**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: November 28, 2023 TIME: 9:00 A.M.**

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

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

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

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

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

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

**FOR YOUR NEXT HEARING DATE:** You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed in January 2024.

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

| LINE | CASE NO. | CASE TITLE | TENTATIVE RULING |
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| 1 | 20CV366677 | The Ohio Casualty Insurance Company vs Min Xie et. al. | This should have been set for trial setting at 11 a.m. on November 28, 2023 to join with Case No. 20CV3666013. The Court will call the case at that time. |
| 2 | 23CV417119 | Reza Tirgari vs Reza Kazemipour et. al. | Defendant's Demurrer is SUSTAINED with 20 days leave to amend. Please scroll down to line 2 for full tentative ruling. For oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order. |
| 3 | 23CV420802 | Jennifer Garcia vs. Direct Erin O'Brien, et. al. | Defendants Erin O'Brien's and Community Solutions' Demurrer to Plaintiff Jennifer Garcia's Complaint is SUSTAINED. An amended notice of motion with this hearing date was served on Plaintiff by electronic and U.S. mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) 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.) Plaintiff failed to meet and confer with Defendant regarding this demurrer. And, while Defendant's reference to facts outside the complaint is improper, even without reference to such facts, there is good cause to SUSTAIN this demurrer. Plaintiff did not respond to the demurrer, much less articulate how she could amend to overcome it. Accordingly, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Moving party to prepare formal order. The parties are ordered to appear at the hearing. |
| 4 | 23CV420802 | Jennifer Garcia vs. Direct Erin O'Brien, et. al. | Defendants Erin O'Brien's and Community Solutions' Motion to Strike Portions of Plaintiff Jennifer Garcia's Complaint is GRANTED. An amended notice of motion with this hearing date was served on Plaintiff by electronic and U.S. mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) 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.) Plaintiff failed to meet and confer with Defendant regarding this motion. And, while Defendant's reference to facts outside the complaint is improper, even without reference to such facts, there is good cause to grant this motion. Plaintiff did not respond to the motion, much less articulate how she could amend to overcome it. Accordingly, the motion is GRANTED WITHOUT LEAVE TO AMEND. Moving party to prepare formal order. The parties are ordered to appear at the hearing. |

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| 5 | 23CV420802 | Jennifer Garcia vs. Direct Erin O'Brien, et. al. | Defendants Adam Berns, M.D.'s Demurrer to Plaintiff Jennifer Garcia's Complaint is SUSTAINED. An amended notice of motion with this hearing date was served on Plaintiff by electronic and U.S. mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) 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.) Plaintiff failed to meet and confer with Defendant regarding this demurrer. And, while Defendant's reference to facts outside the complaint is improper, even without reference to such facts, there is good cause to SUSTAIN this demurrer. Plaintiff did not respond to the demurrer, much less articulate how she could amend to overcome it. Accordingly, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Moving party to prepare formal order. The parties are ordered to appear at the hearing. |
| 6 | 23CV420802 | Jennifer Garcia vs. Direct Erin O'Brien, et. al. | Defendant Adam Berns, M.D.'s Motion to Strike Portions of Plaintiff Jennifer Garcia's Complaint is GRANTED. An amended notice of motion with this hearing date was served on Plaintiff by electronic and U.S. mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) 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.) Plaintiff failed to meet and confer with Defendant regarding this motion. And, while Defendant's reference to facts outside the complaint is improper, even without reference to such facts, there is good cause to grant this motion. Plaintiff did not respond to the motion, much less articulate how she could amend to overcome it. Accordingly, the motion is GRANTED WITHOUT LEAVE TO AMEND. Moving party to prepare formal order. The parties are ordered to appear at the hearing. |
| 7 | 19CV341732 | Calvano/CRP Mountain vs. 1001 Shoreline LLC | The parties' motions to seal records are GRANTED. Please scroll down to lines 7-8 for full tentative ruling. Court to prepare formal order. |
| 8 | 19CV341732 | Calvano/CRP Mountain vs. 1001 Shoreline LLC | Defendants' Motion for Summary Judgment is DENIED. Please scroll down to lines 7-8 for full tentative ruling. Court to prepare formal order. |

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| 9 | 20CV373187 | Austin Erlich et al vs Wahid Shah | Plaintiff's Motion to Compel Defendant's Deposition and for Sanctions is GRANTED. An amended notice of motion with this hearing date was served on Defendant by electronic mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion; Defendant failed to appear for deposition on multiple occasions without seeking a protective order or serving objections. Plaintiff's efforts to secure either a finalized settlement or Defendant's deposition have gone well beyond what is required by the Code of Civil Procedure. Accordingly, Defendant is ordered to (1) appear for deposition within ten days of entry of this formal order at the location and time specified in Plaintiffs March 1, 2023 deposition notice, (2) produce all documents requested in Plaintiff's March 1, 2023 deposition notice at the time of his deposition, and (3) pay $5,105 to Plaintiff for fees and costs Plaintiff incurred to prepare this motion. While the number of hours and hourly rates are reasonable, the Court reduced the amount requested to reflect that no opposition was filed. For oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order. |
| 10 | 20CV373361 | ROIC Pinole Vista LLC vs Oscar Munoz, et. al. | Oscar Munoz's Motion to Compel Form Interrogatories, Special Interrogatories and Requests for Admission is CONTINUED to January 9, 2024 at 9 a.m. in Department 6, the same date as the trial setting conference. The Court is unable to locate an amended notice of motion with the November 28, 2023 hearing date. The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Defendant Oscar Munoz is ordered to serve an amended notice of motion with the January 9, 2024 hearing date and time. If there is no proof of service demonstrating such service by the next court date, the Court will deny this motion without prejudice. Court to prepare formal order. |
| 11 | 21CV385527 | Michael Darden vs The Board of Trustees of the Lelan Stanford University et. al. | The parties are ordered to appear by TEAMS for an informal discovery conference in Department 6 on December 8 at 11 a.m. |
| 12 | 21CV385527 | Michael Darden vs The Board of Trustees of the Lelan Stanford University et. al. | Plaintiff's Motion to Strike is DENIED. Please scroll down to line 12 for full tentative ruling. Court to prepare formal order. |
| 13 | 22CV404728 | Santa Clara County Federal Credit Union vs Steve Aguyayo | The parties are ordered to appear at the hearing and explain whether the case has been settled and should now be dismissed. |

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| 14 | 22CV409134 | Jane Doe vs. Brad Carothers et al | Plaintiff's Motion to Compel is CONTINUED to December 7, 2023 at 9 a.m. to be heard with the demurrer and motion to strike and to permit new counsel to continue to remedy the discovery issues that appear to this Court to have been caused by Carothers' prior counsel. The Court orders the parties to submit on or before December 5, 2023 a joint letter brief (a) listing the discovery requests that still require Court intervention and (b) providing authority for the Court to sanction prior counsel to pay for Plaintiff's attorney fees and costs incurred in bringing this motion. The parties are ordered to file and email the joint letter brief to Department6@scscourt.org. |
| 15 | 23CV416765 | Yicheng Ji vs Tesla Motors, Inc. | Tesla's Motion to Compel Arbitration is CONTINUED to January 11, 2024 at 9 a.m. in Department 6. The Court is unable to locate an amended notice of motion with the November 28, 2023 hearing date. The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Tesla is ordered to serve an amended notice of motion with the January 11, 2024 hearing date and time. If there is no proof of service demonstrating such service by the next court date, the Court will deny this motion without prejudice. Court to prepare formal order. |
| 16 | 2014-1-CV-264065 | C. Berg, Et Al Vs Metaview Wholesale Investments, Lp, Et Al | Mitchell Developments' Motion for Requests for Admissions to Valerie Houghton be Admitted is DENIED. Valerie Houghton served code compliant responses to the requests for admission on November 21, 2023—before the November 28, 2023 hearing. Accordingly, Mitchell Developments' motion must be denied. (Code of Civ. Proc. § 2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 776, 778.) Mitchell Developments' unopposed motion for $1,125 in sanctions is GRANTED. The number of hours and billable rate are reasonable, and the Court finds that Mitchell Development would not have obtained responses without motion practice. Valerie Houghton is ordered to pay the $1,125 within 30 days of service of this formal order. Court to prepare formal order. |
| 17 | 2014-1-CV-264065 | C. Berg, Et Al Vs Metaview Wholesale Investments, Lp, Et Al | Mitchell Developments' Motion for Requests for Admissions to MetaView be Admitted and for sanctions is DENIED. Based on the Declaration of Terry Houghton, the Requests for Admission were not properly served—either they were not served to the correct address, they were not served on the correct person, or they were served on an unrepresented corporate entity at a time when Mitchell Development understood the corporate entity to be unrepresented. Court to prepare formal order. |
| 18 | 20CV365904 | Stanford HealthCare vs Coventry Health Care | Defendant's Motion to Seal Records is CONTINUED to December 19, 2023 at 9 a.m. in Department 6 to be heard with its motion for summary judgment. |

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| 19 | 20CV370750 | MARK BELMESSIERI vs RACHEL DEPALMA | Defendant's Motion for Reconsideration is DENIED. Defendant's motion is untimely and fails to identify any grounds for reconsideration under the Code of Civil Procedure; the arguments either were already made or could have been made at the time of the original hearing. Court to prepare formal order. |
| 20 | 20CV370750 | MARK BELMESSIERI vs RACHEL DEPALMA | Plaintiff's motion for $5,000 in sanctions is GRANTED. Defendant's motion for reconsideration merely reargues points already addressed or that could have been raised during the motion to enforce settlement. This case is settled and is over; compliance with the settlement agreement is required. The Court finds the time spent on the motion and the hourly rate charged reasonable for this type of case and this market. Defendant is ordered to pay to Plaintiff $5,000 within 30 days of entry of this formal order and to comply with the terms of the Court's August 24, 2023 order enforcing settlement. Court to prepare formal order. |
| 21 | 22CV399540 | Rent-a-Fence.com vs Danny Molina | Off calendar. |
| 22 | 23CV412528 | In re: 309 Otono Court, San Jose, CA 95111 | Motion for disbursement. The Parties are ordered to appear for argument. |
| 23 | 23CV412759 | Danielle Adams vs. Lis Gschwandtner etl al | Calix's Motion to Compel Arbitration is GRANTED. This case is stayed pending the outcome of the arbitration proceeding. Please scroll down to line 23 for full tentative ruling. Court to prepare formal order. |

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**Calendar Line 1**
**Case Name:** *Reza Tirgari v. Reza Kazemipour, et al.*
**Case No.:** 23CV417119

Before the Court is defendant Timila Sayar's demurrer to plaintiff Reza Tirgari's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Background

This matter arises out of an alleged multi-year fraud scheme from 2018 to 2022, in which defendant Reza Kazemipour lied amount investment opportunities, which caused Plaintiff to invest money with him that Kazemipour spent on unauthorized personal expenses and travel. (Complaint, ¶ 15.) With the assistance of defendant Troy Foster, Kazemipour defrauded Plaintiff out of approximately $750,638. (*Ibid*.) After he commenced legal action against Kazemipour, Plaintiff discovered Kazemipour transferred Plaintiff's stolen assets to others, including but not limited to, Sayar and Foster. (*Ibid*.) Kazemipour was the manager and director for defendant 1792 Partners, Inc. ("1792 Partners"). (Complaint, ¶ 8.) Sayar was married to Kazemipour from July 20, 1995, until October 1, 2019. (Complaint, ¶ 16.) She filed for divorce on September 7, 2022. (Complaint, ¶ 39.)

Plaintiff initiated this action on June 2, 2023, asserting: (1) Fraudulent Conveyance-Actual Intent (Civ. Code, § 3439.04, subd. (a)(1)); (2) Fraudulent Conveyance-Constructive (Civ. Code, § 3439.04, subd. (a)(2)(B)); (3) Aiding and Abetting Violations of the Uniform Voidable Transactions Act ("UVTA"); (4) Declaratory Relief; (5) Conspiracy to Fraudulently Transfer Assets (Pen. Code, § 192); (6) Receiving Stolen Property (Civ. Code §§ 484, 496, & 503); and (7) Appointment of a Receiver. On August 1, 2023, Saya filed the instant demurrer, which Plaintiff opposes.

## II. Requests for Judicial Notice

### a. Sayar's Request

Sayar requests judicial notice of the following items:

(1) Plaintiff's complaint in *Tirgari v. Kazemipour*, filed in the Superior Court of San Diego County (the "San Diego Fraud Action"): Exhibit 1;

(2) Docket for the San Diego Fraud Action: Exhibit 2;

(3) Notice of Related Case filed by Plaintiff in *Tamila Sayar v. Reza Kazemopour*, filed in the family law division this Court (the "Dissolution Action"): Exhibit 3; and

**(4)** Request for Temporary Emergency Order to Stay Entry of Default Judgment filed by Plaintiff in the Dissolution Action filed on July 7, 2023: Exhibit 4.

These items are court records and judicial notice of such records is permitted under Evidence Code section 452, subd. (d). However, the law is settled that "the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.) Here, Sayar relies on the exhibits for the truth of their contents. "A court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (See *Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 113 (Fremont Indemnity Co*).)

Thus, Sayar's request for judicial notice is DENIED.

**b. Plaintiff's Request**

Plaintiff requests judicial notice of following facts:

(1) Sayar admitted that Kazemipour "transferred funds from his financial accounts to [her] from January 2019 to the present day.": Exhibit 1;

(2) She admitted she "transferred funds from her financial accounts to Kazemipour from January 2019 to the present day": Exhibit 1;

(3) Defendant admits that as of May 15, 2023, she had assets in excess of $3 million: Exhibit 2; and

(4) She admitted "Reza Kazemipour gave her a purse valued at approximately $1,500.00—which he said he gifted her on behalf of their children—in December of 2020 for Christmas": Exhibit 3.

There is a split of authority as to whether a plaintiff can request judicial notice of a defendant's admissions. (See *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485 ["[i]t is true that a court may take judicial notice of a party's admissions or concessions, but only in cases where the admission 'cannot reasonably be controverted,' such as in answers to interrogatories or requests for admission, or in affidavits and declarations filed on the party's behalf"]; but see *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605 ["The court will take judicial notice of

records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, only where they contain statements of *the plaintiff or his agent* which are *inconsistent* with the *allegations of the pleading* before the court."]

Here, Plaintiff's request is for Sayar's responses to requests for admission, which cannot be controverted. Thus, Plaintiff's request is GRANTED as to items 1 through 3. However, it is DENIED as to item 4. (See *Gbur v. Cohen,* (1979) 93 Cal.App.3d 296, 301 [information subject to judicial notice must be relevant to the issue at hand].)

## III. Sayar's Demurrer

Sayar demurs to each cause of action on the ground it fails to allege sufficient facts and is barred by the statute of limitations. (See Code Civ. Proc. § 430.10, subd. (e).)

### A. Legal Standard for 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. Statute of Limitations[1]**

The UVTA, codified in Civil Code section 3439, provides:

> A cause of action with respect to a transfer of obligation under this chapter is extinguished unless action is brought pursuant to subdivision (a) of section 3439.07 or levy is made as provided in subdivision (b) or (c) or section 3439.07:
>
> **(a) Under paragraph (1) of subdivision (a) of section 3439.04, not later than four years after the transfer was made or the obligation was incurred or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant.**

(Civ. Code, § 3439.09, subd. (a) (emphasis added).)

Sayar's statute of limitations argument is direct to the Hilltop Property and the Judson Property. (Dem. 11:3-17.) Kazemipour's mother Farangis Ayari purchased the Hilltop Property on May 27, 2005 and granted it to Kazemipour and Sayar on April 19, 2007 who, in turn, sold the property on December 11, 2013. (Complaint, ¶¶ 23, 25.) The transactions regarding the Hilltop Property predate the alleged fraudulent activities, thus to the extent Plaintiff's claims are based on this property, the claim is time-barred, and Sayer's demurrer based on the statute of limitations as to the Hilltop Property is SUSTAINED. (See Civ. Code, § 3439.04, subd. (a).)

The Judson Property was purchased by Kazemipour and Walter Pena on June 21, 2001 and gifted to Ayari on October 21, 2004. (Complaint, ¶¶ 17-18.) On April 12, 2005, Kazemipour and Ayari granted the property to Foster, who sold it on July 19, 2022, for an estimated profit of $1,147,000. (Complaint, ¶¶ 19, 21.) Kazemipour's transfer of the Judson Property also predates the events at issue, and Plaintiff states the real property transfers are "not necessarily the transfers [he] seeks to unwind." (Opp., p. 16:15-16.) Nevertheless, to the extent Plaintiff's claims are based on the Judson Property, Plaintiff discovered the sale of the Judson Property within one year of the sale and filed suit within that time. (See Complaint, ¶ 21; Exh. 4.) Thus, the demurrer of the basis of the statute of limitation is OVERRULED as to the Judson Property.

[1] The only statute of limitations arguments Sayer makes relate to specific property for the fraudulent conveyance claims, so those allegations are the Court's focus.

**C. First and Second Cause of Action: Fraudulent Conveyance-Actual Intent**

Claims for fraudulent transfer are governed by the UVTA, Civil Code section 3439 et seq., [formerly known as the Uniform Fraudulent Transfer Act]. The purpose of the UVTA is to prevent debtors from placing, beyond the reach of creditors, property that should be made available to satisfy a debt. (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071 (*Lo*).)

"A creditor may set aside a transfer as fraudulent under Civil Code section 3439.04 by showing actual fraud as defined in subdivision (a)(1) or by showing constructive fraud as defined in subdivision (a)(2)." (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 817 (*Chen*).) Actual fraud under the UVTA means that the transfer was made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." (Civ. Code § 3439.04, subd. (a)(1).) Constructive fraud means the debtor made the transfer: "Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." (Civ. Code § 3439.04, subd. (a)(2).) The UVTA allows a judgment to be entered against (1) the first transferee of the fraudulently transferred asset, (2) the transfer beneficiary, and (3) any subsequent transferee other than a good faith transferee." (*Lo, supra*, 24 Cal.App.5th at p. 1071.)

"[I]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus, the policy of liberal construction of the pleadings… will not ordinarily be invoked to sustain a pleading defective in any material respect." (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 993 (*Robinson Helicopter*); see also *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*).)

Based on the allegations, Kazemipour is the debtor and Plaintiff is the creditor. (See Complaint, ¶ 84.) Although Plaintiff alleges transfers of property over the last 20 years, the fraudulent conveyance claim is based on Kazemipour's transfer to Sayar. Plaintiff alleges sometime between 2018 and the filing of the Complaint, Kazemipour and/or 1792 Partners transferred *all or substantially all* of his assets to Sayar, *including but not limited* to the stolen funds. (Complaint, ¶ 58 [emphasis added].) Plaintiff

directs the Court to pages 5-9 and 12-16 of the Complaint, however, pages 5-9 pertain to real property transactions, which mostly predate the events at issue, and pages 12-16 pertain to Sayar's divorce proceedings and do not allege any transfers from Kazemipour to Sayar. Additionally, Plaintiff alleges Kazemipour spent part of the stolen funds. (See Complaint, ¶ 49.) This claim must be alleged with the requisite specificity because it is a fraud cause of action and Plaintiff only alleges the subject transfer generally. (See *Robinson Helicopter, supra,* 34 Cal.4th at p. 993; see also *West, supra,* 214 Cal.App.4th at p. 793.)

Plaintiff also alleges and argues that Sayar paid Kazemipour $1,000,000 as part of their marital settlement agreement ("MSA"), however the first and second claims are based entirely on Kazemipour's transfers to Sayar, not any transfers by Sayar. Thus, the demurrer to the first and second causes of action is SUSTAINED with 20 days leave to amend.

**D. Third Cause of Action-Aiding and Abetting Violations of the UVTA**

"Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person … knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act …." (*Chen v. PayPal, Inc*. (2021) 61 Cal.App.5th 559, 583 (*Chen*), quoting *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846.) However, knowledge alone, even specific knowledge, is not enough to state a claim for aiding and abetting. California law requires that defendant made a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. Or as the Court of Appeal put it in *Gerard v. Ross* (1988) 204 Cal.App.3d 968, 983, an alleged aider and abettor must have "acted with the intent of facilitating the commission of that tort." (*George v. eBay, Inc*. (2021) 71 Cal.App.5th 620, 641–642 (*George*) (internal citation and quotations omitted).) "Because transferring funds to evade creditors constitutes an intentional tort, it logically follows that California common law should recognize liability for aiding and abetting a fraudulent transfer." (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1025.) Without the underlying tort, there can be no liability as an aider and abettor. (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574–575.)

The Court sustained Sayar's demurrer to the fraudulent conveyance claims. As a result, there is no underlying tort upon which to base Plaintiff's aiding and abetting. Thus, the demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

**E. Fifth Cause of Action-Conspiracy**

Penal Code section 182, provides criminal penalties if "two or more persons conspire: (1) to commit any crime… (4) to cheat and defraud any person or any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises." (Pen. Code, § 182, subd. (a)(1) & (4).) Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. (See *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823.)

Here, the conspiracy claim is based on the fraudulent conveyance claims, the demurrer to which the Court has sustained. Accordingly, the demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend.

**F. Sixth Cause of Action-Receiving Stolen Property**

Penal Code section 496 states,

> (a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.

(Pen. Code, § 496, subd. (a).)

The elements of this claim are: "(1) that the particular property was stolen, (2) that the accused received, concealed, or withheld it from the owner thereof, and (3) that the accused knew that the property was stolen." (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 213.) A violation of the statue requires some form of criminal intent. (*Siry Investment LP v.*

*Farkenhondehpour* (2022) 13 Cal.5th 333, 361-362.) In general, statutory causes of action must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

Here, Plaintiff alleges Sayar aided Kazemipour and 1792 Partners in concealing, selling, and withholding property and assets from Plaintiff, knowing the property and assets were stolen. (Complaint, ¶ 107.) He further alleges Sayar received property from Kazemipour and 1792 Partners that they stole from Plaintiff. (*Ibid*.) However, statutory claims are subject to a heightened pleading standard, which requires the plaintiff to set forth particular facts supporting their claim. Plaintiff only offers conclusory allegations as to Sayar's knowledge. Additionally, Plaintiff fails to allege any facts regarding Sayar's criminal intent. As a result, Plaintiff fails to allege sufficient facts to state this claim, the demurrer to the sixth cause of action is SUSTAINED with 20 days leave to amend.

**G. Seventh Cause of Action-Appointment of a Receiver**

Plaintiff seeks the appointment of a receiver to address Defendants' alleged debts, manage and control their assets and properties. (Complaint, ¶ 115.) Code of Civil Procedure section 564 authorizes a court to appoint a receiver under various circumstances authorized by the statute. (Code of Civil Procedure, § 564, subd. (a).) "Receivership is an extraordinary remedy, to be applied with caution and only in cases of apparent necessity, and where other remedies would be inadequate." (*Rogers v. Smith* (1946) 76 Cal.App.2d 16, 21.) "The requirements of Code of Civil Procedure section 564 are jurisdictional, and without a showing bringing the receiver within one of the subdivisions of that section the court's order appointing a receiver is void." (*Turner v. Super. Ct.* (1977) 72 Cal.App.3d 804, 811.) It is a remedy that must be based on an underlying claim; it is not an independent cause of action. (*Starbird v. Lane* (1962) 203 Cal.App.2d 247, 261; see also *Frick v. Calmin Mortgage Corp., Ltd* (1934) 220 Cal.746, 747-748.)

Here, there are no underlying claims to support Plaintiff's cause of action. Thus, the demurrer to the seventh cause of action is SUSTAINED with 20 days leave to amend.

**H. Fourth Cause of Action-Declaratory Relief**

Code of Civil Procedure Section 1060 ("Section 1060"), which governs declaratory relief, states:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights

> or duties with respect to another … may, in cases of actual controversy relating to legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premise, including a declaration of any questions or construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at this time.

(Code Civ. Proc. § 1060.)

The fundamental basis of declaratory relief is the existence of an actual and present controversy over a proper subject. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "A general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged; the pleader need not establish it is entitled to a favorable judgment." (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action because the plaintiff is entitled to a declaration of rights even if it is contrary to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.)

Plaintiff alleges there is an actual and present controversy between the parties as to the respective rights and duties regarding property transferred by and to defendants. (Complaint, ¶ 92.) He requests a judicial determination of the rights, obligations, and interests of the parties relative to the Judson Property; the Okeefe Property; the assets in Sayar's bank and brokerage accounts; the assets in Kazemipour's bank and brokerage accounts; Foster's assets; and any other property Defendants transferred to conceal assets from Plaintiff. (Complaint, ¶ 94.) Here, the declaratory relief claim is based on the fraudulent conveyance claims. The demurrer has been sustained as to all claims. Therefore, the claim for declaratory relief cannot be maintained, and the demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend.

**oo0oo**

**Calendar Lines 7-8**
**Case Name:** *Calvano/CRP Mountain View Venture, LLC, et.al. v 1001 Shoreline LLC, et.al.*
**Case No.:** 19CV341732

Before the Court are Defendants' 1001 Shorelines, LLC ("Shoreline"), Calvano Development, Inc. ("Calvano Development") and Mark Calvano (collectively, "Defendants") motion for summary judgement as to Plaintiffs' Calvano/CRP Mountain View Venture, LLC (the "Company") and CRP Mountain View Owner, LLC's ("Owner") (collectively, "Plaintiffs") third amended complaint ("TAC"); Defendants' motion to seal Exhibits 5 and 6 in Defendants' Compendium of Evidence; and Plaintiffs' motion to seal Exhibit A to Declaration of Allen Gardner and portions of their opposition to Defendants' motion for summary judgement. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

**I. Background**

This is breach of contract action. On January 16, 2015, Owner, Shoreline and Mr. Calvano entered an agreement (the "LLC Agreement") to form the Company for the purposes of acquiring and potentially developing certain real estate in Mountain View (the "Project"). (TAC, ¶ 1.) Both Owner and Defendants profited from the Company's acquisition and development of real estate in the area, with the latter having received $14,426,274 in profit distributions prior to December 2018, at which time, the Representation and Warranty period by which the Company sold the Project expired, allowing for distributions relating to those categories of withholdings. (TAC, ¶ 4.)

On December 26, 2018, Mark Calvano requested that Owner, as the Company's managing member, distribute Shoreline's share of reserves by December 31, 2018 by depositing the funds in an account held by Calvano Development. (*Id.*) Two days later, Owner made a $1,730,960 distribution by wire transfer to a Calvano Development account, as requested. (*Id.*, ¶ 5.) On January 4, 2019, Owner mistakenly wired an additional $1,730,960 to the same account. (*Id.*, ¶ 6.) Rather than returning the funds, Mr. Calvano attempted to leverage the mistake to extract unrelated fees. (*Id.*, ¶ 22.)

On January 22, 2019, Calvano Development filed an interpleader complaint, styled *Calvano Development, Inc. v. CRP Mountain View, LLC, et al*, Case No. 19CV341451, naming Owner and Shoreline as defendants (the "Interpleader Action"). (TAC, ¶ 28.) The Court ultimately dismissed the Interpleader Action for the reasons brought to Defendants' attention by Plaintiffs within days of its

filing, but not before the case caused Plaintiffs to incur significant attorneys' fees and costs. (TAC, ¶ 29.) Defendants have refused to reimburse Plaintiffs for these amounts despite their contractual obligation to do so under Sections 4.5(b) and 11.10 of the LLC Agreement. (*Id*.)

Plaintiffs filed this action in January 2019, and filed a first amended complaint in May 2019. On September 23, 2019, the Court dismissed the Interpleader Action, and approximately two weeks later, on October 8, 2019, Plaintiffs filed their second amended complaint, but did not seek the return of attorneys' fees and costs incurred in defending the Interpleader Action.

Shoreline filed its initial cross-complaint on December 4, 2019, followed by the operative first amended cross-complaint ("FAXC") on July 19, 2021, which asserted: (1) breach 0f contract; (2) breach of implied covenant of good faith and fair dealing; (3) unjust enrichment; (4) accounting; and (5) declaratory relief.

On August 19, 2022, Plaintiffs were granted leave to file their TAC, wherein they admit that the $1,730,960 was returned in January of 2020, and seek their attorneys' fees and costs relating to the Interpleader Action. The TAC was filed on August 23, 2022, and asserts: (1) breaches of contract (against Shoreline and Mark Calvano); (2) quasi-contract (pleaded in the alternative) (against Shoreline and Mark Calvano); (3) conversion (pleaded in the alternative) (against Defendants); and (4) breaches of the implied covenant of good faith and fair dealing (pleaded in the alternative) (against Defendants).

On October I3, 2022, Plaintiffs filed their motion for summary judgment, or in the alternative, summary adjudication. Defendants opposed the motion and subsequently demurred to the TAC. In February 2023, the Court overruled the demurrer as to the first cause of action and sustained it with leave to amend as to the remaining claims. Plaintiffs did not file a fourth amended complaint after the demurrer to the TAC was partially sustained. Consequently, the only claim remaining at issue in the TAC is the first cause of action for breach of contract. On April 5, 2023, the Court entered its order denying Plaintiffs' motion for summary judgement of their TAC and granted summary judgement of the cross-claims.

## II. Legal Standard

A defendant moving for summary judgment has the initial burden to make a prima facie showing there is no merit to a cause of action and that therefore the defendant is entitled to judgment as a matter

of law. (Code Civ. Proc., § 437c, subd. (p)(2); *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) To satisfy this burden, the moving defendant must show that at least one of the elements of the cause of action has not been established by the plaintiff and cannot reasonably be established or must establish the elements of a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar, supra*, at p. 849; *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480 (*Jessen*).) If the moving defendant meets this burden, then the burden shifts to the plaintiff to show that there is at least one triable issue of material fact regarding the cause of action or as to the complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849; *Jessen, supra*, at p. 1484.)

Summary judgement is appropriate if there are no triable issues of material fact and the moving party is entitled to judgement as a matter of law. (Code of Civ. Proc. § 437c, subds. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607. 618) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted; accord, *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) Courts are required to liberally construe the opposing party's evidence and resolve any doubts about the evidence in favor of that party. (*Regents of University of California v. Superior Court*, supra, 4 Cal.5th 607 at 618).

"A party may move for summary adjudication as to one or more causes of action within an action … if that party contends that the cause of action has no merit. . . ." (Code Civ. Proc., § 437c, subd. (f)(1).) "The aim of the procedure is to discover whether the parties possess evidence requiring the weighing procedures of a trial. (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1057 (*Marron*).) "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgement and shall proceed in all procedural respects as a motion for summary judgement" (Code Civ. Proc., § 437c, subd. (f)(2).)

**III. Defendants' Request for Judicial Notice**

Defendants request judicial notice of the verified complaint and the answer filed in the Interpleader of *Calvano Development, Inc. v. CRP Mountain View Owner, L.L.C. et al*., case number

19CV341451, the court's docket in that matter, the third amended complaint filed in this action, and the Court's order overruling and sustaining, in part, Defendants' demurrer and denying Defendants' motion to strike. Plaintiffs do not object to this request.

Judicial notice "is always confined to those matters which are relevant to the issue at hand." (*Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 ("*Gbur*").) Evidence Code sections 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 ("*Lockley*").)

Accordingly, Defendants' unopposed request for judicial notice is GRANTED.

**IV. Motions to Seal Exhibits and Portions of Plaintiffs' Opposition**

Defendants' unopposed motion seeks to seal Exhibits 5 and 6 in their Compendium of Evidence in support of their motion for summary judgement or in alternative for summary adjudication. Exhibit 5 contains copies of billing records from Latham & Watkins for their legal services and Exhibit 6 is a payment summary for the billed legal fees.

Plaintiffs' unopposed motion seeks to seal Exhibit A, attached to Mr. Gardner's declaration, and lines 11-16, on page 5, of their opposition to Defendants' motion for summary judgement. Exhibit A is a summary payment for legal fees dated December 2019.

An application to seal must be accompanied by a declaration and a memorandum containing facts sufficient to justify sealing. (Cal. Rules of Court, Rule 2.551(b)(1).) While Plaintiffs complied with this Rule, Defendants did not. Defendants have failed to submit the required declaration; however, the Court finds sufficient facts in their filed memorandum to address their motion.

A court may order records to be filed under seal when the following conditions are met: "(1) [t]here exists an overriding interest that overcomes the right of public access to the record[s]; (2) [t]he overriding interest supports sealing the record[s]; (3) [a] substantial probability exists that the overriding interest will be prejudiced if the record[s] are not sealed; (4) [t]he proposed sealing is narrowly tailored; and (5) [n]o less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court

2.550(d).) In ruling on a motion to seal, the court must identify (1) the specific information claimed to be entitled to protection from public disclosure, (2) the nature of the harm threatened by disclosure, and (3) any countervailing considerations. (*H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894.) Therefore, to prevail on their motion, Defendants must present a specific enumeration of the facts sought to be withheld and the specific reasons for withholding them. (*Id*. at 904.)

Courts must find compelling reasons before ordering filed documents sealed. (*Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1246; *Champion v. Superior Court* (1988) 201 Cal.App.3d 777, 787.) A proposed sealing must also be narrowly tailored to serve the overriding interest, such as sealing only portions of pleadings or redacting particular text. (*In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1052, 1070.)

Here, both parties' motions are made on the grounds that these exhibits and portions of the opposition contain documents and information that have been designated by Plaintiffs as "Confidential" pursuant to the Stipulated Protective Order entered by the court on March 11, 2019, in the related Interpleader Action. Further, these filings contain Plaintiffs' non-public and confidential information, disclosure of which would invade Plaintiffs' privacy and threaten their legal and business matters.

Good cause appearing, the Court GRANTS Defendants' and Plaintiffs' unopposed motions to seal. The Clerk of this Court shall seal Exhibits 5 and 6 to Defendants' Compendium of Evidence in Support of their motion for summary judgement. The Clerk shall further seal Exhibit A to Declaration of Allen Gardner in support of Plaintiffs' opposition and lines 11-16 on page 5 of the Plaintiffs' opposition to Defendants' motion for summary judgment.

**V. Analysis**

The sole claim at issue in the TAC is for breach of contract, the elements of which are (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach and (4) the resulting damages to the plaintiff. (*Bushell v. JP Morgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921.)

To meet their initial burden, the remaining Defendants, Shoreline and Mark Calvano, must establish that at least one element of the Plaintiff's cause of action cannot be established, or that they have a complete defense to the cause. The way to meet their burden of proof is to present affirmative

evidence negating, as matter of law, an essential element of plaintiff's claim." (Weil Brown, Cal. Prac. Guide; Civ. Proc. Before Trial (The Rutter Group 2014) ¶ 10:241, p. 10-104, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "The moving party's declaration and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to resolve any evidentiary doubts or ambiguities in plaintiff's (opposing party's) favor.'" (Id., ¶ 10241.20, p. 10—105, citing *Johnson v. American Standard, Inc*. (2008) 43 Ca1.4th 56, 64.)

First, Defendant, Calvano Development, Inc.'s motion for summary judgement is DENIED. Calvano Development is among the parties moving for summary judgment; however, it was not a named a Defendant in Plaintiff's cause of action for breach of contract.

Next, the issue of Shoreline's and Mark Calvano's breach of the LLC Agreement was to some extent addressed in this Court's April 5, 2023, Order. The Court found that Shoreline and Mr. Calvano had violated several provisions of the LLC Agreement when they wrongfully refused to return the mistakenly wired funds and improperly initiated an Interpleader Action, which triggered their removal under section 4.4 of the LLC Agreement.

The TAC alleges that Shoreline and Mr. Calvano breached the Indemnity Provision of the LLC Agreement by refusing to reimburse Plaintiffs for their incurred attorneys' fees and costs in defense against the Interpleader Action. LLC Agreement section 4.5(b) expressly permits recovery of attorneys' fees "resulting from any or all actions of [Shoreline] or its Affiliates constituting gross negligence, willful misconduct, fraud, actions taken outside the scope of authority provided under this Agreement or breach of this Agreement." Under *Int'l Rail Partners LLC v. Am. Rail Partners, LLC* (2020) Del. Ch. LEXIS 345; 2020 WL 6882105, such provisions are enforceable under Delaware law.

In defense of their refusal to indemnify Plaintiffs for their incurred attorneys' fees, Shoreline and Mr. Calvano argue (1) Plaintiffs were neither billed nor paid for the attorneys' fees incurred in litigation of the Interpleader Action, and (2) any fees paid by Company are unreasonable since they were not a party in the Interpleader Action. Consequently, Shoreline and Mark Calvano contend that Plaintiffs' breach of contract claim lacks merit as a matter of law.

**A. Billing and Payment of Invoices for Legal Services Rendered in Defense Against the Interpleader**

Shoreline and Mr. Calvano contend that Plaintiffs did not pay for Latham & Watkins' legal services and had no legal obligation to pay since the invoices were billed to Carlyle Realty Partners Fund VII and were paid by Carlyle Investment Management LLC ("CMI"). To further negate Plaintiffs' financial obligation to their attorneys, Shoreline and Mark Calvano argue that CRP Owner could have directly paid Latham & Watkins if they were truly obligated to pay instead of their roundabout way of reimbursing CMI. Alternatively, Shoreline and Mark Calvano contend that if Owner is arguably responsible to repay CMI, then its claim is one for subrogation and not indemnification. In support of their argument, Shoreline and Mark Calvano submit copies of Latham & Watkins' invoices and what appears to be a summary of four fund transfers from CIM to Latham & Watkins. (Defendants' Compendium of Evidence, Exs. 5, 6.) Defendants also cite to *Connelly v. State Farm Mutual Automobile Insurance Company* (Del. 2016) 135 A.3d 1271, 1281 noting "an indemnitee is not entitled to recover under the agreement until he or she has made an actual payment or has otherwise suffered an actual loss." (See also *Levy v. HLI Operating Co., Inc.* (Del. Ch. 2007) 924 A.2d 210, 222-223 (*Levy*).)

Plaintiffs, citing to *Creel v. Ecolab, Inc.* (Del. Ch. Oct. 31, 2018) 2018 WL 5733382, argue that irrespective of CIM's intermediary payments, Defendants were obligated to reimburse CIM. In further support, Plaintiffs cite to the following:

- they are investment entities under the umbrella of the investment fund known as Carlyle Realty Partners VII ("Fund VII") (Athena Shi Decl., ¶ 5);
- Carlyle Investment Management LLC ("CIM") is the registered investment advisor of Fund VII and an affiliate of Carlyle Group (Athena Shi Decl., ¶ 4);
- CIM, among other operational tasks, handles payments and reimbursements for Fund VII and its investment entities, including entity Plaintiffs. (Athena Shi Decl., ¶ 7);
- invoices for costs (including attorneys' fees and costs) attributable to Fund VII investment entities may be billed directly to Fund VII. CIM is responsible to pay for invoices received and requires prompt reimbursement from the investment entity that incurred the cost. (Athena Shi Decl., ¶ 8);

- After the sale of the Project, Venture began its dissolution process and in August 2018 deposited its remaining funds in Owner's bank account to handle remaining tasks. (Athena Shi Decl., ¶ 9);
- Each month CIM paid for Latham & Watkins invoices for its work on behalf of the Plaintiffs, it was promptly reimbursed by Owner on behalf of Venture. (Athena Shi Decl., ¶¶ 11, 12); and
- Owner, as the Venture's managing member, defended the Interpleader Action on its behalf and the fees it paid were Venture's money. (Athena Shi Decl., ¶ 13.)

Section 4.5(b) of the LLC Agreement states: "Each Member agrees to indemnify, defend and hold harmless the Company and the other Members from any loss, claim, damage, liability or expense (including reasonable attorneys' fees) resulting from any or all of actions of such Member or its Affiliates constituting gross negligence, willful misconduct, fraud, actions taken outside the scope of authority provided under this Agreement or breach of this Agreement." According to this provision, Shoreline and Mr. Calvano would be obligated to pay for any damages or attorneys' fees that resulted from their improper actions. There is no language excluding intermediary payors or limiting the recoverable attorneys' fees to fees directly paid by the Company.

Delaware courts also do not allow the purported indemnitor to shirk its obligations because an intermediary fronted indemnifiable costs. (See *DeLucca v. KKAT Mgmt. LLC*, (Del. Ch. Jan.23, 2006) 2006 WL 4762856 at 30-32 (*DeLucca*)) ("If a person owed advancement rights could find an affluent aunt, best friend, or other third party to front her defense costs, she would thereby forfeit her right to seek recompense from the party that should have been advancing those costs on the grounds that she was not 'out of pocket' herself even though she was obliged to repay her benefactor. That would be inequitable and reward the refusal to honor promises of advancement."); *Creel v. Ecolab, Inc*. (Del. Ch. Oct. 31, 2018) 2018 WL5733382 (corporation cannot deny indemnification because payment made by a third party.)

**B. Company's Position in the Interpleader Action**

Without authority, Shoreline and Mark Calvano contend that even if the Company paid attorneys' fees, such fees were unreasonable since it was not a party in the Interpleader Action. First, in

contrast to Defendants' assertion that the Company was not a party to the Interpleader Action, Plaintiffs allege in their TAC that on July 29, 2019, Shoreline filed a cross-complaint in the Interpleader Action naming Calvano Development, Owner, and the Company as cross-defendants. (TAC ¶ 33.) This allegation stands.

Next, Plaintiffs' evidence shows (1) the money in the Interpleader Action was the Company's money, to be distributed to its members according to the Agreement's waterfall provision, (2) Owner defended the Interpleader Action on behalf of the Company, and (3) the paid attorneys' fees were from the Company's funds. (Athena Shi Decl., ¶¶ 12, 13, 14.) Plaintiffs argue they were harmed as the result of Defendants' wrongful conduct and their indemnity rights should not be rejected simply because Defendants named the wrong party in the Interpleader Action. The Court agrees.

Shoreline and Mark Calvano fail to meet their initial burden having no evidence

- negating the express language of LLC Agreement provision 4.5(b);
- showing that Plaintiffs had no obligation to pay for the attorneys' fees and costs incurred in defense against their Interpleader Action;
- showing that neither Company nor Owner suffered an actual loss;
- showing that the interpleaded funds were not the Company's money; or
- showing that the Company was not a party to the Interpleader Action.

Accordingly, Defendants' motion for summary judgment is DENIED.

**oo0oo**

**Calendar Line 12**
**Case Name:** *Darden v. The Board of Trustees of the Leland Stanford Junior University*
**Case No.:** 21CV385527

Before the Court is Plaintiff's motion to strike Defendants' answer to the TAC and to enter default judgement. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Background

This is an action for negligent misrepresentation brought by self-represented Plaintiff, Michael Darden, against several defendants. Darden's original complaint was filed on July 8, 2021. The operative Third Amended Complaint ("TAC"), filed on December 2, 2022, states single cause of action for negligent misrepresentation arising from the termination of Plaintiff's employment on July 29, 2019. (See TAC at ¶ 4.)

The original Complaint, the First Amended Complaint ("FAC"), the Second Amended Complaint ("SAC"), and the Third Amended Complaint (TAC) list seven defendants: the Board of Trustees of the Leland Stanford Junior University, Jane Duperrault, Lawrence Chu, M.D., Norma Leavitt, Susan Hoerger, Marc Tessier—Lavigne, and Ronald Pearl (collectively, "Defendants").

Darden alleges the following misrepresentations:

1. Job Advertisement's Admittedly Outdated Job Description - published on December 5, 2018, viewed by Plaintiff in March 2019.

2. Written Job Offer's Admittedly Outdated Job Description and Requested Start Date -emailed to Plaintiff on May 24, 2019.

3. Complaint Handling Statements - Defendant Norma Leavitt's verbal assertions to Plaintiff on July 22, 2019.

4. Job Termination Statements - Defendants Normal Leavitt and Dr. Lawrence's verbal assertions to Plaintiff on July 29, 2019; and

5. Statements about Defendant's Handling of Plaintiff's Wrongful Termination Concerns-emailed to Plaintiff in August 2019.

Defendants unsuccessfully demurred to the TAC. The Court's Order overruling the demurrer was filed and served on May 17, 2023. Defendants subsequently filed their answer to the TAC on June 16, 2023, generally denying Plaintiff's claims. Defendants asserted 19 affirmative defenses.

On June 26, 2023, Plaintiff filed a demurrer to Defendants' answer and a month later, prior to a hearing on his demurrer, he filed his Request for Entry of Default against Defendants. Subsequently, Plaintiff's demurrer to Defendants' answer was heard, and an order overruling the demurrer was entered on September 18, 2023.

Approximately two months after Defendants filed their answer to the TAC, Plaintiff filed his motion to strike the answer and request for entry of default judgement.

**II. Legal Standard**

The court may, upon a motion, or at any time in its discretion, and upon terms it deems proper, strike any irrelevant, false, or improper matter inserted in any pleading. (Code Civ. Proc., § 436(a).) The court may also strike 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. (*Id.*) The grounds for moving to strike must appear on the face of the pleading or by way of judicial notice. (Code Civ. Proc., § 437.) "When the defect which justifies striking a complaint is capable of cure, the court should allow leave to amend." (*Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 768.)

Where there are grounds both for demurring and moving to strike, the two documents must be filed together and noticed for the same hearing. (Code of Civ. Proc. § 435(b)(3), (d).) Because a motion to strike and a demurrer must be brought at the same time, a motion to strike the answer must be filed within 10 days after service of the answer. (Code Civ. Proc. § 435(b); California Rule of Court, Rule 3.1322(b).)

**III. Analysis**

Plaintiff seeks to strike Defendants' answer on the grounds that (1) it was untimely filed, (2) it contains vacuous answers, (3) the affirmative defenses are not factually supported, and (4) Defendants and their attorneys have in bad faith evaded providing complete responses to his discovery. The Court overruled Plaintiff's demurrer to Defendants' answer, demurrer which asserted virtually identical arguments. The Court will not revisit this issue for this motion.

While Defendants' late answer was a proper basis for a motion to strike, Plaintiff's motion is untimely. Plaintiff was required to file his motion to strike with the demurrer within 10 days after the service of the answer. (Code of Civ. Proc. § 435(b) (1), (3); Cal. Rules of Court, Rule 3.1322(b).)

Plaintiff filed this motion approximately two months after Defendants filed their answer. And, while the Court has discretion to consider striking all or any part of a pleading (Code Civ. Proc. § 436(b); *CPF Agency Corp v. R&S Towing* (2005) 132 Cal.App.4th 1014, 1021), an answer filed 18 days late does not prejudice Plaintiff or constitute sufficient grounds for the Court to exercise this discretion.

Accordingly, Plaintiff's motion to strike Defendants' answer is OVERRULED and request to enter default judgment DENIED.

**oo0oo**

**Calendar Line 23**
**Case Name:** *Danielle Adams vs. Lis Gschwandtner et al*
**Case No.:** 23CV412759

Before the Court is Defendants' Calix Networks Inc.'s and Calix, Inc.'s (collectively, "Calix") Motion to compel arbitration. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Background

This is an action for wrongful termination and retaliation. Plaintiff Danielle Adams was Calix's Senior Manager, Media Equipment and Corporate Communications from July 18, 2022 until her alleged wrongful termination on December 13, 2022. (Complaint, ¶ 7.) Plaintiff alleges during a meeting with Calix's C-Suite executives required as part of her on-boarding process during her first week at Calix, Calix's Chief Financial Officer Cory Sinclair "voluntarily disclosed to Plaintiff that the press releases that Calix consistently put out to their shareholders and investors were false, or at the very least, deliberately misleading." (Complaint, ¶¶ 8-11.)

Plaintiff regularly complained to her manager, Defendant Regional Vice President Content Marketing, Lisa Gschwandtner, regarding the false claims contained in press releases Plaintiff was responsible for getting picked up by the press. (Complaint, ¶ 14.) Plaintiff also complained to Calix's external compliance online platform on or about September 22, 2022. (*Id.*) Plaintiff alleges her complaints and whistleblowing activities subjected her to retaliation, eventually leading to her termination. (Complaint, ¶ 15.)

On June 29, 2022, Adams received a written employment offer from Calix. The offer letter states:

> The terms and conditions set forth in this offer letter contain the entire agreement between Calix and you with regard to your employment and superseded any other agreements, whether written or oral, with regard to the subject of your employment. This agreement cannot be modified except in a written agreement signed by you and an authorized representative of Calix. The agreement and any amendments thereto shall

> be governed in accordance with the las of the state in which are employed by Calix.
>
> If you wish to discuss any of the details of these conditions or any aspect of your employment, please contact your Talent & Culture (HR) Business Partners, Lindsay Taake at (817) 771-8717. . .
>
> The offer of employment may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one agreement. You and Calix agree that signatures delivered by scan, email or other electronic means shall be considered original signatures for all purposes under this offer of employment.
>
> This offer of employment is contingent upon (i) proof of eligibility to work in the United States submitted to Calix within three (3) business days of the employee's first day of employment, (ii) completion of a satisfactory background check, including but not limited to verification of the information presented in your resume and interviews, (iii) satisfactory completion of reference checks, and (iv) execution of both the Employee Confidential Information and Assignment Invention Agreement and the Mutual Arbitration Agreement. Calix will comply with all local Fair Chance Ordinance Requirements.

(Declaration of Dawn Ward ("Ward Decl."), Ex. A.) Adams signed the offer letter on the date she received it.

With her offer letter Adams received a four and a half page Mutual Arbitration Agreement. The Agreement states it is between Adams and "Calix, Inc., a Delaware corporation, and any of its current or future subsidiaries, affiliates, successors or assigns (collectively, 'Calix')." The agreement further provides: "We agree to arbitrate before a neutral arbitrator any and all existing or future disputes or

claims between us that arise out of or related to Employee's recruitment, employment or separation from employment with Calix, including claims involving any current or former officers, director, stockholder, agent or employee of Calix, whether the disputes or claims arise under common law, or in tort, contract, or pursuant to a statute, regulation, or ordnance now in existence or which may in the future be enacted or recognized." The agreement lists examples of such claims, which list includes "claims for wrongful termination of employment." (Ward Decl., Ex. B.)

The Arbitration Agreement further provides in bold text:

> **WE UNDERSTAND AND AGREE THAT THE ARBITRATION OF DISPUTES AND CLAIMS UNDER THIS AGREEMENT SHALL BE INSTEAD OF A COURT TRIAL BEFORE A JUDGE AND/OR JURY. We understand and agree that, by signing this Agreement, we are expressly waiving any and all rights to a trial before a judge and/or a jury regarding any disputes and claims which we now have or which we may in the future have that are subject to arbitration under this Agreement. We also understand and agree that the arbitrator's decision will be final and binding on both Calix and Employee, subject to review on the grounds set forth in the Federal Arbitration Act ("FAA").** (Ward Decl., Ex. B.)

The Arbitration Agreement requires that the arbitration be conducted in accordance with the Employee Arbitration Rules and Mediation Procedures of the American Arbitration Association and provides that the "arbitrator shall allow the discovery authorized under the Federal Rules of Civil Procedure or any other discovery required by state law in arbitration proceedings." (Ward Decl., Ex. B.) The arbitration is also governed by the FAA, "shall take place in the county and state where Employee primarily works or worked at the time of the arbitrable dispute or claim arose", and, except for the filing fee where the employee initiates the action, be paid for by Calix. The Agreement contains a severability clause and an integration clause. Finally, just before the signature line, the Arbitration Agreement states:

> **<u>Knowing and Voluntary Agreement</u>**

> WE UNDERSTAND AND AGREE THAT WE HAVE BEEN ADVISED TO CONSULT WITH AN ATTORNEY OF OUR OWN CHOOSING BEFORE SIGNING THIS AGREEMENT, AND WE HAVE HAD AN OPPORTUNITY TO DO SO. WE AGREE THAT WE HAVE READ THIS AGREEMENT CAREFULLY AND UNDERSTAND THAT BY SIGNING IT, WE ARE WAIVING ALL RIGHTS TO A TRIAL OR HEARING BEFORE A JUDGE, JURY OF ANY AND ALL DISPUTES AND CLAIMS SUBJECT TO ARBITRATION UNDER THIS AGREEMENT.

Adams' signature, dated June 29, 2022, is right below this language. (Ward Decl., Ex. B.)

## II. Legal Standard

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

Even if the Court finds the parties agreed to arbitrate, the agreement is unenforceable if it is unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Unconscionability consists of both procedural and substantive elements. The prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of the procedural unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. (*Armendariz,* 24 Cal.4th at 114.)

The procedural element tests the circumstances of contract negotiation and formation and focuses on "oppression" or "surprise" due to unequal bargaining power. (See *Armendariz,* 24 Cal.4th at 114.) "Oppression" occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form. (*Pinnacle Museum Tower Ass'n v. Pinnacle Mkt.Dev. (US), LLC* (2012) 55 Cal.4th 223, 247, citing *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179.)

Plaintiff is correct that the arbitration agreement here is an adhesion contract. She could not begin her employment until she signed the Arbitration Agreement, and the Ward Declaration plainly states that Calix would not have accepted Plaintiff's employment if she had not signed that agreement. (Ward Decl., ¶ 7.) The California Supreme Court has made clear that in such a take-it-or-leave it scenario when a prospective employee is looking for work, the procedural unconscionability prong is generally met. (*Armendariz*, 24 Cal. 4th at 115.)

Substantive unconscionability relates to the fairness of the terms of the arbitration agreement and assesses whether they are overly harsh or one-sided. (*Armendariz, supra*, 24 Cal.4th at p. 114; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.) Plaintiff primarily relies on the Arbitration Agreement's designation of the Federal Rules of Civil Procedure to govern discovery for her argument that the agreement is substantively unconscionable. Without evidence, Plaintiff argues the federal rules provide for less discovery than the California Code of Civil Procedure. The Court is unpersuaded by this argument. First, both parties are bound by those rules. Next, those rules provide identical—if not slightly more—discovery (for third parties) than the California state rules. Nor does the fact that the arbitration agreement contains a link to the AAA procedural rules render the agreement unconscionable. Providing a link directs the employee to the website that will contain the rules, which rules may change from time to time.

Calix's motion to compel arbitration is therefore GRANTED, and this case is stayed pending the outcome of the arbitration.

**oo0oo**

**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: November 28, 2023 TIME: 9:00 A.M.**

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

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

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

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

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

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

**FOR YOUR NEXT HEARING DATE:** You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed in January 2024.

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

| LINE | CASE NO. | CASE TITLE | TENTATIVE RULING |
|---|---|---|---|
| 1 | 20CV366677 | The Ohio Casualty Insurance Company vs Min Xie et. al. | This should have been set for trial setting at 11 a.m. on November 28, 2023 to join with Case No. 20CV3666013. The Court will call the case at that time. |
| 2 | 23CV417119 | Reza Tirgari vs Reza Kazemipour et. al. | Defendant's Demurrer is SUSTAINED with 20 days leave to amend. Please scroll down to line 2 for full tentative ruling. For oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order. |
| 3 | 23CV420802 | Jennifer Garcia vs. Direct Erin O'Brien, et. al. | Defendants Erin O'Brien's and Community Solutions' Demurrer to Plaintiff Jennifer Garcia's Complaint is SUSTAINED. An amended notice of motion with this hearing date was served on Plaintiff by electronic and U.S. mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) 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.) Plaintiff failed to meet and confer with Defendant regarding this demurrer. And, while Defendant's reference to facts outside the complaint is improper, even without reference to such facts, there is good cause to SUSTAIN this demurrer. Plaintiff did not respond to the demurrer, much less articulate how she could amend to overcome it. Accordingly, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Moving party to prepare formal order. The parties are ordered to appear at the hearing. |
| 4 | 23CV420802 | Jennifer Garcia vs. Direct Erin O'Brien, et. al. | Defendants Erin O'Brien's and Community Solutions' Motion to Strike Portions of Plaintiff Jennifer Garcia's Complaint is GRANTED. An amended notice of motion with this hearing date was served on Plaintiff by electronic and U.S. mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) 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.) Plaintiff failed to meet and confer with Defendant regarding this motion. And, while Defendant's reference to facts outside the complaint is improper, even without reference to such facts, there is good cause to grant this motion. Plaintiff did not respond to the motion, much less articulate how she could amend to overcome it. Accordingly, the motion is GRANTED WITHOUT LEAVE TO AMEND. Moving party to prepare formal order. The parties are ordered to appear at the hearing. |

| | | | |
|---|---|---|---|
| 5 | 23CV420802 | Jennifer Garcia vs. Direct Erin O'Brien, et. al. | Defendants Adam Berns, M.D.'s Demurrer to Plaintiff Jennifer Garcia's Complaint is SUSTAINED. An amended notice of motion with this hearing date was served on Plaintiff by electronic and U.S. mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) 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.) Plaintiff failed to meet and confer with Defendant regarding this demurrer. And, while Defendant's reference to facts outside the complaint is improper, even without reference to such facts, there is good cause to SUSTAIN this demurrer. Plaintiff did not respond to the demurrer, much less articulate how she could amend to overcome it. Accordingly, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Moving party to prepare formal order. The parties are ordered to appear at the hearing. |
| 6 | 23CV420802 | Jennifer Garcia vs. Direct Erin O'Brien, et. al. | Defendant Adam Berns, M.D.'s Motion to Strike Portions of Plaintiff Jennifer Garcia's Complaint is GRANTED. An amended notice of motion with this hearing date was served on Plaintiff by electronic and U.S. mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) 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.) Plaintiff failed to meet and confer with Defendant regarding this motion. And, while Defendant's reference to facts outside the complaint is improper, even without reference to such facts, there is good cause to grant this motion. Plaintiff did not respond to the motion, much less articulate how she could amend to overcome it. Accordingly, the motion is GRANTED WITHOUT LEAVE TO AMEND. Moving party to prepare formal order. The parties are ordered to appear at the hearing. |
| 7 | 19CV341732 | Calvano/CRP Mountain vs. 1001 Shoreline LLC | The parties' motions to seal records are GRANTED. Please scroll down to lines 7-8 for full tentative ruling. Court to prepare formal order. |
| 8 | 19CV341732 | Calvano/CRP Mountain vs. 1001 Shoreline LLC | Defendants' Motion for Summary Judgment is DENIED. Please scroll down to lines 7-8 for full tentative ruling. Court to prepare formal order. |

| | | | |
|---|---|---|---|
| 9 | 20CV373187 | Austin Erlich et al vs Wahid Shah | Plaintiff's Motion to Compel Defendant's Deposition and for Sanctions is GRANTED. An amended notice of motion with this hearing date was served on Defendant by electronic mail. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion; Defendant failed to appear for deposition on multiple occasions without seeking a protective order or serving objections. Plaintiff's efforts to secure either a finalized settlement or Defendant's deposition have gone well beyond what is required by the Code of Civil Procedure. Accordingly, Defendant is ordered to (1) appear for deposition within ten days of entry of this formal order at the location and time specified in Plaintiffs March 1, 2023 deposition notice, (2) produce all documents requested in Plaintiff's March 1, 2023 deposition notice at the time of his deposition, and (3) pay $5,105 to Plaintiff for fees and costs Plaintiff incurred to prepare this motion. While the number of hours and hourly rates are reasonable, the Court reduced the amount requested to reflect that no opposition was filed. For oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order. |
| 10 | 20CV373361 | ROIC Pinole Vista LLC vs Oscar Munoz, et. al. | Oscar Munoz's Motion to Compel Form Interrogatories, Special Interrogatories and Requests for Admission is CONTINUED to January 9, 2024 at 9 a.m. in Department 6, the same date as the trial setting conference. The Court is unable to locate an amended notice of motion with the November 28, 2023 hearing date. The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Defendant Oscar Munoz is ordered to serve an amended notice of motion with the January 9, 2024 hearing date and time. If there is no proof of service demonstrating such service by the next court date, the Court will deny this motion without prejudice. Court to prepare formal order. |
| 11 | 21CV385527 | Michael Darden vs The Board of Trustees of the Lelan Stanford University et. al. | The parties are ordered to appear by TEAMS for an informal discovery conference in Department 6 on December 8 at 11 a.m. |
| 12 | 21CV385527 | Michael Darden vs The Board of Trustees of the Lelan Stanford University et. al. | Plaintiff's Motion to Strike is DENIED. Please scroll down to line 12 for full tentative ruling. Court to prepare formal order. |
| 13 | 22CV404728 | Santa Clara County Federal Credit Union vs Steve Aguyayo | The parties are ordered to appear at the hearing and explain whether the case has been settled and should now be dismissed. |

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| 14 | 22CV409134 | Jane Doe vs. Brad Carothers et al | Plaintiff's Motion to Compel is CONTINUED to December 7, 2023 at 9 a.m. to be heard with the demurrer and motion to strike and to permit new counsel to continue to remedy the discovery issues that appear to this Court to have been caused by Carothers' prior counsel. The Court orders the parties to submit on or before December 5, 2023 a joint letter brief (a) listing the discovery requests that still require Court intervention and (b) providing authority for the Court to sanction prior counsel to pay for Plaintiff's attorney fees and costs incurred in bringing this motion. The parties are ordered to file and email the joint letter brief to Department6@scscourt.org. |
| 15 | 23CV416765 | Yicheng Ji vs Tesla Motors, Inc. | Tesla's Motion to Compel Arbitration is CONTINUED to January 11, 2024 at 9 a.m. in Department 6. The Court is unable to locate an amended notice of motion with the November 28, 2023 hearing date. The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Tesla is ordered to serve an amended notice of motion with the January 11, 2024 hearing date and time. If there is no proof of service demonstrating such service by the next court date, the Court will deny this motion without prejudice. Court to prepare formal order. |
| 16 | 2014-1-CV-264065 | C. Berg, Et Al Vs Metaview Wholesale Investments, Lp, Et Al | Mitchell Developments' Motion for Requests for Admissions to Valerie Houghton be Admitted is DENIED. Valerie Houghton served code compliant responses to the requests for admission on November 21, 2023—before the November 28, 2023 hearing. Accordingly, Mitchell Developments' motion must be denied. (Code of Civ. Proc. § 2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 776, 778.) Mitchell Developments' unopposed motion for $1,125 in sanctions is GRANTED. The number of hours and billable rate are reasonable, and the Court finds that Mitchell Development would not have obtained responses without motion practice. Valerie Houghton is ordered to pay the $1,125 within 30 days of service of this formal order. Court to prepare formal order. |
| 17 | 2014-1-CV-264065 | C. Berg, Et Al Vs Metaview Wholesale Investments, Lp, Et Al | Mitchell Developments' Motion for Requests for Admissions to MetaView be Admitted and for sanctions is DENIED. Based on the Declaration of Terry Houghton, the Requests for Admission were not properly served—either they were not served to the correct address, they were not served on the correct person, or they were served on an unrepresented corporate entity at a time when Mitchell Development understood the corporate entity to be unrepresented. Court to prepare formal order. |
| 18 | 20CV365904 | Stanford HealthCare vs Coventry Health Care | Defendant's Motion to Seal Records is CONTINUED to December 19, 2023 at 9 a.m. in Department 6 to be heard with its motion for summary judgment. |

| | | | |
|---|---|---|---|
| 19 | 20CV370750 | MARK BELMESSIERI vs RACHEL DEPALMA | Defendant's Motion for Reconsideration is DENIED. Defendant's motion is untimely and fails to identify any grounds for reconsideration under the Code of Civil Procedure; the arguments either were already made or could have been made at the time of the original hearing. Court to prepare formal order. |
| 20 | 20CV370750 | MARK BELMESSIERI vs RACHEL DEPALMA | Plaintiff's motion for $5,000 in sanctions is GRANTED. Defendant's motion for reconsideration merely reargues points already addressed or that could have been raised during the motion to enforce settlement. This case is settled and is over; compliance with the settlement agreement is required. The Court finds the time spent on the motion and the hourly rate charged reasonable for this type of case and this market. Defendant is ordered to pay to Plaintiff $5,000 within 30 days of entry of this formal order and to comply with the terms of the Court's August 24, 2023 order enforcing settlement. Court to prepare formal order. |
| 21 | 22CV399540 | Rent-a-Fence.com vs Danny Molina | Off calendar. |
| 22 | 23CV412528 | In re: 309 Otono Court, San Jose, CA 95111 | Motion for disbursement. The Parties are ordered to appear for argument. |
| 23 | 23CV412759 | Danielle Adams vs. Lis Gschwandtner etl al | Calix's Motion to Compel Arbitration is GRANTED. This case is stayed pending the outcome of the arbitration proceeding. Please scroll down to line 23 for full tentative ruling. Court to prepare formal order. |

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**Calendar Line 1**
**Case Name:** *Reza Tirgari v. Reza Kazemipour, et al.*
**Case No.:** 23CV417119

Before the Court is defendant Timila Sayar's demurrer to plaintiff Reza Tirgari's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Background

This matter arises out of an alleged multi-year fraud scheme from 2018 to 2022, in which defendant Reza Kazemipour lied amount investment opportunities, which caused Plaintiff to invest money with him that Kazemipour spent on unauthorized personal expenses and travel. (Complaint, ¶ 15.) With the assistance of defendant Troy Foster, Kazemipour defrauded Plaintiff out of approximately $750,638. (*Ibid*.) After he commenced legal action against Kazemipour, Plaintiff discovered Kazemipour transferred Plaintiff's stolen assets to others, including but not limited to, Sayar and Foster. (*Ibid*.) Kazemipour was the manager and director for defendant 1792 Partners, Inc. ("1792 Partners"). (Complaint, ¶ 8.) Sayar was married to Kazemipour from July 20, 1995, until October 1, 2019. (Complaint, ¶ 16.) She filed for divorce on September 7, 2022. (Complaint, ¶ 39.)

Plaintiff initiated this action on June 2, 2023, asserting: (1) Fraudulent Conveyance-Actual Intent (Civ. Code, § 3439.04, subd. (a)(1)); (2) Fraudulent Conveyance-Constructive (Civ. Code, § 3439.04, subd. (a)(2)(B)); (3) Aiding and Abetting Violations of the Uniform Voidable Transactions Act ("UVTA"); (4) Declaratory Relief; (5) Conspiracy to Fraudulently Transfer Assets (Pen. Code, § 192); (6) Receiving Stolen Property (Civ. Code §§ 484, 496, & 503); and (7) Appointment of a Receiver. On August 1, 2023, Saya filed the instant demurrer, which Plaintiff opposes.

## II. Requests for Judicial Notice

### a. Sayar's Request

Sayar requests judicial notice of the following items:

(1) Plaintiff's complaint in *Tirgari v. Kazemipour*, filed in the Superior Court of San Diego County (the "San Diego Fraud Action"): Exhibit 1;

(2) Docket for the San Diego Fraud Action: Exhibit 2;

(3) Notice of Related Case filed by Plaintiff in *Tamila Sayar v. Reza Kazemopour*, filed in the family law division this Court (the "Dissolution Action"): Exhibit 3; and

**(4)** Request for Temporary Emergency Order to Stay Entry of Default Judgment filed by Plaintiff in the Dissolution Action filed on July 7, 2023: Exhibit 4.

These items are court records and judicial notice of such records is permitted under Evidence Code section 452, subd. (d). However, the law is settled that "the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.) Here, Sayar relies on the exhibits for the truth of their contents. "A court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (See *Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 113 (Fremont Indemnity Co*).)

Thus, Sayar's request for judicial notice is DENIED.

**b. Plaintiff's Request**

Plaintiff requests judicial notice of following facts:

(1) Sayar admitted that Kazemipour "transferred funds from his financial accounts to [her] from January 2019 to the present day.": Exhibit 1;

(2) She admitted she "transferred funds from her financial accounts to Kazemipour from January 2019 to the present day": Exhibit 1;

(3) Defendant admits that as of May 15, 2023, she had assets in excess of $3 million: Exhibit 2; and

(4) She admitted "Reza Kazemipour gave her a purse valued at approximately $1,500.00—which he said he gifted her on behalf of their children—in December of 2020 for Christmas": Exhibit 3.

There is a split of authority as to whether a plaintiff can request judicial notice of a defendant's admissions. (See *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485 ["[i]t is true that a court may take judicial notice of a party's admissions or concessions, but only in cases where the admission 'cannot reasonably be controverted,' such as in answers to interrogatories or requests for admission, or in affidavits and declarations filed on the party's behalf"]; but see *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605 ["The court will take judicial notice of

records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, only where they contain statements of *the plaintiff or his agent* which are *inconsistent* with the *allegations of the pleading* before the court."]

Here, Plaintiff's request is for Sayar's responses to requests for admission, which cannot be controverted. Thus, Plaintiff's request is GRANTED as to items 1 through 3. However, it is DENIED as to item 4. (See *Gbur v. Cohen,* (1979) 93 Cal.App.3d 296, 301 [information subject to judicial notice must be relevant to the issue at hand].)

## III. Sayar's Demurrer

Sayar demurs to each cause of action on the ground it fails to allege sufficient facts and is barred by the statute of limitations. (See Code Civ. Proc. § 430.10, subd. (e).)

### A. Legal Standard for 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. Statute of Limitations[1]**

The UVTA, codified in Civil Code section 3439, provides:

> A cause of action with respect to a transfer of obligation under this chapter is extinguished unless action is brought pursuant to subdivision (a) of section 3439.07 or levy is made as provided in subdivision (b) or (c) or section 3439.07:
>
> **(a) Under paragraph (1) of subdivision (a) of section 3439.04, not later than four years after the transfer was made or the obligation was incurred or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant.**

(Civ. Code, § 3439.09, subd. (a) (emphasis added).)

Sayar's statute of limitations argument is direct to the Hilltop Property and the Judson Property. (Dem. 11:3-17.) Kazemipour's mother Farangis Ayari purchased the Hilltop Property on May 27, 2005 and granted it to Kazemipour and Sayar on April 19, 2007 who, in turn, sold the property on December 11, 2013. (Complaint, ¶¶ 23, 25.) The transactions regarding the Hilltop Property predate the alleged fraudulent activities, thus to the extent Plaintiff's claims are based on this property, the claim is time-barred, and Sayer's demurrer based on the statute of limitations as to the Hilltop Property is SUSTAINED. (See Civ. Code, § 3439.04, subd. (a).)

The Judson Property was purchased by Kazemipour and Walter Pena on June 21, 2001 and gifted to Ayari on October 21, 2004. (Complaint, ¶¶ 17-18.) On April 12, 2005, Kazemipour and Ayari granted the property to Foster, who sold it on July 19, 2022, for an estimated profit of $1,147,000. (Complaint, ¶¶ 19, 21.) Kazemipour's transfer of the Judson Property also predates the events at issue, and Plaintiff states the real property transfers are "not necessarily the transfers [he] seeks to unwind." (Opp., p. 16:15-16.) Nevertheless, to the extent Plaintiff's claims are based on the Judson Property, Plaintiff discovered the sale of the Judson Property within one year of the sale and filed suit within that time. (See Complaint, ¶ 21; Exh. 4.) Thus, the demurrer of the basis of the statute of limitation is OVERRULED as to the Judson Property.

[1] The only statute of limitations arguments Sayer makes relate to specific property for the fraudulent conveyance claims, so those allegations are the Court's focus.

**C. First and Second Cause of Action: Fraudulent Conveyance-Actual Intent**

Claims for fraudulent transfer are governed by the UVTA, Civil Code section 3439 et seq., [formerly known as the Uniform Fraudulent Transfer Act]. The purpose of the UVTA is to prevent debtors from placing, beyond the reach of creditors, property that should be made available to satisfy a debt. (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071 (*Lo*).)

"A creditor may set aside a transfer as fraudulent under Civil Code section 3439.04 by showing actual fraud as defined in subdivision (a)(1) or by showing constructive fraud as defined in subdivision (a)(2)." (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 817 (*Chen*).) Actual fraud under the UVTA means that the transfer was made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." (Civ. Code § 3439.04, subd. (a)(1).) Constructive fraud means the debtor made the transfer: "Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." (Civ. Code § 3439.04, subd. (a)(2).) The UVTA allows a judgment to be entered against (1) the first transferee of the fraudulently transferred asset, (2) the transfer beneficiary, and (3) any subsequent transferee other than a good faith transferee." (*Lo, supra*, 24 Cal.App.5th at p. 1071.)

"[I]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus, the policy of liberal construction of the pleadings… will not ordinarily be invoked to sustain a pleading defective in any material respect." (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 993 (*Robinson Helicopter*); see also *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*).)

Based on the allegations, Kazemipour is the debtor and Plaintiff is the creditor. (See Complaint, ¶ 84.) Although Plaintiff alleges transfers of property over the last 20 years, the fraudulent conveyance claim is based on Kazemipour's transfer to Sayar. Plaintiff alleges sometime between 2018 and the filing of the Complaint, Kazemipour and/or 1792 Partners transferred *all or substantially all* of his assets to Sayar, *including but not limited* to the stolen funds. (Complaint, ¶ 58 [emphasis added].) Plaintiff

directs the Court to pages 5-9 and 12-16 of the Complaint, however, pages 5-9 pertain to real property transactions, which mostly predate the events at issue, and pages 12-16 pertain to Sayar's divorce proceedings and do not allege any transfers from Kazemipour to Sayar. Additionally, Plaintiff alleges Kazemipour spent part of the stolen funds. (See Complaint, ¶ 49.) This claim must be alleged with the requisite specificity because it is a fraud cause of action and Plaintiff only alleges the subject transfer generally. (See *Robinson Helicopter, supra,* 34 Cal.4th at p. 993; see also *West, supra,* 214 Cal.App.4th at p. 793.)

Plaintiff also alleges and argues that Sayar paid Kazemipour $1,000,000 as part of their marital settlement agreement ("MSA"), however the first and second claims are based entirely on Kazemipour's transfers to Sayar, not any transfers by Sayar. Thus, the demurrer to the first and second causes of action is SUSTAINED with 20 days leave to amend.

**D. Third Cause of Action-Aiding and Abetting Violations of the UVTA**

"Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person … knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act …." (*Chen v. PayPal, Inc*. (2021) 61 Cal.App.5th 559, 583 (*Chen*), quoting *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846.) However, knowledge alone, even specific knowledge, is not enough to state a claim for aiding and abetting. California law requires that defendant made a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. Or as the Court of Appeal put it in *Gerard v. Ross* (1988) 204 Cal.App.3d 968, 983, an alleged aider and abettor must have "acted with the intent of facilitating the commission of that tort." (*George v. eBay, Inc*. (2021) 71 Cal.App.5th 620, 641–642 (*George*) (internal citation and quotations omitted).) "Because transferring funds to evade creditors constitutes an intentional tort, it logically follows that California common law should recognize liability for aiding and abetting a fraudulent transfer." (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1025.) Without the underlying tort, there can be no liability as an aider and abettor. (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574–575.)

The Court sustained Sayar's demurrer to the fraudulent conveyance claims. As a result, there is no underlying tort upon which to base Plaintiff's aiding and abetting. Thus, the demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

**E. Fifth Cause of Action-Conspiracy**

Penal Code section 182, provides criminal penalties if "two or more persons conspire: (1) to commit any crime… (4) to cheat and defraud any person or any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises." (Pen. Code, § 182, subd. (a)(1) & (4).) Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. (See *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823.)

Here, the conspiracy claim is based on the fraudulent conveyance claims, the demurrer to which the Court has sustained. Accordingly, the demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend.

**F. Sixth Cause of Action-Receiving Stolen Property**

Penal Code section 496 states,

> (a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.

(Pen. Code, § 496, subd. (a).)

The elements of this claim are: "(1) that the particular property was stolen, (2) that the accused received, concealed, or withheld it from the owner thereof, and (3) that the accused knew that the property was stolen." (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 213.) A violation of the statue requires some form of criminal intent. (*Siry Investment LP v.*

*Farkenhondehpour* (2022) 13 Cal.5th 333, 361-362.) In general, statutory causes of action must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

Here, Plaintiff alleges Sayar aided Kazemipour and 1792 Partners in concealing, selling, and withholding property and assets from Plaintiff, knowing the property and assets were stolen. (Complaint, ¶ 107.) He further alleges Sayar received property from Kazemipour and 1792 Partners that they stole from Plaintiff. (*Ibid*.) However, statutory claims are subject to a heightened pleading standard, which requires the plaintiff to set forth particular facts supporting their claim. Plaintiff only offers conclusory allegations as to Sayar's knowledge. Additionally, Plaintiff fails to allege any facts regarding Sayar's criminal intent. As a result, Plaintiff fails to allege sufficient facts to state this claim, the demurrer to the sixth cause of action is SUSTAINED with 20 days leave to amend.

**G. Seventh Cause of Action-Appointment of a Receiver**

Plaintiff seeks the appointment of a receiver to address Defendants' alleged debts, manage and control their assets and properties. (Complaint, ¶ 115.) Code of Civil Procedure section 564 authorizes a court to appoint a receiver under various circumstances authorized by the statute. (Code of Civil Procedure, § 564, subd. (a).) "Receivership is an extraordinary remedy, to be applied with caution and only in cases of apparent necessity, and where other remedies would be inadequate." (*Rogers v. Smith* (1946) 76 Cal.App.2d 16, 21.) "The requirements of Code of Civil Procedure section 564 are jurisdictional, and without a showing bringing the receiver within one of the subdivisions of that section the court's order appointing a receiver is void." (*Turner v. Super. Ct.* (1977) 72 Cal.App.3d 804, 811.) It is a remedy that must be based on an underlying claim; it is not an independent cause of action. (*Starbird v. Lane* (1962) 203 Cal.App.2d 247, 261; see also *Frick v. Calmin Mortgage Corp., Ltd* (1934) 220 Cal.746, 747-748.)

Here, there are no underlying claims to support Plaintiff's cause of action. Thus, the demurrer to the seventh cause of action is SUSTAINED with 20 days leave to amend.

**H. Fourth Cause of Action-Declaratory Relief**

Code of Civil Procedure Section 1060 ("Section 1060"), which governs declaratory relief, states:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights

> or duties with respect to another … may, in cases of actual controversy relating to legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premise, including a declaration of any questions or construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at this time.

(Code Civ. Proc. § 1060.)

The fundamental basis of declaratory relief is the existence of an actual and present controversy over a proper subject. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "A general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged; the pleader need not establish it is entitled to a favorable judgment." (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action because the plaintiff is entitled to a declaration of rights even if it is contrary to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.)

Plaintiff alleges there is an actual and present controversy between the parties as to the respective rights and duties regarding property transferred by and to defendants. (Complaint, ¶ 92.) He requests a judicial determination of the rights, obligations, and interests of the parties relative to the Judson Property; the Okeefe Property; the assets in Sayar's bank and brokerage accounts; the assets in Kazemipour's bank and brokerage accounts; Foster's assets; and any other property Defendants transferred to conceal assets from Plaintiff. (Complaint, ¶ 94.) Here, the declaratory relief claim is based on the fraudulent conveyance claims. The demurrer has been sustained as to all claims. Therefore, the claim for declaratory relief cannot be maintained, and the demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend.

**oo0oo**

**Calendar Lines 7-8**
**Case Name:** *Calvano/CRP Mountain View Venture, LLC, et.al. v 1001 Shoreline LLC, et.al.*
**Case No.:** 19CV341732

Before the Court are Defendants' 1001 Shorelines, LLC ("Shoreline"), Calvano Development, Inc. ("Calvano Development") and Mark Calvano (collectively, "Defendants") motion for summary judgement as to Plaintiffs' Calvano/CRP Mountain View Venture, LLC (the "Company") and CRP Mountain View Owner, LLC's ("Owner") (collectively, "Plaintiffs") third amended complaint ("TAC"); Defendants' motion to seal Exhibits 5 and 6 in Defendants' Compendium of Evidence; and Plaintiffs' motion to seal Exhibit A to Declaration of Allen Gardner and portions of their opposition to Defendants' motion for summary judgement. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

**I. Background**

This is breach of contract action. On January 16, 2015, Owner, Shoreline and Mr. Calvano entered an agreement (the "LLC Agreement") to form the Company for the purposes of acquiring and potentially developing certain real estate in Mountain View (the "Project"). (TAC, ¶ 1.) Both Owner and Defendants profited from the Company's acquisition and development of real estate in the area, with the latter having received $14,426,274 in profit distributions prior to December 2018, at which time, the Representation and Warranty period by which the Company sold the Project expired, allowing for distributions relating to those categories of withholdings. (TAC, ¶ 4.)

On December 26, 2018, Mark Calvano requested that Owner, as the Company's managing member, distribute Shoreline's share of reserves by December 31, 2018 by depositing the funds in an account held by Calvano Development. (*Id.*) Two days later, Owner made a $1,730,960 distribution by wire transfer to a Calvano Development account, as requested. (*Id.*, ¶ 5.) On January 4, 2019, Owner mistakenly wired an additional $1,730,960 to the same account. (*Id.*, ¶ 6.) Rather than returning the funds, Mr. Calvano attempted to leverage the mistake to extract unrelated fees. (*Id.*, ¶ 22.)

On January 22, 2019, Calvano Development filed an interpleader complaint, styled *Calvano Development, Inc. v. CRP Mountain View, LLC, et al*, Case No. 19CV341451, naming Owner and Shoreline as defendants (the "Interpleader Action"). (TAC, ¶ 28.) The Court ultimately dismissed the Interpleader Action for the reasons brought to Defendants' attention by Plaintiffs within days of its

filing, but not before the case caused Plaintiffs to incur significant attorneys' fees and costs. (TAC, ¶ 29.) Defendants have refused to reimburse Plaintiffs for these amounts despite their contractual obligation to do so under Sections 4.5(b) and 11.10 of the LLC Agreement. (*Id*.)

Plaintiffs filed this action in January 2019, and filed a first amended complaint in May 2019. On September 23, 2019, the Court dismissed the Interpleader Action, and approximately two weeks later, on October 8, 2019, Plaintiffs filed their second amended complaint, but did not seek the return of attorneys' fees and costs incurred in defending the Interpleader Action.

Shoreline filed its initial cross-complaint on December 4, 2019, followed by the operative first amended cross-complaint ("FAXC") on July 19, 2021, which asserted: (1) breach 0f contract; (2) breach of implied covenant of good faith and fair dealing; (3) unjust enrichment; (4) accounting; and (5) declaratory relief.

On August 19, 2022, Plaintiffs were granted leave to file their TAC, wherein they admit that the $1,730,960 was returned in January of 2020, and seek their attorneys' fees and costs relating to the Interpleader Action. The TAC was filed on August 23, 2022, and asserts: (1) breaches of contract (against Shoreline and Mark Calvano); (2) quasi-contract (pleaded in the alternative) (against Shoreline and Mark Calvano); (3) conversion (pleaded in the alternative) (against Defendants); and (4) breaches of the implied covenant of good faith and fair dealing (pleaded in the alternative) (against Defendants).

On October I3, 2022, Plaintiffs filed their motion for summary judgment, or in the alternative, summary adjudication. Defendants opposed the motion and subsequently demurred to the TAC. In February 2023, the Court overruled the demurrer as to the first cause of action and sustained it with leave to amend as to the remaining claims. Plaintiffs did not file a fourth amended complaint after the demurrer to the TAC was partially sustained. Consequently, the only claim remaining at issue in the TAC is the first cause of action for breach of contract. On April 5, 2023, the Court entered its order denying Plaintiffs' motion for summary judgement of their TAC and granted summary judgement of the cross-claims.

## II. Legal Standard

A defendant moving for summary judgment has the initial burden to make a prima facie showing there is no merit to a cause of action and that therefore the defendant is entitled to judgment as a matter

of law. (Code Civ. Proc., § 437c, subd. (p)(2); *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) To satisfy this burden, the moving defendant must show that at least one of the elements of the cause of action has not been established by the plaintiff and cannot reasonably be established or must establish the elements of a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar, supra*, at p. 849; *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480 (*Jessen*).) If the moving defendant meets this burden, then the burden shifts to the plaintiff to show that there is at least one triable issue of material fact regarding the cause of action or as to the complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849; *Jessen, supra*, at p. 1484.)

Summary judgement is appropriate if there are no triable issues of material fact and the moving party is entitled to judgement as a matter of law. (Code of Civ. Proc. § 437c, subds. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607. 618) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted; accord, *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) Courts are required to liberally construe the opposing party's evidence and resolve any doubts about the evidence in favor of that party. (*Regents of University of California v. Superior Court*, supra, 4 Cal.5th 607 at 618).

"A party may move for summary adjudication as to one or more causes of action within an action … if that party contends that the cause of action has no merit. . . ." (Code Civ. Proc., § 437c, subd. (f)(1).) "The aim of the procedure is to discover whether the parties possess evidence requiring the weighing procedures of a trial. (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1057 (*Marron*).) "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgement and shall proceed in all procedural respects as a motion for summary judgement" (Code Civ. Proc., § 437c, subd. (f)(2).)

**III. Defendants' Request for Judicial Notice**

Defendants request judicial notice of the verified complaint and the answer filed in the Interpleader of *Calvano Development, Inc. v. CRP Mountain View Owner, L.L.C. et al*., case number

19CV341451, the court's docket in that matter, the third amended complaint filed in this action, and the Court's order overruling and sustaining, in part, Defendants' demurrer and denying Defendants' motion to strike. Plaintiffs do not object to this request.

Judicial notice "is always confined to those matters which are relevant to the issue at hand." (*Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 ("*Gbur*").) Evidence Code sections 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 ("*Lockley*").)

Accordingly, Defendants' unopposed request for judicial notice is GRANTED.

**IV. Motions to Seal Exhibits and Portions of Plaintiffs' Opposition**

Defendants' unopposed motion seeks to seal Exhibits 5 and 6 in their Compendium of Evidence in support of their motion for summary judgement or in alternative for summary adjudication. Exhibit 5 contains copies of billing records from Latham & Watkins for their legal services and Exhibit 6 is a payment summary for the billed legal fees.

Plaintiffs' unopposed motion seeks to seal Exhibit A, attached to Mr. Gardner's declaration, and lines 11-16, on page 5, of their opposition to Defendants' motion for summary judgement. Exhibit A is a summary payment for legal fees dated December 2019.

An application to seal must be accompanied by a declaration and a memorandum containing facts sufficient to justify sealing. (Cal. Rules of Court, Rule 2.551(b)(1).) While Plaintiffs complied with this Rule, Defendants did not. Defendants have failed to submit the required declaration; however, the Court finds sufficient facts in their filed memorandum to address their motion.

A court may order records to be filed under seal when the following conditions are met: "(1) [t]here exists an overriding interest that overcomes the right of public access to the record[s]; (2) [t]he overriding interest supports sealing the record[s]; (3) [a] substantial probability exists that the overriding interest will be prejudiced if the record[s] are not sealed; (4) [t]he proposed sealing is narrowly tailored; and (5) [n]o less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court

2.550(d).) In ruling on a motion to seal, the court must identify (1) the specific information claimed to be entitled to protection from public disclosure, (2) the nature of the harm threatened by disclosure, and (3) any countervailing considerations. (*H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894.) Therefore, to prevail on their motion, Defendants must present a specific enumeration of the facts sought to be withheld and the specific reasons for withholding them. (*Id*. at 904.)

Courts must find compelling reasons before ordering filed documents sealed. (*Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1246; *Champion v. Superior Court* (1988) 201 Cal.App.3d 777, 787.) A proposed sealing must also be narrowly tailored to serve the overriding interest, such as sealing only portions of pleadings or redacting particular text. (*In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1052, 1070.)

Here, both parties' motions are made on the grounds that these exhibits and portions of the opposition contain documents and information that have been designated by Plaintiffs as "Confidential" pursuant to the Stipulated Protective Order entered by the court on March 11, 2019, in the related Interpleader Action. Further, these filings contain Plaintiffs' non-public and confidential information, disclosure of which would invade Plaintiffs' privacy and threaten their legal and business matters.

Good cause appearing, the Court GRANTS Defendants' and Plaintiffs' unopposed motions to seal. The Clerk of this Court shall seal Exhibits 5 and 6 to Defendants' Compendium of Evidence in Support of their motion for summary judgement. The Clerk shall further seal Exhibit A to Declaration of Allen Gardner in support of Plaintiffs' opposition and lines 11-16 on page 5 of the Plaintiffs' opposition to Defendants' motion for summary judgment.

**V. Analysis**

The sole claim at issue in the TAC is for breach of contract, the elements of which are (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach and (4) the resulting damages to the plaintiff. (*Bushell v. JP Morgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921.)

To meet their initial burden, the remaining Defendants, Shoreline and Mark Calvano, must establish that at least one element of the Plaintiff's cause of action cannot be established, or that they have a complete defense to the cause. The way to meet their burden of proof is to present affirmative

evidence negating, as matter of law, an essential element of plaintiff's claim." (Weil Brown, Cal. Prac. Guide; Civ. Proc. Before Trial (The Rutter Group 2014) ¶ 10:241, p. 10-104, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "The moving party's declaration and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to resolve any evidentiary doubts or ambiguities in plaintiff's (opposing party's) favor.'" (Id., ¶ 10241.20, p. 10—105, citing *Johnson v. American Standard, Inc*. (2008) 43 Ca1.4th 56, 64.)

First, Defendant, Calvano Development, Inc.'s motion for summary judgement is DENIED. Calvano Development is among the parties moving for summary judgment; however, it was not a named a Defendant in Plaintiff's cause of action for breach of contract.

Next, the issue of Shoreline's and Mark Calvano's breach of the LLC Agreement was to some extent addressed in this Court's April 5, 2023, Order. The Court found that Shoreline and Mr. Calvano had violated several provisions of the LLC Agreement when they wrongfully refused to return the mistakenly wired funds and improperly initiated an Interpleader Action, which triggered their removal under section 4.4 of the LLC Agreement.

The TAC alleges that Shoreline and Mr. Calvano breached the Indemnity Provision of the LLC Agreement by refusing to reimburse Plaintiffs for their incurred attorneys' fees and costs in defense against the Interpleader Action. LLC Agreement section 4.5(b) expressly permits recovery of attorneys' fees "resulting from any or all actions of [Shoreline] or its Affiliates constituting gross negligence, willful misconduct, fraud, actions taken outside the scope of authority provided under this Agreement or breach of this Agreement." Under *Int'l Rail Partners LLC v. Am. Rail Partners, LLC* (2020) Del. Ch. LEXIS 345; 2020 WL 6882105, such provisions are enforceable under Delaware law.

In defense of their refusal to indemnify Plaintiffs for their incurred attorneys' fees, Shoreline and Mr. Calvano argue (1) Plaintiffs were neither billed nor paid for the attorneys' fees incurred in litigation of the Interpleader Action, and (2) any fees paid by Company are unreasonable since they were not a party in the Interpleader Action. Consequently, Shoreline and Mark Calvano contend that Plaintiffs' breach of contract claim lacks merit as a matter of law.

**A. Billing and Payment of Invoices for Legal Services Rendered in Defense Against the Interpleader**

Shoreline and Mr. Calvano contend that Plaintiffs did not pay for Latham & Watkins' legal services and had no legal obligation to pay since the invoices were billed to Carlyle Realty Partners Fund VII and were paid by Carlyle Investment Management LLC ("CMI"). To further negate Plaintiffs' financial obligation to their attorneys, Shoreline and Mark Calvano argue that CRP Owner could have directly paid Latham & Watkins if they were truly obligated to pay instead of their roundabout way of reimbursing CMI. Alternatively, Shoreline and Mark Calvano contend that if Owner is arguably responsible to repay CMI, then its claim is one for subrogation and not indemnification. In support of their argument, Shoreline and Mark Calvano submit copies of Latham & Watkins' invoices and what appears to be a summary of four fund transfers from CIM to Latham & Watkins. (Defendants' Compendium of Evidence, Exs. 5, 6.) Defendants also cite to *Connelly v. State Farm Mutual Automobile Insurance Company* (Del. 2016) 135 A.3d 1271, 1281 noting "an indemnitee is not entitled to recover under the agreement until he or she has made an actual payment or has otherwise suffered an actual loss." (See also *Levy v. HLI Operating Co., Inc.* (Del. Ch. 2007) 924 A.2d 210, 222-223 (*Levy*).)

Plaintiffs, citing to *Creel v. Ecolab, Inc.* (Del. Ch. Oct. 31, 2018) 2018 WL 5733382, argue that irrespective of CIM's intermediary payments, Defendants were obligated to reimburse CIM. In further support, Plaintiffs cite to the following:

- they are investment entities under the umbrella of the investment fund known as Carlyle Realty Partners VII ("Fund VII") (Athena Shi Decl., ¶ 5);
- Carlyle Investment Management LLC ("CIM") is the registered investment advisor of Fund VII and an affiliate of Carlyle Group (Athena Shi Decl., ¶ 4);
- CIM, among other operational tasks, handles payments and reimbursements for Fund VII and its investment entities, including entity Plaintiffs. (Athena Shi Decl., ¶ 7);
- invoices for costs (including attorneys' fees and costs) attributable to Fund VII investment entities may be billed directly to Fund VII. CIM is responsible to pay for invoices received and requires prompt reimbursement from the investment entity that incurred the cost. (Athena Shi Decl., ¶ 8);

- After the sale of the Project, Venture began its dissolution process and in August 2018 deposited its remaining funds in Owner's bank account to handle remaining tasks. (Athena Shi Decl., ¶ 9);
- Each month CIM paid for Latham & Watkins invoices for its work on behalf of the Plaintiffs, it was promptly reimbursed by Owner on behalf of Venture. (Athena Shi Decl., ¶¶ 11, 12); and
- Owner, as the Venture's managing member, defended the Interpleader Action on its behalf and the fees it paid were Venture's money. (Athena Shi Decl., ¶ 13.)

Section 4.5(b) of the LLC Agreement states: "Each Member agrees to indemnify, defend and hold harmless the Company and the other Members from any loss, claim, damage, liability or expense (including reasonable attorneys' fees) resulting from any or all of actions of such Member or its Affiliates constituting gross negligence, willful misconduct, fraud, actions taken outside the scope of authority provided under this Agreement or breach of this Agreement." According to this provision, Shoreline and Mr. Calvano would be obligated to pay for any damages or attorneys' fees that resulted from their improper actions. There is no language excluding intermediary payors or limiting the recoverable attorneys' fees to fees directly paid by the Company.

Delaware courts also do not allow the purported indemnitor to shirk its obligations because an intermediary fronted indemnifiable costs. (See *DeLucca v. KKAT Mgmt. LLC*, (Del. Ch. Jan.23, 2006) 2006 WL 4762856 at 30-32 (*DeLucca*)) ("If a person owed advancement rights could find an affluent aunt, best friend, or other third party to front her defense costs, she would thereby forfeit her right to seek recompense from the party that should have been advancing those costs on the grounds that she was not 'out of pocket' herself even though she was obliged to repay her benefactor. That would be inequitable and reward the refusal to honor promises of advancement."); *Creel v. Ecolab, Inc*. (Del. Ch. Oct. 31, 2018) 2018 WL5733382 (corporation cannot deny indemnification because payment made by a third party.)

**B. Company's Position in the Interpleader Action**

Without authority, Shoreline and Mark Calvano contend that even if the Company paid attorneys' fees, such fees were unreasonable since it was not a party in the Interpleader Action. First, in

contrast to Defendants' assertion that the Company was not a party to the Interpleader Action, Plaintiffs allege in their TAC that on July 29, 2019, Shoreline filed a cross-complaint in the Interpleader Action naming Calvano Development, Owner, and the Company as cross-defendants. (TAC ¶ 33.) This allegation stands.

Next, Plaintiffs' evidence shows (1) the money in the Interpleader Action was the Company's money, to be distributed to its members according to the Agreement's waterfall provision, (2) Owner defended the Interpleader Action on behalf of the Company, and (3) the paid attorneys' fees were from the Company's funds. (Athena Shi Decl., ¶¶ 12, 13, 14.) Plaintiffs argue they were harmed as the result of Defendants' wrongful conduct and their indemnity rights should not be rejected simply because Defendants named the wrong party in the Interpleader Action. The Court agrees.

Shoreline and Mark Calvano fail to meet their initial burden having no evidence

- negating the express language of LLC Agreement provision 4.5(b);
- showing that Plaintiffs had no obligation to pay for the attorneys' fees and costs incurred in defense against their Interpleader Action;
- showing that neither Company nor Owner suffered an actual loss;
- showing that the interpleaded funds were not the Company's money; or
- showing that the Company was not a party to the Interpleader Action.

Accordingly, Defendants' motion for summary judgment is DENIED.

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**Calendar Line 12**
**Case Name:** *Darden v. The Board of Trustees of the Leland Stanford Junior University*
**Case No.:** 21CV385527

Before the Court is Plaintiff's motion to strike Defendants' answer to the TAC and to enter default judgement. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Background

This is an action for negligent misrepresentation brought by self-represented Plaintiff, Michael Darden, against several defendants. Darden's original complaint was filed on July 8, 2021. The operative Third Amended Complaint ("TAC"), filed on December 2, 2022, states single cause of action for negligent misrepresentation arising from the termination of Plaintiff's employment on July 29, 2019. (See TAC at ¶ 4.)

The original Complaint, the First Amended Complaint ("FAC"), the Second Amended Complaint ("SAC"), and the Third Amended Complaint (TAC) list seven defendants: the Board of Trustees of the Leland Stanford Junior University, Jane Duperrault, Lawrence Chu, M.D., Norma Leavitt, Susan Hoerger, Marc Tessier—Lavigne, and Ronald Pearl (collectively, "Defendants").

Darden alleges the following misrepresentations:

1. Job Advertisement's Admittedly Outdated Job Description - published on December 5, 2018, viewed by Plaintiff in March 2019.

2. Written Job Offer's Admittedly Outdated Job Description and Requested Start Date -emailed to Plaintiff on May 24, 2019.

3. Complaint Handling Statements - Defendant Norma Leavitt's verbal assertions to Plaintiff on July 22, 2019.

4. Job Termination Statements - Defendants Normal Leavitt and Dr. Lawrence's verbal assertions to Plaintiff on July 29, 2019; and

5. Statements about Defendant's Handling of Plaintiff's Wrongful Termination Concerns-emailed to Plaintiff in August 2019.

Defendants unsuccessfully demurred to the TAC. The Court's Order overruling the demurrer was filed and served on May 17, 2023. Defendants subsequently filed their answer to the TAC on June 16, 2023, generally denying Plaintiff's claims. Defendants asserted 19 affirmative defenses.

On June 26, 2023, Plaintiff filed a demurrer to Defendants' answer and a month later, prior to a hearing on his demurrer, he filed his Request for Entry of Default against Defendants. Subsequently, Plaintiff's demurrer to Defendants' answer was heard, and an order overruling the demurrer was entered on September 18, 2023.

Approximately two months after Defendants filed their answer to the TAC, Plaintiff filed his motion to strike the answer and request for entry of default judgement.

**II. Legal Standard**

The court may, upon a motion, or at any time in its discretion, and upon terms it deems proper, strike any irrelevant, false, or improper matter inserted in any pleading. (Code Civ. Proc., § 436(a).) The court may also strike 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. (*Id.*) The grounds for moving to strike must appear on the face of the pleading or by way of judicial notice. (Code Civ. Proc., § 437.) "When the defect which justifies striking a complaint is capable of cure, the court should allow leave to amend." (*Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 768.)

Where there are grounds both for demurring and moving to strike, the two documents must be filed together and noticed for the same hearing. (Code of Civ. Proc. § 435(b)(3), (d).) Because a motion to strike and a demurrer must be brought at the same time, a motion to strike the answer must be filed within 10 days after service of the answer. (Code Civ. Proc. § 435(b); California Rule of Court, Rule 3.1322(b).)

**III. Analysis**

Plaintiff seeks to strike Defendants' answer on the grounds that (1) it was untimely filed, (2) it contains vacuous answers, (3) the affirmative defenses are not factually supported, and (4) Defendants and their attorneys have in bad faith evaded providing complete responses to his discovery. The Court overruled Plaintiff's demurrer to Defendants' answer, demurrer which asserted virtually identical arguments. The Court will not revisit this issue for this motion.

While Defendants' late answer was a proper basis for a motion to strike, Plaintiff's motion is untimely. Plaintiff was required to file his motion to strike with the demurrer within 10 days after the service of the answer. (Code of Civ. Proc. § 435(b) (1), (3); Cal. Rules of Court, Rule 3.1322(b).)

Plaintiff filed this motion approximately two months after Defendants filed their answer. And, while the Court has discretion to consider striking all or any part of a pleading (Code Civ. Proc. § 436(b); *CPF Agency Corp v. R&S Towing* (2005) 132 Cal.App.4th 1014, 1021), an answer filed 18 days late does not prejudice Plaintiff or constitute sufficient grounds for the Court to exercise this discretion.

Accordingly, Plaintiff's motion to strike Defendants' answer is OVERRULED and request to enter default judgment DENIED.

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**Calendar Line 23**
**Case Name:** *Danielle Adams vs. Lis Gschwandtner et al*
**Case No.:** 23CV412759

Before the Court is Defendants' Calix Networks Inc.'s and Calix, Inc.'s (collectively, "Calix") Motion to compel arbitration. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Background

This is an action for wrongful termination and retaliation. Plaintiff Danielle Adams was Calix's Senior Manager, Media Equipment and Corporate Communications from July 18, 2022 until her alleged wrongful termination on December 13, 2022. (Complaint, ¶ 7.) Plaintiff alleges during a meeting with Calix's C-Suite executives required as part of her on-boarding process during her first week at Calix, Calix's Chief Financial Officer Cory Sinclair "voluntarily disclosed to Plaintiff that the press releases that Calix consistently put out to their shareholders and investors were false, or at the very least, deliberately misleading." (Complaint, ¶¶ 8-11.)

Plaintiff regularly complained to her manager, Defendant Regional Vice President Content Marketing, Lisa Gschwandtner, regarding the false claims contained in press releases Plaintiff was responsible for getting picked up by the press. (Complaint, ¶ 14.) Plaintiff also complained to Calix's external compliance online platform on or about September 22, 2022. (*Id.*) Plaintiff alleges her complaints and whistleblowing activities subjected her to retaliation, eventually leading to her termination. (Complaint, ¶ 15.)

On June 29, 2022, Adams received a written employment offer from Calix. The offer letter states:

> The terms and conditions set forth in this offer letter contain the entire agreement between Calix and you with regard to your employment and superseded any other agreements, whether written or oral, with regard to the subject of your employment. This agreement cannot be modified except in a written agreement signed by you and an authorized representative of Calix. The agreement and any amendments thereto shall

> be governed in accordance with the las of the state in which are employed by Calix.
>
> If you wish to discuss any of the details of these conditions or any aspect of your employment, please contact your Talent & Culture (HR) Business Partners, Lindsay Taake at (817) 771-8717. . .
>
> The offer of employment may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one agreement. You and Calix agree that signatures delivered by scan, email or other electronic means shall be considered original signatures for all purposes under this offer of employment.
>
> This offer of employment is contingent upon (i) proof of eligibility to work in the United States submitted to Calix within three (3) business days of the employee's first day of employment, (ii) completion of a satisfactory background check, including but not limited to verification of the information presented in your resume and interviews, (iii) satisfactory completion of reference checks, and (iv) execution of both the Employee Confidential Information and Assignment Invention Agreement and the Mutual Arbitration Agreement. Calix will comply with all local Fair Chance Ordinance Requirements.

(Declaration of Dawn Ward ("Ward Decl."), Ex. A.) Adams signed the offer letter on the date she received it.

With her offer letter Adams received a four and a half page Mutual Arbitration Agreement. The Agreement states it is between Adams and "Calix, Inc., a Delaware corporation, and any of its current or future subsidiaries, affiliates, successors or assigns (collectively, 'Calix')." The agreement further provides: "We agree to arbitrate before a neutral arbitrator any and all existing or future disputes or

claims between us that arise out of or related to Employee's recruitment, employment or separation from employment with Calix, including claims involving any current or former officers, director, stockholder, agent or employee of Calix, whether the disputes or claims arise under common law, or in tort, contract, or pursuant to a statute, regulation, or ordnance now in existence or which may in the future be enacted or recognized." The agreement lists examples of such claims, which list includes "claims for wrongful termination of employment." (Ward Decl., Ex. B.)

The Arbitration Agreement further provides in bold text:

> **WE UNDERSTAND AND AGREE THAT THE ARBITRATION OF DISPUTES AND CLAIMS UNDER THIS AGREEMENT SHALL BE INSTEAD OF A COURT TRIAL BEFORE A JUDGE AND/OR JURY. We understand and agree that, by signing this Agreement, we are expressly waiving any and all rights to a trial before a judge and/or a jury regarding any disputes and claims which we now have or which we may in the future have that are subject to arbitration under this Agreement. We also understand and agree that the arbitrator's decision will be final and binding on both Calix and Employee, subject to review on the grounds set forth in the Federal Arbitration Act ("FAA").** (Ward Decl., Ex. B.)

The Arbitration Agreement requires that the arbitration be conducted in accordance with the Employee Arbitration Rules and Mediation Procedures of the American Arbitration Association and provides that the "arbitrator shall allow the discovery authorized under the Federal Rules of Civil Procedure or any other discovery required by state law in arbitration proceedings." (Ward Decl., Ex. B.) The arbitration is also governed by the FAA, "shall take place in the county and state where Employee primarily works or worked at the time of the arbitrable dispute or claim arose", and, except for the filing fee where the employee initiates the action, be paid for by Calix. The Agreement contains a severability clause and an integration clause. Finally, just before the signature line, the Arbitration Agreement states:

> **<u>Knowing and Voluntary Agreement</u>**

> WE UNDERSTAND AND AGREE THAT WE HAVE BEEN ADVISED TO CONSULT WITH AN ATTORNEY OF OUR OWN CHOOSING BEFORE SIGNING THIS AGREEMENT, AND WE HAVE HAD AN OPPORTUNITY TO DO SO. WE AGREE THAT WE HAVE READ THIS AGREEMENT CAREFULLY AND UNDERSTAND THAT BY SIGNING IT, WE ARE WAIVING ALL RIGHTS TO A TRIAL OR HEARING BEFORE A JUDGE, JURY OF ANY AND ALL DISPUTES AND CLAIMS SUBJECT TO ARBITRATION UNDER THIS AGREEMENT.

Adams' signature, dated June 29, 2022, is right below this language. (Ward Decl., Ex. B.)

## II. Legal Standard

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

Even if the Court finds the parties agreed to arbitrate, the agreement is unenforceable if it is unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Unconscionability consists of both procedural and substantive elements. The prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of the procedural unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. (*Armendariz,* 24 Cal.4th at 114.)

The procedural element tests the circumstances of contract negotiation and formation and focuses on "oppression" or "surprise" due to unequal bargaining power. (See *Armendariz,* 24 Cal.4th at 114.) "Oppression" occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form. (*Pinnacle Museum Tower Ass'n v. Pinnacle Mkt.Dev. (US), LLC* (2012) 55 Cal.4th 223, 247, citing *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179.)

Plaintiff is correct that the arbitration agreement here is an adhesion contract. She could not begin her employment until she signed the Arbitration Agreement, and the Ward Declaration plainly states that Calix would not have accepted Plaintiff's employment if she had not signed that agreement. (Ward Decl., ¶ 7.) The California Supreme Court has made clear that in such a take-it-or-leave it scenario when a prospective employee is looking for work, the procedural unconscionability prong is generally met. (*Armendariz*, 24 Cal. 4th at 115.)

Substantive unconscionability relates to the fairness of the terms of the arbitration agreement and assesses whether they are overly harsh or one-sided. (*Armendariz, supra*, 24 Cal.4th at p. 114; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.) Plaintiff primarily relies on the Arbitration Agreement's designation of the Federal Rules of Civil Procedure to govern discovery for her argument that the agreement is substantively unconscionable. Without evidence, Plaintiff argues the federal rules provide for less discovery than the California Code of Civil Procedure. The Court is unpersuaded by this argument. First, both parties are bound by those rules. Next, those rules provide identical—if not slightly more—discovery (for third parties) than the California state rules. Nor does the fact that the arbitration agreement contains a link to the AAA procedural rules render the agreement unconscionable. Providing a link directs the employee to the website that will contain the rules, which rules may change from time to time.

Calix's motion to compel arbitration is therefore GRANTED, and this case is stayed pending the outcome of the arbitration.

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