]; ¶ 80 [Tashjian knew the representations were false at the time he made them]; ¶ 81 [Tashjian intended Plaintiffs rely on the representations to induce them to agree to pay early].) The Court does not find these allegations, taken together, to be conclusory. Thus, the second cause of action sufficiently states a claim against Tashjian for fraudulent misrepresentation.

Accordingly, the demurrer to the second cause of action is OVERRULED as to Tashjian.

E. Fourth and Fifth Causes of Action – Fraud-False Promise and Concealment

Demurring Defendants assert identical arguments as to their fourth and fifth causes of action and Plaintiffs likewise refer to their argument regarding the second cause of action for both.

For the same reasons explained in detail above, regarding the second cause of action, the demurrer to the fourth and fifth causes of action is SUSTAINED with 15 days leave to amend as to Whitman and OVERULED as to Tashjian

F. Sixth Cause of Action – Constructive Fraud

Demurring Defendants contend the sixth cause of action fails because Plaintiffs do not allege that Whitman and Tashjian were in a fiduciary relationship with them. (Demurrer, p. 11:22-24.)

To establish constructive fraud, Plaintiffs must allege: "(1) a fiduciary relationship, (2) nondisclosure, (3) intent to deceive, and (4) reliance and resulting injury." (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1249-1250 (*Tindell*).)

Constructive fraud depends on the existence of a fiduciary or confidential relationship of some kind, and this must be alleged in the pleading. (*Feeney v. Howard* (1889) 79 Cal. 525, 529 [fiduciary relation must be averred in cases of constructive fraud]; *Peterson Dev. Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 116 ["[i]t is essential to the operation of the doctrine of constructive fraud there exists a fiduciary or special relationship"].) The specific fact pleading requirement applies to constructive fraud as it does to fraud in general and *every* element must be pleaded with specificity. (See *Schauer v. Mandarin Gems of California* (2005) 125 Cal.App.4th 949, 960-961.)

In opposition, Plaintiffs contend that 1) a plaintiff can plead constructive fraud against a defendant where the defendant is vicariously liable for the acts of its agents (Opposition, p. 9:18-20, citing *Tindell, supra,* at p. 1239); and 2) Plaintiffs allege aiding and abetting. (*Id.* at p. 10:8-12.)

1. Vicarious Liability

"Vicarious liability 'means that the act or omission of one person . . . is imputed by operation of law to another[.]' Thus, vicarious liability is a departure from the general tort principle that liability is based on fault." (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 [internal citations omitted].) The two most common applications of vicarious liability are: (1) an employer is vicariously liable for the tortious acts of its employee committed within the scope of employment (*Ibid.*); and (2) a principal is vicariously liable for the torts of its agents committed during the scope of the agency relationship. (*Shultz Steel Co. v. Hartford Accident & Indemnity Co.* (1986) 187 Cal.App.3d 513, 518-519.)

In *Tindell*, the buyers of a home alleged that the seller and appraiser failed to disclose defects in the property and acted in concert with others to conceal those defects and profit from the sale of the property. (*Tindell*, *supra*, 22 Cal.App.5th at p. 1239.) The trial court sustained the seller's demurrer and granted summary judgment for the appraiser. (*Ibid*.) The Court of Appeal affirmed the judgment holding, in part, that no fiduciary duty supported the buyers' constructive fraud allegations against the seller because any vicarious liability on the seller's part depended on the appraiser being found liable, and the trial court properly found that there was no triable issue of fact as to the appraiser's liability in the underlying transaction. (*Ibid*.) The Court of Appeal explained that while a principal may be vicariously liable if a seller's agent makes misrepresentations during the purchase of the seller's property, even if the seller is unaware of the fraud, "any vicarious liability on [the principal's] part depends on [the agent] being found liable." (*Id.* at p. 1250, citing *Ach v. Finkelstein* (1968) 264 Cal.App.2d 667, 677 ["'Where an agent acting within his actual or apparent authority procures a sale of property by means of fraud, the principal is jointly liable with the agent for damages incurred thereby, even though the principal is innocent of personally participating in the fraud, when he accepts and retains the benefits which accrue from the transaction'"].)

Although *Tindell* also addressed a motion for summary judgment, this Court is concerned only with whether sufficient facts of vicarious liability have been pled to support a constructive fraud cause of action.

Turning to the allegations of the sixth cause of action, it is clear that Plaintiffs are alleging constructive fraud based on Baronian's breach of his fiduciary duty. (See Compl., ¶ 129 ["As the dual agent for both buyer and seller, Baronian (employed by Compass, broker for buyer and seller) had a fiduciary of utmost are, integrity, honesty, and loyalty to Plaintiffs as buyers"].) While the sixth cause of action incorporates prior allegations, aside from vicarious liability being raised in the opposition, there is no indication anywhere in the Complaint that Plaintiffs are alleging Demurring Defendants are liable for constructive fraud based on a theory of vicarious liability.[3] Thus, the Court does not find that Plaintiffs have sufficiently alleged vicarious liability.

2. Aiding and Abetting

"The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to plaintiff." (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343 (*Nasrawi*).) Further, "a defendant may be found liable for aiding and abetting a breach of fiduciary duty even though the defendant owes no independent duty to the plaintiff[.]" (*Ibid*. [internal quotations omitted].)

[3] Paragraph 11 of the Complaint generally alleges that "Defendants, and each of them, were agents . . . of each of the remaining Defendants, and in doing the acts hereinafter alleged, were acting within the course and scope of such agency. . . ." (Compl., ¶ 11.) However, there are no specific facts to support vicarious liability.

The sixth cause of action alleges Baronian, as real estate agent for buyer and seller, owed a fiduciary duty to Plaintiffs and subsequently breached that duty through his failures to disclose material facts to Plaintiffs. (Compl., ¶¶ 129-132.)

While the sixth cause of action incorporates the prior allegations, and also contains a general allegation about aiding and abetting, it is clear from the language of the sixth cause of action that the breach of fiduciary duty is based on 1) Baronian's fiduciary duty (Compl., ¶ 129); 2) Baronian misleading Plaintiffs by failing to disclose relevant information (*Id.* at ¶ 132); and 3) that "Baronian's failure to disclose such information was a substantial factor in causing that harm" (*Id.* at ¶ 132). Paragraph 133 of the Complaint contains a general allegation that all defendants agreed with one another or aided and encouraged one another or ratified and adopted the acts of each other. (*Id.* at ¶ 133.) However, Plaintiffs' conclusory allegations of aiding and abetting are insufficient to survive a demurrer. (See *Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1153 [conclusory allegations of aiding and abetting breach of fiduciary duty insufficient to survive demurrer]; *cf. Nasrawi*, *supra*, at pp. 343-344 [reversing trial courts sustaining over demurrer where plaintiff adequately alleged facts to support each element of aiding and abetting].)

Accordingly, the demurrer to the sixth cause of action is SUSTAINED with 15 days leave to amend.

G. Seventh Cause of Action – Breach of Fiduciary Duty

Similar to their argument as to the sixth cause of action, Demurring Defendants assert that there are no allegations they were in a fiduciary relationship with Plaintiffs and that any aiding and abetting or conspiracy allegations are conclusory. (Demurrer, p. 12:16-18, 23-24.)

In opposition, Plaintiffs contend that similar to the sixth cause of action, Demurring Defendants 1) are vicariously liable for the breaches of Baronian; 2) committed conspiracy; and 3) aided and abetted Bartonian's breach of fiduciary duty.

1. Vicarious Liability

For the same reasons as explained above, the Complaint does not sufficiently allege Demurring Defendants' vicarious liability for Baronian's breaches of his fiduciary duty to Plaintiffs.

2. Conspiracy

For the same reasons explained in connection with second cause of action, the Complaint does not sufficiently allege conspiracy.

3. Aiding and Abetting

The seventh cause of action alleges Baronian, as real estate agent for buyer and seller, owed a fiduciary duty to Plaintiffs and subsequently breached that duty through his intentional/negligent misrepresentations, fraudulent concealment, and failures to disclose material facts to Plaintiffs. (Compl., ¶¶ 135-136.)

Similar to the sixth cause of action, it is clear from the language of the seventh cause of action that the breach of fiduciary duty is based on 1) Baronian's fiduciary duty (Compl., ¶ 135); 2) Baronian's breach of that duty (*Id.* at ¶ 136); and 3) that "Baronian's breach of fiduciary duty was a substantial factor in causing that harm" (*Id.* at ¶ 137). Paragraph 138 of the Complaint contains a general allegation that all defendants agreed with one another or aided and encouraged one another or ratified and adopted the acts of each other. (*Id.* at ¶ 138.) Thus, as explained above, Plaintiffs' conclusory allegations of aiding and abetting are insufficient to survive a demurrer.

As such, the demurrer to the seventh cause of action is SUSTAINED with 15 days leave to amend.

III. Conclusion and Order

The demurrer to the first cause of action is OVERRULED. The demurrer to the second, fourth, and fifth causes of action is SUSTAINED with 15 days leave to amend as to Whitman and OVERRULED as to Tashjian. The demurrer to the sixth and seventh causes of action is SUSTAINED with 15 days leave to amend. The Court will prepare the final Order.

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IV. Factual and Procedural Background

Plaintiffs Brandon Valdez ("Valdez"), the Estate of Monte Garrett ("Garrett") (collectively, " Employee Plaintiffs"), Jackie Valdez, and Patti Garrett (collectively, "Plaintiffs") bring this action against the City of Santa Clara ("Santa Clara City"), the City of San Jose ("San Jose City")(collectively, "City Defendants"), and the County of Santa Clara ("Santa Clara County")(collectively, "Defendants").

The Employee Plaintiffs were employed by Kiewit Infrastructure West Corporation ("Kiewit Corporation") as Journeyman Pipe Fitters, working at San Jose-Santa Clara Regional Wastewater Facility ("Wastewater Facility"). (Compl., ¶ 19.) The Wastewater Facility is owned by the City Defendants. (Compl., ¶ 18.)

On or around June 14, 2022, Employee Plaintiffs' employer was contracted by Defendants to replace and update equipment at the Wastewater Facility. (Compl., ¶ 20.) As a result, Employee Plaintiffs were working in an underground tunnel moving pipes when Valdez heard a sudden pop and felt a strong pressure. (Compl., ¶ 21.) Once Valdez opened his eyes, he saw Garrett on the ground. (*Ibid*.) A large, improperly installed pipe had collapsed onto Valdez and Garrett. (Compl., ¶ 22.) Valdez suffered severe injuries after a blow to his head. (Compl., ¶ 23.) Garrett's injuries were fatal. (*Ibid*.)

On September 22, 2022, Defendants were each served with administrative claims on behalf of Plaintiffs pursuant to Government Code section 810. (Compl., ¶¶ 14-16.) San Jose City was served with an amended claim on October 12, 2022. (Compl., ¶ 16.) On November 8, 2022, Plaintiffs received notice from Santa Clara City rejecting their claims. (Compl., ¶ 14.) On October 28, 2022, they received notice from Santa Clara County rejecting their claims. (Compl., ¶ 15.) On November 3, 2022, they received notice from San Jose City rejecting their claims. (Compl., ¶ 16.)

On June 5, 2023, Plaintiffs filed their Complaint, asserting the following causes of action:

1) Public Employee Negligence/Wrongful Death [against Defendants];
2) Dangerous Condition of Public Property [against Defendants];
3) Negligence – Wrongful Death [against Doe defendants];
4) Premise Liability and Wrongful Death [against Doe defendants];
5) Loss of Consortium [against all defendants on behalf of plaintiffs Jackie Valdez and Patti Garrett]; and
6) Survival Action [against all defendants on behalf of the Estate of Monte Garrett].

On July 27, 2023, the City Defendants each filed a demurrer to the Complaint. Plaintiffs oppose both demurrers.

V. Plaintiffs' Request for Judicial Notice in Support of Opposition to Both Demurrers

In support of their oppositions to both demurrers, Plaintiffs request the Court take judicial notice of the following documents:

1) Valdez's Workers' Compensation Appeals Board Application ("Ex. 1");
2) Garrett's Workers' Compensation Appeals Board Application ("Ex. 2");
3) Valdez's Petition for Increase in Compensation for Serious and Willful Misconduct ("Ex. 3");
4) Garrett's Petition for Increase in Compensation for Serious and Willful Misconduct ("Ex. 4"); and
5) Notice of Deposition and Request for Production of Documents to Santa Clara City ("Ex. 5").

The unopposed request for judicial notice is GRANTED as to each document's existence. (See *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 ["While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein"]; see also *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 988 (*Monroy*) [taking judicial notice existence of court documents].)

VI. City of San Jose's Demurrer

San Jose City demurs to the entire Complaint on the ground it is time-barred under Government Code section 945.6.

A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) A demurrer is not sustainable if there is only a possibility the cause of action is time-barred; the statute of limitations defense must be clearly and affirmatively apparent from the allegations in the pleading. (*Id.* at pp. 1315-1316.) When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*Id.* at p. 1316.)

Government Code section 945.6 provides a six-month statute of limitation for commencing suit against a public entity once written notice of rejection of a claim is given to the party. (Gov. Code, § 945.6, subd. (a)(1); Gov. Code, § 913.)

San Jose City argues section 945.6's statute of limitations is mandatory and must be strictly complied with. (SJ Demurrer, p. 3:13-14.) It contends that the Complaint alleges Plaintiffs received written notice of rejection on November 3, 2022 and so the six-month period commenced no later than this date. (SJ Demurrer, p. 3:22-27, citing Compl., ¶ 16.) It further asserts that the Complaint had to be filed by May 3, 2023 at the latest but was not filed until June 5, 2023 and is therefore time-barred. (SJ Demurrer, p. 4:1-2, 5-6.)

Plaintiffs concede that they received written notice on November 3, 2022, that the six-month statute of limitations ran by May 3, 2023, and that Plaintiffs did not file their Complaint until June 5, 2023. (Opposition-SJ, p. 11:8-11.) However, they argue that the statute of limitations was equitably tolled while they pursued workers' compensation claims. (See Opposition-SJ, p. 6:7-10.) Plaintiffs primarily rely on *Elkins v. Derby* (1974) 12 Cal.3d 410

(*Elkins*) and *Addison v. State of California* (1978) 21 Cal.3d 313 (*Addison*) to support their argument.

Citing *Elkins*, Plaintiffs contend that it is well established that the pursuit of a workers' compensation claim may equitably toll the statute of limitations for personal injury lawsuits. (Opposition-SJ, p. 6:9-10.)

In *Elkins*, the trial court dismissed plaintiff's personal injury complaint against his employer on the ground it was time-barred by the applicable statute of limitations. (*Elkins*, *supra*, 12 Cal.3d at p. 412.) Plaintiff was injured at work and within the one-year statute of limitations period prescribed for the tort-action, filed a workers' compensation claim. (*Ibid.*) The workers' compensation claim was denied and he thereafter filed a tort claim. (*Ibid*.) However, the tort claim was not filed within the one-year period. (*Ibid*.) The Supreme Court reversed the trial court's dismissal of the tort claim, holding that the one-year limitations period for tort actions was properly tolled while plaintiff pursued his workers' compensation claim because the purpose of the limitations statute was accomplished where the employer received adequate notice of plaintiff's claim in order to assemble a defense. (*Ibid*.)

The *Elkins* Court explained that it "has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding. (*Elkins*, *supra*, 12 Cal.3d at p. 414.) Defendant argued that plaintiff was not required to seek a workers' compensation claim as a prerequisite to filing a civil action. (*Ibid*.) In response, the Supreme Court explained that "recent California cases . . . point[] toward the principle that regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled 'when an injured person has several legal remedies and, reasonably and in good faith, pursues one.'" (*Ibid*.; see also *Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482, 490 ["exhaustion of administrative remedies will suspend the statute of limitations even though no statute makes it a condition of the right to sue"].)

The Supreme Court also explained that policy considerations reinforced their holding, including the Court's "belief that the suspension of the running of the limitations period in this and similar cases will not frustrate achievement of the limitations statute's primary purpose. That purpose . . . is to 'prevent surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" (*Elkins*, *supra*, 12 Cal.3d at p. 417.) The Court went on to explain that while an employer who is notified of a compensation claim may fail to gather evidence, the "likelihood . . . that [an] employer will suffer prejudice if the compensation claimant files a tort action more than one year after the date of injury is minimal." (*Id.* at p. 418.)

In *Addison*, defendants filed a demurrer on the ground the pleading was time-barred under Government Code section 945.6. (*Addison*, *supra*, 21 Cal.3d at p. 315.) The trial court sustained the demurrer without leave to amend and dismissed the case. (*Ibid*.) The Supreme Court affirmed the Court of Appeals reversal of the trial court's dismissal of plaintiff's claims against Santa Clara County on the ground the doctrine of equitable tolling applied because plaintiff timely filed suit in federal court and, without prejudice to defendant, waited for the federal ruling before proceeding in state court. (*Ibid*.)

The *Addison* Court explained that "courts have adhered to a general policy which favors relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage." (*Addison*, *supra*, 21 Cal.3d at p. 317.) Citing to *Elkins*, the *Addison* Court reaffirmed its holding that the statute of limitations on a personal injury action is tolled while plaintiff seeks a workers compensation remedy against the defendant, and again noted "that 'regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled . . ." where plaintiff pursues a different legal remedy. (*Id.* at p. 318.) The Supreme Court then explained that equitable tolling requires: 1) timely notice; 2) lack of prejudice; and 3) reasonable and good faith conduct on the part of plaintiffs. (*Id.* at p. 319.)

In this case, Plaintiffs contend all three elements are present such that equitable tolling should apply. (Opposition-SJ, p. 8:4-5.)

A. Timely Notice

First, Plaintiffs assert that San Jose City had timely notice through Employee Plaintiffs' workers' compensation claims that arose from the work being performed at the Wastewater Facility. (Opposition-SJ, p. 8:15-16.) Specifically, Plaintiffs argue that Employee Plaintiffs' employer Kiewit Corporation, which was contracted by City Defendants at the time of the injuries, received notice of the workers' compensation claim, and therefore, San Jose City had notice of the claim because San Jose City was the principal of Kiewit Corporation.[4] (Opposition-SJ, p. 8:19-26.)

Plaintiffs are correct that "'[a]s against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.'" (*Chaplis v. County of Monterey* (1979) 97 Cal.App.3d 249, 262.) "Thus, it is a well established rule in California that the principal is chargeable with, and is bound by the knowledge of, or notice to, his agent, received while the agent is acting within the scope of his authority, and which is in reference to a matter over which his authority extends." (*Trane Co. v. Gilbert* (1968) 267 Cal.App.2d 720, 727.) However, the Court does not find allegations in the pleading that Kiewit Corporation had knowledge of the workers' compensation claim such that San Jose City would then also be on notice. That said, San Jose City contends in reply that it does not take issue with the timely notice element of equitable estoppel given that Plaintiffs filed administrative claims within the limitation period. (Reply, p. 2:17-19.) Thus, Plaintiffs have sufficiently met the first element of equitable estoppel.

B. Lack of Prejudice

[4] San Jose City argues that it was not Employee Plaintiffs' employer and was only implicated in the workers' compensation claim as a witness, but only Kiewit Corporation is named as a defendant. (SJ Reply, p. 4:1-12.) San Jose City does not address principal/agent argument or cite to relevant authority. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [a point asserted without citation to authority will be disregarded].) Further, the Court has only taken judicial notice of the existence of the workers' rights claims and not the contents of the documents.

As to the second element, Plaintiffs argue San Jose City would not be prejudiced if the statute of limitations was tolled because the workers' compensation claim and the current civil action arise from the same set of facts – that Employee Plaintiffs suffered serve injuries after a pipe collapsed onto them while working at the Wastewater Facility. (Opposition-SJ, p. 10:11-14, citing Compl., ¶ 22.) Plaintiffs further contend that even if knowledge of the workers' compensation claims were not imputed onto San Jose City, the deposition notices served on Santa Clara City afforded the City Defendants the opportunity to preserve evidence. (Opposition-SJ, p. 10:14-18.) In summary, Plaintiffs argue City Defendants would not be prejudiced if the statute of limitations were tolled given that they had an opportunity through the workers' compensation claims to identify evidence that might be needed to defend themselves against the civil claim. (Opposition-SJ, p. 10:22-24.)

In reply, San Jose City contends that the equitable tolling of Plaintiffs' claims would result in prejudice "because it would reward Plaintiffs' neglect of the six-month filing deadline, of which they had full and proper notice. Finding that Plaintiffs' oversight justifies tolling the statute would risk rendering the claim statute as optional. . . . [and] would expand the equitable tolling doctrine beyond . . . only occasional and special situations . . . expos[ing] [San Jose City] to potential future untimely lawsuits by plaintiffs who . . . request equitable tolling based on mere neglect." (SJ Reply, p. 3:10-17.) San Jose City further asserts that it would be prejudiced because Plaintiffs' failure to timely file a complaint created an expectation that they had abandoned their claims against it and that "no further litigation would ensue." (SJ Reply, p. 3:18-21.) The Court does not find these arguments to be persuasive, especially given that San Jose City acknowledges that Plaintiffs presented administrative claims based on the same incidents, effectively giving them notice. (See SJ Reply, p. 2:17-19 ["While Plaintiffs' complaint failed to provide timely notice of their causes of action, Defendant CSJ takes no issue as to the first element given that Plaintiffs presented their administrative claims within the limitation period"].) Moreover, as the Supreme Court noted in *Addison*, courts favor the general policy of relieving plaintiff from a statute of limitations bar where plaintiff pursues a legal remedy designed to lessen the extent of his injuries or damage. (*Addison*, *supra*, 21 Cal.3d at p. 317; see also *J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648, 657 [stating same; also holding that equitable estoppel did not apply where plaintiff did not pursue an alternate remedy before filing a complaint simultaneously with his petition for relief under section 946.6].)

In any event, similar to above, there are no allegations in the Complaint that San Jose City had knowledge of the workers' compensation claims. That the Court has taken judicial notice of the existence of Employee Plaintiffs' workers' compensation claims and the deposition notice and request for production of documents is unhelpful as the existence of these documents does not necessarily mean that San Jose City had knowledge of the claims. (See *Monroy, supra,* 215 Cal.App.4th at p. 987 ["'Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning'"].) Therefore, Plaintiffs fail to satisfy the second element for lack of prejudice.

C. Good Faith and Reasonable Conduct

As for the last element, Plaintiffs contend they filed their civil action about one-month after the six-month period had run, but before equitable tolling would have ended because their workers' compensation claims are still pending. (Opposition-SJ, p. 11:11-14.) In reply, San Jose City asserts that Plaintiffs cite no reasonable justification for failing to timely file their

complaint and that they were aware of the untimeliness but neglected their government claims while pursing workers' compensation claims. (Reply, p. 5:10-16.) Given the holdings in both *Elkins* and *Addison*, San Jose City's argument is unpersuasive.

But, again, the Complaint does not contain sufficient allegations of reasonable and good faith conduct by Plaintiffs. (Cf. e.g., *Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1011 [reversing sustaining of demurrer where complaint alleged sufficient facts to support application of the doctrine of equitable tolling, including where plaintiff includes allegations of reasonable and good faith conduct on plaintiff's part].)

Based on the foregoing, the Court is persuaded by Plaintiffs' arguments that equitable tolling could apply in this instance. However, the Complaint is devoid of allegations regarding the workers' compensation claims or allegations that could further establish equitable tolling, such as the City Defendants' knowledge of the workers' compensation claims through its agent, or any investigation into the Serious and Willful claims (RJN, Ex. 4). (See e.g., *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174 ["court assesses whether "'the complaint shows on its face that the statute bars the action'""].) Without such allegations, the Complaint is time-barred. That said, it is clear from the opposition that Plaintiffs can amend their Complaint to allege equitable tolling. As such, the demurrer to the Complaint on the ground it is time-barred is SUSTAINED with 15 days leave to amend. (See e.g., *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App5th 1125, 1145 ["a trial . . . court may grant leave to amend '. . . if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case'"].)

VII. City of Santa Clara's Demurrer

Santa Clara City's demurrer to the Complaint, Plaintiffs' opposition, and Santa Clara City's reply are identical to that of San Jose City's demurrer, the opposition, and the reply. The only difference is that Santa Clara City sent written notice of rejection on November 8, 2023 and therefore, the statute of limitations would have run no later than May 8, 2023, but Plaintiffs filed their action on June 5, 2023. (SC Demurrer, pp. 3:23-24, 4:2-6.) In opposition, Plaintiffs conceded this point but assert that equitable tolling should apply for the same reasons as above. (Opposition-SC, p. 11:9-12.)

Accordingly, for the same reasons explained in detail above, Santa Clara City's demurrer to Plaintiffs' Complaint on the ground it is time-barred under Government Code section 945.6 is SUSTAINED with 15 days leave to amend.

VIII. Conclusion and Order

The City of San Jose's demurrer is SUSTAINED with 15 days leave to amend. The City of Santa Clara's demurrer is SUSTAINED with 15 days leave to amend.

The Court will prepare the final Order.

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Calendar Line 4
Case Name: *Ilias Taptelis v. Quality Loan Service Corporation, et al.*
Case No.: 20CV372905

I. Background

This is a wrongful foreclosure action brought by plaintiff Ilias Taptelis ("Plaintiff") against defendants Quality Loan Service Corporation ("Quality"), Specialized Loan Servicing, LLC ("SLS"), Homeward Opportunities Fund I Trust 2019-2, U.S. Bank National Association, not in its individual capacity but solely as trustee ("Homeward")[5].

In June 2019, Plaintiff borrowed $1.24 million from Recovco Mortgage Management, LLC, dba Sprout Mortgage ("Recovco") to purchase property located at Fennel Court in Morgan Hill (the "Property). (Complaint, ¶¶ 1, 16-17.) To secure the loan, he executed a deed of trust ("Deed of Trust") by which he conveyed the Property to Stewart Title of California Inc. ("Stewart Title") as trustee to hold for the benefit of Recovco's designee, Mortgage Electronic Recording Systems, Inc. ("MERS"). (*Id.* at ¶ 1, Exs. A, B.) The Deed of Trust was recorded on June 14, 2019. (*Ibid.*)

In or around August 2019, Plaintiff applied for loan modification and was denied. (Complaint, ¶ 24.) In approximately March 2020, Plaintiff became delinquent on his mortgage payments. (*Id.* at ¶ 23.) On April 20, 2020, MERS assigned the Deed of Trust to defendant Homeward. (*Id.* at ¶ 18, Ex. C.) On May 28, 2020, defendant SLS, acting as attorney in fact for Homeward, executed a substitution of trustee replacing Stewart Title with defendant Quality as the trustee. (*Id.* at ¶ 19, Ex. D.)

On June 19, 2020, a notice of default ("Notice of Default") was recorded, listing Quality as trustee, and including a declaration from SLS asserting compliance with Civil Code[6] section 2923.55, subdivision (c)[7]. (Complaint, ¶ 20, Ex. E.) Plaintiff disputes the accuracy of the declaration of compliance. (*Id.* at ¶ 21.) In or around August 2020, Plaintiff again applied for loan modification but was denied. (*Id.* at ¶ 24.) Plaintiff made numerous attempts to contact SLS during 2020, and SLS representatives repeatedly requested the same documents. (*Id.* at ¶ 25.)

On October 30, 2020, Plaintiff filed the operative complaint in these proceedings asserting the following causes of action: (1) violation of Homeowners Bill of Rights (against all defendants); (2) violation of Section 2923.5 (against SLS and Quality); (3) violation of Section 2924.17 (against SLS and Quality); (4) breach of good faith and fair dealing (against all defendants); (5) negligence (against Homeward and SLS); (6) wrongful foreclosure (against all defendants); (7) cancellation of instruments (against all defendants); violation of Business and Professions Code section 17200 (against all defendants); (9) quiet title (against all defendants).

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[5] The complaint erroneously names Homeward and U.S. Bank as separate entities.
[6] Further unspecified statutory references are to the Civil Code.
[7] Section 2923.55 provides: "A notice of default recorded pursuant to Section 2924 shall include a declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required because the individual did not meet the definition of 'borrower' pursuant to subdivision (c) of Section 2920.5."

On October 15, 2020, a notice of trustee's sale was recorded, listing the date of sale as December 4, 2020, and showing the amount of unpaid balance and other charges as $1,352,510.31. (Complaint, ¶ 22, Ex. F.)

On March 24, 2021, Homeward filed a complaint for unlawful detainer against Plaintiff. (*Homeward Opportunities Fund I Trust 2019-2, U.S. Bank National Association, not in its individual capacity but solely as trustee v. Ilias Louie Taptelis, et al.* (Super. Ct. Santa Clara County, 2021, No. 21CV378676.) Thereafter, the Sixth District Court of Appeal issued a decision in the unlawful detainer matter. (*Homeward Opportunities Fund I Trust 2019-2 v. Taptelis* (2023) 96 Cal.App.5th 299.)

On July 7, 2023, defendants SLS and Homeward filed the instant motion for summary judgment or, in the alternative, summary adjudication. Plaintiff filed opposition papers, and SLS filed timely reply papers.

II. Legal Standards

A. Summary Judgment and Summary Adjudication

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue of material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id.* at p. 843.)

Furthermore, "a motion for summary adjudication may be made … as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).) "A party may seek summary adjudication on whether the cause of action, affirmative defense or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630; Code Civ. Proc., § 437c, subd. (f)(1).)

B. Non-Judicial Foreclosure—Generally

"The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is

final between the parties and a bona fide purchaser. [Citation]." (*Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 , 926 (*Yvanova*).)

> California's system of nonjudicial foreclosure has long been governed by a detailed scheme of statutes that evolved over time[8]…. The system is founded upon and presupposes adequate—and thus constitutionally valid—presale notice. Basically, the statutes requires that before the trustee, acting under a power of sale contained in the deed of trust, can sell the subject property, the trustee must first record a notice of default setting forth the nature of the default and the election to exercise the power of sale at a specified place and time. … [¶] The traditional method to challenge a nonjudicial foreclosure sale is a suit in equity … to have the sale set aside and to have the title restored.

(*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 294 (*Morris*) [internal quotation marks, brackets, and citations omitted].)

> Layered on top of this foundational scheme of statutory, common law and equitable rights and remedies is the [California Homeowner Bill of Rights (HBOR)[9]], a complex set of enactments focused specifically on residential mortgages and passed as a legislative response to the ongoing mortgage foreclosure crisis.... The HBOR is principally designed to ensure that as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure…. [¶] At the heart of the HBOR are mandated procedures designed to promote good faith negotiations of some form of foreclosure alternative, typically modification of the borrower's loan terms.

(*Id.* at p. 295 [internal quotation marks and citations omitted].)

III. Request for Judicial Notice

In support of their motion, Defendants request that the court take judicial notice ("RJN") of the following items: (1) the Deed of Trust on the Property recorded on June 14, 2019 (RJN A); (2) the Assignment of Deed of Trust recorded on May 4, 2020 (RJN B); (3) the Notice of Default recorded on June 19, 2020 (RJN C); and the Notice of Trustee's Sale recorded on October 15, 2020 (RJN D). The court may properly take judicial notice of the foregoing items as recorded documents. (Evid. Code, §452, subd. (h); *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265, disapproved on other grounds in *Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. 1 [the court may take judicial notice of the existence and contents of recorded documents, though not of disputed or disputable facts stated therein].)

Defendants' request for judicial notice of RJNs A-D is GRANTED.

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[8] Sections 2920-2923, 2924 et seq.

[9] Statutes 2012, chapters 86-87; see also *Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 750, fn. 1— "Although the Legislature did not give the legislation a title, the Governor in his signing statement, and courts and commentators, have referred to the legislation as the "California Homeowner Bill of Rights. [Citations.]"

IV. Defendants' Motion for Summary Judgment, or in the Alternative, Summary Adjudication

A. Defendants' Undisputed Material Facts

Defendants proffer purportedly undisputed material facts in support of their motion. (Defendants' Separate Statement of Undisputed Material Facts in Support of MSJ/MSA ("UMF").) On June 10, 2019, Plaintiff obtained a loan with a principal amount of $1,240,000 (the "Loan") secured by real property located on Fennel Court in Morgan Hill (the "Property") via Deed of Trust recorded on June 14, 2019. (UMF No. 1.) The Deed of Trust lists the original lender as Recovco and provides that MERS is authorized to act on behalf of Recovco and its successors and assigns. (UMF Nos. 2-3.) SLS was the servicer on the Loan at all relevant times. (UMF No. 4.)

The Loan was in default from in or around September 2019 to December 2020, when the property was sold at a foreclosure sale due to Plaintiff's failure to make payments on the Loan. (UMF No. 5.) The Property address was Plaintiff's mailing address at all relevant times in this action prior to the foreclosure, and Plaintiff received mail at the Property address during that time. (UMF No. 6.) Plaintiff's phone number has remained the same between June 2019 and May 24, 2022. (UMF No. 7.)

SLS attempted to reach Plaintiff on multiple occasions by mail prior to June 19, 2020. (UMF No. 9.) SLS sent Plaintiff a letter, dated December 6, 2019 and addressed to the Property, informing Plaintiff that the Property was at risk of foreclosure and providing Plaintiff with potential avenues Plaintiff could explore to avoid foreclosure. (UMF No. 10.) The letter included the toll-free phone number for the United States Department of Housing and Urban Development ("HUD"). (*Ibid*.) SLS attempted to contact Plaintiff via telephone at his telephone number on January 2, 2020, around 9:04 a.m., February 5, 2020, around 6:00 p.m., and February 13, 2020, around 12:16 p.m. (UMF No. 11.) In each instance, SLS representatives left a voicemail. (*Ibid.*)

SLS sent another letter, dated February 26, 2020, and addressed to the Property, which again informed Plaintiff the loan was delinquent and provided information regarding loss mitigation options and the HUD phone number. (UMF No. 12.) At all relevant times, SLS website contained information regarding options available to those who could afford their mortgage. (UMF No. 13.)

On or about January 9, 2020, Plaintiff submitted his first Request for Mortgage Assistance ("RMA") to SLS. (UMF No. 14.) In response to Plaintiff's first RMA, SLS sent Plaintiff a letter dated January 10, 2020, assigning a single point of contact ("SPOC") to the Loan. (UMF No. 15.) SLS sent Plaintiff a letter dated February 7, 2020, acknowledging receipt of the first RMA and informing that SLS determined the first RMA to be complete as of January 9, 2020. (UMF No. 16.) In a letter to Plaintiff dated February 11, 2020, SLS denied several mortgage relief options in response to the first RMA. (UMF No. 17.) SLS informed Plaintiff that he could seek an independent review of the denial of the mortgage relief options in response to the first RMA. (UMF No. 18.)

On or about July 24, 2020, Plaintiff submitted his second RMA. (UMF No. 19.) SLS sent Plaintiff a letter, dated July 27, 2020, acknowledging receipt of Plaintiff's second RMA and stating that SLS determined the second RMA to be complete as of July 25, 2020. (UMF No. 20.) SLS denied several mortgage relief options in response to the second RMA in a letter dated August 5, 2020. (UMF No. 21.)

On or about August 5, 2020, Plaintiff submitted a third RMA to SLS. (UMF No. 22.) SLS sent Plaintiff a letter, dated August 11, 2020, acknowledging receipt of Plaintiff's third RMA and stating that SLS determined the third RMA to be complete as of August 5, 2020. (UMF No. 23.) SLS denied several mortgage relief options in response to the third RMA in a letter dated August 14, 2020. (UMF No. 24.)

On June 19, 2020, a Notice of Default was recorded on behalf of Homeward. (UMF No. 26.) On October 15, 2020, a Notice of Trustee's Sale was recorded, setting a foreclosure sale of the Property for December 4, 2020. (UMF No. 27.) The scheduled foreclosure sale took place on December 4, 2020. (UMF No. 28.) The Trustee's Deed of Sale was recorded on December 11, 2020. (UMF No. 29.) There was no pending, active loan modification review for the Loan when the Notice of Default, Notice of Trustee's Sale, and Trustee's Deed of Sale were recorded. (UMF No. 30.)

B. Analysis

1. First Cause of Action (Violation of Homeowners Bill of Rights)

In the first cause of action, Plaintiff contends that SLS and Homeward (collectively, "Defendants") violated the HBOR by failing to comply with the six following statutory provisions and requirements: (i) Section 2923.5 (Due Diligence); (ii) Section 2923.7 (Single Point of Contact); (iii) Section 2924.9; (iv) Section 2924.10; (v) Section 2924.17; and (vi) engaging in dual tracking. (Complaint, ¶ 28.) In support of their motion, Defendants address each of these arguments in turn, arguing none present a triable issue of material fact.

i. Due Diligence

Section 2923.55[10] prevents a mortgage servicer from recording a notice of default "until all of the following:"

A. The mortgage servicer has satisfied the requirements of paragraph (1) of subdivision (b).
B. Either 30 days after initial contact is made as required by paragraph (2) of subdivision (b) **or 30 days after satisfying the due diligence requirements as described in subdivision (f)**.
C. The mortgage servicer complies with subdivision (c) of Section 2923.6, if the borrower has provided a complete application as defined in subdivision (h) of Section 2923.6.

(Section 2923.55, subdivision (a) [emphasis added].) Section 2923.55, subdivision (f) defines **"due diligence"** as follows in pertinent part:

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[10] Section 2923.5, subdivision (e) and Section 2923.55, subdivision (f) set forth substantially similar definitions for due diligence under the HBOR. (*Billesbach v. Specialized Loan Servicing LLC* (2021) 63 Cal.App.5th 830, 844, fn. 7 (*Billesbach*) ["Section 2923.55 generally applies only to larger mortgage servicers…. [while] Section 2923.5, which is substantially similar to section 2923.55, applies to smaller servicers"].) For purposes of this order, the court cites to Section 2923.55 for the due diligence standard. In doing so it follows *Billesbach*, where the appellate court relied upon Section 2923.55 for the due diligence standard with respect to SLS, the same mortgage servicer as this case. (*Billesbach*, *supra*, 63 Cal.App.5th at pp. 215, 842-844.)

(1) A mortgage servicer shall first attempt to contact a borrower by sending a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(2)

(A) After the letter has been sent, the mortgage servicer shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls shall be made to the primary telephone number on file. … [¶]

(3) If the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgage servicer shall then send a certified letter, with return receipt requested, that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(4) The mortgage servicer shall provide a means for the borrower to contact it in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours.

(5) The mortgage servicer has posted a prominent link on the homepage of its Internet Web site, if any, to the following information:

(A) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options.

(B) A list of financial documents borrowers should collect and be prepared to present to the mortgage servicer when discussing options for avoiding foreclosure.

(C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgage servicer.

(D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(Section 2923.55, subd. (f).)

Here, Defendants submit evidence that establishes the following: on December 6, 2019, SLS sent a certified letter to Plaintiff at his mailing address that included the toll-free HUD phone number (UMF Nos. 6, 10; Declaration of Cynthia Wallace ("Wallace Decl."), Ex. 1.); in 2020, after the letter was sent, SLS attempted to contact Plaintiff by phone at his telephone number on January 2, February 5, and February 13 (UMF Nos. 7, 11); on or about January 9, Plaintiff submitted his first RMA (UMF No. 14); SLS sent another letter to Plaintiff on February 26, 2020, that included contact information for SLS and the toll-free HUD phone number (UMF No. 12); and SLS posted a prominent link on its website containing options available for borrowers who are unable to afford their mortgage payments (UMF No. 13; Wallace Decl., ¶ 17). This evidence collectively demonstrates that Defendants complied with their due diligence obligations under Section 2923.55.[11]

[11] SLS does not appear to specify whether the prominent link on its website included a list of documents borrowers should collect, a toll-free number for SLS, or the toll-free number for HUD, as required under Section 2923.55, subd. (f)(5). However, the court notes that all of this information was included in the December 6, 2019 letter to Plaintiff. (Wallace Decl., Ex. 1.)

Although Plaintiff disputes Defendants' compliance in his opposition, he fails to offer any admissible evidence supporting his version of events and appears to misinterpret the due diligence requirements. (*LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 981 ["A party cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact"].) As set forth above, under Section 2923.55, subdivision (a), one of the three requisites to recording a notice of default is that the mortgage servicer must wait either 30 days after either initial contact is made in person or by telephone, as described in subdivision (b)(2), or 30 days after satisfying the due diligence requirements as described in subdivision (f). Plaintiff contends SLS fails to identify a telephone call or in-person meeting in which options to avoid foreclosure were discussed. (Opp., p. 11:13-15.)

However, Plaintiff conflates the "initial contact" requirements under subdivision (b)(2) with the "due diligence" requirements under subdivision (f). By the plain language of Section 2923.55, subdivision (f), a notice of default may be recorded when mortgage servicer fails to make initial contact as described under subdivision (b)(2), "provided that such failure to contact the borrower occurred despite the due diligence of the mortgage servicer." Thus, Plaintiff's argument that there was no initial in-person or telephone meeting does not establish a triable issue of material fact as to whether Defendants failed to comply with the due diligence requirements.

Similarly, Plaintiff argues Defendants do not present evidence that they sent a certified letter as stated under Section 2923.55, subdivision (f)(3). (Opp., p. 11.) But, by its terms, that subdivision only applies "[i]f the borrower does not respond within two weeks after the telephone call requirements" have been met. (Section 2923.55, subd. (f)(3).) Here, Defendants present uncontradicted evidence that Plaintiff did respond before the two-week period elapsed. The phone calls occurred on January 2, February 5, and February 13 of 2020. (UMF No. 11.) Plaintiff "responded" by submitting his first Request for RMA on or about January 9, 2020. (UMF No. 14.) Further, Defendants present evidence that the initial due diligence letter was sent to Plaintiff via certified mail. (Wallace Decl., Ex. 1.)

In sum, Plaintiff fails to present evidence or argument sufficient to establish a triable issue of material fact as to the due diligence requirements.

ii. Section 2923.7

Defendants next argue they provided Plaintiff a SPOC as required under Section 2923.7. (Mot., p. 16.)

> When a borrower requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact.

(Section 2923.7, subd. (a).) The statute defines a SPOC as "an individual or team of personnel" each of whom is responsible for: (1) communication with the borrower regarding available foreclosure prevention alternatives, including deadlines; (2) coordinating receipt of all documents associated with those alternatives; (3) having access to information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative; (4) ensuring that a borrower is considered for all foreclosure prevention alternatives, if any; and (5) having access to individuals with the ability to stop foreclosure proceedings when necessary. (Section 2923.7, subds. (b) and (e).)

Defendants proffer evidence that SLS assigned Plaintiff a SPOC in a letter dated January 10, 2020. (UMF No. 14; Wallace Decl., ¶ 19, Ex. 4 ["Your Relationship Manager is Jessica (Teller ID)"]; Declaration of Valerie Schratz, Exs. 14 (RFA Response 14) and 17.) However, Defendants do not appear to present any evidence that the assigned SPOC was responsible for for doing all of the five items listed in Section 2923.7, subd. (b). Thus, Defendants do not meet their burden of establishing the absence of a triable issue of material fact as to the claim that they violated Section 2923.7 by failing to establish a SPOC as defined by the statute.

Even if Defendants had met their burden as to this claim, Plaintiff presents evidence and argument in opposition that demonstrates the existence of a triable issue of material fact. (Opp., pp. 7-9; Plaintiff's Separate Statement of Undisputed Facts (PUMF), Nos. 5, 34-37.) Among the authority Plaintiff relies upon is *Morris*, *supra*, 78 Cal.App.5th 279. While *Morris* followed the trial court's decision on demurrer rather than summary judgment, it nevertheless is instructive about whether an assigned SPOC meets the statutory standard.

The appellate court in *Morris* described the SPOC requirements as a "channel of communication" that "must have access to current information and personnel necessary to inform the borrower of the status of her application." (*Morris*, *supra*, 78 Cal.App.5th at pp. 295-296.) The court found the plaintiff sufficiently alleged a material violation of Section 2923.7 by asserting, among other things, that she was "shuffled from one representative to another" each of whom asked for the same information and provided her with "positive statements and reassurances" even though a notice of default and a notice of trustee's sale had been filed. (*Id.* at p. 302.) When the plaintiff finally reached the representative she had been assigned, the person "did not have the competence to serve in the role described in the SPOC statute." (*Ibid.*)

The evidence proffered by Plaintiff states a similar scenario. Plaintiff asserts that, after he was initially assigned Jessica as his "Relationship Manager," he received a letter dated January 15, 2020 stating he was reassigned to Brandon. (PUMF No. 5; Declaration of Louie Taptelis (Taptelis Decl.), ¶ 9, Ex. 2.) Plaintiff states he repeatedly called and asked for Brandon but did not actually speak with him until August 21, 2020. (Taptelis Decl., ¶ 9.) Plaintiff further asserts the letters he received often conflicted with the information received on phone calls, that he was consistently passed around to different departments, and that even when he was able to reach Brandon, he was unable to assist him. (*Id.* at ¶¶ 11, 14.) In the court's estimation, this evidence is sufficient to establish a triable issue of material fact as to whether Defendants met their SPOC obligations. As the court finds a triable issue of material fact as to the first cause of action, it declines to address Defendant's remaining arguments on that claim.

Accordingly, the motion for summary adjudication of the first cause of action is DENIED. As such, it follows that the motion for summary judgment is DENIED.

2. Second Cause of Action (Violation of Civil Code section 2923.5)

In the second cause of action, Plaintiff again asserts that SLS failed to meet its due diligence requirements in violation of Section 2923.5, subdivision (b). (Complaint, ¶¶ 31-37.) As discussed above, Defendants met their burden of showing the absence of a triable issue of material fact on this claim, which Plaintiff failed to rebut.

Accordingly, the motion for summary adjudication of the second cause of action is GRANTED.

3. Third Cause of Action (Violation of Civil Code section 2924.17)

In the third cause of action, Plaintiff claims that SLS recorded an inaccurate due diligence declaration in violation of Section 2924.17. (Complaint, ¶¶ 39-44.) More specifically, the Complaint alleges the due diligence declaration attached to the Notice of Default is not based on reliable and competent evidence, and that the Notice of Default and Notice of Trustee's Sale are not based on reliable and competent evidence. (*Id*. at ¶¶ 40, 41.) Section 2924.17 provides as follows in pertinent part:

> **(a)** A declaration recorded pursuant to Section 2923.5 or pursuant to Section 2923.55, a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or on behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of Section 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding shall be accurate and complete and supported by competent and reliable evidence.
>
> **(b)** Before recording or filing any of the documents described in subdivision (a), a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information.

(Section 2924.17, subds. (a) and (b).)

Defendants proffer evidence that the Notice of Default was accompanied by a declaration of compliance with Section 2923.55, subdivision (c). (UMF No. 26; RJN C.) The declaration states: "The mortgage servicer has exercised due diligence to contact the borrower pursuant to California Civil Code § 2923.55(f) to 'assess the borrower's financial situation and explore options for the borrower to avoid foreclosure'. Thirty days or more have passed since these due diligence requirements were satisfied." (*Ibid*.) As discussed previously, Defendants proffer evidence that they complied with the due diligence requirements of Section 2923.55. (UMF Nos. 6, 7, 10-14.)

Defendants also proffer evidence to establish that before recording the Notice of Default and Notice of Trustee Sale, they reviewed competent and reliance evidence to substantiate the right to default and foreclose, including that the Loan was in default from September 2019 to December 2020 (UMF No. 5), and that there was no pending, active modification review for the Loan when the Notice of Default, Notice of Trustee's Sale, Trustees' Deed of Sale were recorded (UMF No. 30). Such evidence is sufficient to establish the absence of a triable issue of material fact for the third cause of action.

Plaintiff's arguments in opposition focus on whether Defendants actually met their due diligence requirements (which has already been addressed), and whether there was a pending application for COVID forbearance when the Notice of Default was recorded on June 19, 2020. (Opp., pp. 11-12.) Plaintiffs dispute UMF No. 26 in part, asserting that Plaintiff was told his request for COVID forbearance was good until July 2020. (PUMF No. 26; Taptelis Decl., ¶¶ 19-21, 24; Declaration of Ronald Freshman ("Freshman Decl."), Ex.2 ["transcripts" of phone calls with SLS personnel].)

In reply, Defendants persuasively argue that Plaintiff's claim about COVID forbearance should be disregarded because: (1) it appears for the first time in Plaintiff's opposition and because; (2) the evidence relied upon by Plaintiff is inadmissible[12]; and (3) Plaintiff was not

[12] Both sides submitted objections to evidence in connection with the motion. The court however declines to consider the objections as they are not material to the outcome of the

eligible for COVID relief because he was not current on his payment as of February 1, 2020. (Reply, pp. 6-8.) As Defendants point out, the "pleadings play a key role in a summary judgment motion," and a summary judgment defendant need only "negate plaintiff's theories of liability *as alleged in the complaint*." (*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 485, 493 [emphasis original]; see also *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 90 (*Knapp*) ["plaintiff cannot bring up new, unpleaded issues in his or her opposing papers," and a plaintiff wishing "to rely upon unpleaded theories to defeat summary judgment must move to amend the complaint before the hearing"])

Here, the Complaint does not allege that Defendants violated any provision of the HBOR by failing to address or credit Plaintiff with a COVID forbearance claim. Indeed, based on the court's review, the term "COVID" only appears once in the Complaint: "In or around March 2020, Plaintiff suffered financial hardships and loss of income when due to COVID-19 caused his work to decline and thus causing him to become delinquent in his mortgage payments." (Complaint, ¶ 23.) Further, the Complaint does not allege that Plaintiff ever requested a forbearance claim, and Plaintiff admits that he was in default on the Loan from September 2019 through February 2020, for six months prior to onset of the COVID pandemic. (PUMF No. 5; Mot. p.1:3 ["Mr. Taptelis' default is not at issue…"].) Thus, Plaintiff's contention of a purported COVID forbearance claim does not create a triable issue of material fact because it is an unpleaded theory, brought in opposition to the instant motion. (*Knapp*, *supra*, 123 Cal.App.4th at p. 90.)

Accordingly, the motion for summary adjudication of the third cause of action is GRANTED.

4. Fourth Cause of Action (Breach of the Covenant of Good Faith and Fair Dealing)

In the fourth cause of action, Plaintiff asserts that Defendants breached the implied covenant of good faith and fair dealing. (Complaint, ¶¶ 46-49.)

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest.2d Contracts, §205.) "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658; see also *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 482, disapproved on other grounds in *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 688, 700, fn. 42 [254 Cal. Rptr. 211, 765 P.2d 373] (there cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results).) "The covenant [of good faith and fair dealing] thus cannot 'be endowed with an existence independent of its contractual underpinnings.' [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 – 350.)

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motion for reasons explained below. (Code Civ. Proc., § 437c, subdivision (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

Here, the Complaint alleges Defendants breached the covenant of good faith and fair dealing by "dual tracking." (Complaint, ¶ 47.) "[T]he HBOR prohibits what is sometimes known as 'dual tracking,' a practice that, described broadly, occurs when a lender or servicer pursues foreclosure while simultaneously going through the motions of reviewing a borrower's application for foreclosure mitigation, without a good faith intent to entertain the application. [Citations.]" (*Morris*, *supra*, 78 Cal.App.5th at p. 296; see also *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 928-929 [dual tracking constitutes breach of implied covenant].)

Defendants proffer evidence that the Deed of Trust says nothing regarding dual tracking. (UMF Nos. 1; RJN A.) Defendants further proffer evidence that they did not engage in dual tracking because SJS informed Plaintiff in writing that each of his requests to modify the Loan were denied, and that there was no pending, active Loan modification review when the Notice of Default, Notice of Trustee's Sale, and Trustee's Deed of Sale were recorded. (UMF Nos. 17, 21, 24, 30.) Defendants further argue that imposing a dual tracking requirement under the implied covenant of good faith and fair dealing would be directly adverse to the terms of the contract between the parties.

In opposition, Plaintiff relies upon *Carma Developers (Cal.), Inc. v. Marathon Development Cal., Inc.* (1992) 2 Cal.4th 342 (*Carma*) for his position that the implied covenant should be applied here. (Opp., p. 12.) At issue in *Carma* was the validity of a provision in a commercial lease, and the jury was instructed that the court had conclusively determined that the defendant breached the contract and the implied covenant of good faith and fair dealing. (*Id.* at p. 351.) *Carma* is readily distinguishable because it has nothing to do with foreclosure, and while our high court engaged in a detailed discussion of good faith, it found that the implied covenant of good faith and fair dealing did not apply. (*Id.* at pp. 351, 374-376.) "We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement." (*Id.* at p. 374.) Plaintiff provides no such authority here.

Therefore, the motion for summary adjudication of the fourth cause of action is GRANTED.

5. Fifth Cause of Action (Negligence)

In the fifth cause of action, Plaintiff contends that SLS was negligent in its servicing of the Loan, and that Homeward went beyond its role as lender by reviewing Plaintiff's request for modification assistance. (Complaint, ¶¶ 51-58.) In support of their motion, Homeward and SLS argue that they did not owe a duty of care to Plaintiff and cannot be liable for negligence. (Mot., pp. 20-21.)

"In order to prove negligence, plaintiff must establish duty, breach of that duty, causation, and damages." (*WFG National Title Ins. Co. v. Wells Fargo Bank, N.A.* (2020) 51 Cal.App.5th 881, 893.) Duty is a necessary element of Plaintiff's claim. (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 411.) The existence and scope of a defendant's duty is an issue of law to be decided by the court. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161.) As such, it is generally amenable to resolution by summary judgment. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1004.)

In support, moving defendants rely upon *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, where our high court explained that "a lender's involvement in the loan modification process [including processing, reviewing, and responding to loan modification applications] is part and parcel of its assessment regarding how best to recoup the money it is

owed," and that "[s]uch involvement, without more, does not exceed the scope of [an institution's] conventional role as a lender." (*Id.* at pp. 928-929 [internal quotation marks and citations omitted].)

In his opposition, Plaintiff concedes moving defendant's argument, stating "In compliance with *Sheen v. Wells Fargo Bank*, 12 Cal.5th 905 (Cal. 2022), Plaintiff dismisses his Negligence claim." (Opp., p. 4:5-6.) Plaintiff does not otherwise address the fifth cause of action in his opposition.

Accordingly, the motion for summary adjudication of the fifth cause of action is GRANTED.

6. Sixth Cause of Action (Wrongful Foreclosure)

The sixth cause of action is for wrongful foreclosure. (Complaint, ¶¶ 56-58.)

"A wrongful foreclosure is a common law tort claim. It is an equitable action to set aside a foreclosure sale, or an action for damages resulting from the sale, on the basis that the foreclosure was improper. The elements of a wrongful foreclosure cause of action are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 561-562 [internal quotation marks and citations omitted].)

"[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case." (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 409.)

Here, Plaintiff asserts that Defendants committed the tort of wrongful foreclosure because they failed to contact him prior to recording the foreclosure and committed dual tracking during the foreclosure process. (Complaint, ¶¶ 57-58.) In support of their motion, Defendants contend they fulfilled all due diligence requirements and did not engage in dual tracking. (Mot., p. 22; UMF Nos., 6-13, 17-18, 21, 24, 26-27 and 30.) As discussed previously, Defendants' evidence is sufficient to meet their burden as to these claims.

The sole evidence that Plaintiff proffers in opposition is that SLS stated the wrong amount of arrears because it did not include Plaintiff's purported request for COVID forbearance. (Opp., p. 13; PUMF No. 45.) As stated above, this is a new, previously-unpleaded theory of relief, and Plaintiff cannot rely upon it in opposing summary adjudication. (*Knapp*, *supra*, 123 Cal.App.4th at p. 90 ["plaintiff cannot bring up new, unpleaded issues in his or her opposing papers"].) Plaintiff's remaining argument is that Defendants' alleged HBOR violations also provide grounds for the tort of wrongful foreclosure. (Opp., p. 14.) However, the authorities cited by Plaintiff do not discuss this proposition. (*Ibid.*)

Thus, the motion for summary adjudication of the sixth cause of action is GRANTED.

7. Seventh Cause of Action (Cancellation of Instruments)

The seventh cause of action is for cancellation of instruments. (Complaint, ¶¶ 60-64.)

"Under Civil Code section 3412, '[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.' To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud, and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alteration of one's position. [Citation.]" (*U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 778.)

Here, the Complaint alleges that documents relative to the foreclosure proceeding (Assignment of Deed of Trust, Notice of Default, and Notice of Deed of Sale) should be rescinded and/or cancelled because they were not based on competent evidence, SLS did not comply with its due diligence requirements, and because MERS had no authority to substitute Quality as successor trustee. (Complaint, ¶¶ 60-64.) As to the first two arguments, Defendants have already discussed these issues. For the reasons stated above, Defendants have met their burden and Plaintiff has not.

Defendants contend the third claim lacks merit, and proffer evidence that the Deed of Trust that Plaintiff admits to signing provides that MERS had the authority to substitute a successor trustee. (Mot., p. 23; UMF Nos. 1, 3.) In opposition, Plaintiff does not specifically address MERS' authority (or lack thereof) in his memorandum (Opp., p. 14), but disputes UMF No. 3. (PUMF, No. 3 ["MERS is identified solely as nominee acting as beneficiary. MERS authority is derived from its agency agreement with Recovco and specific to the DOT. The DOT does not authorized MERS any authority as to the "loan"]; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270 (*Fontenot*) [MERS authority defined by its agency agreement with the lender]".)

Plaintiff's reliance upon *Fontenot* is misplaced as that case addresses and dismisses Plaintiff's argument regarding authority to assign. (*Fontenot*, *supra*, 198 Cal.App.4th at p. 270 ["the lack of a possessory interest in the note did not necessarily prevent MERS from having the authority to assign the note. While it is true MERS had no power *in its own right* to assign the note, since it had no interest in the note to assign, MERS did not purport to act for its own interests in assigning the note. Rather, the assignment of deed of trust states that MERS was acting as nominee for the lender, which *did* possess an assignment interest"].) Similarly here, MERS was acting as nominee of Recovco. (RJN A, p. 4 of 22 ["MERS (as nominee for Lender and Lender's successor as assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument"].) This unrebutted evidence is sufficient to establish that MERS had the necessary authority to substitute a successor trustee.

Thus, the motion for summary adjudication of the seventh cause of action is GRANTED.

8. Eighth Cause of Action (Violation of Business and Professions Code section 17200)

The eighth cause of action is for violation of business and professions code section 17200. (Complaint, ¶¶ 66-68.)

Business and Professions Code section 17200 ("Section 17200") prohibits any "unlawful, unfair, or fraudulent business practices." (Bus. & Prof. Code, § 17200.) The Unfair

Competition Law ("UCL") covers a wide range of conduct. It embraces anything that can be properly called a business practice and that at the same time is forbidden by law. (*Korea Supply Co. v. Lockhead Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) Under section 17200, a practice may be deemed unfair or deceptive even if not proscribed by some other law. (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48.) There are three varieties of unfair competition: practices which are unlawful, unfair, or fraudulent. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Pursuant to Section 17200, unfair competition includes, "any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive, untrue, or misleading advertising…" (Bus. & Prof. Code, § 17200.)

To have standing to sue under the UCL, a private plaintiff must allege he or she "has suffered injury in fact and has lost money or property." (Bus. & Prof. Code, § 17204.) A plaintiff must "(1) establish loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322 (*Kwikset*).)

Here, the Complaint alleges Defendants violated the UCL by violating the HBOR. (Complaint, ¶¶ 66-68.) Defendants argue that Plaintiff has not alleged any economic injury caused by Defendants conduct. (Mot., p. 24.) Defendants have provided evidence that Plaintiff's alleged harm was caused by the default, rather than by its conduct. (UMF No. 5.) Thus, Defendants have met their burden by establishing Plaintiff lacks standing to support the UCL claim. (*Kwikset*, *supra*, 51 Cal.4th at p. 322.) Plaintiff does not address this causation argument in opposition, and as discussed previously, he does not dispute that he was in default on the Loan beginning in September 2019.

Therefore, the motion for summary adjudication of the eight cause of action is GRANTED.

9. Ninth Cause of Action (Quiet Title)

The ninth cause of action is for quiet title. (Complaint, ¶¶ 70-77.)

"A quiet title action is a statutory action that seeks to declare the rights of the parties in realty. The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to. The purpose of a quiet title action is to determine any adverse claim to the property that the defendant may assert, and to declare and define any interest held by the defendant, so that the plaintiff may have a decree finally adjudicating the extent of his own interest in the property in controversy." (*Robin v. Crowell* (2020) 55 Cal.App.5th 727, 740 [quotation marks and citations omitted] (*Robin*).)

The elements of a quiet title cause of action are: (1) a description of the property; (2) the title of the property as to which a determination is sought; (3) the adverse claims to title; (4) the date as of which the determination is sought; and (5) a prayer for the determination of title. (See Code Civ. Proc., § 761.020; *Weeden v. Hoffman* (2021) 70 Cal.App.5th 269, 294.)

Here, the Complaint alleges there are adverse claims to title because: (1) "On or about May 4, 2020, MERS assigned the Deed of Trust to Homeward Opportunities Fund I Trust 2019-2, U.S. Bank, N.A., not in its individual capacity but solely as Trustee (Complaint, ¶73); and (2) the grant deed recorded on June 14, 2019 transferred the Subject Title to Plaintiff (*Id.* at ¶¶72, 74.) Defendants have provided evidence establishing that to secure the Loan, Plaintiff

executed the Deed of Trust by which he conveyed the Property to Stewart Title as trustee to hold for the benefit of Recovco's designee, MERS. (UMF No. 1; RJN A.) Defendants further present authority that a deed of trust "conveys title to real property from the trustor-debtor to a third party trustee to secure the payment of a debt owed to the beneficiary-creditor under a promissory note." (*Robin*, *supra*, Cal.App.5th at p. 742.) Thus, Defendants meet their burden of establishing the absence of a triable issue as to alleged adverse claim to title.

In his opposition, Plaintiff states he "does not dispute the validity of the DOT itself, or the valid lender's interest in the DOT, but rather any claim by U.S. Bank by virtue of the defective assignment, and any claim made pursuant to the TDUS." (Opp., pp. 15-16.) As the court understands it, Plaintiff's quiet title argument is based on his claim that the Notice of Default is invalid. However, Plaintiff does not provide evidence in support of this claim. Further, while Plaintiff relies upon *Miller v. Cote* (1982) 127 Cal.App.3d 888, in that case, the court found that the notice of default was invalid because there was no default. (*Id.* at p. 894.) Here, as addressed previously, it undisputed that Plaintiff was in default from September 2019 until the trustee's sale. (UMF 5.)

Therefore, the motion for summary adjudication of the ninth cause of action is GRANTED.

V. Conclusion

Defendants' motion for summary judgment is DENIED.

Defendants' motion for summary adjudication of the first cause of action is DENIED.

Defendants' motion for summary adjudication of the second, third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action is GRANTED.

The Court will prepare the final order.

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Calendar Line 8
Case Name: California Department of Fair Employment and Housing et al. v. Cisco Systems, Inc. et al.
Case No: 20CV372366

Motion to Intervene

The Hindu American Foundation has filed a motion to intervene in the case. Plaintiff, California Department of Fair Employment and Housing, now Civil Rights Department (CRD), opposes the intervention.

Plaintiff's request for judicial notice is granted. Evid. Code § 452.

Mandatory intervention is available if a non-party can establish: (1) the non-party has "an interest relating to the property or transaction that is the subject of the action," (2) that the "disposition of the action may impair or impede [the non-party's] ability to protect that interest," and (3) the interest is not "adequately represented by one or more of the existing parties." (§ 387 subd. (d)(1)(B).) "These criteria are virtually identical to those for compulsory joinder of an indispensable party." (*Carlsbad Police Officers Association v. City of Carlsbad* (2020) 49 Cal.App.5th 135, 148.) Section 387, subdivision (d)(2) provides for permissive intervention where a nonparty timely applies and "(1) the intervenor has a direct and immediate interest in the litigation, (2) the intervention will not enlarge the issues in the case, and (3) the reasons for intervention outweigh opposition by the existing parties." (*Hinton v. Beck* (2009) 176 Cal.App.4th 1378, 1382–1383.)" If these factors are met, permissive intervention is still discretionary.

For intervention as a right, the interest must be legally "protectable." (*Accurso*, 94 Cal.App.5th at 1145.) HAF's motion raises a free exercise claim under the First Amendment. To establish a viable free exercise claim a plaintiff must show that a government action substantially burdened or had a coercive effect on their practice of religion. (See *Harris v. McRae* (1980) 448 U.S. 297, 321 [organizational plaintiff must demonstrate coercive effect against the practice of individual member's religions]; *Jones v. Williams* (9th Cir. 2015) 791 F.3d 1023, 1031–1032 [plaintiff must show that the government action in question substantially burdens the person's practice of their religion].)[13] "A substantial burden . . . place[s] more than an inconvenience on religious exercise; it must have a tendency to coerce individuals into acting contrary to their religious beliefs or exert substantial pressure on an adherent to modify his behavior and to violate his beliefs." (*Jones,* 791 F.3d at 1031-1032.) HAF has not demonstrated a viable Free Exercise Clause claim as required for mandatory intervention. HAF's complaint does not allege any facts showing that CRD coerced anyone into doing something inimical to their religious convictions or otherwise prevented them from being able to practice their religion. Seeking to end caste-based discrimination at Cisco (the goal of CRD's enforcement action) would not prevent or burden Hindu Americans from practicing their religion. HAF's motion erroneously characterizes CRD's enforcement action as seeking to define Hinduism, but erroneously defining or characterizing a religion in a pleading does not have an unlawful coercive effect on an adherent's ability to practice their religion.

[13] Due to the similarities between Code of Civil Procedure section 387 and Federal Rules of Civil Procedure Rule 24, it is proper for California courts to "take guidance from federal law" in interpreting section 387. (*Accurso*, *supra*, 94 Cal.App.5th at 1138.)

HAF's proposed complaint also contains a cause of action under the Unruh Act. This cause of action is legally insufficient as Unruh "prohibits arbitrary discrimination in California business establishments on the basis of specified classifications." (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 172.) Government entities are only liable under Unruh when they act as business establishments. (*Ibid*. at p. 175-76.) Here, HAF argues that CRD's actions are legislative in nature--the type of actions courts have found is not liable under Unruh. (See *ibid*. at p. 175.) HAF does not have a legal interest under Unruh as CRD is not acting as a business establishment.

The lack of interest is sufficient to deny mandatory intervention. It should be noted that it does not appear that HAF can meet the second criteria for mandatory intervention either-that the disposition of the action may impair HAF's ability to protect the free exercise of Hinduism. The point of the lawsuit is to prevent discrimination at Cisco based on caste. It is hard to see how such a case, even though it wrongfully ascribes the caste system to Hinduism, would result in the inability of Hindus to freely practice their religion. The Court does not find HAF's papers persuasive on this point. For these reasons, HAF is not entitled to mandatory intervention.

In deciding whether to permit discretionary intervention, the court must first consider whether the HAF has a direct and immediate interest in the litigation. For the reasons outlined above, the answer to this is no. HAF does not have a legally protectable interest in the case. The court must also consider whether the intervention will enlarge the issues in the case. The answer is it would, as it would introduce issues of First Amendment law and the Unruh Civil Rights Law, neither of which are at issue in the underlying action. Finally, the reasons for intervention do not outweigh the opposition and therefore, the court denies the HAF's motion to intervene. Plaintiff shall prepare the final order.

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Calendar line 9
Case Name: California Department of Fair Employment and Housing et al. v. Cisco Systems, Inc. et al.
Case No: 20CV372366

Plaintiff (formerly FEHA, now Civil Rights Department (CRD)) moves for permission to use a fictitious name for the real party in interest in the course of this litigation. The trial court initially denied the motion. See Order of February 3, 2021. Because the trial court failed to consider the risk to the real party in interest's (hereinafter Doe) family members in India as a basis for allowing him to proceed anonymously, the Court of Appeal issued a Peremptory Writ of Mandate vacating the order denying Plaintiff's Motion and instructing the Court to reconsider the Motion based on the views expressed in its Opinion attached to the Remittitur ("Opinion"). This Court's Order declined to consider "residents of another country or another country's discriminatory practices" when assessing "whether a party in California may remain anonymous in a lawsuit alleging violation of the California FEHA against a corporation in California." Order 4. The Court of Appeal found this to be error. The Court of Appeal concluded that "evidence of potential harm to family members anywhere is a legitimate consideration in determining whether a party should be granted anonymity in litigation." Opinion 1. The Appellate Court found that CRD "has the burden to show that geographically distant family members are at risk," that the Court must consider evidence presented by CRD and assign it the appropriate weight, and that the Court must engage in the "fact-dependent exercise" of assessing whether the likelihood and severity of harm "to the identified family members" constitutes an overriding interest that "outweighs the First Amendment right to public access to court proceedings." Opinion 7. The Court of Appeal cautioned that, unless permitted by statute, allowing a party to litigate under a pseudonym should occur "only in the rarest of circumstances." *Id*. 6.

Except with respect to the effect of risk of harm to Doe's family in India, the decision of this court from February 11, 2021 is incorporated into this decision and this Court again finds that the Plaintiff has failed to provide sufficient evidence to show that the risk of harm to Doe outweighs the public's right to access in this case.

As ordered, the Court now assesses whether the potential harm to Doe's family in India is sufficient to allow him to proceed under a fictitious name in this lawsuit. Doe has provided general evidence of discrimination and violence toward members of the Dalit in India, as indicated in the court's opinion of February 11, 2021. But generalized discrimination against an entire group does not demonstrate a likelihood of harm to Doe's specific family members. Doe also indicates that his father faced discrimination at work based on his caste but fails to say when this was. He asserts that that he was ostracized for his status as a child. He says that his wife's family changed its names "decades ago." All of this conduct appears to have occurred decades ago and fails to demonstrate a likelihood of current harm.[14] The severity of the harm suffered by him and his family is also not sufficient to meet his burden. Doe does not describe any assaults, acts of violence, or even threats of violence toward his family now or

[14] His statement that his mother-in-law recalls a time when neighbors stopped interacting with her because she cooked meat does not indicate it was a recent event, does not establish it was tied to her being a Dalit, and, in any event, is hearsay and as such will not be considered by this Court.

ever. If claims of lack of promotion and name-calling from decades ago coupled with generalized statistics of continuing and sometimes violent discrimination were sufficient to allow a person to file anonymously there is scarcely any discrimination case in which a plaintiff could not meet the burden to proceed under a fictitious name, as racism and antisemitism, to name just a few examples, are all alive and well both here and abroad.

Plaintiff's motion to proceed by fictitious name is DENIED. Defendant shall prepare the final order.

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