

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2320

Department20@scscourt.org

"Every case is important" "No case is more important than any other." —
United States District Judge Edward Weinfeld (<https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html>)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the
Biggest Case of Your Life." — Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and
drink as friends." (Shakespeare, *The Taming of the Shrew*, act I, scene ii.)" (*Gregori v. Bank of
America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.*
(1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented
by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the
Code of Professionalism adopted by the Santa Clara County Bar Association:

<https://www.sccba.com/code-of-professional-conduct/>

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DATE: Thursday, 06 July 2023

TIME: 9:00 A.M.

**Please note that for the indefinite future, all hearings will be conducted remotely as the Old
Courthouse will be closed. This Department prefers that litigants use Zoom for Law and
Motion and for Case Management Calendars. Please use the Zoom link below.**

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal
Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
<https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09>
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See **Jensen v. Superior Court (San Diego)** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwidth. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California **Rules of Court**, rule 3.672.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and **California Rules of Court**, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

Please notify this Court immediately if the matter will not be heard on the scheduled date. **California Rules of Court**, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. **California Rules of Court**, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will be helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: **Line #/name/party**. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); **California Rules of Court**, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK

SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with **California Rules of Court**, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the “Control” key and click. If you see last week’s tentative rulings, you have checked prior to the posting of the current week’s tentative rulings. You will need to either “REFRESH” or “QUIT” your browser and reopen it. Another suggestion is to “clean the cache” of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court’s tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court’s final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	21CV391969	Hien Vu v. Ramyar Sias	Order of Examination. There does not appear to be a proof of service in the file. Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM via the Zoom virtual platform. The appropriate oath will be administered by the Court and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely. NO FORMAL TENTATIVE RULING.
LINE 2	22CV403402	Jesse Sanchez; et al. v. City of Gilroy; et al.	Demurrer of Defendant County of Santa Clara to Plaintiffs’ Complaint. OFF CALENDAR per moving party.
LINE 3	21CV390996	Aaron Klein v. Matthew Klein	Trial Setting Conference. NO TENTATIVE RULING. The parties should meet and confer and agree on a trial date beginning in February 2024.
LINE 4	21CV390996	Aaron Klein v. Matthew Klein	Motion of Plaintiff for Summary Judgment. The motion for summary judgment to the complaint is DENIED. The motion for summary adjudication to the second and third affirmative defenses in the FAA is DENIED. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 5	22CV394887	Miguel Angel Ramirez v. Anthony Alonzo Fred Hayes, Jr.	<p>Motion of Plaintiff to Compel Defendant to Provide Further Responses to Requests for Admissions.</p> <p>Defense counsel has filed a single opposition to Lines ##5 and 6. Defendant was served with the summons and complaint and an answer was filed on his behalf. Defense counsel has now lost contact with the defendant.</p> <p>Is defense counsel conceding negligence and intends to dispute only the claimed damages?</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 6	22CV394887	Miguel Angel Ramirez v. Anthony Alonzo Fred Hayes, Jr.	<p>Motion of Plaintiff For Sanctions Against Defendant, or in the alternative, Compel Compliance With This Court's Order of 02 February 2023.</p> <p>SEE LINE #5.</p>
LINE 7	22CV401772	Robert Foss v. Liberation Distribution, LLC; Intellidib, Inc.; Insperity Peo Services, L.P.; Cheryl Durzy.	<p>Motion of Plaintiff to Compel Defendants to Provide Responses to Plaintiff's Form Interrogatories-General on Defendant Cheryl Jersey Discovery Requests and Request for Sanctions.</p> <p>The motion is not opposed.</p> <p>Counsel for moving party should review California Rules of Court, rule 3.1345(d): "Identification of interrogatories, demands, or requests A motion concerning interrogatories, inspection demands, or admission requests must identify the interrogatories, demands, or requests by set and number."</p> <p>On 10 November 2022, plaintiff served Form Interrogatories-Employment Law on the entity defendants; Form Interrogatories-General on defendant Cheryl Durzy; and first set of Requests for Production of Documents on all defendants. Defendants have never responded.</p> <p>The motion is GRANTED. Defendants are to provide code-compliant responses without objections within 20 days of the filing and service of this order.</p> <p>Plaintiff also makes a request for monetary sanctions. While the request is code-compliant, the better practice is to state the request for sanctions in the title of the motion as well as stating a specific amount claimed. The Court will award to plaintiff the sum of \$1,625.00, payable within 20 days of the filing and service of this order.</p> <p>NO FORMAL TENTATIVE RULING.</p>
LINE 8	21CV389780	Julie Prince v. Shannon Bruga; Sherri Hammond.	<p>Application of Tara A. Murray, Esq. to Withdraw as Counsel for Shannon Bruga.</p> <p>This Court will arrange a breakout room on the Zoom platform to hear further from Ms. Murray.</p> <p>NO FORMAL TENTATIVE RULING.</p>

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 9	22CV404450	Jane Doe v. Paul Fornesi	Motion of Defendant Paul Fornesi for Leave to File a Cross-Complaint. The motion of defendant for leave to file a cross-complaint is GRANTED. Counsel should present a copy of the cross-complaint to the clerk via the e-filing queue and then submit a conformed copy to counsel for plaintiff, who will then have 20 days leave within which to RESPOND. SEE ATTACHED TENTATIVE RULING.
LINE 10			SEE ATTACHED TENTATIVE RULING.
LINE 11			SEE ATTACHED TENTATIVE RULING.
LINE 12			SEE ATTACHED TENTATIVE RULING.
LINE 13			SEE ATTACHED TENTATIVE RULING.
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LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

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Calendar Line 2

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Calendar Line 3

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Calendar Line 4

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV390996

Aaron Klein v. Matthew Lowell Klein

DATE: 06 July 2023

TIME: 9:00 am

LINE NUMBER: 04, 05

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 26 June May 2023. Please specify the issue to be contested when calling the Court and Counsel.

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**Order on Motion for Summary Judgment and Summary Adjudication
by Plaintiff Aaron Klein.**

I. Statement of Facts.

This is a partition action.

According to the complaint, the subject of this action concerns real property located at 21851 Almaden Avenue in Cupertino, California ("Subject Property"). (Complaint at ¶ 1.) The Subject Property is a single family residential property. (Id. at ¶ 2.)

Plaintiff Aaron Klein ("Plaintiff") is the owner of an undivided one-half interest in the Subject Property, which is co-owned concurrently as to an undivided one-half interest by defendant Matthew Lowell Klein ("Defendant"). (Complaint at ¶¶ 3-4.)

Plaintiff and Defendant took title to the Subject Property under a certain Individual Grant Deed recorded in Santa Clara County on 11 February 1986. (Complaint at ¶ 9.)

Prior to commencing this action, it was necessary for Plaintiff to procure a title report costing approximately \$820. (Complaint at ¶ 7.) The title report is kept for available for inspection, copying, and use by the parties at the office of Plaintiff's counsel. (Ibid.)

On 17 September 2021, Plaintiff demanded Defendant to cooperate in the partition by sale of the Subject Property within 21 days. (Complaint at ¶ 8.) Defendant however failed and refused to cooperate with Plaintiff's demand. (Ibid.)

On 9 November 2021, Plaintiff filed a verified complaint for partition by sale against Defendant.¹

¹ This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (**Ca. St. Civil Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C)).

On 1 March 2022, Defendant filed a verified answer admitting and denying allegations of the complaint and asserting affirmative defenses. On the same day, he also filed a verified cross-complaint alleging:

- (1) Breach of Contract;
- (2) Breach of Implied Covenant of Good Faith and Fair Dealing;
- (3) Quasi-Contract;
- (4) Specific Performance;
- (5) Declaratory Relief as to Duties and Liabilities under an Agreement.

On 14 March 2022, Defendant filed a verified first amended cross-complaint ("FACC") alleging the same causes of action.

On 21 November 2022, Defendant filed a verified first amended answer ("FAA") admitting and denying allegations of the complaint and asserting affirmative defenses.

On 22 November 2022, Plaintiff filed an answer admitting and denying allegations in the FACC and asserting affirmative defenses.

On 23 February 2023, Plaintiff filed the motion presently before the court, a motion for summary adjudication to the complaint and the second and third affirmative defenses in the FAA. The court however treats the instant application as two separate motions. The first is a motion for summary judgment to the complaint as it alleges a single cause of action for partition. The second is a motion for summary adjudication to the second and third affirmative defenses in the FAA. Defendant filed written opposition. Plaintiff filed reply papers.²

A trial setting conference is also set for 6 July 2023.

II. Motions for Summary Judgment in General.

Any party may move for summary judgment. (**Code of Civil Procedure**, § 437c, subdivision (a); **Aguilar v. Atlantic Richfield Co.** (2001) 25 Cal.4th 826, 843 (**Aguilar**).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (**Code of Civil Procedure**, § 437c, subdivision (c); **Aguilar**, *supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (**Aguilar**, *supra*, at p. 843.)

A plaintiff moving for summary judgment "bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto." (**Aguilar**, *supra*, 25 Cal.4th at p. 850.) "Once the plaintiff ... has met that burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant ... shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (**Code of Civil Procedure**, § 437c, subdivision (p)(1).)

"It is necessary for the motion and any opposition to be supported by admissible evidence, in the form of affidavits, declarations, admissions, answers to interrogatories, depositions or matters judicially noticed. [Citation.] The court must then rule on the motion based on all the papers submitted. [Citation.]" (**Fisher v. Gibson** (2001) 90 Cal.App.4th 275, 282.)

A triable issue of material fact exists "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

² The court notes Plaintiff submitted a declaration from his counsel with his reply papers. The court however declines to consider the declaration as it constitutes new evidence submitted in reply. (See **Jay v. Mahaffey** (2013) 218 Cal.App.4th 1522, 1537 [the general rule of motion practice is that new evidence is not permitted with reply papers]; see also **Nazir v. United Airlines, Inc.** (2009) 178 Cal.App.4th 243, 252 [improper to introduce new evidence in reply].)

proof.” (*Aguilar, supra*, at 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

Throughout the process, the trial court “must consider all of the evidence and all of the inferences drawn therefrom.” (*Aguilar, supra*, 25 Cal.4th at p. 856.) Thus, the court views the evidence in the light most favorable to Defendant and construes his submissions liberally while strictly scrutinizing Plaintiff’s showing. (*Richards v. Sequoia Ins. Co.* (2011) 195 Cal.App.4th 431, 435-436.)

“Summary judgment is a drastic remedy to be used sparingly, and any doubts about the propriety of summary judgment must be resolved in favor of the opposing party.” (*Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 17.)

III. Plaintiff’s Motion for Summary Judgment.

Plaintiff moves for an order of summary judgment to the complaint as there are no triable issues of material fact and thus judgment should be entered as a matter of law.

A. Plaintiff’s Request for Judicial Notice.

“Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In support of the motion, Plaintiff requests judicial notice of the following:

- (1) The legal description of the property and common address are as follows:

The land situated in the County of Santa Clara, City of Cupertino, described as:

The Easterly 1/2 of Section 92 as shown upon that certain Map entitled “Map of Subdivision ‘A’ of Monta Vista,” which Map was filed for record in the Office of the County Recorder of the County of Santa Clara, State of California, on April 11, 1917 in Book P of Maps, at page 20.

The Assessors Parcel Number for the property is APN: 357-15-016.

- (2) The property is commonly known as 21851 Almaden Ave., Cupertino, California, 95014.
- (3) Plaintiff and Defendant are each 1/2 owners of the property as tenants in common.
- (4) The only interests of other persons or other matters affecting title to the real property as of the date of filing of this motion are as follows:

Taxes and assessments, general and special, for the fiscal year 2022-2023, the second installment due and payable on or before 4/10/2023 being unpaid.

Special tax which is now a lien and that may be levied within the Santa Clara Library District, notice(s) for which having been recorded. The recorded notice provides that this is a special tax to be levied annually, the amounts of which are to be added to and collected with the property taxes.

An easement for ingress, egress and public utilities and incidental purposes affecting the portion of the land within the Almaden Avenue as shown on the Map.

An easement for electrical transmission and incidental purposes in favor of Pacific Gas and Electric Company, a corporation, recorded on September 27, 1922 in Book 559 of Official Records, Page 522.

An easement for laying down, inspecting, maintaining and using, as conduits for conveying gas, gas mains or pipes, and incidental purposes, in favor of Pacific Gas and Electric Company, a corporation, recorded on August 15, 1932 in Book 619 of Official Records, Page 398.

(See Request for Judicial Notice [“RJN”] at Item No. 1-5.)

As to Item Nos. 1-3, the court may take judicial notice of the legal description of the Subject Property and the parcel number under **Evidence Code** section 452, subdivision (h). This subdivision allows a court to take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

As to Item No. 4, the court declines to take judicial notice of Plaintiff and Defendant's ownership interests in the Subject Property as that remains a disputed issue in the case. (See **Scott v. JPMorgan Chase Bank, N.A.** (2013) 214 Cal.App.4th 743, 760-761 ["Judicial notice can be taken of matters not reasonably subject to dispute, but cannot be taken of matters shown to be reasonably subject to dispute."].)

As to Item No. 5, the court may take judicial notice of the recorded instruments contained therein. (See **San Francisco CDC LLC v. Webcor Construction L.P.** (2021) 62 Cal.App.5th 266, 281, fn. 5 ["Judicial notice may be taken of the existence and facial contents of recorded real property records where, as here, the authenticity of the document is not challenged."]; see also **Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC** (2015) 234 Cal.App.4th 166, 184 ["Judicial notice may be taken of 'the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity.'"].) The court declines to take judicial notice of the remaining portions of Item No. 5 as those do not appear to be proper subjects of judicial notice.

B. Defendant's Request for Judicial Notice.

In opposition, Defendant requests judicial notice of the following:

- (1) Complaint;
- (2) Notice of Pending Action, filed December 7, 2021;
- (3) Answer to the Complaint;
- (4) Cross-Complaint;
- (5) FACC;
- (6) FAA.

(See RJN at Exs. 1-6.)

Here, the court may take judicial notice of these exhibits as records of the superior court. (**Evidence Code**, § 452, subdivision (d); see **Stepan v. Garcia** (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) But, "while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files." (**Richtek USA, Inc. v. uPI Semiconductor Corp.** (2015) 242 Cal.App.4th 651, 658.)

C. Evidentiary Objections.

Both sides submitted objections to evidence in connection with the motion. The court however declines to consider the objections as they are not material to the outcome of the motion for reasons explained below. (**Code of Civil Procedure**, § 437c, subdivision (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

D. Partition Actions in General.

"Under California law, the term 'partition' signifies 'the procedure for segregating and terminating common interests in the same parcel of property.' [Citations.] The term 'partition' encompasses division of interests by judicial action and by voluntary agreement of the parties. [Citations.]" (**14859 Moorpark Homeowner's Assn. v. VRT Corp.** (1998) 63 Cal.App.4th 1396, 1404-1405.)

"A co-owner of real or personal property may bring an action for partition. [Citation.] 'The primary purpose of a partition suit is, as the terminology implies, to partition the property, that is, to sever the unity of

possession. [Citations.] [Citation.] 'Partition is a remedy much favored by the law. The original purpose of partition was to permit cotenants to avoid the inconvenience and dissension arising from sharing joint possession of land. An additional reason to favor partition is the policy of facilitating transmission of title, thereby avoiding unreasonable restraints on the use and enjoyments of property.' [Citation.]" (**LEG Investments v. Boxler** (2010) 183 Cal.App.4th 484, 493 (**LEG Investments**)).

The governing statute for partition is **Code of Civil Procedure** section 872.720, which provides, in pertinent part, that "[i]f the court finds that the plaintiff is entitled to partition, it shall make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property and, unless it is to be determined later, the manner of partition." (**Code of Civil Procedure**, § 872.720, subdivision (a).) The manner of partition may be "in kind"- i.e., physical division- or, if the parties agree or the court concludes it "would be more equitable," the court may order the property sold and the proceeds divided among the parties. (**Code of Civil Procedure**, §§ 872.820, 873.510 et seq.).

Thus, an interlocutory judgment in a partition action must include the following two elements: a determination of the parties' interests in the property and an order granting the partition. (See **Summers v. Super. Ct.** (2018) 24 Cal.App.5th 138, 143; **Code of Civil Procedure**, § 872.720, subdivision (a).) In a partition action, any interest of a party in the property may be put in issue, tried, and determined. (**Code of Civil Procedure**, § 872.610.) If there are any other issues affecting this determination, the court must resolve them. (**Code of Civil Procedure**, § 872.620.)

E. Analysis.

To establish his claim for partition, Plaintiff submits the following material facts and supporting evidence:

- (1) The legal description of the property and common address are as follows:

The land situated in the County of Santa Clara, City of Cupertino, described as follows:

The Easterly 1/2 of Section 92 as shown upon that certain Map entitled "Map of Subdivision 'A' of Monta Vista," which Map was filed for record in the Office of the County Recorder of the County of Santa Clara, State of California, on 11 April 1917 in Book P of Maps, at page 20.

APN: 357-15-016

Commonly known as 21851

Almaden Ave., Cupertino,

California, 95014.

- (2) Plaintiff and Defendant, are each 1/2 owners of the property as tenants in common.
- (3) The only interests of other persons or other matters affecting title to the real property as of the date of filing of this motion are as follows:

Taxes and assessments, general and special, for the fiscal year 2022-2023, the second installment due and payable on or before 10 April 2023 being unpaid.

Special tax which is now a lien and that may be levied within the Santa Clara Library District, notice(s) for which having been recorded. The recorded notice provides that this is a special tax to be levied annually, the amounts of which are to be added to and collected with the property taxes.

An easement for ingress, egress and public utilities and incidental purposes affecting the portion of the land within the Almaden Avenue as shown on the Map.

An easement for electrical transmission and incidental purposes in favor of Pacific Gas and Electric Company, a corporation, recorded on 27 September 1922 in Book 559 of Official Records, Page 522.

An easement for laying down, inspecting, maintaining and using, as conduits for conveying gas, gas mains or pipes, and incidental purposes, in favor of Pacific Gas and Electric Company, a corporation, recorded on 15 August 1932 in Book 619 of Official Records, Page 398.

(4) The property is a single family residence.

(5) Plaintiff prays that the fee title ownership interest of the tenants in common be sold.

(See Plaintiff's Separate Statement of Undisputed Facts ["SSUF"] at Nos. 1-5 at pp. 1-4; Plaintiff's RJN.)

In opposition, Defendant argues Plaintiff impliedly waived his claim to partition the Subject Property as the parties entered into a separate agreement addressing transactions related to the property.

"Waiver requires the intentional relinquishment of a known right upon knowledge of the facts. The burden is on the party claiming a waiver of right to prove it by clear and convincing evidence that does not leave the matter to speculation. As a general rule, doubtful cases will be decided against the existence of a waiver. [Citations.]

Waiver may be express, based on the words of the waiving party; or implied, based on conduct indicating an intent to relinquish the right. [Citations.]" (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1188.)

"California courts will find waiver when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." (*Old Republic Ins. Co. v. Fsr Brokerage* (2000) 80 Cal.App.4th 666, 678 (*Old Republic*).)

"Whether there has been a waiver is usually regarded as a question of fact to be determined by the jury, or by the trial court if there is no jury." [Citation.]" (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 189.)

"However, the trial court may properly resolve an issue of waiver as a question of law when the underlying facts are undisputed." (*Old Republic*, *supra*, 80 Cal.App.4th at p. 679.)

"A co-owner of property has an absolute right to partition unless barred by a valid waiver. [Citation.] '[T]he right of partition may be waived by contract, either express or implied.' [Citation.]" (*LEG Investments*, *supra*, 183 Cal.App.4th at p. 493.)

A partition cannot be had without the consent of all the parties where it would conflict with a previous agreement of the parties regarding the use of the property. (*Thomas v. Witte* (1963) 214 Cal.App.2d 322, 327 (*Thomas*).) "Agreements which are implied, as well as those which are expressed, may operate to limit or modify the right to partition property held in co-ownership." (*Ibid.*)

In support, Defendant attaches a contract entitled "Agreement to Sell Real Estate to Third Parties" ("Agreement"), signed by both sides on 23 August 2021. (See Defendant's Disputed Fact at No. 2 [Defendant Decl. at ¶¶ 23-24, Ex. H].) The Agreement provides in relevant part:

First: In consideration of AK (or Plaintiff) agreeing to accept \$1,000,000 for his interest in the property irrespective of the sales price, MK (or Defendant) shall pay \$5,000 to AK monthly (the first such payment having been made in July 2021) as an advance against the amount to be paid to AK from the sale of the property, and such payments shall continue monthly until the closing for the sale of the property.

Second: MK shall immediately begin listing the property through an agent or multiple listing service, or may sell the property directly to a Developer, and shall take all other necessary actions to consummate a sale of the property, including retaining counsel to prepare any disclosure documents, contracts and take other prudent, reasonable, and necessary actions for the sale of the property.

Third: The parties agree that they will promptly sign all documents necessary to initiate and consummate the sale of the property. This includes execution by AK of a limited Power of Attorney to MK with respect to real estate only.

(See Defendant's Decl. at Ex. H [pp. 1-2].)

In addition, Defendant submits the aforementioned Power of Attorney, executed by Plaintiff on 20 August 2021, in favor of Defendant in connection with real estate matters. (See Defendant's Decl. at Ex. I.) This document specifically gives authority to Defendant:

- a. To deal with any interest I (meaning Plaintiff) may have in real property and sign all documents on my behalf concerning any interest, including, but not limited to, real property I may subsequently acquire or

These powers include, but are not limited to, the ability to:

- i. Purchase, sell, exchange, accept as gift, place as security on loans, convey with or without covenants, rent, collect rent, sue for and receive rents, eject and remove tenants or other persons, to pay or contest taxes or assessments, control any legal claim in favor of or against me, partition or consent to partitioning, mortgage, charge, lease, surrender, manage or otherwise deal with real estate and any interest therein; and
- ii. Execute and deliver deeds, transfers, mortgages, charges, leases, assignments, surrenders, releases and other instruments required for any such purpose.

(Ibid.)

While these documents do not explicitly prohibit Plaintiff from partitioning the Subject Property, the authority given to Defendant with respect to real estate matters, including the property, is at least inconsistent with the right to partition to create an implied waiver. (See ***Penasquitos, Inc. v. Holladay*** (1972) 27 Cal.App.3d 356, 358 [“Although partition is a matter of right when a cotenant desires it (citation), it is subject to the requirement of fairness and the right may be waived by contract, either expressly or by implication.”].) Plaintiff disputes this position and contends the parties’ Agreement allows him to pursue other remedies, including partition, based on the following language:

Sixth: This agreement shall be enforceable after it has been signed by both parties, and may be relied upon the California courts to seek a sale of the property *or other relief if either party fails or refuses to meet its obligations set forth herein.*

(See Defendant’s Decl. at Ex. H [p. 2], italics added.)

But, as the opposition points out, this provision applies only if a party fails or refuses to meet obligations set forth in the Agreement. Thus, a remedy of partition may be available to Plaintiff should Defendant breach any part of the Agreement. Plaintiff however has not submitted any competent evidence demonstrating a breach of the Agreement by Defendant and thus this provision is not applicable.

Therefore, as there is evidence of an implied waiver, Defendant has presented a triable issue of material fact to defeat the motion for summary judgment. (See ***Gleason v. Klammer*** (1980) 103 Cal.App.3d 782 [appellate court reversed trial court’s order granting summary judgment because there was a single triable issue of fact].)

Accordingly, the motion for summary judgment is DENIED.

IV. Motions for Summary Adjudication in General.

“When a plaintiff moves for summary adjudication on an affirmative defense, the court shall grant the motion ‘only if it completely disposes’ of the defense. [Citation.] The plaintiff bears the initial burden to show there is no triable issue of material fact as to the defense and that he or she is entitled to judgment on the defense as a matter of law. In so doing, the plaintiff must negate an essential element of the defense, or establish the defendant does not possess and cannot reasonably obtain evidence needed to support the defense. [Citations.]” (***See’s Candy Shops, Inc. v. Super. Ct.*** (2012) 210 Cal.App.4th 889, 899-900 (***See’s Candy Shops***).)

“If the plaintiff does not make this showing, ‘it is unnecessary to examine the [defendant’s] opposing evidence and the motion must be denied.’” [Citation.] ‘“However, if the moving papers establish a prima facie showing that justifies a [ruling] in the [plaintiff’s] favor, the burden then shifts to the [defendant] to make a prima facie showing of the existence of a triable material factual issue.”’ [Citation.]” (***See’s Candy Shops, supra***, 210 Cal.App.4th at p. 900.)

V. Plaintiff’s Motion for Summary Adjudication.

Plaintiff also moves to summarily adjudicate the second and third affirmative defenses for waiver and estoppel in the FAA.

A. Second Affirmative Defense: Waiver.

The court has already addressed the waiver defense in connection with Plaintiff's motion for summary judgment. For reasons explained above, the court finds evidence of an implied waiver based on the parties' Agreement and the Power of Attorney executed by Plaintiff in favor of Defendant as to real estate matters. (See Defendant's Disputed Fact at No. 2 [Defendant Decl. at ¶¶ 23-24, Exs. H-I].)

Therefore, the motion for summary adjudication of the second affirmative defense is DENIED.

B. Third Affirmative Defense: Estoppel.

"[P]artition, which is frequently denominated an absolute right (citation), is subject to waiver, and also estoppel and similar equitable defenses." (*Thomas*, *supra*, 214 Cal.App.2d at p. 326.)

"The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citation.] [Citations.]" (*City of Goleta v. Super. Ct.* (2006) 40 Cal.4th 270, 279.)

"The existence of equitable estoppel generally is a factual question for the trier of fact to decide, unless the facts are undisputed and can support only one reasonable conclusion as a matter of law." (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1263.)

The third affirmative defense alleges:

"This answering Defendant asserts Plaintiff is barred by the equitable doctrine of estoppel of the implied waiver of partition found in the written agreement among the parties to sell the real property." (FAA at p. 3.)

In challenging the estoppel defense, Plaintiff submits the following material facts:

- (1) Plaintiff made no misrepresentations of fact in connection with the making of the Agreement to Sell Real Estate to Third Parties.
- (2) Plaintiff made no misrepresentations of intention in connection with the making of the Agreement to Sell Real Estate to Third Parties.
- (3) Plaintiff concealed nothing in connection with the making of the Agreement to Sell Real Estate to Third Parties.

(See Plaintiff's SSUF at Nos. 1-3 at p. 5; see also *San Diego Mun. Credit Union v. Smith* (1986) 176 Cal.App.3d 919, 923 [estoppel requires a representation or concealment of material facts].)

Plaintiff's argument however is misplaced as the estoppel defense is not raised in connection with the making of the parties' Agreement. Instead, as pled, the defense pertains to the implied waiver of partition found in the Agreement. (See *Maria D. v. Westec Residential Sec.* (2000) 85 Cal.App.4th 125, 132 ["A summary adjudication motion is directed to the issues framed by the pleadings."].) In other words, the essence of the defense is that Plaintiff may not deny the existence of the implied waiver contained in the parties' Agreement. Plaintiff does not address this point in his motion and thus fails to meet his initial burden in disposing of the estoppel defense.

Furthermore, the *Thomas* court, citing a secondary source, explains:

"The general rule is well settled that partition will not be granted at the suit of one in violation of his own agreement, since the agreement operates as an estoppel against the right to partition. ... The agreement not to partition may be implied as well as express; and will be readily implied and

enforced if such implication proves necessary to secure fulfillment of an agreement between the cotenants, or if the granting of partition would destroy the estate sought to be partitioned.”

(**Thomas**, *supra*, 214 Cal.App.2d at p. 330, emphasis in bold added.)

Similarly, on the issue of estoppel, another appellate court states:

“The applicable general rule is that the right of a cotenant to partition is absolute except where denied or limited by agreement expressed or implied. [Citations.] Thus partition may not be had without consent where it would conflict with a previous agreement of the parties to the use of the property. [Citation.] **Under such circumstances the party seeking partition is held to be estopped to assert or has waived such.** [Citations.]”

(**Heber v. Yaeger** (1967) 251 Cal.App.2d 258, 262-263, emphasis in bold added.)

Thus, according to these authorities, both cited in opposition, Plaintiff is estopped from partitioning the Subject Property by virtue of the parties’ Agreement. Plaintiff does not deny the existence of the Agreement or otherwise being bound by the terms contained therein. Therefore, based on the foregoing, the affirmative defense for estoppel remains viable and will be considered at trial by the trier of fact.

Consequently, the motion for summary adjudication of the third affirmative defense is DENIED.

VI. Conclusion and Order.

The motion for summary judgment to the complaint is DENIED.

The motion for summary adjudication to the second and third affirmative defenses in the FAA is DENIED.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20**

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
department20@scscourt.org
<http://www.scscourt.org>

(For Clerk's Use Only)

CASE NO.: It

DATE: 07 July 2023

TIME: 9:00 am

Jane Doe v. Paul Fornesi

LINE NUMBER: 09

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 05 July 2023. Please specify the issue to be contested when calling the Court and Counsel.

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**Order on Motion of Defendant Paul Fornesi
for Leave to File a Cross-Complaint.**

Plaintiff/cross-defendant Jane Doe alleges that, during intimate relations, defendant transmitted the herpes simplex viruses HSV 1 and HSV 2 to her.

Defendant Paul Fornesi seeks leave from the Court to file a cross-complaint for illegal recording of Defendant's confidential communications.

Plaintiff opposes the motion, claiming that the claim is untimely, barred by the statute of limitations, and that the claims in the cross-complaint are completely unrelated to her lawsuit and brought only to harass her.

Motions for leave to amend the pleadings are directed to the Court's sound discretion. (See Code of Civil Procedure, § 473(a)(1); Code of Civil Procedure, § 576.) Judicial policy favors the liberal exercise of discretion to permit amendment of the pleadings so as to resolve all disputed matters between the parties in the same lawsuit. (See *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.) If the delay in seeking the amendment has not misled or prejudiced the other side, the liberal policy of allowing amendments prevails and it is an abuse of discretion to deny leave to amend. (See *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.)

On the other hand, leave to amend is not always granted. Leave will be denied if any one or combination of several factors are found.

"There is a platoon of authority to the effect that a long unexcused delay is sufficient to uphold a trial judge's decision to deny the opportunity to amend pleadings, particularly where the new amendment would interject a new issue which requires further discovery. (See *Rainer v. Community Memorial Hosp.* (1971) 18 Cal.App.3d 240, 258 and authorities cited there.)

Leave to amend a pleading has been denied when the requested amendment was untimely or was prejudicial to the opposing party. (*Bank of America Nat. Trust & Savings Ass'n v. Goldstein* (1938) 25 Cal.App.2d 37, 46-47.) The cases do not always make it clear whether they rest upon (1) the subjective element of lack of diligence in discovering the facts or in offering the amendment after knowledge of them, or (2) the effect of the delay on the adverse party. But in most cases both factors are involved. (See *Johnson v. Johnson* (1933) 134 Cal.App. 460 (unexplained delay of nearly year); *Dos Pueblos Ranch & Imp. Co. v. Ellis* (1937) 8 Cal.2d 617, 622 (delay indicative of bad faith); *Bank of America v. Goldstein*, supra (defendant's request to amend

answer on morning of trial, over 1 year after complaint and over 5 months after answer); **Davies v. Symmes** (1942) 49 Cal.App.2d 433, 444 (long unexcused delay, and amendment would necessitate continuance to adverse parties);]; **Yee v. Mobilehome Park Rental Review Bd.** (1998) 62 Cal.App.4th 1409, 1428 (constitutional claims in proposed amendment were barred either by res judicata or statute of limitations and were offered more than 2 years after original complaint was filed, and shortly before final resolution of all issues remaining before trial court); **Record v. Reason** (1999) 73 Cal.App.4th 472, 486 (plaintiff had knowledge of circumstances on which amended complaint was based almost 3 years before he sought leave to amend.

Leave to amend has been denied where the proposed amendment failed to state a valid cause of action or defense. (See **Allen v. Los Molinos Land Co.** (1914) 25 Cal.App. 206, 213; **Rose v. Ames** (1942) 53 Cal.App.2d 583, 589; **Oswald v. Northrop Aircraft** (1944) 62 Cal.App.2d 824, 828; **Vogel v. Thrifty Drug Co.** (1954) 43 Cal.2d 184, 189; **Hayutin v. Weintraub** (1962) 207 Cal.App.2d 497, 506; **Congleton v. National Union Fire Ins. Co.** (1987) 189 Cal.App.3d 51, 62; see **California Casualty General Ins. Co. v. Superior Court** (1985) 173 Cal.App.3d 274, 280-281) (overruled on their grounds in **Kransco v. American Empire Surplus Lines Ins. Co.** (2000) 23 Cal.4th 390.) Such denial is most appropriate where the pleading is deficient as a matter of law and the defect can not be cured by further appropriate amendment. (*Id.*)

Judicial policy favors the liberal exercise of discretion to permit amendment of the pleadings so as to resolve all disputed matters between the parties in the same lawsuit. (See **Nestle v. Santa Monica** (1972) 6 Cal.3d 920, 939; **Mabie v. Hyatt** (1998) 61 Cal.App.4th 581, 596.)

While the Court has discretion to deny leave to amend when the proposed amendment fails to state a valid cause of action or defense, (**California Casualty General Ins. Co. v. Superior Court**, 173 Cal.App.3d 274, 280-281), where the sufficiency of the proposed amendment is a novel question almost certain to be tested in an appellate court, the preferable practice is to permit the amendment and allow the parties to test its legal sufficiency by demurrer or other appropriate motion. (*Id.*)

This Court believes that while the opposition may ultimately have merit, the allegations should be challenged in a formal motion and specific opposition.

Good cause appearing, IT IS ORDERED that the motion of defendant for leave to file a cross-complaint is GRANTED. Counsel should present a copy of the cross-complaint to the clerk via the e-filing queue and then submit a conformed copy to counsel for plaintiff, who will then have 20 days leave within which to RESPOND.

DATED:

HON. SOCRATES PETER MANOUKIAN

*Judge of the Superior Court
County of Santa Clara*

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