SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

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

DATE: July 9, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

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

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

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

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

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

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

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1-2, 14	19CV356261	Sherry Chuang vs Shiuh Chuang et al	The parties' cross motions for sanctions is DENIED. Tentatively, Defendants' demurrer to third, fourth, eighth and ninth causes of action is SUSTAINED WITHOUT LEAVE TO AMEND; seventh cause of action SUSTAINED WITH 20 DAYS LEAVE TO AMEND; and otherwise OVERRULED. However, the Court orders the parties to appear at the hearing and provide further argument regarding whether the claims here are barred by failure to bring them as compulsory counterclaims in other litigation between the parties. The Court wants to see how each claim here relates (or does not relate) earlier filed litigation between the parties. Defendants' motion to strike is GRANTED, IN PART and otherwise DENIED. Scroll to lines 1-2, 14 for complete rulings. Court to prepare formal order.
3	24CV433113	Hesham Eassa vs Elaine Jones et al	Defendants' demurrer is SUSTAINED with 20 days leave to amend. Plaintiff received notice of this hearing date and time by U.S. mail sent on April 30, 2024 and served no opposition. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Although Plaintiff failed to file an opposition, the Court is providing Plaintiff an opportunity to amend. Defendants' arguments on demurrer largely relate to their status as former owners and law surrounding post-foreclosure. However, review of the complaint suggests the gravamen of Plaintiff's complaint is fraud, which must be plead with particularity, not matters related to the foreclosure. Thus, Defendants' demurrer is SUSTAINED with 20 days leave to amend. The Court also notes that there are at least two related cases-one civil harassment and another unlawful detainer that has been converted to an unlimited civil case. The parties are ordered to appear and show cause why this case should not be consolidated with the former unlawful detainer case (Case No. 24CV418659) for all purposes.
4-5	24CV434229	Mohammad Ghanbaran vs Rex Bennett	Defendant's demurrer is SUSTAINED with 20 days leave to amend; Defendant's motion to strike is MOOT. Court to prepare formal order. However, parties are ordered to appear at the hearing. Plaintiff is self-represented and likely to be unfamiliar with the tentative ruling and notice process.

7	21CV381190	Nayoung Lee vs Raul Arias et al	Plaintiff's motion for reconsideration of the Court's May 15, 2024 order granting summary judgment is DENIED. Motions for reconsideration are generally governed by Code of Civil Procedure section 1008, which represents the Legislature's attempt to regulate what the Supreme Court has referred to as "repetitive motions." (See *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 885.) The legislative intent was to restrict motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not offering it earlier. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500; see *Baldwin v. Home Sav. Of America* (1997) 59 Cal.App.4th 1192, 1198.) The burden under Section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212-213.) Plaintiff argues an expert declaration regarding signage requirements on the undercrossing could not have been obtained earlier because of counsel's busy schedule and resulting tight deadlines for responding to this motion and the Court impermissibly drew inferences in Defendant's rather than Plaintiff's favor as required. First, Plaintiffs are the architect of their own cases and are responsible for moving the cases they bring forward. This case was filed in March 2021, summary judgment was noticed two years later on March 21, 2023, continued at Plaintiff's request from June 13, 2023 to October 10, 2023, further continued at Plaintiff's request to December 21, 2023, then continued again to March 14, 2024 by stipulation of the parties, the date upon which it was finally heard—some three years after the case was filed and a full year after City moved for summary judgment. Plaintiff's explanation for the delayed discovery of this expert declaration is therefore not well taken. Next, because City came forward with sufficient evidence in support of design immunity, it became Plaintiff's burden to show a triable issue of fact regarding design immunity. Even after reading the entirety of Sewell's deposition transcript as Plaintiff requested, it was clear there was no such evidence. Moreover, Plaintiff's newly obtained expert declaration cannot change the applicability of trail immunity, which is also applicable here. Finally, Plaintiff's motion is not timely. For all these reasons, Plaintiff's motion for reconsideration is DENIED. Court to prepare formal order.
8	22CV392934	V & Victoria, LLC vs Check Into Cash of California, Inc.	Defendant's motion for summary judgment/adjudication is DENIED. Scroll to line 8 for complete ruling. Court to prepare formal order.

9	23CV419420	Maria Lopez vs AMERICAN HONDA MOTOR CO., INC.	Plaintiffs' motion to compel responses to request for production nos. 18-19, 27-28, 33, 37-39, and 46 and for $2,620 in sanctions is DENIED. Defendant responded that no documents were located in response to nos. 18-19 after a reasonable search. This response is code complaint. The remainder of the requests seek information untethered to the vehicle at issue here. The primary focus of permitted discovery in Song-Beverly cases is on the vehicle at issue in a particular case—not sweeping discovery regarding other customers' complaints or other vehicles. (See, e.g., *Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52; *BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136; *Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072; *Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136; *Kwan v. Mercedes-Benz of North America, Inc.* (1996) 23 Cal.App.4th 174, 186.) *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138 and *Doppes v. Bently Motors, Inc.* (2009) 174 Cal.App.4th 967 do not change this analysis. The parties' cross motions for sanctions is DENIED. The parties appear to have engaged in good faith meet and confer, and each was substantially justified in bringing these issues to the Court for resolution. Court to prepare formal order.
10	23CV422193	Rachael Menchaca vs Kayla Chong-Flores et al	Withdrawn by moving party.

11	23CV427730	Netanel Nutman vs General Motors, LLC	Plaintiff's motion to compel the deposition of General Motors, LLC's person most qualified with production of documents and for $2,970 in sanctions is GRANTED, IN PART. Defendant already agreed to produce a witness or witnesses for deposition for Topics 1-4 and 6-7, so there was no need for Plaintiff to seek an order compelling that deposition. The Court disagrees with Defendant that topic 5 is not relevant but does agree that its wording is overbroad. Plaintiff can ask questions about the policies and procedures General Motors, LLC has in place for compliance with Song-Beverly. Plaintiff's motion is otherwise DENIED. First, topic 8 is not relevant. The primary focus of permitted discovery in Song-Beverly cases is on the vehicle at issue in a particular case—not sweeping discovery regarding other customers' complaints or other vehicles. (See, e.g., *Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52; *BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136; *Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072; *Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136; *Kwan v. Mercedes-Benz of North America, Inc.* (1996) 23 Cal.App.4th 174, 186.) Plaintiff's citation to *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138 and *Doppes v. Bently Motors, Inc.* (2009) 174 Cal.App.4th 967 does not change this analysis. Neither of those cases directly addressed a trial court's discovery orders in a lemon law case. Next, A party seeking to compel is required to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) Plaintiff fails to do that here. Finally, and most troubling, the Court finds there was a complete lack of meet and confer before filing this motion. Plaintiff does not appear to have engaged in a single conversation with Defendant regarding Defendant's objections or willingness to provide a deponent on most topics. Code of Civil Procedure section 2023.020 states: "the court *shall* impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as result of that conduct." (Emphasis added; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 448 (failure to participate in meet and confer process in good faith is independent discovery abuse for which sanctions are authorized by statute); *Ellis v. Toshiba Am. Info. Sys., Inc.* (2013) 218 Cal.App.4th 843, 879-880 (substantial monetary sanction appropriate for failure to cooperate in setting protocol for expert inspection as ordered).) This monetary sanction is mandatory regardless of how the court rules on the offending party's motion. (Code Civ. Proc. §2023.020.) The Court finds such sanctions appropriate here. Plaintiff is ordered to pay Defendant $1000 in attorneys fees and costs associated with the need to respond to this motion. Court to prepare formal order.
12	23CV423756	Martha Chaidez vs Terrence Lee et al	Falls Lake Fire and Casualty Company's motion to intervene is off calendar. The relief sought in this motion was addressed in the parties' stipulation, which the Court signed on May 19, 2024.
15	20CV363875	Capital One Bank (USA), N.A. vs Steve Ringwood	Judgment debtor's claim of exemption is granted, IN PART. The Court will order $150 per pay period to be garnished from judgment debtor's wages each pay period and release of the funds currently in the Sheriff's custody.

17	21CV377179	City Of Sunnyvale vs Lucille Lynch et al	Prior Receiver Eric P. Beatty's motion for an order approving receiver's final report and final accounting, approving receiver's fees and costs, of instructions to replacement receiver, exonerating the receiver's undertaking and discharging the receiver is GRANTED IN PART. The Court has presided over this matter since January 2023. From that time until February 2024 the Court conducted some four case management conferences. At each conference Prior Receiver gave the same report which contained no movement towards a rehabilitation plan. Ms. Lynch sometimes also appeared at these conferences and expressed difficulty obtaining information from Prior Receiver. In sum, the Court personally observed Prior Receiver's slow pace and lack of progress, which lead to the Court's ready agreement to appoint a new receiver. The Court also did not receive timely accountings or requests for cash advances from Prior Receiver during the time the undersigned Court has presided over this matter. Accordingly, the Court agrees with City that the amount of fees Prior Receiver seeks are not commensurate with the work completed. The Court orders City to prepare a final order that includes (1) reimbursement for Prior Receiver's actually incurred hard costs and (2) a reasonable number of hours spent on the activities connected with those hard costs (i.e., obtaining insurance, tree removal, trash and other hoarding related removal work, deep cleaning, relocating Ms. Lynch, searching for her relatives, etc.) within 20 days of this July 9, 2024 hearing. These orders will be reflected in the minutes.
18	21CV384685	Jeremy Witt vs Sherry Ross et al	Jeremy Witt's motion to strike costs is DENIED. The record does not support Mr. Witt's position that there was an agreement that entitled him not to pay costs. Mr. Witt dismissed this matter without prejudice without a settlement agreement. This makes Defendants the prevailing parties and entitled to costs. Court to prepare formal order.
19	23CV412126	MITTHAN MEENA vs SRINIVAS AKELLA et al	Plaintiff's motion for leave to file an amended complaint to add Netskope, Inc. is once again DENIED WITHOUT PREJUDICE. This is Plaintiff's second attempt to amend the complaint to add Netskope, Inc. The Court explained to Plaintiff during the hearing on his first motion to amend that the motion did not comply with the requirements for amendment which rendered it impossible for the Court or counsel to assess whether the amendment was appropriate. The Court issued a formal order dated May 14, 2024 stating: "Plaintiff's motion to file an amended complaint to add Netskope, Inc. as a Defendant is DENIED WITHOUT PREJUDICE. The motion does not include a copy of the proposed amended complaint, a delineation of what additional allegations Plaintiff seeks leave to assert, or an affidavit under oath detailing why the proposed amendment is proper. In other words, the deficiencies outlined in the opposition are correct. And, while Plaintiff is self-represented, self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Accordingly, this motion is denied without prejudice." Plaintiff's current motion fails to correct any of these defects and is therefore DENIED.
20	23CV415872	Rigoberto Hernandez vs Ford Motor Company et al	Plaintiff's motion for attorneys' fees, costs, and expenses is GRANTED, IN PART. Scroll to line 20 for complete ruling. Court to prepare formal order.
24	2011-1-CV-212974	W. Dresser vs A. Hiramanek	Vacated by the Court's July 2, 2024 order.

25	24CV439748	Gary King vs Agus Tandiono et al	The Court granted Defendants' motion to expunge lis pendens and set this matter for hearing on Defendants' motion for fees and costs by order dated June 14, 2024. Code of Civil Procedure section 405.38 provides: "The court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." Granting fees is not automatic; whether fees are appropriately granted is in the trial court's discretion. (See *Kirkeby v. Superior Court* (2003) 109 Cal. App. 4th 1275, review granted, depublished, (Cal. 2003), rev'd, superseded, (Cal. 2004), 33 Cal. 4th 642; *Trapasso v. Superior Court* (1977) 73 Cal. App. 3d 561.) And, while Defendants are correct that an attorneys' verified time statements are entitled to a presumption of credibility, that does not mean the Court is required to award all fees and costs sought just because such fees and costs are attached to and described in an attorney's declaration. (*Horsfort v. Board of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 396.) The Court already determined there was not substantial justification for the lis pendens; Plaintiff seeks money damages. However, the Court agrees that certain fees referenced in Exhibit A to the Griswold declaration are related to other than expunging the lis pendens. Relevant here is that Defendants' counsel is also Defendants' real estate agent, and some of the work described in Exhibit A appears related more to the sales transaction than the lis pendens expungement. The rate of $425 per hour is reasonable in Santa Clara County for this case type; the number of hours for an ex parte application is not. The Court thus awards Defendants $8,561.27 in attorney fees and costs representing: 20 hours of attorney work, $16.42 for e-filing and e-service charges, and $44.85 for One Legal e-filing fees, payable within 30 days of service of the formal order, which order the Court will prepare.
26	20CV369250	Felipe Patricio Vasquez vs Penelope Suzanne Chestnut Lee, et. al.	Makkabi Law Group APC's motion to withdraw as counsel for Felipe Patricio Vasquez is GRANTED. The withdrawal will be effective upon filing the proof of service of the formal order. The parties are ordered to appear, as counsel specifically requested a conference with the Court to avoid prejudice to the Plaintiff.

Calendar Line 1-2, 12
Case Name: *Sherry Chuang v. Shiuh Chuang, et al.*
Case No.: 19CV356261

Before the Court is (1) Defendants Sherry Chuang's and Alexander Liu's (collectively, "Defendants") demurrer to Plaintiffs' Mei Haw Chuang ("Mei"), Shiuh Chuang ("Lisa"), and Alessio Lisi ("Lisi") (collectively, "Plaintiffs") first amended complaint ("FAC"), (2) Defendants' motion to strike portions contained therein, (3) Plaintiffs' motion for sanctions against defense counsel Scott Talkov, and (4) Defendants' motion for sanctions against Plaintiffs' counsel Brian Affrunti, Douglas W. Dal Cielo and their law firm Burke, Williams, & Sorensen, LLP.[1] Pursuant to California Rule of Court 3.1308, the Court issues its tentative rulings as follows.

I. Background

This is a consolidated matter pertaining to various property disputes. The lead case involves property located at 410 Sheridan Avenue in Palo Alto (the "Sheridan Property")[2], while the consolidated cases involve property located at 4234 Pomona Avenue in Palo Alto (the "Pomona Property").[3] The instant matter involved property located at 2972 Clara Drive in Palo Alto (the "Clara Property").

In 2002, Sherry and Lisa purchased the Clara Property. (FAC, ¶ 16.) Mei and her late husband, Ying, put the down payment of $300,000 for the Clara Property as a gift to their daughters, who are each 50% owners. (*Ibid*.) It was agreed Lisa, Lisi, and their children would reside on their side of the property and Mei and Ying would reside on Sherry's side of the property rent free in exchange for the gifted down payment. (*Ibid*.)

Ying and Mei appointed Sherry as their power of attorney until January 21, 2017, when they learned only $20,000 remained between their accounts at Wells Fargo. (FAC, ¶ 23.) Ying, Mei, and Lisa attempted to trace the transactions and learned that approximately $488,018 had been transferred

[1] As multiple individuals share a surname, the Court will refer to them by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)
[2] *Sherry Chuang v. Mei Haw Chuang, et al.*, Case No. 19CV358358 also involves the Sheridan Property.
[3] *Mei Haw Chuang, et al. v. Sherry Chuang, et al.*, Case No. 20CV371732 involves both the Sheridan and Pomona Properties. *Sherry Chuang v. Mei Haw Chuang, et al.*, Case No. 20CV372732 involves just the Pomona Property. The above matters were consolidated on July 13, 2021. (See July 13, 2021, Order RE: Motion to Consolidate, p. 3.) The parties also have an active probate case, *Ying Cheh Chuang and Mei Haw Chuang Revocable Trust dated 5/10/1998*, Case No. 20PR189253.

to Sherry and Liu's bank accounts. (FAC, ¶ 24.) Plaintiffs were able to recoup $48,000 before Ying's passing and May 9, 2017, Defendants agreed to return an additional $133,427. (FAC, ¶ 25.)

After they were confronted about the theft, Defendants filed three separate partition actions regarding the properties. (FAC, ¶ 26.) Subsequently, Mei amended the survivor's trust to remove Sherry as trustee and beneficiary. (FAC, ¶ 27.) Sherry carried out harassing and intimidating behavior toward Mei, including but not limited to, trying to control her daily activities, monitoring her, belittling her, locking her out of the Clara Property. (FAC, ¶¶ 28-29.) She also took steps to harass, intimidate, Lisa, Lisi, and their children. (FAC, ¶¶ 30-32.)

In March 2020, Sherry moved into her side of the Clara Property to monitor Plaintiffs. (FAC, ¶ 37.) Mei disinherited Sherry in December 2019. (FAC, ¶ 38.) At that time, Sherry began refusing to provide Mei with rent obtained from tenants in the Pomona Property. (*Ibid*.) Liu and Sherry misappropriated money from Mei's bank accounts and her when they withheld rent due to her. (FAC, ¶ 39.) Sherry also falsified text messages on Mei's phone on two separate occasions. (FAC, ¶ 40.)

On October 8, 2020, Plaintiffs filed the Complaint for the following claims: (1) financial elder abuse; (2) conversion; (3) breach of fiduciary duty; (4) accounting; (5) intentional infliction of emotional distress; (6) negligent infliction of emotional distress; (7) invasion of privacy; (8) private nuisance; and (9) unauthorized computer access and fraud.

On March 19, 2021, the Court issued its order denying Defendant's anti-SLAPP motion, which was appealed. On May 23, 2023, the appellate court affirmed the order and on August 10, 2023, it issued the remittitur. On September 20, 2023, Defendants filed their demurrer to the Complaint. On February 14, 2024, the Court issued its order (the "Order"), which overruled the demurrer as to the first, second, fourth, and ninth causes of action and sustained as to the third, fifth, sixth, seventh, and eighth with 20 days leave to amend. On March 4, 2024, Plaintiffs filed their FAC, asserting the same claims. On May 7, 2024, Defendants filed the instant motions, which Plaintiffs oppose.

II. Request for Judicial Notice[4]

A. Defendants' Request

Defendants request judicial notice of the following 19 items:

[4] The parties request judicial notice of the same items in connection with the demurrer and motion to strike.

(1) The Order, dated February 14, 2024: Exhibit 1;

(2) FAC in this action, filed on March 4, 2024: Exhibit 2;

(3) Complaint filed in this action on October 8, 2020: Exhibit 3;

(4) Lisa and Lisi's Amended Answer filed on June 12, 2020: Exhibit 4;

(5) Mei's Amended Answer in the Sheridan Property action, filed on June 12, 2020: Exhibit 5;

(6) Mei's Cross-complaint in the Pomona Property action, filed on December 11, 2020: Exhibit 6;

(7) The Court's (Hon. Lie) order granting appointment of Matthew L. Taylor, Esq. as receiver for accounting of income, expenses, and financial affairs in the Sheridan Property matter: Exhibit 7;

(8) Sheridan Property Receiver's interim accounting for the Sheridan Property, filed on December 17, 2021: Exhibit 8;

(9) The Court's (Hon. Rudy) order, which ordered Sherry to manage the Pomona Property and provide accounting for rents and expenses, filed on October 13, 2022: Exhibit 9;

(10) The Order granting Sherry's motion for summary adjudication as to the Sheridan Property, filed on January 17, 2023: Exhibit 10;

(11) The Court's order regarding interlocutory judgment of partition by sale and appointment of referee, filed on March 8, 2023: Exhibit 11;

(12) The Court's (Hon. Overton) order regarding Mei's requested restraining order related to the Clara Property, which stated "All requested relief is granted excepted request to remove security cameras from Mei's home.": Exhibit 12;

(13) Mei's declaration under penalty of perjury, stating "Sherry returned an additional $133,427 of the funds she had misappropriated from Ying and me because I demanded that she do so", filed on June 16, 2022: Exhibit 13;

(14) Lisa's declaration in opposition to Sherry's motion for interlocutory judgment of partition in the Clara Property case, stating, "if I had to move out of the Property, I would incur significant costs and inconvenience because I would have to find another place to live with my family and I would have to move out", filed on October 1, 2020: Exhibit 14; and

(15) The docket of *The People of the State of California v. Alessio Lisi*, Case No. B2002025: Exhibit 15.

The request for judicial notice as to item 15 is GRANTED. (See *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 961 [taking judicial notice of "superior court docket"]; *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 872, fn. 3 [taking judicial notice of "superior court's public record docket entries"]; *In re Estevez* (2008) 165 Cal.App.4th 1445, 1452, fn.4 [taking judicial notice of "docket (register of actions) entries)"]; *County of Los Angeles v. American Contractors Indemnity Co.* (2011) 198 Cal.App.4th 175, 178, fn. 4 [taking judicial notice of "electronic docket"].)

Evidence Code section 452, subdivision (d), permits judicial notice of court records. Items 1 through 14 are court records, which are proper items for judicial notice. However, "the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgement." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.) Thus, judicial notice as to items 1 through 12 is GRANTED. The Court will not take judicial notice of items 13 and 14 as it appears Defendants rely on them for the document's contents.

B. Plaintiffs' Request

Plaintiffs request judicial notice of the following 3 items:

(1) Sherry's opposition to motion to consolidate, filed February 8, 2021, in the Sheridan Property matter: Exhibit A;

(2) Sherry's opposition to Defendants' second motion to consolidate and Talkov's declaration, filed on June 22, 2021: Exhibit B; and

(3) Sherry's verified complaint in the Pomona Property matter, filed on October 26, 2020: Exhibit C.

The Court will take judicial notice of item 3, however, it will not take judicial notice of items 1 and 2 as it appears Plaintiffs rely on them for the truth of their contents.

III. Defendants' Demurrer

A. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any

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

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendants demur to each cause of action on the grounds it fails to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

B. Analysis

1. Compulsory Cross-Complaint

Defendants argue allegations to support the first and second causes of action as well as the fifth, sixth, seventh and eighth causes of action themselves are barred because they were not asserted in a cross-complaint in the other matters.

Code of Civil Procedure section 426.30, provides: "if a party against whom a complaint has been filed and served fails to allege in a cross-complaint, any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related *cause of action not pleaded*." (Code Civ. Prod., § 426.30, subd. (a) [emphasis added].) "'Related cause of action' means a cause of action which arises

out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." (Code Civ. Proc., § 426.10, subd. (c).) "The compulsory cross-complaint statute is designed to prevent 'piecemeal litigation.'" (*Wittenberg v. Bornstein* (2020) 51 Cal.App.5th 556, 564.) The causes of action must involve common issues of fact and law, an overlap of issues, and a common transaction. (*ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd.* (2016) 5 Cal.App.5th 69, 82.)

a. Mei

It appears Defendants' argument arises from the Pomona Property action (Case No. 20CV372732). On October 26, 2020, Sherry filed her complaint against Mei, as an individual and as trustee of multiple trusts for breach of contract and partition. The Pomona Property complaint involved the Pomona Property Agreement, Sherry's election to purchase Mei's interest in the property, and events that occurred in 2019. The allegations regarding Defendants' withholding rent from the Pomona Property arise out of the same occurrence. On December 11, 2020, Mei filed a cross-complaint in Case Pomona Property action, which asserted causes of action based on the Pomona Property rent. (Defendants' RJN, Exh. 6.)

Mei alleges Sherry stopped paying her rental income from the Sheridan Property. (FAC, ¶ 38.) On November 12, 2019, Sherry filed her complaint in the Sheridan Property matter against Mei for quiet title, resulting trust, partition by sale of real property, and restitution regarding the Sheridan Property. Mei failed to file a cross-complaint in the Sheridan Property matter. However, none of Mei's claims are predicated solely upon the Sheridan Property. Thus, the demurrer cannot be sustained on this basis.

Code of Civil Procedure section 426.10, subdivision (c), provides, "'Related cause of action' means a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the *plaintiff alleges in his complaint."* (Code Civ. Proc., § 426.10, subd. (c) [emphasis added].)

Defendants also contend the allegations regarding the misappropriation of funds from Mei's account which was discovered in 2017 were required to be asserted in a cross-complaint. However,

none of the complaints by Sherry asserted causes of action that arose from the same transaction or occurrence. Therefore, Mei was not required to file a cross-complaint asserting these allegations.

b. Lisa and Lisi

The first action between the parties commenced on October 7, 2019, when Sherry filed the Complaint against Lisa and Lisi, in Case No. 19CV356261, for partition of the Clara Property.[5] On June 12, 2020, Lisa and Lisi filed their amended answer, and they asserted affirmative defenses for unclean hands and failure to mitigate. Defendants contend Lisa and Lisi were required to file cross-complaint to assert claims for IIED, NIED, invasion of privacy, and private nuisance.

Defendants rely on *Demetris v. Demetris* (1954) 125 Cal.App.2d 440, 444-445 (*Demetris*), which states, "in a suit for partition it is a general rule that all equities and conflicting claims existing between the parties and arising out of their relation to the property to be partition may be adjudicated." *Demetris* relies on Code of Civil Procedure section 759 in support of that proposition, however, Section 759 was repealed in 1977. Moreover, *Demetris* is factually distinguishable because it did not involve Section 426.30, it pertained exclusively to the ownership of the property, whereas here the claims arise from Sherry's conduct *on* the property and towards Plaintiffs.

Case No. 19CV356261 only alleged a partition cause of action. Defendants fail to provide any authority that *Lisa and Lisi's answer* broadens *Sherry's* cause of action such that Lisa and Lisi are precluded from asserting their claims in this action because they did not file a cross-complaint in the Clara Property action. Moreover, Defendants fail to provide any authority which requires a compulsory cross-complaint when defendants have claims arising from events outside of ownership of the property, especially where the complaint does not allege such a claim. Therefore, the demurrer cannot be sustained on this basis.

2. First Cause of Action: Elder Abuse

Plaintiffs allege Sherry committed physical elder abuse against Mei and Defendants committed financial elder abuse against her. (FAC, ¶44-45.)

"'Elder' means any person residing in this state, 65 years of age or older." (Welf. & Inst. Code, § 15610.27.) "Abuse of an elder… means any of the following: (1) Physical abuse… or other

[5] Mei was not a defendant in this matter; therefore, she was not required to file a cross-complaint.

treatment with resulting physical harm or pain or mental suffering…(3) Financial abuse, as defined in Section 15610.30." (Welf. & Inst. Code, § 15610.07, subd. (a).) Mental suffering means "fear, agitation, confusion, severe depression… brought about by forms of intimidating behavior, threats, harassment… made with malicious intent to agitate, confuse, frighten… the elder…" (Welf. & Inst. Code, § 15610.53.) Financial abuse includes, but is not limited to, taking, secreting, obtaining, or retaining the real or personal property of an elder for a wrongful use or with intent to defraud. (Welf. & Inst. Code, § 15610.30.)

Plaintiffs allege Sherry physically abused Mei by belittling her for various things such as her mental capacity, physically preventing Mei from conversing with her attorney, stealing her keys, locking her out, and pushing her out of the Clara Property, installing cameras facing her bathroom to invade her privacy and make her uncomfortable, stealing her personal belongings and moving them to the Pomona Property, without her permission, yelling at her about who she associates with and receives food from. (FAC, ¶ 29.) Plaintiffs further allege Sherry committed financial abuse when she took Mei's real or personal property such as her money, with the intent to defraud. (FAC, ¶ 45.)

"Physical abuse" means assault, battery, assault with a deadly weapon, unreasonable physical constraint, or prolonged or continual deprivation of food or water, sexual assault, or use of a physical or chemical restraint. (See Welf. & Inst. Code, § 15610.63, subds. (a)-(f).) Plaintiffs fail to allege any of the above conduct. Rather Plaintiffs argue "other treatment with resulting physical harm or pain or mental suffering." (See Opp., p. 6:15-17.) However, the FAC specifically alleges *physical elder abuse.* (See FAC, ¶ 44.) Therefore, Plaintiffs fail to allege sufficient facts to support their claim for physical elder abuse. Nevertheless, Mei's claim is also based on financial elder abuse, which she sufficiently alleges. (See FAC, ¶¶ 22-25, 44-45.) "A demurrer does not lie to a portion of a cause of action." (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 (*PH II*).) Thus, the demurrer to the first cause of action is OVERRULED.

3. Second Cause of Action: Conversion

Conversion is the wrongful exercise of dominion over the property of another. (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 45.) The elements of a conversion are (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) the

defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. (*Ibid*.) "Conversion requires affirmative action to deprive another of property, not a lack of action." (*Spates v. Dameron Hospital Assn* (2003) 114, Cal.App.4th 208, 222.) It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 544.) "Money can be the subject of an action for conversion if a specific sum capable of identification is involved." (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 452 (*Farmers Ins. Exchange*).)

Plaintiffs allege Defendants stole and denied Mei the right to ownership of her personal property when they made large withdrawals from her bank account. (FAC, ¶ 51.) They allege Defendants transferred approximately $488,018 from Ying and Mei's bank accounts into their own. (FAC, ¶ 24.) Plaintiffs identify the amount of money, and the Court is not persuaded by Defendants' assertion that Mei actually alleges a breach of contract.[6] Defendants argue Plaintiffs fail to describe Mei's allegedly converted personal property with sufficiently particularity. However, Defendants rely on an unpublished federal case, which is not binding on this court.[7] Even if the Court required more particular facts about Mei's personal property, "a demurrer does not lie to a portion of a cause of action." (See *PH II, supra,* 33 Cal.App.4th at p. 1682.) Plaintiffs have sufficiently alleged this claim based on the money taken from Mei's bank account. Thus, the demurrer to the second cause of action is OVERRULED.

4. Third Cause of Action: Breach of Fiduciary Duty

a. Statute of Limitations

The applicable limitations period for a breach of fiduciary duty is generally four years. (See Code Civ. Proc., § 343) *except* where the claim is based on concealment or misrepresentation of facts, i.e., actual fraud on the part of the defendant. (*Stalberg v. Western Title Ins. Co.* (1991) 230

[6] Defendants' reliance on *Durgin v. Kaplan* (1968) 68 Cal.2d 81, 91 (*Durgin*) is unavailing because it did not address conversion but rather voluntary acceptance.

[7] While the case is not binding, it may be relied upon for persuasive value. (See *Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 576, fn. 8 (*Aleman*).)

Cal.App.3d 1223, 1230.) In such a circumstance, the applicable statute of limitations is the three-year limitations period provided by Code of Civil Procedure section 338, subdivision (d).

Plaintiffs allege Sherry owed Mei a fiduciary duty as her power of attorney. (FAC, ¶ 56.) Sherry concealed material facts, such as the fact that she was stealing from Mei's bank accounts and that she was using Mei's money to pay her own financial obligations. (FAC, ¶ 58.) Thus, the claim is based on the concealment of facts and subject to the three-year limitations period. Sherry's conduct as Mei's power of attorney was discovered on January 21, 2017. Plaintiffs allege Sherry and Alexander repeatedly promised to return the stolen monies and on two occasions, they made partial repayments, with the continued promise that the full amount would be paid.[8] (FAC, ¶ 61.) On that basis, Plaintiffs allege their claim did not accrue until October 2019, when Sherry filed the Clara Property action and asserted the money that she took was owed to her as credits and/or offsets from the Clara Property, the Pomona Property, and the Sheridan Property. (FAC, ¶ 62.)

Based on Plaintiffs' allegation about Defendants' partial repayment on May 7, 2017, Defendants argue Plaintiffs had until May 7, 2020, to assert this cause of action. However, as the Court stated in the Order, Sherry's conduct as Mei's power of attorney was discovered on January 7, 2017. A fraud claim accrues when the aggrieved party discovers the facts constituting the fraud or mistake. (See Code Civ. Proc., § 338, subd. (d).) While Plaintiffs allege Defendants made several promises to return the money and failed to do so, the discovery of the fraud occurred on January 7, 2017, and the claim started accruing then. Critically, Sherry was removed as power of attorney when her conduct was discovered, thus, she was no longer Mei's fiduciary after that. (See FAC, ¶ 23.)

"Under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury or some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at the time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as reasonable investigation would have revealed its factual basis." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 803 (*Fox*).) "'In order to rely on the discovery

[8] Plaintiffs only provide the date of one partial repayment: May 7, 2017. On this basis, the parties appear to agree that prior to any tolling, Plaintiffs had until May 7, 2020, to assert this claim.

rule for delayed accrual of a cause of action, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." ' [Citations.]" (*NBC Universal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1232 (*NBC*); see also *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832 ["plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified"].) "When a plaintiff relies on a theory of fraudulent concealment, delayed accrual, equitable tolling, or estoppel to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts which, if proved, would support the theory." (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 641 (*Mills*).)

Plaintiffs rely on Defendants' promises to return the money to allege delayed discovery. However, the factual basis for Mei's claim was already known to her when Defendants made their promises. Moreover, Plaintiffs fail to allege any reasonable investigation by Mei to discover Sherry's false promise. (*Fox, supra,* 35 Cal.4th at p. 803.)

"Generally, speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of the fact; and (4) he must rely upon the conduct to his injury." (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37 (*Honeywell*).) Critically, in order for the doctrine to apply, the plaintiff must be "*directly* prevented … from filing [a] suit on time" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 385, emphasis added (*Lantzy*)), with the defendant "engag[ing] in some sort of *purposeful* conduct or make a representation that leads that *particular* plaintiff not to take action against [it]." (*Ortega v. Pajaro Valley Unified Sch. Dist.* (1998) 64 Cal.App.4th 1023, 1056, emphasis added.) Further, "the rule of equitable estoppel, includes, of course, the requirement that the plaintiff exercise reasonable diligence." (*Bernson v. Browning-Ferris Indus.* (1994) 7 Cal.4th 926, 936 (*Bernson v. Browning-Ferris Indus.*).)

In the statute of limitations context, equitable estoppel may be appropriate where the defendant's act or omission actually and reasonably induced the plaintiff to refrain from filing a timely

suit. (See *Lantzy, supra,* 31 Cal.4th at p. 385.) The requisite act or omission must involve a misrepresentation or nondisclosure of a material fact bearing on the necessity of bringing timely suit. (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1149-1152.)

While Plaintiffs respond to the estoppel argument in their opposition, the FAC is devoid of facts in support their assertion of estoppel. (See FAC, ¶ 63 ["Sherry is estopped from asserting a statute of limitations defense"]; see *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants."]; *Perry v. City of San Diego* (2021) 65 Cal.App.5th 172, 188, fn. 8 ["It is not this court's role to connect the dots."].) Therefore, Plaintiffs fail to allege sufficient facts to support the application of estoppel here. (See *Mills, supra,* 108 Cal.App.4th at p. 641 ["When a plaintiff relies on a theory of fraudulent concealment, delayed accrual, equitable tolling, or estoppel to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts which, if proved, would support the theory."].)

While Plaintiffs request leave to amend, they fail to state how they can do so, and it does not appear they can successfully amend this claim. (See *Camsi IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1542 (*Camsi IV*) ["absent an effective request for leave to amend in specified ways," it is an abuse of discretion to deny leave to amend "only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case"]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*) ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"], quoting *Cooper v. Leslie Salt Co*. (1969) 70 Cal.2d 627, 636 (*Cooper*); *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 (*Hendy*) ["the burden is on the plaintiff… to demonstrate the manner in which the complaint might be amended"].) Thus, the demurrer to the third cause of action is SUSTAINED without leave to amend.

5. Fourth Cause of Action: Accounting

An action for an accounting is equitable in nature. It may be brought to compel the defendant to account to the plaintiff for money or property, (1) where a fiduciary relationship exists between the parties, or (2) where, even though no fiduciary relationship exists, the accounts are so complicated that

an ordinary legal action demanding a fixed sum is impracticable. (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 401 (*Los Defensores*).) "A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) "An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing. Equitable principles govern, and the plaintiff must show the legal remedy is inadequate… some underlying misconduct on the part of the defendant must be showing to invoke the right to this equitable remedy." (*Prakashpalan v. Engstrome, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136-1137 (*Prakashpalan*).)

Plaintiffs allege Defendants have misappropriated not only Mei's money from her bank accounts but also rent monies due and owing from the Pomona and Sheridan Properties. (FAC, ¶ 65.) They further allege Defendants have refused to provide an accounting of the monies due to her and one is required to ascertain the amount due. (*Ibid.*)

Defendants contend the Court issued an order for Sherry to provide an accounting regarding the Pomona Property (see Defendants' RJN, Exh. 9) and there is a judgment for a partition referee/receiver account for the Sheridan Property. (MPA, p. 7:24-27; Defendants' RJN, Exhs. 8, 10-11.) Thus, an accounting is not required regarding the rent due for the Pomona and Sheridan Properties. Defendants' argument is well taken as an accounting in this matter is not required in addition to the accountings already ordered by the Court. The rest of the claim is based on the amount misappropriated from Mei's bank account, however, it is unclear to the Court why that amount would require an accounting to be ascertained. Thus, the demurrer to the fourth cause of action is SUSTAINED without leave to amend.

6. Fifth Cause of Action: Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional

distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001 (*Potter*).) For the purposes of the tort, "extreme and outrageous" conduct is that which exceeds "all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) Generally, the question of whether the conduct at issue is in fact extreme and outrageous is a question of fact to be determined beyond the pleading stage. (*So v. Shin* (2013) 212 Cal.App.4th 652, 672 (*So*).)

Plaintiffs allege Mei is elderly, in declining health and she became increasingly dependent on her children after Ying's death. (FAC, ¶ 67.) They allege Sherry stole money from Mei and embarked on a campaign of abuse and harassment against them. (FAC, ¶ 28-29, 68.) As a result, they have suffered severe and extreme emotional distress, including but not limited to anxiety, grief, and worry. (FAC, ¶ 71.)

Defendants contend the alleged conduct does not arise to the level of extreme and outrageous. Plaintiffs allege conduct, including but not limited to, belittling Mei, preventing Mei from conversing with her attorney, stealing her keys, locking her out, pushing Mei out of the Clara Property, stealing her personal property and moving them to the Pomona Property. (FAC, ¶ 29.) Plaintiffs allege Sherry's conduct towards Lisa and Lisi included, but is not limited to impersonating Lisa on a call with Child Protective Services, going through their mail, harassing their house guests, following and recording their children when they returned from school, sending vitriolic emails to their friends and neighbors. (FAC, ¶ 30.) Thus, whether such conduct was extreme and outrageous is a question of fact that cannot be resolved on demurrer. (See *So, supra*, 212 Cal.App.4th at p. 672.)

Defendants argue Plaintiffs' allegations regarding extreme and emotional distress are insufficient. (MPA, p. 11:6.) Defendants rely on two cases, *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376 (*Wong*) and *Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 88 (*Bikkina*). However, both cases involved appeals for anti-SLAPP motions and considered evidence, which the Court does not do in the instant motion. Moreover, based on the allegations, the Court cannot conclude that Plaintiffs alleged extreme and emotional distress is not of "substantial or enduring quality that no reasonable person in civilized society should be expected to endure it." (See *Potter, supra*, 6 Cal.4th at p. 1004.) Thus, the demurrer to the fifth cause of action is OVERRULED.

7. Sixth Cause of Action: Negligence Infliction of Emotional Distress

"The law of negligent infliction of emotional distress in California is typically analyzed by reference to two 'theories' of recovery: the 'bystander' theory and the 'direct victim' theory. We have repeatedly recognized that the negligent causing of emotional distress is not an independent theory, but a tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." (*Fluharty v. Fluharty* (1997) 59 Cal.App.4th 484, 490 (*Fluharty*).) To recover for negligent infliction of emotional distress, a plaintiff must prove a special relationship with the defendant. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205 (*Ragland*).)[9]

Plaintiffs allege Sherry stole money from Mei and embarked on a campaign of abuse and harassment against Plaintiffs. (FAC, ¶¶ 26-30, 78.) Plaintiffs allege Sherry owed a duty to Mei because they are mother daughter. (FAC, ¶ 75.) They further allege she owed a duty to Mei, Lisa, and Lisi to act as a reasonably prudent person because they were family members living under the same roof. (*Ibid*.)

The FAC does not specify whether this claim is asserted under the direct victim theory or the bystander theory. Defendants' arguments pertain to a direct victim theory, whereas Plaintiffs' opposition focuses entirely on the bystander theory. Based on the opposition, it appears Plaintiffs may be able to allege facts to clarify their theory for this claim. Thus, the demurer to the seventh cause of action is SUSTAINED with 20 days leave to amend.

8. Seventh Cause of Action: Invasion of Privacy

The elements of a common law invasion of privacy claim are intrusion into a private place, conversation, or matter, in a manner highly offensive to a reasonable person. In determining the existence of 'offensiveness,' one must consider: '(1) the degree of intrusion; (2) the context, conduct and circumstances surrounding the intrusion; (3) the intruder's motives and objectives; (4) the setting into which the intrusion occurs; and (5) the expectations of those whose privacy is invaded.'" (*Mezger v. Bick* (2021) 66 Cal.App.5th 76, 86-87 (*Mezger*) [internal citations omitted].)

[9] *Ragland* involved a direct victim theory, rather than a bystander theory.

"Tort liability for invasion of privacy arises from four distinct kinds of activities: (a) intrusion into private matters; (b) public disclosure of private facts; (c) publicity placing a person in a false light; and (d) misappropriation of a person's name or likeness." (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 24 (*Hill*).) "Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ("autonomy privacy")." (*Hill, supra*, 7 Cal.4th at p. 35.)

"'Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.' The impact on the plaintiff's privacy rights must be more than 'slight or trivial.'" (*Mezger, supra,* 66 Cal.App.5th at p. 87 [internal citations omitted].)

Furthermore, "the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability." (*Hill, supra,* 7 Cal.4th at p. 26.)

Plaintiffs allege they had a reasonable expectation of privacy in their home. (FAC, ¶84.) Sherry intentionally intruded on their privacy by installing security cameras pointed towards Mei's bathroom, videotaping Plaintiffs while they were inside their home, going through Lisa and Lisi's mail, walking through their portion of the home and taking pictures and viewing private documents, and impersonating Lisa to social workers. (FAC, ¶ 87.) They further allege Sherry's conduct would be highly offensive to a reasonable person. (FAC, ¶ 88.)

Plaintiffs allege Sherry had 50% ownership of the Clara Property and at the time of purchase, the parties agreed Lisa, Lisi, and their children would reside on their side of the property and Mei and Ying would reside on Sherry's side of the property. (FAC, ¶ 16.)

Defendants again argue the claim fails because the parties are tenants in common as Sherry was a co-owner of the Clara Property. "Each tenant in common equally is entitled to share in the possession of the entire property and neither may exclude the other from any part of it." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541.) Plaintiffs argue that tenants in common have a right to privacy but they fail to cite any authority in support of their assertion. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [points asserted without supporting authority are waived].) Nevertheless, Sherry's entitlement to possess the entire Clara Property does not mean she was entitled to videotape Plaintiffs, go through their mail, or view their private documents. (See FAC, ¶ 87.)

1. Public Disclosure of Private Facts

The elements of a public disclosure of private facts are (1) a public disclosure, (2) of a private fact, (3) which would be offensive and objectionable to the reasonable person, and (4) which is not of legitimate public concern. (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214.)

Plaintiffs contend "Sherry disclosed private facts about the Chuang family including through flyers posted throughout the neighborhood and on postings she made on YouTube," but such facts are not alleged in the FAC. (See Opp., 18:12-14.) Thus, Plaintiffs fail to allege sufficient facts to state an invasion of privacy claim under this theory.

2. Intrusion Upon Seclusion

"A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude on a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person. (*Schulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 231.)

Plaintiffs allege Sherry intruded upon Plaintiffs by going to Lisa and Lisi's mail, taking pictures and viewing private documents, hacking into Mei's phone to send fake text messages to herself. (FAC, ¶¶ 30, 87, 97.) Plaintiffs also allege Sherry's intrusion would be highly offensive to a reasonable person and is a blatant violation of their reasonable expectation of privacy. (FAC, ¶ 88.) While Defendants contend Plaintiffs are required to allege more specific facts, they fail to cite to any authority in support of their assertion. Plaintiffs allege sufficient facts to support an invasion of

privacy claim based on intrusion upon seclusion. Thus, the demurrer to the seventh cause of action is OVERRULED.

9. Eighth Cause of Action: Private Nuisance

Civil Code section 3479, defines a nuisance as: "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." (Civ. Code, § 3479.)

"A nuisance may be public nuisance, a private nuisance, or both. 'A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' Every other nuisance is private." (*Newhall Land & Farming Co. v. Super. Ct.* (1993) 19 Cal.App.4th 334, 341. (*Newhall Land & Farming*).)

To prevail on a claim for private nuisance, a plaintiff must prove (1) an interference with his use and enjoyment of his property; (2) "that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage'"; and (3) that the interference was unreasonable, "i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.'" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal. 4th 893, 938-939 (*San Diego Gas & Electric Co*.) Nuisance liability "does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38.)

Plaintiffs allege they owned/occupied their side of the Clara Property. (FAC, ¶ 91.) The properties were divided by walls and fencing and for all intents and purposes are separate properties. (*Ibid*.) Sherry's actions created conditions so as to interfere with Plaintiffs' comfortable enjoyment of life or property and accordingly interfered with Plaintiffs' use and enjoyment of the Clara Property.

(FAC, ¶ 92.) Sherry's conduct included but was not limited to: constant harassment and video monitoring of all occupants, including Lisa and Lisi's minor children and attempting to force entry and disrupt Plaintiffs' activities on multiple occasions. (*Ibid*.) Sherry committed the actions with the sole purpose and intention of being a nuisance against Plaintiffs. (*Ibid*.)

Plaintiffs argue there was an implied contract between the parties in which they agreed to divide the Clara Property into two separate dwellings and granted the exclusive right to Lisa, Lisi, and their children to occupy half of the Clara Property. (Opp., p. 21:15-17; FAC, ¶ 16.) "An implied contract is one, the existence and terms of which are manifested by conduct." (Civ. Code, § 1621.) The Clara Property contains an interior wall with a French door that was agreed to be the dividing wall between the two sides of the Clara Property. (FAC, ¶ 16.) Each side had a separate exterior door for ingress and egress purposes. (*Ibid*.) Based on the alleged implied contract, it appears there was an agreement between the parties regarding the division and use of the Clara Property.

Plaintiffs allege Sherry created conditions to interfere with Plaintiffs' comfortable enjoyment of life or property and the conditions did interfere with Plaintiffs' use and enjoyment of the Clara Property. (FAC, ¶ 92.) However, Plaintiffs fail to allege the invasion of their interest in the use and enjoyment was substantial and that it was unreasonable. (See *San Diego Gas & Electric Co., supra*, 13 Cal. 4th at pp. 938-939.) Thus, the demurrer to the eighth cause of action is SUSTAINED without leave to amend.

10. Ninth Cause of Action: Unauthorized Computer Access and Fraud

Penal Code section 502, provides:

Any person who commits any of the following acts is guilty of a public offense:

(1) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer system, or computer network, in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort; or (B) wrongfully control or obtain money, property, or data.

(2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any

supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network…

(4) Knowingly accesses and without permission adds, alters, damages, deletes, or destroys any data, computer software, or computer programs which reside or exist internal or external to a computer, computer system, or computer network.

(Pen. Code, § 502, subd. (c)(1), (2), & (4).)

Penal Code section 502, subdivision (e)(1), provides: "in addition to any other civil remedy available, the owner or lessee of the computer, computer system, computer network, computer program, or data who suffers damage or loss *by reason of a violation* of any of the provisions of subdivision (c) may bring a civil action against the violator for compensatory damages and injunctive relief or other equitable relief." (Emphasis added.)

Defendants contend Plaintiffs fail to meet the heightened pleading standard for fraud, such as the date, time, location, method of access, or contents of the text messages. (MPA, p. 16:24-25.) Defendants rely on *Nowak v. XAPO, Inc*. (2020) 2020 U.S. Dist. LEXIS 219575, which states that the plaintiffs Section 502 claim sounded in fraud and was subject to the Federal Rule of Civil Procedure, Rule 9, subdivision (b), which requires a heightened pleading standard for fraud claims.[10] While Rule 9, subdivision (b), does not apply here, it appears the parties agree the claim sounds in fraud. Fraud must be alleged with particularity. (*See Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

Plaintiffs allege Sherry violated the statue by knowingly accessing and without permission, altering, damaging, data from Mei's computer, computer systems, or computer network, in addition to taking, copying, and making use of Mei's computer, computer systems, or computer networks. (FAC, ¶ 97.) Plaintiffs incorporate prior allegations into the claim and in doing so, allege that in August 2020, Mei discovered text messages on her phone, sent to Sherry, which she did not send. (FAC, ¶ 40.) Plaintiffs further allege Sherry stole Mei's phone and sent fake text messages to herself, falsely communicating Mei's apology and position that she did not want the rental income from one of the properties, as well as trying to have Mei blame Lisi for bad behavior. (*Ibid*.) Thus, it appears Plaintiffs

[10] Because *Nowak* is an unpublished federal case, it is not binding upon this Court, but it may be relied upon for persuasive value. (See *Aleman, supra*, 209 Cal.App.4th at p. 576, fn. 8.)

allege this claim with sufficient particularity. (See *Committee on Children's Television, supra,* 35 Cal.3d at p. 217 [when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lien more in the knowledge of the opposition party"]; see also *Bushell v. JPMorgan Chase Bank N.A.* (2013) 220 Cal.App.4th 915, 931 ["plaintiff did not have to specify the …personnel who prepared these documents because that information is uniquely within…[defendant's knowledge."].)

Plaintiffs allege Sherry falsely communicated an apology by Mei, a false position that she did not have rental income from one of the properties and tried to have Mei blame Lisi for bad behavior. (FAC, ¶¶ 40, 98.) However, they fail to allege how Mei was damaged by Sherry's violation. (See *Pratt v. Higgins* (2023) 2023 U.S. Dist. LEXIS 122849, at *27.) Thus, the demurrer to the ninth cause of action is SUSTAINED without leave to amend.

IV. Defendants' Motion to Strike

A. Legal Standard

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

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant

matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"While under Code of Civil Procedure section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. [Citation.] Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike. [Citation.]" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281.)

Defendants move to strike each cause of action from the FAC.

B. Analysis

As an initial matter, the demurrer has been sustained as to the fourth, sixth, and ninth causes of action, thus the motion to strike those claims or portions contained therein is MOOT.

1. Allegations Regarding Sheridan Property

As the Court stated above, Mei was required to file a cross-complaint asserting any claims arising from the Sheridan Property and she failed to do so. Therefore, the allegations used to support Plaintiffs claims for failure to remit rent in connection with the Sheridan Property are improper. But, to the extent Plaintiffs allege facts regarding the existence and relevance of the property to the parties, the Court is not persuaded to strike them. Thus, the motion to strike allegations about the Sheridan Property at paragraphs 3, 21, 38, 39, 62, 65 is GRANTED with 20 days leave to amend and it is DENIED as to paragraph 20.

2. Allegations Regarding Pomona Property

As the Court explained above, Mei filed a cross-complaint in the Pomona Property action and asserted claims based on rent related to the Pomona Property. Thus, the motion strike allegations regarding the Pomona Property rent is DENIED.

3. Allegations Regarding Clara Property

As the Court explained above, Sherry's complaint in the Clara Property matter was for partition and she did not identify any of the same transactions or occurrences that Plaintiffs claims arise from. Moreover, Defendants fail to provide any authority that affirmative defenses expand the causes of action in the complaint such that Lisa and Lisi were required to assert their claims in a cross-complaint. Thus, the motion to strike allegations of harassment at the Clara Property is DENIED.

4. Allegations Regarding Mei's Bank Account

As the Court explained above, the allegations about the 2017 events regarding Mei's bank account do not arise from the same transaction or occurrence as the property matters and Mei was not required to file a cross-complaint to assert claims. Thus, the motion to strike allegations regarding the bank account is DENIED.

5. First Cause of Action: Elder Abuse

Defendants argue allegations of financial and physical elder abuse are improper because they are insufficient to meet the requisite standard and are barred by litigation privilege.

The litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege is absolute and applies regardless of whether the communication was made with malice or the intent to harm. (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1302.)

Defendants contend Plaintiffs allege Sherry committed a wrongful act by "asking for credits and offsets," however, this is not the basis for the claim. The alleged financial abuse is based on the money taken from Mei's account and Defendants failure to return the amount taken, despite promises to do so. (FAC, ¶ 25.) Moreover, as the Court noted above, Sherry's complaint in the Clara Property

action does not mention the money taken from Mei's account at all. The motion to strike paragraphs 45 based on litigation privilege is DENIED.

6. Allegations Regarding Harmful Breach

Defendants move to strike the allegations at paragraph 44 and 46 because they do not allege sufficient facts to support an element of the elder abuse claim. (MPA, p. 7:24-25.) However, this argument is improperly made on a motion to strike. (See (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 342 ["A motion to strike does not lie to attack a complaint for insufficiency of allegations to justify relief; that is ground for a general demurrer."].) Thus, the motion to strike paragraphs 44-46 is DENIED.

7. Punitive and Treble Damages

Defendants move to strike Plaintiffs' request for punitive and treble damages because they are not available for a breach of contract.

Civil Code section 3294, provides: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).)

Plaintiffs do not assert any claims for breach of contract. Moreover, Welfare and Institutions Code section 15657.5, provides: "Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse…and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs… compensatory damages, and all other remedies otherwise provided by law, the limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable to not apply." (Welf. & Inst. Code, § 15657.5, subd. (b).)

To properly plead a claim for punitive damages, a plaintiff must allege the defendant was guilty of malice, oppression, or fraud and the ultimate facts underlying such allegations. (Civ. Code, § 3294, subd. (a); *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) " 'Malice' is defined as, "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of

others. 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.' " (*Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63, internal citations omitted; Civ. Code, § 3294, subd. (c)(1)-(3).)

Plaintiffs allege Defendants' misappropriation of funds from Mei's bank account. (FAC, ¶ 23.) They detail Sherry's alleged harassment and abuse towards Plaintiffs. (See FAC, ¶ 26-36.) The demurrer to the elder abuse claim has been overruled and these allegations are sufficient to support Plaintiffs' request for punitive damages. Moreover, the Court is not persuaded by Defendants attempt to characterize Plaintiffs' claims as contractual claim when they are based Defendants' alleged misappropriation of Mei's funds and refusal to return them. Thus, the motion to strike paragraphs 49, 54, 60, 73 is DENIED.

8. Allegations Regarding Cameras

Defendants move to strike any allegations regarding cameras because the Court's (Hon. Overton) August 27, 2020, order denied Mei's request to remove the cameras from the home. (MPA, p. 16:15-18.)

The Court (Hon. Overton) stated, "All relief requested is granted except request to remove security cameras from the person in (1)'s home. Because of the 50-yard stay away orders, the restrained person should not be in proximity to the person in (1) or her home. Additionally, the person in (1) may remove such equipment from her own home." (Defendants' RJN, Exh. 12.)

Plaintiffs' allegations do not violate the August 27, 2020, order because Plaintiffs do not request the removal of the cameras but rather the allegations demonstrate Sherry's use of the cameras to harass and control Mei. Thus, the motion to strike paragraphs 28, 29, 69, 76, and 87 is DENIED.

V. Plaintiffs' Motion for Sanctions

A. Evidentiary Objections

Defendants submit evidentiary objections to the declarations of Mr. Affrunti, Tyler Marsten and Plaintiffs' request for judicial notice.

Objections 1-11, 13-15 are OVERRULED.

Objections 2, 12 are SUSTAINED.

B. Request for Judicial Notice

Plaintiffs request judicial notice of the following items:

(1) The order regarding motion for protective order and sanctions, filed on June 15, 2021: Exhibit A;

(2) The order regarding motion for protective order and the appointment of a discovery referee, filed on May 19, 2022: Exhibit B;

(3) The Order, filed on February 14, 2024: Exhibit C; and

(4) The order regarding motion to quash deposition subpoenas, filed on September 29, 2023: Exhibit D.

The Court will take judicial notice of these items because they are court records. (See Evid. Code, § 452, subd. (d).) Plaintiffs' request for judicial notice is GRANTED.

C. Procedural Issues

Defendants contend the motion is procedurally defective because the notion of motion does not specify who the sanctions are sought against and the conduct the motion is based on.

Code of Civil Procedure section 128.5, subdivision (f)(1)(A), provides, "A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (f)(1)(A).)

The notion of motion states the sanctions are sought, "in connection with counsel for Defendants, Scott Talkov's, ongoing professional and offensive conduct intended to harass and offend Plaintiffs that has persisted through the entirely of this litigation." (Notice of Motion, p. 2:6-8.) Plaintiffs' memorandum of points and authorities states, "Plaintiffs respectfully request that sanctions be imposed on counsel for Defendants, Scott Talkov." (MPA, p. 1:4-5.) Plaintiffs identify Mr. Talkov's reference to the pleading in this matter as the "Kitchen Sink Complaint", his personal attacks against Plaintiffs' counsel Mr. Marsten, and two interactions with Plaintiffs' counsels. The notice of motion and MPA sufficiently identify Mr. Talkov as the individual against whom sanctions are sought

and it specifies the alleged action or tactics that are at issue. Thus, the Court will consider the merits of the motion.

D. Legal Standard for Sanctions

Code of Civil Procedure section 128.5, provides, "A trial court may order a party, the party's attorney, or both to pay the reasonable expenses, including the attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (a).) " 'Actions or tactics' include, but are not limited to the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading." (Code Civ. Proc., § 128.5, subd. (b)(1).) " 'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party." (Code Civ. Proc., § 128.5, subd. (b)(2).) The party moving for sanctions must meet its burden of proving that the opposing party's action or tactic was (1) totally and completely without merit, measured by an objective, reasonable attorney standard, or (2) motivated solely by an intention to harass or cause unnecessary delay, measured by a subjective standard. (*Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 893 (*Wallis*).) Whether sanctions are warranted depends on evaluating all the circumstances surrounding the questioned action. (*Ibid*.)

A movant must provide the opposing party with a 21-day safe harbor period, "if the alleged action or tactic is the making or opposing of a written motion of the filing and service of a complaint, cross-complaint, answer, or other responsive pleading that can be withdrawn or appropriately corrected." (Code Civ. Proc., § 128.5, subd. (f)(1)(B).)[11]

Plaintiffs move for sanctions against Mr. Talkov based on his alleged ongoing professional and offensive conduct intended to harass and offend Plaintiffs, which they allege has persisted through throughout this litigation. (Notice of Motion, p.2:6-8.) Plaintiffs seek monetary sanctions, a specific order that Mr. Talkov is no longer allowed to refer to Plaintiffs' complaint as the "Kitchen Sink," and an assignment of a discovery referee to oversee all depositions and meet and confer efforts at Defendants' cost.

[11] Compliance with the safe harbor period is not required here as the conduct warranting sanctions has already occurred and cannot be withdrawn or corrected by Defendants.

E. Analysis

1. Discovery

Code of Civil Procedure section 128.5, provides, "This section shall not apply to disclosure and discovery requests, responses, objections, and motions." (Code Civ. Proc., § 128.5, subd. (e).)

Plaintiffs argue Mr. Talkov's conduct throughout the entire litigation should be considered. Plaintiffs rely on *Sabado v. Morago* (1987) 189 Cal.App.3d 1, which states, if "an attorney continues to engage in dilatory tactics to prevent legitimate discovery, a court should be able to consider past conduct in considering the attorney's bad faith on the subsequent occasions." (*Id*. at p. 11.)

Plaintiffs asked the Court to review Mr. Talkov's conduct during the entire litigation, specifically, (1) the order regarding motion for a protective order and request for sanctions in Clara Property matter, (2) the order regarding motion for a protective order and request for sanctions in the Pomona Property matter, and (3) the Order.

In its February 22, 2021, Order, the Court (Hon. Rudy) granted the request for a protective order and ordered sanctions against Mr. Talkov for his behavior during Sherry's deposition. In its May 19, 2022, Order, the Court (Hon. Rudy) granted the request for a protective order but declined to order sanctions in connection with the request.[12] In the Order, the Court found Mr. Talkov's tone in the moving papers *and* reply was discourteous and reminded him of the rules of professional conduct. Based on the foregoing, the Court recognizes that Mr. Talkov has displayed conduct that does not conform with the professional standards.

However, Plaintiffs do not identify any discovery requests, responses, objections, or motions identified by Plaintiffs in this motion. Moreover, Plaintiffs do not identify any behavior by Mr. Talkov involving efforts to prevent legitimate discovery besides behavior that has already been addressed by the Court. Thus, the motion cannot be granted on this basis. Based on the foregoing, Plaintiffs fail to establish a need for the appointment of a discovery referee.

2. "Kitchen Sink" References

Mr. Talkov's reference to this matter as the "Kitchen Sink Complaint" is not sufficient to warrant sanctions. Namely, because it appears counsel disagreed on how to reference the instant

[12] The Court (Hon. Rudy) awarded sanctions to Mr. Affrunti in connection with the motion to compel.

action by Plaintiffs as Plaintiffs referred to it as "the elder abuse case," while Defendants referred to it as the Kitchen Sink Complaint. Plaintiffs fail to meet their burden of proving Mr. Talkov's use of "Kitchen Sink" was "totally and completely without merit" or "motivated solely by an intention to harass or cause unnecessary delay." (See *Wallis, supra,* 168 Cal.App.4th at p. 893.) Moreover, it appears the parties have reached an agreement to refer to this matter as "the Civil Action." (Opp., p. 10:17-18.) Therefore, it does not appear an order stating Mr. Talkov is "no longer allowed to refer to Plaintiffs' complaint here as the "Kitchen Sink Complaint," is required. (MPA, p. 1:15-16.)

3. Personal Attacks

Plaintiffs also direct the Court to Mr. Talkov's conduct towards them, specifically his supplemental opposition to Plaintiffs' motion to quash a bank subpoena for Lisa and Lisi's personal bank records. (MPA, p. 9:22-23.) Mr. Talkov addressed statements in the reply and categorized them as "Lie # 1 – Lie # 5. (*Id*. at p. 9:26-27.) Mr. Talkov stated, "Unfortunately, Mr. Marsten's lack of familiarity with this extraordinarily large file appears to me to be the source of the numerous erroneous representations in the reply brief." (MPA, p. 10:1-3.) He attached Mr. Marsten's LinkedIn page to discredit Mr. Marsten's legal acumen and his supplemental objection and declaration were made solely to harass and offend Plaintiffs' counsel. (MPA, p. 10:2-10.) The Court (Hon. Takaichi) declined to levy sanctions against Mr. Talkov for his conduct. (See Plaintiffs' RJN Exh. D.) Notably, the Court (Hon. Takaichi) determined, "the motion was not opposed in bad faith or without substantial justice." (Plaintiffs' RJN, Exh. D, p. 8:18-19.) The Court declines to depart from that analysis and Plaintiffs cannot use the instant motion to get around the Court's conclusion on their previous request.

On February 5, 2024, Mr. Talkov emailed Plaintiffs' counsel regarding a dispute of a text message conversation between Mei and Sherry, pertaining to the ninth cause of action. (MPA, p. 10:11-14.) Mr. Talkov, stated, "this is something that most teenagers walking in front of the BWS law office in San Jose could probably confirm for you (no expert witness needed)." (MPA, p. 10:16-17.) He subsequently attached an article from a Reddit thread titled, "NoStupidQuestions" and concluded the email by stating, "I don't want to embarrass you in front of the court, but you're leaving me no option." (MPA, p. 10:18-24.) While the Court is not persuaded by Mr. Talkov's attempt to characterize his conduct as only an "attempt to resolve Plaintiffs' factually mistaken text message

allegation" (Opp., p.10:21-22), and the Court strongly cautions Mr. Talkov not to add extraneous commentary like this to his communications with any counsel, Plaintiffs fail to establish Mr. Talkov's conduct was for the *sole purpose* for harassing Plaintiffs' counsel or *completely frivolous and without merit*." (Code Civ. Proc., § 128.5, subd. (b)(1) & (2).) Thus, Plaintiffs' motion for sanction is DENIED.

VI. Defendants' Motion for Sanctions

Defendants move for sanctions against Plaintiffs' counsels Mr. Affrunti, Mr. Dal Cielo, as well as their law firm Burke, Williams, & Sorensen, LLP under Code of Civil Procedure section 128.5, subdivision (h).

Section 128.5, subdivision (h), provides, "A motion for sanctions brought by a party or a party's attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, shall itself be subject to a motion for sanctions. It is the intent of the Legislature that courts shall vigorously use its sanction authority to deter the improper actions or tactics, or comparable actions or tactics of others similarly situated." (Code Civ. Proc., § 128.5, subd. (g).)

A. Safe Harbor Provision

Code of Civil Procedure section 128.5, subdivision (f), provides, "if the alleged action or tactic is the making or opposing of a written motion or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading that can be withdrawn or appropriately corrected, a notice of motion shall be provides in Section 1010, but *shall not be filed with* or presented to the court, *unless 21 days after* service of the motion or any other period as the court may prescribe, the challenged action or tactic is not withdrawn or appropriately corrected." (Code Civ. Proc., § 128.5, subd. (f)(1)(B) [emphasis added].)

Defendants' motion is based on Plaintiffs' filing and prosecution of their motion for sanctions against Mr. Talkov. Accordingly, Defendants request for sanctions must comply with the safe harbor provision. Defendants' notice was *filed and served* on June 25, 2024. (See Notice of Request, pp. 1,

10-11.) Defendants did not comply with the safe harbor provision.[13] Thus, Defendants' motion for sanctions is DENIED.

[13] The Court also notes Defendants did not comply with Code of Civil Procedure section 1005, subdivision (b), which requires all moving and supporting papers to be filed and served *at least 16 court days* before the hearing. (See Code Civ. Proc., § 1005, subd. (b) [emphasis added].) Defendants motion was filed and served 10 days before the hearing.

Calendar Lines 4-5
Case Name: *Mohammad Ghanbaran v. Rex Bennett*
Case No.: 24CV434229

Before the Court is Defendant, Rex Bennett's motion to strike and demurrer to Plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Factual Background

According to the complaint, on January 25, 2023, Plaintiff submitted his rental application to the manager of Live Oaks Apartments, Mr. Bennett. Defendant allegedly refused to rent an apartment to Plaintiff because he had a Section 8 voucher. (Complaint, PLD-C-001(1), BC-1, BC-2.)

Claiming housing discrimination, Plaintiff initiated this action on April 2, 2024 against Mr. Bennett for breach of contract and common counts.

II. Legal Standard

A. Demurrer

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

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

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

B. Motion to Strike

The Court may, upon a motion made pursuant to Code of Civil Procedure section 436, or at any time in its discretion, and upon terms it deems proper, strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) Motions to strike are disfavored, and the policy is to construe the pleadings liberally, with a view to substantial justice. (Code Civ. Proc., § 452.)

Code of Civil Procedure section 436, subdivision (a), states that matters that are "irrelevant, false or improper" are subject to a motion to strike. "Irrelevant" means any immaterial allegation in the complaint. Section 431.10, subdivision (b), defines an immaterial allegation as any of the following: (1) an allegation that is not essential to the statement of a claim or defense; (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense; or (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (Code Civ. Proc., § 431.10, subd. (b).) The grounds to strike shall either appear on the face of the pleading or from matters that are judicially noticed. (Code Civ. Proc., §437.) The court reads the allegations as a whole with all parts in their context and assumes their truth. (*Spielholz v. Sup. Ct.* (2001) 86 Cal.App.4th 1366, 1371.)

III. Analysis

Defendant demurrers to the entirety of the complaint on the grounds that it fails to state viable claims for breach of contract and common counts. Defendant also seeks to strike certain portions of the complaint on the grounds the language is irrelevant and improper.

Plaintiff did not properly respond to Defendant's demurrer or motion to strike. California Rules of Court, Rule 3.1113 (a) requires a memorandum that "contain[s] a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (California Rules of Court, Rule 3.1113(b).) Rule 3.1113 rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the opposing party's theories by freeing it from any obligation to comb the record

and the law for factual and legal support that a party has failed to identify or provide. (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934, [trial court was justified in denying post-trial motions for failure to provide adequate memorandum].) Plaintiff failed to properly oppose Defendant's demurrer and motion to strike. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.)

However, Defendant's points regarding the complaint are well taken; Plaintiff's complaint fails to allege sufficient facts to support a breach of contract claim or a claim for common counts.

Accordingly, Defendant's demurrer to Plaintiff's complaint is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Defendant's motion to strike is DENIED as moot.

Plaintiff is self-represented. Self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985. If Plaintiff decides to file an amended complaint, Plaintiff can only provide additional facts to support the claims already brought. Plaintiff may not add parties or causes of action without leave of court.

Calendar Line 8
Case Name: *V & Victoria , LLC v. Check Into Cash of California Inc*.
Case No.: 22CV392934

Before the Court is Defendant Check Into Cash of California, Inc.'s motion for summary judgment against Plaintiff V & Victoria, LLC's complaint. Pursuant to the California Rule of Court, Rule 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from an alleged breach of a commercial lease. On April 7, 2005, Plaintiff's first predecessor-in-interest and Defendant entered a written Lease Agreement and rider under which certain real property located at 1217 East Calaveras Blvd., Milpitas, California ("Premises") was leased to Defendant. (Complaint ¶¶ 7, 8.)

On November 3, 2007, and thereafter on November 2, 2010, Plaintiff's next predecessor-in-interest and Defendant entered a first and a second lease modification agreement, extending the original Lease term and providing Defendant with options to renew. On October 16, 2013, Plaintiff and Defendant entered a third lease modification agreement which further extended the lease term and provided Defendant with two more options to renew, identified therein as Option 1 and Option 2. On February 1, 2017, Defendant exercised Option 1, under which the new lease term would commence on May 1, 2017, and expire on April 30, 2020. On February 26, 2020, Defendant exercised Option 2, under which the new lease term would commence on May 1, 22 2020, and expire on April 30, 2023. (Complaint ¶¶ 9, 11-13.)

In October 2019, California passed Assembly Bill 539, also known as the Fair Access to Credit Act ("FACA"), which took effect on January 1, 2020. Essentially, FACA sought to cap certain interest rates for loans ranging between $2,500 and $10,000 at 36% per annum plus the federal funds rate and provided other consumer protections. (Defendant's Separate Statement of Undisputed Material Facts nos. 7, 10 ("SSUMF).)

Prior to January 1, 2020, Defendant offered short-term high interest loans that included deferred presentment loans, retail installment loans, and motor vehicle title loans. (Defendant's SSUMF nos. 13, 14, 15.) Allegedly, enactment of FACA negatively affected Defendant's economic viability. Therefore, on September 1, 2021, Defendant informed Plaintiff of its intent to terminate the

Lease Agreement pursuant to the Law Revision clause set in Lease Rider No. 1. (Defendant's SSUMF nos. 17, 26.)

On October 31, 2021, Defendant vacated the Premises despite Plaintiff's disagreement and objection to the early termination of the Lease. Thereafter, Defendant refused to pay its monthly rent and CAM obligations as required by the Lease Agreement. (Complaint ¶¶ 15, 19.) Consequently, Plaintiff initiated this action on January 3, 2022, for breach of Lease.

II. Legal Standard

Motions for summary judgment are governed by Code of Civil Procedure section 437c, which allows a party to "move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Pro. § 437c(a)(1).) The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) Code of Civil Procedure section 437c(c) requires "the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

"The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67, citing *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 381-382.) As to each claim framed by the complaint, the defendant moving for summary judgment must satisfy the initial burden of proof by presenting facts to negate an essential element, or to establish a defense. (Code Civ. Pro. § 437c(p)(2); *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520.) Defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Defendant must present evidence and not simply point out that plaintiff

does not possess and cannot reasonably obtain needed evidence. (*Aguilar, supra*, 25 Cal.4th at 865-66.) Thus, a moving defendant has two means by which to shift the burden of proof under the summary judgment statute: "The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. [Citation.] [Or a]lternatively, the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1103.)

Until the moving defendant has discharged its burden of proof, the opposing plaintiff has no burden to come forward with any evidence. Once the moving defendant has discharged its burden as to a particular cause of action, however, the plaintiff may defeat the motion by producing evidence showing that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc. §437c(p)(2).) Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389.)

III. Defendant's Requests for Judicial Notice

1. Plaintiff's complaint in this action – GRANTED.
2. Exhibit A – A copy of the Assembly Bill No. 539 – GRANTED.

The Assembly Bill is subject to judicial notice as either "[t]he decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state" or "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States[,]" as well as a fact or proposition "not reasonably subject to dispute and …capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code § 452(a), (c), (h).)

3. Exhibit B – Ruling from the District Court for the District of Nevada, granting summary judgment in *Metejemei, LLC v. Moneytree, Inc*., case no. 2:21-cv-00249-JCM-VCF. – GRANTED.

The Court can take judicial notice of the records in the pending action, or in any other action pending in the same court or any other court of record in the United States. (Evid. Code §452(d).) Judicial notice is limited to the orders and judgments in other court files, as distinguished from the contents of documents filed therein. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113; *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-484.)

IV. Evidentiary Objections

Plaintiff objects to (a) several items of evidence on the grounds that they are not properly authenticated, (b) certain statements in Mr. Marcum's declaration for lack of foundation, improper expert testimony, and asserting legal conclusions, and (c) Defendant's SSUMF nos. 8, 9, 11, 27, and 28 for lack of foundation and asserting legal conclusions.

Plaintiff's objection nos. 1, 5, 14, 18, 19, 20, are OVERRULED.

Plaintiff's objection nos. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 21, 22, are SUSTAINED.

V. Analysis

Defendant contends it did not breach the Lease Agreement and is thus entitled to summary judgment as a matter of law because, (1) provision 5 of the Lease Rider No. 1 [titled law revision] expressly granted CIC the right to an early termination of the lease due to a change in law affecting its business, and (2) FACA negatively impacted and restricted its economic viability. In support of its position, Defendant has submitted Mr. Marcum's declaration [and its enclosed exhibits A-C], and has attached the following exhibits to its motion:

- Ex. 1 – Complaint in this action;
- Ex. 2 – Copy of a Lease Agreement and Lease Rider No. 1, executed on April 7, 2005, between Kirkorian Enterprises, LLC as agent for JMK Partnership (landlord) and Check Into Cash of California, Inc. (tenant);
- Ex. 3 – Copy of Assembly Bill No. 539, Chapter 708, printed from legalinfo.legislature.ca.gov;
- Ex. 4 – CIC's amended responses to Plaintiff's special interrogatories;

- Ex. 5 - Financial charts and graph purportedly pertaining to Defendant's Milpitas store. Portions of these documents have also been attached to Mr. Marcum's declaration as Exhibits A and B;
- Ex. 6 - Financial charts purportedly pertaining to Defendant's Milpitas store. Portions of which have also been attached to Mr. Marcum's declaration as exhibit C;
- Ex. 7 – Copy of Defendant's letter, dated September 1, 2021, sent to Plaintiff notifying its termination of the Lease in accordance with Section 5 of Lease Rider No. 1; and
- Ex. 8 – Copy of a ruling from the District Court for the District of Nevada, granting summary judgment in *Metejemei, LLC v. Moneytree, Inc*., case no. 2:21-cv-00249-JCM-VCF.

In opposition, Plaintiff asserts the motion suffers from procedural and evidentiary deficiencies as well as substantive failings. Procedurally, Defendant's SSUMF violates California Rules of Court, rule 3.1350(h), and Exhibits attached to the motion are not authenticated. Substantively, triable issues of facts exist as to whether (1) FACA's restrictions, exclusively, frustrated Defendant's commercial purpose thus releasing it from its obligation to pay rent, (2) Defendant waived its early termination right when it renewed the Lease on February 26, 2020, knowing the FACA's restriction and its effective date of January 1, 2020, (3) doctrine of estoppel precludes Defendant from belatedly relying on FACA to terminate the lease early.

First, California Rules of Court, rule 3.1350(h) illustrates the proper format for the separate statement. The Court's power to deny summary judgment on the basis of failure to comply with California Rules of Court, rule 3.1350 is discretionary, not mandatory. (See *Cadlo v. Owens-Illinois, Inc*. (2004) 125 Cal. App. 4th 513, 523; cf. *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315–316.) Here, although Defendant fails to comply with the required formatting. Nevertheless, the facts critical to the ruling were adequately identified and Plaintiff fails to explain how the defective format impaired its ability to marshal evidence to show disputed material facts as to whether FACA restrictions were proper grounds for Defendant's early termination of the Lease. Therefore, no prejudice will result by disregarding the formatting defect with Defendant's SSUMF.

Second, a summary judgment motion must be accompanied by admissible evidence in support of the motion. (Cal. Rules of Court, rule 3.1350(c).) The crux of Defendant's motion is that the FACA's restrictions provided sufficient grounds for early termination of the Lease Agreement under the express terms in paragraph 5 of Lease Rider No. 1. Therefore, evidence of the Lease Agreement's terms and Defendant's notice of termination are critical to its motion for summary judgment. Defendant submits copies of these documents as attachments to its motion [Exhibit nos. 2 and 7] but provides no evidence to authenticate them. (See Evid. Code, § 1401, subds. (a) & (b); *People v. Valdez* (2011) 201 Cal. App. 4th 1429, 1435; *People v. Goldsmith* (2014) 59 Cal. 4th 258, 271.) Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law. (See, Evid. Code, § 1400; *People v. Valdez, supra*, at p. 1435.) A writing may be authenticated by its contents and circumstantial evidence. (*People v. Cruz* (2020) 46 Cal. App. 5th 715, 729.)

Here, Defendant provides no evidence that the attached documents are true and correct copies of the Lease Agreement and the termination correspondence between the parties. While the allegations of the complaint can be considered as Plaintiff's admission to the existence of a Lease Agreement, there is no evidence Plaintiff admits to the authenticity of the version Defendant attaches as Exhibit 2 to its motion. (Evid. Code § 1414.)

Similarly, Defendant also improperly attaches its own amended interrogatory responses and certain financial records as exhibits to its motion and to Mr. Marcum's declaration to prove the negative impact of the FACA's restriction on its economic viability. Neither Defendant nor Mr. Marcum establish the source, provider, and accuracy of the accounting documents. Furthermore, Code of Civil Procedure § 2030.410 prohibits a responding party from using its own interrogatory responses in its favor. (*Great American Ins. Cos. v. Gordon Trucking, Inc*. (2008) 165 Cal. App. 4th 445, 450.)

Third, the Court sustained Plaintiff's evidentiary objections to Exhibit nos. 2, 5, 6, 7 for lack of foundation and authentication.

Based on the foregoing, the Court finds that the requisite foundation for considering Defendant's Exhibits 2, 4, 5, 6, 7, and Mr. Marcum's Exhibits A, B, and C, have not been established. Hence,

Defendant fails to present sufficient admissible evidence to satisfy its initial summary judgment burden. Accordingly, Defendant's motion for summary judgment is DENIED.

Calendar Line 20
Case Name: *Rigoberto Hernandez vs Ford Motor Company et al*
Case No.: 23CV415872

A prevailing buyer in a lemon law case is entitled to fees and costs and has the burden of "showing that the fees incurred were 'allowable', were 'reasonably necessary to the conduct of the litigation,' and were 'reasonable in amount.'" (*Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99; see also Civ. Code §1794(d); *Wohlgemuth v. Catepillar, Inc.* (2012) 207 Cal.App.4th 1252, 1262.) A fee award need not be proportional to the amount recovered, but it must be reasonably incurred. (*Robertson v. Fleetwood Travel Trailers of California, Inc.*, 17 Cal.4th 985, 820 (1998); *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal.App.4th 140, 164 (2006); *McKenzie v. Ford Motor Company* (2015) 238 Cal.App.4th 695, 703; *Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 152; *Christian Research Inst. V. Alnor* (2008) 165 Cal.App.4th 1315, 1320.)

The U.S. Supreme Court has described the lodestar method as the guiding light of fee-shifting jurisprudence and has established a strong presumption that the lodestar represents the reasonable fee. (*City of Burlington v. Dague* (1982) 5050 U.S. 557, 562.) To determine the lodestar figure, the starting point is the calculation of the reasonable rate for comparable legal services in the local community for non-contingent lawyers of the same type, multiplied by the reasonable number of hours spent on the case. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1132.) A party who qualifies for a fee should recover for all hours reasonably spent unless special circumstances would render an award unjust. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 632-633.)

The first step is to determine the number of hours reasonably expended in the litigation. (*Serrano v. Priest* (1971) 20 cal.3d 25, 48, fn. 23.) he reasonable hours expended can also include the time spent preparing and litigating the fee application. (*Serrano v. Unruh* 32 Cal.3d at 639.) The next step is to determine reasonable rates. Attorneys' rates are reasonable if they are within the range of rates charged by private attorneys of similar skill, reputation, and experience for comparably complex litigation. *See, e.g. Bihun v. AT&T Info. Sys.* (1993) 13 Cal.App.4th 976, 997. The court may also rely on its own knowledge and familiarity with the legal market to set a reasonable hourly rate. (*Heritage Pac. Fin., LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1009.)

Once the lodestar amount is determined, the court may increase that amount by a multiplier depending on the result obtained, litigation risks, novelty and difficulty of the legal and factual issues involved in the case and the skill exhibited by counsel. (*In re Consumer Privacy Cases,* 175 Cal.App.4th 545, 556.) The Court may also decrease the lodestar amount. (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 840.)

Here, Plaintiff seeks (1) $42,200 in attorney fees, (2) $1,144.19 in costs and expenses, and (3) a modest 0.3 multiplier ($12,660). Defendant argues these amounts are excessive because this case settled at the nascent stage before any litigation really took place, Plaintiff's rate is too high for someone of his years of experience and this case type, tasks that would normally be performed by clerical staff should not be billed, time spent on certain tasks was excessive, this was a simple case not entitled to a multiplier, and it should not reimburse Plaintiff for expenses incurred related to the dealership.

First, the Court agrees that this is not a matter that is entitled to a multiplier. This was a straightforward case with typical claims and did not present any special or unique issues.

Next, the Court agrees that certain billing entries reflect work that would typically be performed by clerical staff. The Court appreciates that Plaintiff's counsel is a solo practitioner and therefore performs these tasks personally. However, charging $500 per hour to perform such tasks is inappropriate. In the Court's view, this issue permeates the totality of work performed, since many aspects of fact research and motion preparation are frequently conducted by paralegal and other staff and not directly by attorneys. The Court accordingly applies a blended rate (reflecting the combination of $500 per hour for attorney work, a rate that is reasonable for Santa Clara County, and a more appropriate rate of $150 per hour for clerical/paralegal work) of $325 per hour. This blended rate multiplied by the 84.4 hours billed results in $27,430 in attorney fees.

The Court also agrees that Defendant should not be responsible for costs related to another entity, and therefore reduces the costs by $181, for a total of $963.19 in recoverable costs and expenses.

Defendant is therefore ordered to pay Plaintiff $27,430 in attorney fees and $963.19 in costs.