## TENTATIVE RULINGS: CIVIL LAW & MOTION

**Wednesday, September 2, 2026 at 3:00 p.m.**
**Courtroom 18 – Hon. Dana Simonds**
**Civil and Family Law Courthouse**
**3055 Cleveland Avenue**
**Santa Rosa, California 95403**

The tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6724**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing.

**If the tentative ruling is accepted, no appearance is necessary unless otherwise indicated.**

### TO JOIN ZOOM ONLINE:

**Department 18:**
Meeting ID: **160—739—4368**
Password: **000169**
https://sonomacourtorg.zoomgov.com/j/1607394368?pwd=aW1JTWlIL3NBeE9LVHU2NVVpQlVRUT09

### TO JOIN ZOOM BY PHONE:
By Phone (same meeting ID and password as listed for each calendar):
Call: +1 669 900 6833 US (San Jose)

Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

### 1. 26CV01973, In Re: 607 Oman Springs Circle, Sonoma, CA 95476

The hearing on Petitioner's Motion to Deposit Surplus Trustee's Sale Proceeds with the Court is **CONTINUED** to Wednesday, October 7, 2026, at 3:00 P.M. in Department 18. The parties have submitted a stipulation and proposed orders regarding the motion, which are under review by the Court.

### 2. SCV-273623, Alexander Valley Gourmet, LLC v. Industry West Commerce Center, LLC

This matter is continued to September 23, 2026 at 3:00 pm in Department 18. No further briefing is allowed.

## 3. SCV-270898, Gemignani v. Andrade

Defendants' demurrer to Plaintiffs' Third Amended Complaint is **SUSTAINED**. It is **SUSTAINED** as to all causes of action against Defendant City of Santa Rosa. It is also **SUSTAINED** as to the Second Cause of Action against Defendant Jose Andrade. Leave to amend is **DENIED**.

Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Plaintiff Cindy Gemignani is the Conservator of the Estate of Daryl W. Titus. Plaintiff Edith Titus is the Conservator of the Person of Daryl W. Titus. The defendants are the City of Santa Rosa, Jose Andrade (a City of Santa Rosa Police Officer), Alberto Vasquez Rojas, and Ivan Medina. Plaintiffs filed a Third Amended Complaint against Defendants alleging that on or about September 7, 2021, Mr. Titus was walking along the south side of Bennett Valley Road near the Calvary Catholic Cemetery. They allege that while Mr. Titus was walking alongside the road, he was "stopped" by Defendant Andrade because he observed Mr. Titus walking in a manner and location that Defendant Andrade determined created a traffic hazard and Defendant Andrade suspected Mr. Titus of being either physically disabled, cognitively disabled or impaired by drugs, alcohol, and/or medication. As alleged, Defendant Andrade parked his vehicle in the eastbound traffic lane of Bennett Valley Road with the headlights on as it was dark and the area did not have any streetlights or other artificial illumination. After parking his vehicle in the lane of traffic on Bennett Valley Road, Defendant Andrade partially exited his vehicle and directed Mr. Titus to cross Bennett Valley Road to walk on the other side of the road. Plaintiffs allege that he did so without first doing a wellness assessment of Mr. Titus.

Mr. Titus complied with Defendant Andrade and immediately began crossing the road. While crossing, he was struck by a westbound van driven by Defendant Rojas and owned by Defendant Medina. Plaintiffs allege that due to Defendant Andrade parking his car in the eastbound lane of travel and having his headlights and emergency flashers on, this caused a visual obstruction that impaired Defendant Rojas's ability to see Mr. Titus crossing the road.

Plaintiffs allege that Defendant Andrade's command for Mr. Titus to cross the road placed Mr. Titus in a situation in which Mr. Titus was exposed to an unreasonable risk of harm through the reasonably foreseeable conduct of a third party, which created a "special relationship" between Defendant Andrade and Mr. Titus, such that Defendant Andrade owed him a duty to exercise reasonable care.

Though Plaintiffs allege that Defendant Andrade was off duty at the time of the incident, they allege that his actions were incidental to his duties as a police officer because they were done in the interest of public safety and as a benefit to the City. They allege that Defendant Andrade's actions were accomplished by using the authority the officer had as a result of his employment with the city. Thus, Plaintiffs allege that the City of Santa Rosa is vicariously liable for Defendant Andrade's alleged torts.

Plaintiffs assert a cause of action for negligence against all defendants and a cause of action for violation of the Bane Act against Defendant Andrade and the City of Santa Rosa. The City of Santa Rosa herein demurs to both causes of action for failure to adequately plead facts to support respondeat superior liability. Both Andrade and City demur to the second cause of action on the basis that Plaintiffs have failed to allege sufficient facts for the cause of action against either defendant

I. Plaintiffs Have Failed to State Facts Sufficient to Constitute a Cause of Action for Violation of the Bane Act

Civil Code § 52.1 ("The Bane Act") authorizes suit against those who by threats, intimidation or coercion interfere with the exercise or enjoyment of rights secured by the state or federal Constitutions or laws without regard to whether the victim is a member of a protected class. "The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." (*Austin B. v. Escondido Union Sch. Dist.* (2007) 149 Cal.App.4th 860, 883.) "[N]othing in Civil Code section 52.1 requires any showing of actual intent to discriminate." (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 841.)

> For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police "contacts" or "interactions" with individuals, ranging from the least to the most intrusive. First, there are what Justice White termed "consensual encounters" (*id.* 103 S.Ct. at p. 1329), which are those police-individual interactions which result in no restraint of an individual's liberty whatsoever—i.e., no "seizure," however minimal—and which may properly be initiated by police officers even if they lack any "objective justification." (*Id.* 103 S.Ct. at p. 1324.) Second, there are what are commonly termed "detentions," seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police "if there is an articulable suspicion that a person has committed or is about to commit a crime." (*Ibid.*) Third, and finally, there are those seizures of an individual which exceed the possible limits of a detention, seizures which include formal arrests and restraints on an individual's liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime.

*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.

Andrade and the City argue that the conduct at issue here is not sufficient to rise above the first category of Fourth Amendment interactions under *Wilson*, and that this was a consensual encounter. Andrade is alleged to have pulled his vehicle about 10 yards short of Mr. Titus, leaving on his lights and activating his hazard blinkers. He verbally engaged with Mr. Titus, instructing him to cross the street to the other side. There is no allegation that Andrade identified himself as law enforcement, that Andrade told Mr. Titus to turn back or that he was not free to leave, or that Mr. Titus was threatened with reprisals or repercussions. This falls far short of a detention. "[A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (*U.S. v. Mendenhall* (1980) 446 U.S. 544, 554.) No allegations offer a factual basis for why Mr. Titus was not free to continue in the same direction of travel, just on the other side of the road. This not being sufficient to form a detention, especially since Andrade is not even alleged to have identified himself as an officer.

To this effect, Plaintiff misconstrues the concept of a detention. While Plaintiff argues that a stop is sufficiently stated because Andrade "blocked" Mr. Titus's path, but this fails to reflect the nature of detentions. Plaintiff provides no published authority showing that mere impediment of a path is a "stop", where a detour is available and Mr. Titus remained free to walk any direction except on the shoulder Andrade allegedly blocked. "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." (*U.S. v. Mendenhall* (1980) 446 U.S. 544, 554.) Only Andrade's tone of voice is mentioned in the TAC. There were no other officers. There are no allegations that Andrade was in uniform or had a firearm. There are no allegations he identified himself as law enforcement. Andrade did not physically touch Mr. Titus. While *Mendenhall* does not provide a comprehensive list, the facts alleged are not sufficient to plead a detention.

Given that there is no indication that Andrade's conduct was under color of law, the remaining query is whether the conduct can constitute a generalized threat, intimidation, or coercion. The specific facts here fall significantly short of a threat as contemplated by the jurisprudence. "A threat is an 'expression of an intent to inflict evil, injury, or damage on another.' " (*Certation*.) When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection." *In re M.S.* (1995) 10 Cal.4th 698, 710 (defining a threat for the purposes of Penal Code § 422.6, the criminal counterpart to the Bane Act). Nothing alleged to have been said by Andrade approaches even the colloquial use of the term threatening. It falls far short of what is required to show a threat under the Bane Act.

The balance of the allegations are legal conclusions, unsupported by necessary facts. There are no factual allegations sufficient to state a Given that Plaintiff has not alleged facts sufficient to state the necessary threat, intimidation, or coercion to state a Bane Act violation.

City and Andrade also argue that Plaintiff fails to allege the necessary "intentional" conduct to state a cause of action under the Bane Act. They argue both that there was not the required "specific intent", nor any discriminatory intent. Plaintiff is correct that no *discriminatory* intent is required. (*Quezada v. City of Los Angeles* (2014) 222 Cal.App.4th 993, 1007.) However the action is required to both meet the test of "specific" intent and be deliberate or spiteful. "The act of interference with a constitutional right must itself be deliberate or spiteful." *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959. Plaintiff does not allege that the interference with Mr. Titus's rights was deliberate or spiteful.

As to specific intent, Plaintiff must show that Andrade both performed an unlawful arrest, and that he did so with the specific intent to violate Mr. Titus's rights. Plaintiff is incorrect that this is entirely a factual issue to be resolved at trial. The first step is a *purely legal determination*, to be made by the judge. *Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 803. A precursor to specific intent is that an unlawful arrest must be "pleaded and proved". *Murchison v. County of Tehama* (2021) 69 Cal.App.5th 867, 896. Given that no arrest was pleaded, this fails the specific intent test.

Plaintiff has not pled facts sufficient to support the cause of action for violation of the Bane

Act. Accordingly, Andrade and the City's demurrer to both the Second cause of action is SUSTAINED for failure to plead sufficient facts. Plaintiff has articulated no method by which they could remedy this defect, and accordingly leave to amend is DENIED.

## II. Plaintiffs Have Failed to State Facts Sufficient to Allege Defendant Andrade was Acting Within the Course and Scope of his Employment

### A. Extent of an Officer "On Duty"

Plaintiffs allege that the City of Santa Rosa is vicariously liable for the actions of Defendant Andrade because Defendant Andrade was acting within the course and scope of his employment when he stopped his vehicle to tell Mr. Titus to cross the road. The prior demurrer was sustained on this theory, finding that Plaintiff had not alleged sufficient facts to show that Andrade's off duty conduct was within the course and scope of his employment. Plaintiff has amended the complaint to now allege that Andrade was on duty at the time of the accident, due to his performance of acts which he might otherwise do when on duty.

Respondeat superior liability is "grounded upon 'a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.'" (*Martinez v. Hagopian* (1986) 182 Cal.App.3d 1223, 1228.) A public entity employer is vicariously liable for the torts of its employees committed within the scope of the employment. (Gov. Code, § 815.2.) "The determination as to whether an employee committed a tort during the course of his employment turns on whether '1) the act performed was either required or 'incident to his duties' [citation], or 2) the employee's misconduct could be reasonably foreseen by the employer in any event [citations].'" (*Martinez, supra,* at 1228.)

> [A]a public employee is acting in the course and scope of his employment "when he is engaged in work he was employed to perform or when the act is an incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or conveniences."…The phrase "scope of employment" has been equated with the express or implied power of the public employee to act in a particular instance, and in evaluating his conduct to determine whether it is within the ambit of his authority we are to look not to the nature of the act itself, but to the purpose or result intended.

(*Neal v. Gatlin* (1973) 35 Cal.App.3d 871, 875.) "[I]t is necessary to determine the main purpose of injury-producing activity: If it was the pursuit of the employee's personal ends, the employer is not liable." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1607.) "The existence or nonexistence of employer benefits is not dispositive in determining vicarious liability…Rather, the dispositive factor is whether an employee was acting within the scope of employment when the tort was committed." (*Id*. at 1609.) "The benefit of an employee's activity to the employer's enterprise, and the employer's right to control that activity, are relevant factors in determining whether the activity comes within the scope of employment." (*Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal.App.4th 1, 12.) '

Since the prior demurrer, Plaintiff has added allegations regarding the Code of Conduct for officers, and their job duties. TAC ¶¶ 6-9, 28. Plaintiff therefore argues that because the conduct undertaken is something Andrade may do during work and police officers are on duty "24 hours a day", that he was on duty at the time of the accident. TAC ¶ 24.

In support of this legal contention, Plaintiff cites to *Long v. Valentino* (1989) 216 Cal.App.3d 1287, 1298 opining that a police officer "is literally on duty 24 hours a day". The applicability of this to respondeat superior is questionable. As Plaintiff's other cited authority states, "The County argues that Inouye's cases are inapposite because their dicta pronouncements regarding the 24–hours–a–day duty of police officers do not address the issue of potential civil liability of a peace officer's employer for the officer's conduct while off duty. We agree." *Inouye v. County of Los Angeles* (1994) 30 Cal.App.4th 278, 283. The facts alleged here assert that Andrade was "on duty" as a legal conclusion. Assessment of the factual and legal support is necessary.

B. Sham Pleadings

"The general rule . . . is that material factual allegations in a verified pleading that are omitted in a subsequent amended pleading without adequate explanation will be considered by the court in ruling on a demurrer to the later pleading." *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 12. "(T)he policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint." *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384. "While inconsistent Theories of recovery are permitted (Citation), a pleader cannot blow hot and cold as to the Facts positively stated. (Citations)." *Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449. Inconsistent statements are defined as those which are "contradictory or antagonistic." *Steiner v. Rowley* (1950) 35 Cal.2d 713, 719.

The first reason to disregard Plaintiff's newfound allegation that Andrade was on duty at the time of the incident is that it contradicts previous express allegations. To the degree that this is based on Plaintiff's erroneous legal conclusion, the below shows there are insufficient facts alleged to support it, and their legal authority does not adequately substantiate their position. To the degree the contention represents a full factual reversal of Plaintiff's prior allegations, it falls directly under the sham pleading doctrine. Plaintiff may not modify facts in the pleading to fit their theories, the theories may only be reassessed to fit the facts. *Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449. Plaintiff may avoid this result by showing the reason for the changed allegation, but Plaintiff has not done so here. Plaintiff admits in prior complaints that Andrade was not on the clock at the time of the incident, and their legal authorities are insufficient to show that this nonetheless mandates that they are "on duty" at all times for respondeat superior purposes. The prior decision here adequately expresses the vulnerability of this reasoning. Under Plaintiff's theory, the City would be liable for every purportedly negligent act that tangentially benefitted the public good. Plaintiff's factual definition of "on duty" fails as a legal conclusion. The prior admission that Andrade was not actively on duty at the time of the accident controls.

C. Judicial Admissions

Plaintiff's contention regarding the City's provision of defense for Andrade fares no better. As the City points out on reply, if the allegations are found to be within the course and scope of employment, the City is obligated to provide for Andrade's defense. Gov. Code § 995. In contrast, where they find that the conduct is outside the course and scope of employment, they may refuse to provide defense. Gov. Code § 995.2. It is rational for the City to have elected to provide a defense, as they would be obligated to do if the Court were to adopt Plaintiff's position. Plaintiff is not persuasive that the City's election constitutes a judicial admission. It is irrelevant for determining if the conduct in the TAC adequately pleads that Andrade's conduct was within the scope of his employment.

D. Respondeat Superior for "Off Duty" Officers

The determinative question is whether Andrade's off-duty conduct in attempting to avoid an accident (and thereby allegedly causing it) falls within the scope of his employment. Cases relating to the conduct of officers while on duty are varied but inapplicable. The majority of cases related to police officer's off-duty conduct relate to shootings during the course of arrests or detentions. See, e.g., *Inouye v. County of Los Angeles* (1994) 30 Cal.App.4th 278.

The most analogous case appears to be *Henriksen v. City of Rialto* (1993) 20 Cal.App.4th 1612 ("*Henriksen*"). In that case, an officer, who was off duty and drinking alcohol, negligently shot the plaintiff while handling his service weapon. (*Id*. at 1616.) The trial court granted the city's summary judgment to the officer's cross complaint for indemnity. (*Id*. at 1615-1616.) The court of appeal affirmed, noting that the factors provided in *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209 applied. (*Henriksen, supra,* at 1618.) The court of appeal determined that the conduct at issue was not appropriate for respondeat superior, failing the *Mary M.* factors. *Id.* at 1621-1622.

Accordingly, though neither party raises it, the *Mary M.* factors must be addressed and applied to the allegations within the TAC. Respondeat superior should be applied "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209.)

The first step, preventing recurrence of tortious conduct, does not militate in Plaintiff's favor. The conduct alleged here, much like that alleged in *Henriksen* provides greater benefit than risk as a policy. The *Henricksen* court noted that the city received a benefit from its officers keeping their service weapons during off-duty hours. (*Henriksen, supra,* at 1618.) Andrade undertook action to attempt to reduce the risk of an accident by telling Mr. Titus to cross to an area where he would be further from the roadway. First, this is not a function unique to police officers, any concerned citizen might have advised Mr. Titus in such a manner. It would not likely prevent additional accidents to create a rule discouraging officers from vocalizing risks apparent to them in their off-duty hours. It is dubious whether the city even *could* do anything to prevent this, as it would essentially require them to prohibit officers from doing anything for the public benefit while off hours. This factor weighs heavily against Plaintiff.

Second, the question is whether this would give "greater assurance of compensation for the victim". This segment, at least at demurrer, almost assuredly weighs in Plaintiff's favor to some degree, but there are no allegations regarding the scope of that distinction. As such, it has limited weight.

Finally, the third factor weighs against Plaintiff. Plaintiff expresses no reason why the public should bear the costs beyond their general averment of the public good. Much like *Henriksen*, this asks the City to take responsibility for off duty conduct of its officers, over which it has no control. Plaintiff does not plead facts sufficient to show that there is a reason to make the public bear the cost of conduct which any non-officer could undertake as a concerned citizen.

On reviewing the factors, Plaintiff has not pled facts sufficient to show the propriety of respondeat superior. Accordingly, the City's demurrer to both the First and Second causes of action is SUSTAINED on lack of liability for Andrade's conduct. Plaintiff has articulated no method by which they could remedy this defect, and accordingly leave to amend is denied.

**4. <u>25CV05528, Citibank v. Edwards</u>**

Plaintiff Citibank, N.A.'s ("Plaintiff" or "Citibank") unopposed motion to set aside and vacate the Court's prior order of dismissal and enter judgment pursuant to Code of Civil Procedure ("C.C.P.") section 664.6 is **GRANTED**. Judgment shall be entered in the amount of **$4,031.63** against Defendant Edwards ("Defendant"). Plaintiff's request for judicial notice of the Stipulation Agreement filed in this case is **GRANTED**.

## I. PROCEDURAL HISTORY

Plaintiff brought this action against Defendant to collect payment on credit card debt owed. The parties entered into a Stipulation Agreement, according to which Defendant agreed to pay Plaintiff $4,245.02 to satisfy the debt owed under account number ending in 3813. (Request for Judicial Notice ["RJN"], Exhibit B, ¶¶ 1-2.)

Per the Stipulation, the case would be dismissed with the Court retaining jurisdiction to enforce the parties' Stipulation under which a default on the payment by Defendant would result in the Court vacating the dismissal entered and entering judgment for the amount remaining on the debt plus any court costs required. (RJN, Exhibit B, ¶ 7.) Defendant defaulted after paying off $797.00 and now Plaintiff moves that the dismissal be vacated and judgment be entered for the remaining unpaid amount plus court costs. (Langedyk Decl., ¶¶ 6-7.)

## II. ANALYSIS

If parties to a pending litigation agree to sign a written stipulation for settlement of the case, then the court may upon noticed motion enter judgment pursuant to the terms of the settlement. (C.C.P. § 664.6(a).) The court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement if the parties request it. (*Ibid*.) "Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.)

Plaintiff requests to vacate the dismissal and enter judgment per the Stipulation and section 664.6. (Motion, pp. 3-4.) Plaintiff properly and timely served notice of the hearing date and notice of this motion by mail on Defendant, who has not opposed. Bank of America now moves the Court to enter judgment in the amount of $4,031.63 against Defendant, which includes the balance remaining on the debt of $3,448.02 and court costs of $583.61. (Langedyk Decl., ¶ 7; See generally Memorandum of Costs.)

Plaintiff has sufficiently demonstrated that the parties entered into a valid written and signed settlement agreement that was subject to C.C.P. section 664.6, under which Defendant continues to owe after defaulting on the agreed-upon payment obligations. Per the motion, the parties'

Stipulation, and section 664.6, the Court finds it reasonable to enter judgment in the amount of $4,031.63 against Defendant for the remaining debt owed and court costs.

## III. CONCLUSION

Accordingly, the unopposed motion is **GRANTED**. Judgment shall be entered in the amount of **$4,031.63** against Defendant for the outstanding debt plus costs. Unless the parties request and appear for oral argument, the Court will sign the proposed order setting aside the dismissal and the proposed judgment filed with this motion.

## 5. 24CV04077, Torninato v. Gonzales

This matter is continued to September 23, 2026 at 3:00 pm in Department 18. No further briefing is allowed.

## 6. 24CV03934, Ortiz v. John Doe

Counsel Lusine Ghazaryan moves unopposed to be relieved as counsel for client Plaintiff David Ortiz. The motion is **GRANTED**, per Code of Civil Procedure section 284(2).

Counsel's declaration states that this motion was necessary due to a "an irremediable breakdown in the attorney client relationship that stands in the way of effective representation." (Counsel Decl., ¶ 2.) No opposition or objection has been filed. The next hearing date is a Trial Readiness Conference on April 16, 2027. Unless oral argument is requested, the Court will sign the proposed order lodged with the motion.

## 7-8. 24CV00099, Burns v. Kuok

### 1. Cross-Defendant REALHome Services and Solutions, Inc.'s Demurrer to the Cross-Complaint

Cross-Defendant REALHome Services and Solutions, Inc. has filed a withdrawal of the demurrer.

### 2. Cross-Defendants' Motion to Bifurcate Trial of Complaint and Cross-Complaint

Cross-Defendants' Motion to Bifurcate Trial of Complaint and Cross-Complaint is **DENIED**. All requests for judicial notice are **GRANTED**.

Cross-Complainant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Analysis:

Plaintiffs, Jordan Burns and Jennifer Branham-Burns, allege that on April 1, 2016, Plaintiffs entered into a written lease agreement with an option to purchase the property located at 1158 Comalli St., Santa Rosa, CA 95407, with Elizabeth Bjornstad, who owned the Property at that time. The purchase price under the Lease Option was $350,000 or the current remaining principle on the mortgage identified in the Lease Option.

In March 2018, before the end of the term of the Lease Option, the Property was foreclosed. It was subsequently purchased by Defendants, Hen Kuok and Dim Nhey, on August 13, 2018 for $443,000. Plaintiffs allege that at all times, Defendants have had notice of the Lease Option. As alleged, at the time of the initial foreclosure proceedings in 2017, Plaintiffs gave notice of the Lease Option to Ocwen Loan Servicing, which serviced the mortgage for the prior owner and was involved in the foreclosure. On May 16, 2018, Plaintiffs also provided a copy of the Lease Option to Wells Fargo Bank who acted as the trustee for the foreclosure. Plaintiffs also gave a copy of the Lease option to the Defendants' real estate agent after the foreclosure.

In September 2018, approximately a month after purchasing the Property, Defendants attempted to evict Plaintiffs by giving a 90-day notice of termination of tenancy. After Plaintiffs asserted rights under the Lease Option, Defendants rescinded the eviction notice and gave instructions to Plaintiffs about how to make rent payments. Plaintiffs have continued to live at the Property, pay the rent/purchase amount due, and pay for all repairs and improvements to the Property.

On February 21, 2023, Plaintiffs exercised their option to purchase the Property under the terms of the Lease Option. Plaintiffs have arranged financing and have taken all of the steps they can to date to purchase the Property. Defendants have refused to transfer title to the Property, claiming that the option to purchase was extinguished when the Property was foreclosed. Plaintiffs brought suit against Defendants asserting causes of action arising out of breach of contract and fraud.

On March 11, 2024, Defendants filed a Cross-Complaint against Ocwen Loan Servicing LLC, Wells Fargo Bank, N.A., Trustee for Harborview Mortgage Loan Trust 2006-10, Altisource Online Auction, Inc. dba Hubzu; and Roes 1 through 25. Defendants/Cross-Complainants assert that Ocwen Loan Servicing, LLC and Wells Fargo Bank N.A. failed to disclose the lease option to purchase the Property to potential purchasers and Cross-Complainants. As such, at the time of the purchase, Cross-Complainants had no knowledge of Plaintiffs' lease option to purchase the Property. Therefore, Cross-Complainants are bona fide purchasers for value.

Cross-Complainants assert causes of action against Cross-Defendants for (1) Nondisclosure of Material Facts by Mortgage Holder; (2) Equitable Indemnity; (3) Contribution; (4) Intentional Representation; (5) Negligent Misrepresentation; and (6) Intentional Concealment.

Cross-Defendants herein request that the Court exercise its discretion under CCP §§ 379.5, 598, and 1048(b) to bifurcate the trial into two phases—the first phase being solely on the claims of the Complaint and the second phase being on the claims of the Cross-Complaint. Cross-Defendants argue that doing so would be in the interests of judicial economy and efficiency because if Plaintiffs do not succeed in proving their claims against Defendants, then the Cross-Complaint will be "moot" because there will be nothing for Cross-Defendants to indemnify Cross-Complainants for.

Cross-Defendant's motion fails for numerous reasons. First, Cross-Complainants do not merely seek indemnity from Cross-Defendants for the claims of Plaintiffs. They assert causes of action against Cross-Defendants that would result in direct liability independent of the outcome of the Complaint, such as the fraud causes of action. Accordingly, the major premise upon which this motion is made—that if Plaintiff does not succeed against Defendants, then Defendants cannot succeed against Cross-Defendants—is unavailing.

Moreover, the facts of the Complaint and the Cross-Complaint are inextricably intertwined, such that several witnesses will overlap if the case is tried in two phases. The initial creation of the Lease Option, Plaintiff's learning of the foreclosure and providing Cross-Defendants with a copy of the Lease Option, Cross-Defendants failure to disclose the Lease Option to Defendants in their purchase of the Property from Cross-Defendants, and Defendants' refusal to honor the terms of the Lease Option will all factor in to determinations of liability on each of the causes of action in both the Complaint and the Cross-Complaint. There is no way to try either the Complaint or Cross-Complaint without calling overlapping witnesses, such as Plaintiffs, Defendants, and Cross-Defendants. Accordingly, the Court does not agree with Defendant that a trial in two phases would promote judicial economy and efficiency. Rather, it would do the opposite.

Nor does Cross-Defendant's Reply persuade the Court that the opposition was "smoke and mirrors". Cross-Defendants are the foreclosing parties who transferred the property to Defendants/Cross-Complainants without disclosing Plaintiff's right to purchase. The legal issues are not discrete, and Cross-Defendants invariably will be required to opine on facts underlying the contentions of both Plaintiffs and Defendants. The bifurcation of trial increases the risk of repetitive evidence, and loss of a consistent finder of fact. Bifurcation is inappropriate here.

## 9. SCV-273177, Cotchett v. Romano

Defendant's motion for summary judgment is **DENIED**. Defendant's alternative motion for summary adjudication is **DENIED**.

Plaintiff's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Evidentiary Objections:

Plaintiff's objections to Defendant's evidence are **OVERRULED**.

Defendant's objections to the Declaration of Darrell Lancaster are **SUSTAINED** in part and **OVERRULED** in part, as follows:

Objection No. 1 – sustained only as to "which I later came to learn was owned by Donna Romano's family."
Objections Nos. 2-4 – sustained
Objection No. 5 – overruled
Objections Nos. 6-11 – overruled

Defendant's objections to the Declaration of Rachell Cotchett are **SUSTAINED** in part and **OVERRULED** in part, as follows:

Objections Nos. 1-5 – overruled
Objection No. 6 – sustained only as to "Ms. Romano knew that I had always dreamed of having a flower farm of my own"
Objections Nos. 7-11 – overruled
Objections Nos. 12-13 – sustained
Objections Nos. 14-24 – overruled

<u>Background and Summary:</u>

Plaintiff alleges in her Third Amended Complaint that she and Defendant were life-long friends. In approximately December of 2021, the parties entered into an oral agreement to operate a flower growing farm and flower retail shop on Defendant's family's property. Plaintiff alleges that Defendant proposed a joint venture where Plaintiff would develop a growing operation and in turn Defendant would benefit from the beautification and landscaping of her family's property due to the addition of a flower farm. The joint venture would capitalize on the flower farm by adding a retail farm stand and hosting events, such as weddings, flower arranging workshops, and pumpkin patches on the property. According to Plaintiff, the parties agreement provided that Plaintiff could use the flowers grown on the property to supply flowers to her separate flower arranging business, Wild Flower Artistry, for at least ten years, while Defendant would enjoy the benefits of the flower garden on her property. If Plaintiff would withdraw from the business at that point, Plaintiff alleges that the parties agreed that Defendant would retain the operations and inventory of Sol Sistas.

Plaintiff alleges that the parties formed a joint business called Sol Sistas. As alleged, Plaintiff spent thousands of dollars and hours of her own time planting flowers and building the infrastructure necessary to grow flowers and establish a retail space. She also forewent another business opportunity to go into business with Defendant.

As alleged, in January 2023, Defendant abruptly asked Plaintiff to sign a lease agreement to rent the property from the trusts that owned it, but Plaintiff refused. Therefore, Plaintiff alleges that Defendant abruptly reneged on the partnership agreement, told Plaintiff she could no longer grow and sell flowers on the property, and kept the business and its infrastructure for herself.

Plaintiff alleges that Defendant represented to her that she had the authority to allow Plaintiff and Sol Sistas to utilize the property for their activities. In reality, as Plaintiff alleges, Defendant and Defendant's sister are the co-trustees of the trusts that own the property. Therefore, Defendant needed the approval of the other co-trustee to allow Plaintiff to use the property in the manner promised. Plaintiff alleges that Defendant knew this, but represented otherwise to Plaintiff to induce her to make improvements to the property. Plaintiff alleges that Defendant never had any intention to perform under the parties' oral contract. Plaintiff also alleges that Defendant obtained the property of Plaintiff (the infrastructure purchased for the business) from Plaintiff in a manner constituting theft.

Plaintiff alleges causes of action against Defendant for (1) breach of contract (2) promissory fraud (3) intentional misrepresentation (4) breach of the implied covenant of good faith in fair dealing (5) violation of Penal Code section 496(c) and (6) quantum meruit.

Defendant herein seeks summary judgment in her favor, or in the alternative, summary adjudication of each of the causes of action asserted against her. Defendant relies on her own declaration and the deposition testimony of Plaintiff to support her arguments that there lack any tribal issues of material effect as to any of the causes of action. Defendant submits that the undisputed facts show that there was never any joint venture involving a retail flower shop that did business on the property. Plaintiff has submitted her own declaration that contradicts each of the factual assertions made by Defendant regarding the parties agreement or representations made in relation to or in the course of forming the agreement. The evidence in the record is entirely contradictory and the defendant has failed to show the lack of triable issue of material fact as to any of the causes of action.

Analysis:

As an initial matter, the Court notes that it does not find the procedural deficiencies of Defendant's Separate Statement to warrant outright denial of the motion.

I. First Cause of Action – Breach of Contract

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.

Defendant raises several arguments in support of the motion for summary adjudication of this cause of action. The first is that there was never any agreement to enter into a joint venture, the second is that the contract is illusory, the third is that it lacks consideration and the fourth is that it is barred by the Statute of Frauds and that no exceptions to the Statute of Frauds apply. In reply, Defendant argues for the first time that Plaintiff cannot establish contract damages.

Defendant's position regarding the existence of an agreement to create a joint venture is not persuasive. The evidence to this point is entirely contradictory and consists mostly of self-serving statements by either party regarding their perceptions of the communications and history of events between the two parties. The evidence in the record reflects triable issues of material fact regarding whether the parties intended to embark upon a joint venture, whether such an agreement was created, and what the terms of that agreement were. There also exist triable issues of material fact regarding Plaintiff's damages. It is Defendant's initial burden to prove that Plaintiff will be unable to prove the elements of this cause of action. Defendant has not met that burden; therefore, the burden did not shift to Plaintiff to provide such evidence.

Regarding defendant's argument that the contract is illusory, there is nothing in the record to indicate that either party retained an unfettered right to terminate or modify the agreement. (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 15.) The record also does not support defendant's contention that there was no consideration. Plaintiff asserts that the consideration Defendant received under their agreement is that she was to receive the benefit of Plaintiff's time, expertise, effort, and money spent on building the flower farm on the Defendant's Property, which would not only beautify the Property but would result in measurable improvements to the Property that would increase its value. Defendant has not shown a lack of triable issue of material fact regarding consideration.

Finally, regarding Defendant's arguments that this cause of action is barred by the Statute of Frauds, this argument was addressed by the Court in detail in the Court's order on Defendant's demurrer to the Third Amended Complaint. As explained by the Court in that order, the Court agrees that the Statute of Frauds does apply to this cause of action. However, the Court also explained that the Plaintiff had sufficiently alleged that two exceptions to the Statute of Frauds applied—equitable estoppel and part performance. The Defendant has not shown the lack of tribal issue of material fact as to either of these two exceptions to the Statute of Frauds.

*a. Equitable Estoppel*

"A party is estopped to assert the statute of frauds as a defense 'where [the] party, by words or conduct, represents that he will stand by his oral agreement, and the other party, in reliance upon that representation, changes his position, to his detriment.'" (*Garcia v. World Sav., FSB* (2010) 183 Cal.App.4th 1031, 1041, fn. 10.) "The existence of an estoppel is a question of fact, unless, of course, but a single inference may be drawn from the facts." (*Associated Creditors' Agency v. Haley Land Co.* (1966) 239 Cal.App.2d 610, 617.) "The doctrine of estoppel to assert the statute of frauds is invoked to prevent fraud that inheres in unconscionable injury that would result from denying enforcement of the oral contract after one party has been induced by the other seriously to change his position in reliance upon the oral contract."

Defendant argues that equitable estate does not apply here because Plaintiff was aware that the property did not belong to Defendant and that it could be sold at any time; therefore, Plaintiff could not have reasonably relied on any alleged promise by Defendant. This argument is unpersuasive. There is evidence that Defendant told Plaintiff she planned to buy the Property from her siblings after her mom passed away so that she would be the sole owner and could retire there. Therefore, triable issues of material fact exist as to whether Plaintiff's reliance on Defendant's alleged promises regarding the property was reasonable.

> The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract…or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute.

(*Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 623–624.) There is evidence that Plaintiff invested significant time and funds into improving Defendant's property under the belief that the parties had entered into a joint venture. Whether such belief was reasonable is a question for the trier of fact. A single inference cannot be drawn from the facts before the Court. Triable issues of material fact exist as to whether Defendant is equitably estopped from invoking the Statute of Frauds.

*b. Part Performance*

"The doctrine of part performance by the purchaser is a well-recognized exception to the statute of frauds as applied to contracts for the sale or lease of real property." (*Sutton v. Warner* (1993) 12 Cal.App.4th 415, 422.) However, "[b]efore a party can be estopped to assert the statute due to the other's part performance, it must appear that a sufficient change of position has occurred so that the application of the statutory bar would result in an unjust and unconscionable loss, amounting in effect to a fraud." (*Anderson v. Stansbury* (1952) 38 Cal.2d 707, 715.) The mere payment of money is not sufficient part performance to take an oral agreement out of the statute of frauds "for the party paying money 'under an invalid contract…has an adequate remedy at law.'" (*Id.* at 716.)

As stated above, there is evidence that Plaintiff invested significant time and funds into improving Defendant's property under the belief that the parties had entered into a joint venture. Whether such acts were or were not taken in connection with a joint venture is not established unequivocally in the record. Triable issues of material fact exist as to whether Defendant is estopped from asserting the Statute of Frauds based on part performance.

## II. Second and Third Causes of Action – Promissory Fraud and Intentional Misrepresentation

Defendant asserts that these causes of action fail because when asked at her deposition what false statements were made by Defendant to her, Plaintiff testified only "that we would be doing this for 10 years." As argued, Defendant's alleged misrepresentation is either a statement of opinion or representation of a future event, neither of which is actionable. Notwithstanding whether this argument has merit, this is not the sole misrepresentation alleged by Plaintiff. Plaintiff also alleges, and has submitted evidence to support her allegations, that Defendant misrepresented to her that Defendant was going to buy her siblings out of the property upon her mother's death so she could retire there and thus have decision-making authority to commit the property to their joint venture for a period of at least 10 years.

Nevertheless, both of these alleged misrepresentations are actionable. These alleged misrepresentations are not statements of opinion or predictions about future events.

> The rule that mere expressions of opinion cannot constitute actionable fraud is, no doubt, subject to some qualification. A party inducing another to contract in reliance upon estimates or opinions professedly based upon alleged facts known to the party stating them to be non-existent will not be permitted to escape responsibility by the plea that he was merely declaring his opinion. A statement that the history of the defendant showed that its stock would mature in seven years is clearly a statement of fact, and, if falsely made and relied on, would furnish ground for relief to the party misled by it.

(*Henry v. Continental Building & Loan Ass'n* (1909) 156 Cal. 667, 680.) Similarly, a statement made that a joint venture would last for 10 years is clearly a statement of fact that if falsely made and relied on, would furnish ground for relief. Similarly, a statement that a party would purchase a particular property in order to benefit a joint venture is likewise an actionable statement of fact. In reply, Defendant argues for the first time that Plaintiff cannot not prove reliance damages. This argument is not persuasive. Triable issues of material fact exist as to Plaintiff's damages.

## III. Fourth Cause of Action – Breach of Implied Covenant of Good Faith and Fair Dealing

Defendant argues that to the extent the alleged oral contract cannot be enforced, a claim for breach of the implied covenant of good faith and fair dealing likewise cannot prevail. The Court agrees that this cause of action is derivative of the breach of contract cause of action. Since

Defendant has failed to establish a lack of triable issue of material fact as to the First Cause of Action, she has also failed to make such a showing as to this one.

IV. Fifth Cause of Action – Violation of Penal Code § 496(c)

The elements of this cause of action under Penal Code § 493(c),

> 1. The defendant (bought/received/sold/aided in selling/concealed or withheld from its owner…property that had been (stolen/obtained by extortion);
> [AND]
> 2. When the defendant (bought/received/sold/aided in selling/concealed or withheld…the property, (he/she) knew that the property had been (stolen/obtained by extortion)…

(CALCRIM 1750.) "[Property is *stolen* if it was obtained by any type of theft, or by burglary or robbery. [Theft includes obtaining property by larceny, embezzlement, false pretense, or trick.]]" (CALCRIM 1750.)

Plaintiff alleges that the equipment, tools, plants and shed that she provided on the property belonged to Plaintiff and were obtained by Defendant a manner constituting theft under false pretenses or trickery. This is because Defendant never intended to honor the parties' agreement and knew at the time of receiving the items that she obtained them under false pretenses or trickery. Defendant argues that the undisputed facts show that Plaintiff gifted the shed and planter boxes to Defendant and her sisters and was given ample opportunity to get her property back and never did. However, Plaintiff's testimony contradicts this. Triable issues of material fact exist as to this cause of action.

Defendant argues for the first time in reply that Plaintiff lacks proof of actual damages. Considering this Court finds that Defendant never met its initial burden on this motion to prove the lack of triable issue of material fact as to damages, the burden on this motion did not shift to Plaintiff to provide such evidence.

V. Sixth Cause of Action – Quantum Meruit

"Quantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.'" (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 458.) "To recover in quantum meruit, a party need not prove the existence of a contract…but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made'." (*Ibid*.)

Plaintiff alleges that the parties understood that if Plaintiff did the work to create a flower growing operation on Defendant's property, Plaintiff would be compensated by being permitted to use the flowers grown on the property for her own separate flower arranging business for 10 years. She alleges that Defendant benefited from the work performed by Plaintiff by beautifying the property and creating the infrastructure necessary to operate a flower growing and flower retail operation on the property. Plaintiff has now sufficiently alleged this cause of action.

Defendant argues that the allegation that this was done to benefit Defendant is inconsistent with Plaintiff's allegation and testimony that she did it in further of the alleged joint venture. Defendant has not pointed to anywhere in the record where Plaintiff stated that such work and effort was done in furtherance of the alleged joint venture. Rather, Plaintiff alleges that it was always part of the plan that Plaintiff would use some of the flowers in her separate business.

For the first time on reply, Defendant argues that Plaintiff has not supplied time records, task breakdown, customary hourly rate, expert opinion, market comparison, or other evidence of reasonable value of services. Again, the Court finds that Defendant never met its initial burden on this motion to prove a lack of tribal issue of material fact as to this cause of action. Accordingly, it is Defendant's burden to prove that Plaintiff cannot produce such evidence. Defendant has not done so. Triable issues of material effect exist as to this cause of action.

*****This is the end of the Tentative Rulings*****