TENTATIVE RULINGS
LAW & MOTION CALENDAR
Friday, April 4, 2025 9:00 a.m.
Courtroom 19 –Hon. Oscar A. Pardo
3055 Cleveland Avenue, Santa Rosa

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) 521-6602**, 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.

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1. 24CV04489, Barta v. Pure Luxury Limousine Service

Defendant Pure Luxury Limousine Service's ("Defendant") motion to compel arbitration is **GRANTED** as to Plaintiff Joao Barta's ("Plaintiff") individual claims. Plaintiff's Complaint is stayed pending completion of arbitration.

I. Procedural History

This action arises from the employment of Plaintiff with Defendant. As part of the hiring process, Plaintiff signed an Alternative Dispute Resolution Agreement ("Agreement") on March 13, 2023 and states in relevant part:

> 1. Both Pure Luxury Limousine Service, Inc. ("Company") and the undersigned employee ("Employee") acknowledge and agree that in, the event employment disputes arise between them, both parties will be bound by this Alternative Dispute Resolution Agreement ("Agreement") providing for final and binding arbitration of disputes relating to the Employee's employment with the Company or the termination of employment. **Both the**

Company and the undersigned Employee hereby expressly wave any right that either party has or may have to a jury trial of any dispute covered by this Agreement and arising out of or in any way relates to the Employee's employment with the Company including, but not limited to, the termination of said employment.

2. The purpose of this Agreement is to encourage the speedy, cost-effective resolution of disputes between the Company and its employees concerning any of the terms, conditions or benefits of employment and disputes arising from termination of the employment relationship, but excluding any claims for which arbitration is disallowed as a matter of law. Both the Company and the Employee shall be required to submit any dispute(s) covered by this Agreement to binding arbitration in accordance with the then-current rules of the American Arbitration Association rules and procedures for the resolution of employment disputes.

6. The enforceability of this agreement shall be governed by California law. Should any part of this Agreement be declared by a court of competent jurisdiction to be invalid, unlawful or otherwise unenforceable, the remaining parts shall not be affected thereby; the parties expressly agree that, to the extent permitted by law, they shall arbitrate their dispute without reference to or reliance upon the invalid, unlawful or unenforceable part of the Agreement.

7. This Agreement is the full and complete Agreement of the parties relating to resolution of disputes about conditions of employment and/or termination of employment.

(Buffo Declaration, Exhibit A)

Plaintiff filed a Complaint alleging eight causes of action: (1) failure to pay minimum and straight time wages, (2) failure to pay overtime wages, (3) failure to provide meal periods, (4) failure to authorize and permit rest periods, (5) failure to timely pay wages at termination, (6) failure to provide accurate itemized wage statements, (7) failure to indemnify employees for expenditures, and (8) unfair business practices. (See Class Action Complaint, filed July 30, 2024.)

Defendant seeks to compel Plaintiff to submit his claims to arbitration and to stay Plaintiff's Complaint pending completion of arbitration.

Plaintiff asserts that the Court should deny the motion to compel arbitration because the Agreement is procedurally and substantively unconscionable.

II. Governing Law

A. Unconscionability

Both procedural and substantive unconscionability must be present before a court can refuse to enforce an arbitration provision based on unconscionability. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243.)

1. Procedural

"Procedural unconscionability pertains to the making of the agreement; it focuses on the oppression that arises from unequal bargaining power and the surprise to the weaker party that results from hidden terms or the lack of informed choice." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795.) First, the court must determine whether the contract is adhesive, meaning it is standardized and offered by the party with superior bargaining power on a take-it-or-leave-it basis. (*Baltazar, supra,* 62 Cal.4th at 1245.) Then the court determines whether the circumstances of the contract's formation created such oppression or surprise that the overall fairness must be subject to closer scrutiny. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126 ["*OTO*"].)

2. Substantive

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246.) Mere unequal benefit is insufficient to show substantive unconscionability, rather, the terms must be "so one-sided as to shock the conscience." (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.) Though many factors go into determining substantive unconscionability, the primary consideration in assessing substantive conscionability is mutuality. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 655.)

III. Analysis

A. Procedural Unconscionability

1. Adhesion Contract

In Opposition, Plaintiff asserts that the Agreement is both procedurally and substantively unconscionable. Regarding procedural unconscionability, Plaintiff argues that the Agreement is an adhesion contract, which makes the contract per se unconscionable. (Opposition, 3:17–4:12.) Specifically, Plaintiff argues that since the contract was on a take-it-or-leave-it basis with no opportunity to negotiate the terms of the contract, the contract is one of adhesion. (Opposition 3:23–27.)

The Court finds that this Agreement is one of adhesion because it is a standardized agreement imposed as a condition of Plaintiff's employment. Defendant does not dispute this fact. (Motion to Compel, 7:3–5.) However, adhesion alone does not make an agreement procedurally unconscionable per se—the Court must also review the circumstances of the contract's formation for oppression or surprise. (*OTO, supra*.)

2. Oppression or Surprise

Relevant factors in determining whether there was oppression includes "(1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Hasty v. Am. Auto. Assn. etc.* (2023) 98 Cal.App.5th 1041, 1056.)

Defendant argues that the Agreement is not procedurally unconscionable because the Agreement was not the result of surprise or oppression. (Motion to Compel 7:2–25.) Defendant asserts that Plaintiff received the agreement before his first day of work giving him time to review or negotiate its terms, Defendant did not exert any pressure on Plaintiff to sign the Agreement, and that the Agreement itself is plain and unambiguous. (Motion to Compel, 7:16–25.) Defendant further claims that Plaintiff is fluent in English and Plaintiff did not dispute this fact. (Reply, 5:21–26)

Plaintiff argues that failing to include the American Arbitration Association ("AAA") rules and procedures (referenced in the Agreement) with the Agreement itself or tell Plaintiff how to access these rules made it impossible for Plaintiff to know how to initiate arbitration or understand the critical areas of arbitration, which highlights the oppressive nature of the agreement. (Opposition, 5:8–18.)

The Court finds these arguments uncompelling. Here, Plaintiff had two weeks to review the Agreement before he began working as a driver for Defendant. (Buffo Declaration, ¶2.) Plaintiff claims he was never given an opportunity to negotiate the terms of the Agreement. (Barta Declaration, ¶ 7.) However, Defendant allegedly offers to answer questions about pre-employment forms, including the Agreement, during the training process and Plaintiff did not raise any questions about the forms during this time. (Reply, 7:13–17; Buffo Declaration, ¶¶ 3–4). Failing to ask to negotiate or request attorney review of the Agreement does not mean that Plaintiff never had an opportunity to have attorney review or to negotiate the terms. Plaintiff does not contest that he had a two-week period from when he was first given the Agreement on March 13, 2023, to when he began working as a driver on March 30, 2023, to review and engage in negotiations or seek clarifications. Additionally, Plaintiff's reliance on *Parada v. Superior Ct.* to support this contention is misplaced. (*Parada v. Superior Ct.* (2009) 176 Cal.App.4th 1554, 1570–571.) The agreement in *Parada* contained a provision that "Any deletions from, additions to or cutting or mutilation of any portion of this Agreement will render the Agreement unacceptable." (*Ibid.*) The Agreement at issue here had no such provision. In fact, the Agreement states that it "may not be modified except by the parties in writing," which implies that Plaintiff had the option to modify the Agreement in writing throughout his entire period of employment with Defendant. (See Buffo Declaration, Exhibit A, ¶ 7.) Furthermore, Plaintiff does not claim any pressure at the hands of Defendant to sign the Agreement. The Agreement itself is a two-page document with seven short paragraphs that uses plain English and reasonably sized font without legalese or legal jargon.

Defendant's failure to include the AAA rules and procedures with the Agreement is one factor but is not dispositive of a finding of procedural unconscionability. (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 721.) The Agreement does specify that the arbitration will occur "in accordance with the then-current rules of the American Arbitration Association rules and procedures for the resolution of employment disputes." (See Buffo Declaration, Exhibit A, ¶ 2.) Rules and procedures of the AAA for employment disputes are reasonably accessible to Plaintiff through independent search, which he would have had two weeks to review himself or solicit an attorney for assistance. (See *Lane v. Francis Cap. Mgmt. LLC* (2014) 224 Cal.App.4th 676, 691–92 [concluding that "[F]ailure to attach a copy of the AAA rules did not render the agreement procedurally unconscionable. There could be no surprise, as the arbitration rules referenced in the agreement were easily accessible to the parties—the AAA rules are available on the Internet"].) Even though the Agreement requires Plaintiff to arbitrate all claims "in any way related to [his] employment," this also applies equally to Defendant. (See Buffo Declaration, Exhibit A, ¶ 1; *Fitz*, supra, at 725 [reasoning that "arbitration agreements imposed in adhesive contexts lack basic fairness if they require one party but not the other to arbitrate all claims arising out of the same transaction or occurrence"].)

Plaintiff further claims he has no recollection of receiving the Agreement at any point during his employment, that he did not know what the word "arbitration" meant, or that no one at his job explained the contents or significance of the Agreement or gave him a copy of the agreement. (Barta Declaration, ¶¶ 6–11.) However, the Agreement is clearly labeled "Alternative Dispute Resolution Agreement" in bolded font and is signed and dated by Plaintiff and was kept in his personnel file. It was not the duty of Defendant to explain to Plaintiff what arbitration meant or explain its contents when the Agreement is a contract on its face. (*Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.* (2001) 89 Cal.App.4th 1042, 1049 ["ordinarily one who signs an instrument which on its face is a contract is deemed to assent to all its terms. A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing"] [citations omitted].) There is no argument that Plaintiff was unable to access his personnel file from Defendant to retain a copy of the Agreement. Additionally, Plaintiff's assertion that he did not know he was waiving certain rights by signing the Agreement is unpersuasive. The only section of the Agreement that is bolded to bring emphasis to that section is at the end of the first paragraph which states that "**Both the Company and the undersigned Employee hereby expressly wave any right that either party has or may have to a jury trial of any dispute covered by this Agreement and arising out of or in any way relates to the Employee's employment with the Company including, but not limited to, the termination of said employment.**" (See Buffo Declaration, Exhibit A, ¶ 1.)

Therefore, the only factors that could support a finding procedural unconscionability of the Agreement are the fact that the contract was one of adhesion, and Defendant did not provide a copy of the applicable AAA rules or tell Defendant where he could retrieve the rules. However, the circumstances of the Agreement formation here do not show an inequity in bargaining power between the Parties, a lack of a meaningful choice, or terms that unreasonably favor Defendant. Thus, based on the foregoing, the Agreement was not formed as a result of oppression or surprise.

B. Substantive Unconscionability

While a contract must show both procedural and substantive unconscionability, they are not required "to be present in the same degree" and are evaluated on a "sliding scale." (*OTO, supra,* at 125 citing *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 114.) "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude that the term is unenforceable" and vice versa. (*Ibid.*)

Defendant claims the Agreement is not substantively unconscionable because it is a fair and reasonable agreement that does not "shock the conscience." (Motion to Compel, 7:27–8:16.)

Plaintiff argues that the Agreement is substantively unconscionable for four main reasons: (1) the Agreement is unclear as to how to initiate arbitration, (2) the Agreement does not provide for a neutral arbitrator, (3) the Agreement does not allow for adequate discovery, and (4) the Agreement does not allow for judicial review. (Opposition, 5:20–9:25.)

In its Reply, Defendant asserts that the way to initiate arbitration is an online form linked on the same information page for the AAA employment arbitration rules. (Reply, footnote 3, p. 8.) Defendant also contends that the AAA employment arbitration rules have a section on the selection for a neutral arbitrator that requires the arbitrator to "have no personal or financial interest in the results of the proceeding in which they are appointed and have no relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias" and that the AAA provides procedures for disqualifying arbitrators if they are biased or lack independence. (Reply, 9:21–10:6.) Additionally, Defendant asserts that the discovery process is described in the AAA employment arbitration rules online, which allows Plaintiff to subpoena witnesses, among other discovery protocols and requirements for employers. (Reply, 10:7–17.) Lastly, Defendant contends that a requirement of having a provision allowing for judicial review is a misapplication of *Armendariz, supra*. (Reply, 10:18–11:7.)

The Court agrees with Defendant. The AAA reemployment arbitration rules are readily available on the internet and cover the initiation of arbitration, require a neutral arbitrator, and allow for adequate discovery as determined by the arbitrator. While Plaintiff asserts that the AAA procedures "presumably" fail to entitle him to third-party discovery, no evidence to this effect is submitted. The California Arbitration Act provides third party discovery procedures. (*Berglund v. Arthroscopic & Laser Surgery Ctr. of San Diego, L.P.* (2008) 44 Cal.4th 528, 535–36, 539 [reasoning that where discovery rights under C.C.P. section 1283.05 apply, parties to the arbitration also have rights to discovery from non-parties and Plaintiff maintains judicial remedies if the non-party fails to comply with the arbitrator's order].) While the Agreement does not explicitly state that it allows for judicial review, the Agreement requires the arbitrator to "issue a decision or award, in writing, stating the essential findings of fact and conclusions of law supporting the decision or award" and prevents the arbitrator from "issu[ing] any award contrary to or inconsistent with the law, including the statute(s) at issue." (See Buffo Declaration, Exhibit A, ¶ 5.) *Armendariz* highlights the importance of judicial review of an arbitrator's written arbitration decision. (*Armendariz, supra,* at 107.) However, as found in *Armendariz,* here, the Court is not reviewing a petition to confirm an arbitration award, and thus, the assertion of inadequate judicial review of an arbitration award is premature. (*Ibid.*)

Accordingly, Plaintiff fails to show that the Agreement is so one-sided as to "shock the conscience" and therefore fails to show substantive unconscionability.

"The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*OTO, supra*, at 126.) Given the aforementioned facts and circumstances, Plaintiff fails to show that the Agreement is procedurally and substantively unconscionable in part or in whole that would move this Court to withhold enforcement.

C. Severance of the Agreement

Plaintiff argues that the Agreement's innumerable defects render it unconscionably tainted and the Court may not sever portions of the Agreement. (Opposition, 9:27–10:21.)

The Court does not find any of the Agreement's sections to be unconscionable, so severance is irrelevant.

D. California Labor Code Section 229

Lastly, Plaintiff asserts that since the Agreement is governed by California law, California Labor Code section 229 prevents Plaintiffs causes of action related to unpaid wages from being arbitrated. (Opposition, 10:24–13:14.)

In its Reply, Defendant argues that Labor Code section 229 does not apply because the Federal Arbitration Act ("FAA") preempts the application of the California Labor Code in cases like this that involve interstate commerce. (Reply, 11:19–12:18.) Defendant claims that even if Section 229 applied, all of Plaintiff's claims are still subject to the arbitration provision because it requires arbitration of all employment claims. (Reply, 12:21–13:25.)

Here, the Agreement covers "any dispute covered by this Agreement and arising out of or in any way relates to the Employee's employment with the Company, including, but not limited to, termination of said employment" and requires "[t]he enforceability of this agreement to be governed by California law." (See Buffo Declaration, Exhibit A, ¶¶ 1, 6.) The Court in *Bravo v. RADC Enterprises, Inc.* held that the arbitration agreement, with choice-of-law clause requiring interpretation in accordance with California law, required all claims to be arbitrated, including plaintiff's wage claims. (*Bravo v. RADC Enterprises, Inc.* (2019) 33 Cal.App.5th 920.) Similar to the Agreement here, the agreement in *Bravo* was a two-page arbitration agreement covering "any and all disputes" arising from plaintiff's employment "including any claims brought by the Employee related to wages" under the California Labor Code. (*Id.* at 921–22.) The Court found that the parties could not have intended to apply Section 229 to the agreement "because that section prohibits arbitrating wage claims and requires the courts to disregard private agreements to arbitrate" and the application of Section 229 contradicts the parties' intent to arbitrate. (*Id.* at 922–23 [reasoning that plaintiff's interpretation of the choice-of-law provision is untenable because "it unnecessarily sets one clause in conflict with the rest of the agreement" and "we read documents to effectuate and harmonize all contract provisions"].) Therefore, the Agreement here requires all of Plaintiff's claims related to his employment to be arbitrated, which includes his

wage claims. Since all eight of Plaintiff's claims in his Complaint "aris[e] out of or in any way relate to the Employee's employment with the Company," Plaintiff is required to arbitrate all of his claims and Labor Code section 229 does not restrict any of his claims from being arbitrated.

IV. Conclusion

Based on the foregoing, Defendant's motion to compel arbitration is **GRANTED**. Plaintiff's Complaint is stayed pending completion of arbitration.

Defendant shall submit a written order on its motion to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

2-3. SCV-272155, Axos Bank, FSB v. Wilcox

Plaintiff, Axos Bank, FSB ("Plaintiff" or "Axos"), filed the currently operative first amended complaint ("FAC") against defendants Ayn Wilcox and Alan Wilcox (together "Defendants"), and Does 1-10 with one cause of action for declaratory relief. Defendants have in turn filed a cross-complaint alleging 13 causes of action derived from the underlying facts and this case. Defendants have subsequently filed the currently operative first amended cross-complaint ("FAXC") against Plaintiff, AmeriHome Mortgage Company ("AmeriHome"), BW Real Estate ("BW"), Western Alliance Bank ("Western", together with AmeriHome and BW, "Additional Cross-Defendants") (Axos with Additional Cross-Defendants, "Cross-Defendants") and Roes 1-10 alleging fourteen causes of action derived from the same underlying circumstances as the FAC. Thereafter, Plaintiff dismissed the FAC. Cross-Defendants demurred to the FAXC, which was sustained to multiple causes of action. Defendants have now filed a second amended cross-complaint ("SAXC").

This matter is on calendar for Plaintiff's demurrer to each cause of action in the SAXC. Additional Cross-Defendants have also filed a Demurrer to multiple causes of action. Plaintiff's demurrer is in part **OVERRULED or SUSTAINED without leave to amend**. Additional Cross-Defendants' Demurrer is also in part **OVERRULED or SUSTAINED without leave to amend.**

I. Procedural Issues

AmeriHome has raised the defense that Defendants have amended to add a cause of action not in conformity with the Code of Civil Procedure. "Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order." *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023 ("*Harris*"). "(S)uch granting of leave to amend must be construed as permission to the pleader to amend the cause of action which he pleaded in the pleading to which the demurrer has been sustained." *People By and Through Dept. of Public Works v. Clausen* (1967) 248 Cal.App.2d 770, 785 ("*Clausen*"). "The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." *Harris, supra,* 185 Cal.App.4th at 1023. Where an amendment exceeds the leave granted by the court, a motion to

strike is the proper vehicle to remedy the issue. *Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1329. This is addressed in substance below.

II. Governing Law

A. Demurrers Generally

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. CCP § 430.30(a). In the event a demurrer is sustained, leave to amend should be granted where the complaint's defect can be cured by amendment. *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852. At demurrer, all facts properly pleaded are treated as admitted, but contentions, deductions and conclusions of fact or law are disregarded. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591. Similarly, opinions, speculation, or allegations contrary to law or facts which are judicially noticed are also disregarded. *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 702. Generally, the pleadings "must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." *Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390; *FPI Develop., Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384. Each evidentiary fact that might eventually form part of a party's proof does not need to be alleged. *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872. Conclusory pleadings are permissible and appropriate where supported by properly pleaded facts. *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6. "The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree." *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 473. Leave to amend should generally be granted liberally where there is some reasonable possibility that a party may cure the defect through amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

B. Negligence

"The elements of a cause of action for negligence are: duty; breach of duty; legal cause; and damages." *Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463. Whether a duty of care is owed is a question for the court and not a jury. *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572. "Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434. "A financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 927 (Internal quotations omitted). Generally, once there is privity of contract between the lender and the consumer, the proper remedy is for breach of contract, and the application of tort law violates the economic loss rule. *Id.* at 937 ("[*Biakanja v. Irving* (1958) 49 Cal.2d 647]) does not displace the contractual economic loss rule when that rule squarely applies."). "A duty of care may arise through statute or by operation of the common law." *Id.* at 920 (internal quotations omitted). The central question in whether a duty is owed outside of

contract claims in mortgage contexts is whether the lender's conduct has fallen outside the scope of their "role as a lender". *Id.* at 928.

C. The Real Estate Settlement Procedures Act ("RESPA")

Federal law regulates the real estate settlement process and various loan servicing functions through the Real Estate Settlement Procedures Act ("RESPA"), 12 USC § 2601, et seq. Violations of RESPA are also violations of California Law. Financial Code § 50505 (a). Under RESPA, mortgage lenders are required to make various disclosures to a borrower whenever a loan is assigned, sold, or transferred. 12 USC § 2605 (c). Lenders also have obligations to reply to borrower requests for information during the transfer process. 12 USC § 2605 (e). Lenders must acknowledge receipt of the borrower request within 5 days of receipt. 12 USC § 2605 (e)(1)(A). Lenders must provide a substantive response within 30 days of receipt. 12 USC § 2605(e)(2).

"Asserting a defendant's failure to respond to a QWR and the suffering of general damages is insufficient to state a claim under RESPA." *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 531, disapproved of on other grounds by *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919. "RESPA's provisions relating to loan servicing procedures should be "construed liberally" to serve the statute's remedial purpose." *Medrano v. Flagstar Bank, FSB* (9th Cir. 2012) 704 F.3d 661, 665–666. "(U)nder § 2605(e), a borrower's written inquiry requires a response as long as it (1) reasonably identifies the borrower's name and account, (2) either states the borrower's 'reasons for the belief ... that the account is in error' or 'provides sufficient detail to the servicer regarding other information sought by the borrower,' and (3) seeks 'information relating to the servicing of [the] loan.'" *Id*. at 666. Challenges to the validity of the loan are not qualified written requests related to the service of the loan, and as such, trigger no duty to respond. *Id*. at 667-668.

D. Negligent Misrepresentation, Fraud, and Fraud by Concealment

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.

Fraud may be accomplished though suppression of a fact by one who is bound to disclose it. Civ. Code § 1710 (3). "(T)he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613. "A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to

the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." *Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255.

To establish reliance on fraud, reliance upon the truth of the fraudulent misrepresentation does not have to be a predominant factor, but it must be a substantial factor in the plaintiff's subsequent conduct. *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864. Plaintiffs in fraud by concealment claims must show that if the information had not been omitted, plaintiff would have been aware of it and therefore would have behaved differently. *Id.* The pleading must be adequately specific to show actual reliance on the omission, and that the damages causally resulted therefrom. *Id*. California law "requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages." *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499. Reasonable reliance may, where the facts are clear, be determined as a matter of law. *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 22. "Reliance on an alleged misrepresentation is not reasonable when plaintiff could have ascertained the truth through the exercise of reasonable diligence." *Rowland v. PaineWebber Inc.* (1992) 4 Cal.App.4th 279, 286 (disapproved on other grounds by *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415).

"'[I]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] "Thus 'the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect.'[Citation.] [¶] This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993; *see Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166-1167 [" 'the plaintiff must allege the names of the persons who made the representations, ... to whom they spoke, what they said or wrote, and when the representation was made' "]; *see also Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. "However, the requirement of specificity is relaxed when the allegations indicate that the defendant must necessarily possess full information concerning the facts of the controversy [citations] or when the facts lie more in the knowledge of the defendant." *Daniels*, at p. 1167, internal quotations and citations omitted; *see Tarmann v. State Farm Mut. Auto. Ins.* Co. (1991) 2 Cal.App.4th 153, 158. In pleading fraud claims, "(e)very element of the cause of action must be alleged in full, factually and specifically." *Id.* at 1249. In general, as with showing fraud, oppression, or malice sufficient to support punitive damages, while plaintiffs must plead facts, with respect to intent and the like, a "general allegation of intent is sufficient." *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 632; see *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060 (in pleading promissory fraud, a general allegation that the promise was made without intent to perform was sufficient); see also *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608 (pleading that a hospital intentionally withheld that a health practitioner was operating without a medical license was sufficient to meet the pleading requirements for intent).

"The elements of a negligent misrepresentation are '(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.'" *Borman v. Brown* (2020) 59 Cal.App.5th 1048, 1060; *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252; see also, *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 127; *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196. A cause of action for negligent misrepresentation sounds in fraud and therefore, "each element must be pleaded with specificity." *Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1166; see also, *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 185, fn. 14 [the elements of negligent misrepresentation "must be pled with particularity…"]. This means "a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant…the names of the persons who made the representations [and] their authority to speak on behalf of the corporation..." *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793; see also, *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. Thus, "general and conclusory allegations do not suffice," and "the policy of liberal construction of the pleadings...will not ordinarily be invoked to sustain a pleading defective in any material respect." *Lazar, supra*, 12 Cal.4th at 645.

E. Emotional Distress

Claims of intentional infliction of emotional destress require: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Whether treated as an element of the prima facie case or as a matter of defense, it must also appear that the defendants' conduct was unprivileged. Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 internal citations and quotations omitted. To constitute a basis for emotional distress, the alleged conduct must extend beyond mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051. The conduct must be such that on hearing of the alleged conduct an average member of the community would resent the defendant and lead the community member to exclaim, "Outrageous!" *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494. "In order to avoid a demurrer, the plaintiff must allege with great specificity the acts which he or she believes are so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832 (Internal quotations omitted). "Without such pleading, no cause of action for intentional infliction of emotional distress will stand." *Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 536.

"Severe emotional distress means 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004, quoting *Girard v. Ball* (1981) 125 Cal.App.3d 772, 787–788. "(T)he requisite emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger,

chagrin, disappointment or worry." *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397.

F. Conversion

The elements of conversion are: 1) plaintiff's ownership or right to possession of the property; 2) defendant's conversion through a wrongful act; and 3) damages. *Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208. "Money may be the subject of conversion if the claim involves a specific, identifiable sum; it is not necessary that each coin or bill be earmarked." *Id*. Conversion can include the misappropriation of intangible property, such as net operating losses, so long as they reflect a definite amount and rights of possession and exclusive use are sufficiently definite and certain. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 125. Credit accounts are also appropriate for conversion actions as long as plaintiffs can show they had a property right in its credit card account, evidenced by proving their interest is specific, showing they had control over its credit card account, and they had an exclusive claim to the balance in the account. *Welco, supra* at 212. "A plaintiff must specifically identify the amount of money converted, not that a specific, identifiable amount of money has been entrusted to the defendant." *Id.* at 216.

G. Rosenthal Fair Debt Collection Practices Act ("RFDCPA")

The Rosenthal Fair Debt Collection Practices Act ("RFDCPA") is stated in Civil Code sections 1788, *et seq*. The RFDCPA was enacted "to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts…" Civ. Code §1788.1(b). The RFDCPA applies to the collection of consumer debts resulting from "consumer credit transactions" in which "property, services or money is acquired on credit ... primarily for personal, family, or household purposes." Civ. Code § 1788.2(e). The prohibited unfair or deceptive practices include use of threats, harassment, profanity and making false representations about the nature or status of the debt. Civ. Code §§1788.10-1788.16. "The Rosenthal Act ... incorporates the FDCPA, so that a violation of the FDCPA is per se a violation of the Rosenthal Act." *Young v. Midland Funding LLC* (2023) 91 Cal.App.5th 63, 89 (internal quotations omitted).

"No debt collector shall collect or attempt to collect a consumer debt by means of the following practices: … (b) Collecting or attempting to collect from the debtor the whole or any part of the debt collector's fee or charge for services rendered, or other expense incurred by the debt collector in the collection of the consumer debt, except as permitted by law." Civ. Code § 1788.14(b). "No debt collector shall collect or attempt to collect a consumer debt by means of the following practices: … (e) The false representation that the consumer debt may be increased by the addition of attorney's fees, investigation fees, service fees, finance charges, or other charges if, in fact, such fees or charges may not legally be added to the existing obligation." Civ. Code § 1788.13. The RFDCPA applies to home loans, and collection actions thereon. *Best v. Ocwen Loan Servicing, LLC* (2021) 64 Cal.App.5th 568, 579.

H. Unfair Competition Law

Business & Professions Code section 17200, prohibits "any unlawful, unfair or fraudulent" business practices. Bus. & Prof. Code §17200. "Since section 17200 is [written] in the disjunctive, it establishes three separate types of unfair competition" and "prohibits practices that are either 'unfair' or 'unlawful,' or 'fraudulent.'" *Pastoria v. Nationwide Ins.* (2003) 112 Cal.App.4th 1490, 1496; see also *CelTech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, (1999) 20 Cal.4th163, 180 (1999).

A party may bring a section 17200 claim only if he or she shows that he or she "suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code § 17204. To have standing, a plaintiff must sufficiently allege that (1) he has "lost 'money or property' sufficient to constitute an 'injury in fact' under Article III of the Constitution" and (2) there is a "causal connection" between the defendant's alleged UCL violation and the plaintiff's injury in fact. See, *Rubio v. Capital One Bank* (9th Cir. 2010) 613 F.3d 1195, 1203-1204. The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. *Chabner v. United Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1048. Violation of almost any federal, state, or local law may serve as the "unlawful" basis for a UCL claim. *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-839. In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827. Where plaintiff's UCL claim is entirely derivative of other fatally flawed causes of action, the UCL claim also fails. See, *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 277 [finding plaintiff's "UCL claim is derivative of [his] defamation cause of action, that is, it is based on the same [allegations] and likewise that cause of action stands or falls with that underlying claim."]. "A breach of contract may ... form the predicate for Section 17200 claims, *provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.*" *Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 645 (internal quotations omitted, emphasis original).

"With respect to the *unlawful* prong, virtually any state, federal or local law can serve as the predicate for an action under section 17200." *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 515 (internal quotations omitted). "Unlike common law fraud, a UCL fraud claim "can be shown even without allegations of actual deception, reasonable reliance and damage"; what is required to be shown is that members of the public are likely to be deceived." *Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 258 (internal quotations omitted)("*Collins*"). Fraud claims under the UCL must be stated with "reasonable particularity". *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1261; *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.

I. Accounting

"A cause of action for accounting requires a showing of a relationship between the plaintiff and the defendant, such a fiduciary relationship, that requires an accounting or a showing that the accounts are so complicated they cannot be determined through an ordinary action at law." *Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1413. "An action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation." *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179

J. Declaratory Relief

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. **The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought**.

Code Civ. Proc., § 1060 (emphasis added)

"Declaratory relief operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them." *SJJC Aviation Services, LLC v. City of San Jose* (2017) 12 Cal.App.5th 1043, 1062 (internal quotations omitted)

III. Evidentiary Issues

The Court takes permissive judicial notice of both the content of Plaintiff's Complaint and First Amended Complaint under Evid. Code § 452, but not the truth of any allegations therein. Similarly, the Court takes judicial notice of the FAXC, and the Court's September 25, 2024 order on demurrer.

IV. Axos's Demurrer

A. Agency

As an initial matter, there are several instances in the opposition where Defendants rely upon allegations against one cross-defendant or another as agents of each other in order to defend a cause of action. Defendants' sole allegation regarding agency simply states that each of the Cross-Defendants is the agent of the others. SAXC ¶ 18- ¶20. However, such allegations are "egregious examples of generic boilerplate", and properly disregarded as conclusory pleading. *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 134, fn. 12; *cf. Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1172 (Agency was adequately pled where plaintiffs alleged "BofA 'had authority to represent and bind [U.S. Bank] in regard to a

modification of' their loan and U.S. Bank 'directed and authorized [BofA's] conduct in connection with the [loan] modification by directing [BofA] concerning what to tell' appellants."). Agency is inadequately pled. Accordingly, the Court need not engage in further consideration on the matter.

B. RESPA

What appears clear is that claims under RESPA may be found deficient if the pleading does not convey adequate facts to trigger a defendant's duty to respond. Defendants' allegations regarding their qualified written requests ("QWRs") contain substantial specificity as to when Defendants sent the communications, and the timing of the responses, and that they were unable to make loan payments, asking for information on where to remit payment.

Defendants contend that "RESPA's provisions relating to loan servicing procedures should be "construed liberally" to serve the statute's remedial purpose." *Medrano v. Flagstar Bank, FSB* (9th Cir. 2012) 704 F.3d 661, 665–666. Accordingly, they argue that their submissions to Axos via the web portal (SAXC ¶ 42) as opposed to the address listed on the Notice of Assignment (SAXC, Ex. 3.) makes no difference. Given that Axos timely responded, this seems to be of no consequence to the cause of action how Defendants submitted the QWR.

Defendants aver that the QWRs are sufficient. As the Court explains below, the contention that the challenge to the enforceability of the loan itself is not a QWR. *Medrano v. Flagstar Bank, FSB* (9th Cir. 2012) 704 F.3d 661, 665–666. It does not relate to the issue of servicing. In contrast, Defendants' initial contact under the QWR on July 30, 2022 appears materially distinguishable. Axos was informed that Defendants' account had been closed and seeking clarity as to where Defendants should be remitting payment. SAXC¶ 42. Axos responded by telling Defendants there was no need to make a monthly payment, as their loan had been paid off. SAXC ¶ 44. This entire action, and Axos's efforts to remedy that error, stem from the inaccuracy of that statement. Accordingly, the SAXC adequately pleads that Axos failed to respond as required by 12 U.S.C. § 2605.

Axos also argues that Defendants fail to plead damages. Defendants plead various types of damages of varying viability. SAXC ¶ 99. At demurrer, any viable form of damages will support the cause of action. Particularly, Defendants aver that they were charged late charges resulting from Axos's failure to accurately respond. *Ibid*. This appears to be an adequate assertion of economic damages resulting from Axos's failure to timely respond in correcting the account.

Accordingly, Defendants have adequately pled the elements for a cause of action under RESPA. Axos's demurrer to the first cause of action in the SAXC is OVERRULED.

C. Negligence

From the FAXC, Defendants have pivoted their negligence claims entirely to the concept that Axos had a duty of care arising from statute, RESPA, and their breach of RESPA gives rise to negligence claims. The viability of the RESPA claims against Axos have already been addressed. The claims for negligence are still deficient due to the economic loss rule.

Defendants argue that under *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 923, "tort claims from fraud and statutory violations are not barred by the economic loss rule." This is a correctly cited portion, but an obvious and glaring misstatement of the case. Fraud claims are not precluded by the economic loss rule. *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 991. Meanwhile, the *Sheen* court's holding as to statutory damages could not be further from Defendants' position. The economic loss rule appears to preclude using statutory duties as imposing a new form of tort liability outside of those statutory causes of action. The court in *Sheen* likens mortgage relationships to those of employer-employee. *Id.* at 931. In that vein, the *Sheen* court quotes in part their prior opinion in an employment case. *Ibid*. "The effect would be to transform a category of contract claims into torts, and to pile additional measures of tort damages on top of statutory recovery, even in cases of good-faith mistake." *Voris v. Lampert* (2019) 7 Cal.5th 1141, 1162. That logic applies soundly here. Defendants have their statutory claim. Negligence liability based solely on RESPA would impermissibly expand tort into matters of contract.

Defendants' allegations of RESPA violations may satisfy the element of a duty of care, but accordingly concede a contractual relationship. The economic loss rule therefore bars their claims in tort absent factual pleading supporting that the cause of action arises independent of the mortgage contract.

Therefore, as to Axos, the demurrer to the second cause of action is SUSTAINED without leave to amend.

D. Fraud, Negligent Misrepresentation and Fraud by Concealment

Defendants assert three causes of action predicated on misrepresentation or withholding of information. Defendants assert only two actions undertaken in reliance on the misrepresentations or concealment. First, Defendants state that they stopped making payments to AmeriHome based on Axos's representation that their loan was paid off. SAXC ¶ 129. Second, Defendants aver that they made two payments to AmeriHome "in protest" and "under duress". SAXC ¶ 130.

Defendants specify several instances where Axos made affirmative representations to them that their loan was paid off. Cross-Defendants continue to attack the reasonableness of Defendants belief that their loan was somehow paid in full despite having alleged no actions which would support such a conclusion.

Indeed, while Defendants assert that the Court is required to take their allegations at face value, this is not true where they are contradicted by attached exhibits. There is no contradiction here, and both the allegations of the SAXC and Exhibits attached concede facts making Defendants' reliance unreasonable as a matter of law. Exhibits 1 and 2 to the SAXC state that Plaintiff's had a $652,000 loan, dated June 8, 2022, with an expected pay off date of July 1, 2052. See also, SAXC ¶¶ 35-37. Defendants assert no facts which would support the assumption that their loan was paid in full mere months after its origination. Defendants continue to assert, without any cited authority, that they were not required to make payments because their loan was no longer

secured by the property under the Full Reconveyance. Defendants have failed to plead reasonable reliance as a matter of law under these facts.

Furthermore, Defendants still plead conflicting acts undertaken in reliance. As noted, Defendants made payments "under duress". SAXC ¶ 130. In contrast, they would have "paid all [their] financial obligations" had they been aware of all the relevant information. SAXC ¶ 146. Defendants have not pled reasonable reliance as a matter of law and appear to be unable to do so. The fraud by concealment claim fails for an additional reason. Defendants still have not pled the information which was concealed. Defendants vaguely assert "above-described" facts. SAXC ¶143, ¶145, and ¶147. However, Defendants never clearly plead what information was withheld in order to adequately state a concealment claim.

The demurrer to the third, fourth and fifth causes of action is SUSTAINED without leave to amend.

E. Intentional Infliction of Emotional Distress

Defendants aver that this claim states outrageous conduct because "whether conduct is outrageous is usually a question for the trier of fact." Defendant's Opposition to Axos's Demurrer, pg. 10:15-16; quoting *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946 disapproved of by *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563. ***Agarwal* contains no such quotation**. Despite this, Defendants are generally correct that "whether conduct is 'outrageous' is usually a question of fact." *So v. Shin* (2013) 212 Cal.App.4th 652, 672. However, this does not abrogate Defendants' obligation to plead facts which may be found to meet the standard of outrageous conduct. *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832. Where determination of the outrageous conduct is so clear that it may be determined as a matter of law, it is appropriate to resolve at demurrer. *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1609.
There is relevant authority which states that where mortgage servicers provide information which is "confusing, confused, tardy, or flat wrong", that is insufficient to "exceed all bounds of what a civilized society usually tolerates." *Sheen v. Wells Fargo Bank, N.A.* (2019) 38 Cal.App.5th 346, 358, *aff'd* (2022) 12 Cal.5th 905. As this Court previously opined, "(t)he conduct alleged against Axos does not rise beyond mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051." The SAXC fails to remedy the Court's prior observation.

While Defendants argue vociferously that the conduct is outrageous, nothing resembles cases where outrageous conduct was found. Axos allegedly mismanaged Defendants' mortgage, threatened foreclosure and penalties, and provided false reports to consumer reporting agencies. SAXC ¶ 169. "Cross-Defendants' RESPA and statutory violations and described conduct were outrageous because Cross-Defendants' were repeatedly notified and failed to act timely at the Wilcoxes' expense." SAXC ¶ 171. These allegations of violating contract oriented statutory obligations bears no resemblance to the jurisprudence on outrageous conduct. To quote the prior order:

> Cases where allegations were found to be outrageous sufficient to survive demurrer are marked by their allegations of conduct not acceptable in a civilized society. *Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 229 (plaintiff received repeated harassing calls, threatening the safety of his family); *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498 (use of racial epithets in combination with discriminatory employment action was sufficient to allege outrageous conduct). In contrast, courts of appeal have repeatedly held that alleged conduct must be sufficiently outrageous, or the matter is susceptible to demurrer. *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 497 (even where defendant's comments were clearly threatening, where the threats lacked immediacy and had veiled meaning, the statements were not sufficiently outrageous and demurrer was properly sustained); *Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 536 (vague and conclusory allegations of outrageous conduct does not satisfy that element, and a cause of action for intentional infliction of emotional distress so plead will not withstand demurrer.) Defendants provide only vague pleading of uncertainty and possible foreclosure. The outrageousness of conduct is only a matter for a finder of fact "(w)here reasonable men may differ". *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499. Without outrageous facts, creditor/debtor relationships do not comprise facts sufficient to be outrageous conduct. *Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009.

Court's 9/25/24 Order, Section IV(C).

Defendants fail to plead outrageous conduct to support intentional infliction of emotional distress. The demurrer to the sixth cause of action is therefore SUSTAINED without leave to amend.

F. Conversion

Defendants allege that the Cross-Defendants converted the escrow account in which they maintained an interest. As to Axos, Defendants have simply pled that they ratified AmeriHome's actions in seizing the escrow account. For the reasons already covered above regarding agency, this is insufficient. Therefore, there are no facts to support Axos being liable for conversion.

The demurrer to the seventh cause of action is therefore SUSTAINED without leave to amend.

G. Rosenthal Fair Debt Collection Practices Act

As this Court has already determined, the Rosenthal Fair Debt Collection Practices Act applies to mortgage loans. However, the pleading thereon only refers to fees charged by AmeriHome, not Axos. As has already been addressed, allegations of agency asserted in a conclusory manner do not suffice. In this cause of action, Defendants assert that Axos "as the predecessor and originator of the mortgage loan, [] controlled and dominated all aspects of its servicing and proper transfer to other successor service providers." SAXC ¶ 201.

The prior problem with Defendants assertion of the RFDCPA remains. There is no alleged representation or attempt to collect the mortgage by Axos at this time. The allegation of agency does not connect the transfer of the loan to the allegations of collection efforts by AmeriHome. Indeed, the allegation is self-defeating, as in the same paragraph Defendants admit that "Axos caused the spread of misinformation on which all parties reasonably relied", ostensibly including AmeriHome. SAXC ¶ 201. Defendants have not pled facts connecting Axos to the representations made by AmeriHome.

Therefore, as to the RFDCPA claim, the demurrer is SUSTAINED without leave to amend.

H. Unfair Competition Law

Despite pleading a statutory violation, Defendants' UCL claim still fails. Defendants still have not adequately pled standing under the UCL. Again, referring to the prior order:

> Standing under the UCL requires that Defendants show a loss of money or property to bring UCL claims. Defendants provide no authority showing that their alleged damage to credit scores is concrete enough to be a loss of property as required under the UCL. Defendants plead that a variety of fees "could" be imposed, or that they "may" be charged attorneys' fees. These are too speculative to state a UCL claim.
>
> The only ascertainable loss of property that the Defendants had was the seizure of the escrow accounts. First, Defendants have made no effort to connect this seizure of property to the allegedly actionable conduct under the UCL. The seizure of the escrow account appears to be an alleged wrong separate and apart from any claims of alleged unlawful conduct or fraud. Second, the seizure of the escrow account is not alleged as conduct by Axos, and therefore the Defendants are not entitled to any restitution from Axos under the UCL. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 (remedies under the UCL are restrained to restitution and injunctive relief, and "disgorgement" of property in which a plaintiff does not have a direct interest is not an appropriate remedy, even where the substance of the claim is clear).

The SAXC still raises no factual allegations regarding the taking of money or property by Axos. Defendants have not pled standing as to Axos for UCL claims.

Therefore, as to the UCL claim, the demurrer is SUSTAINED without leave to amend.

I. Accounting

None of the prior deficiencies with the cause of action for accounting have been remedied. Defendants still fail to plead a cause of action for accounting because they fail to show standing to bring the claim (at common law, accounting claims are for where *plaintiff* is owed funds, not defendant), they fail to show that the related accounting is so complicated as to require judicial

intervention, and they have a remedy to request an accounting without judicial intervention. Indeed, Defendants plead facts which make clear that there is little mystery to them as to what has occurred with their account. SAXC ¶ 116. Accordingly, Defendants have failed to show an accounting claim applies to the facts pled.

Therefore, as to the accounting claim, the demurrer is SUSTAINED without leave to amend.

J. Declaratory Relief

The cause of action for declaratory relief previously had the demurrer sustained with leave to amend, particularly as to the declaration regarding attorney's fees. Plaintiff cites *de la Cuesta v. Superior Court* (1984) 152 Cal.App.3d 945, 949, averring that any determination of attorney's fees is premature, and therefore the cause of action is not ripe. Plaintiff's cited case is unpersuasive. In *de la Cuesta*, the Court of Appeal found that the motion to set attorney's fees was premature under Civil Code § 1717, and accordingly there was no judiciable controversy until such time that the foreclosing mortgage lender requested unreasonable fees. This is distinguishable from the case at bar. Plaintiff's cause of action is for declaratory relief, which properly allows Defendants to seek "a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract." CCP § 1060. The cause of action is proper to "be used in the interests of preventive justice, to declare rights rather than execute them." *SJJC Aviation Services, LLC v. City of San Jose* (2017) 12 Cal.App.5th 1043, 1062. Accordingly, the claim for declaratory relief appears judiciable and adequately pled.

Therefore, the demurrer to the eleventh cause of action is OVERRULED**.**

V. Additional Cross-Defendants Demurrer

A. RESPA

Defendants' cause of action for RESPA also fails against AmeriHome.

Defendants fail to state the essential element identified by the court in *Medrano*, namely why their account was in error. That court explained: "(U)nder § 2605(e), a borrower's written inquiry requires a response as long as it (1) reasonably identifies the borrower's name and account, (2) either states the borrower's 'reasons for the belief ... that the account is in error' or 'provides sufficient detail to the servicer regarding other information sought by the borrower,' and (3) seeks 'information relating to the servicing of [the] loan.'" *Medrano v. Flagstar Bank, FSB* (9th Cir. 2012) 704 F.3d 661, 666. Challenges to the validity of the loan are not qualified written requests related to the service of the loan, and as such, trigger no duty to respond. *Id*. at 667-668.

Defendants allegations regarding the issues they raised to AmeriHome appear to be challenges to the validity of the loan itself, owing to the errors of Axos. The tenor of Defendants' position in the QWRs to AmeriHome is an attempt to benefit from Axos's obvious error. The content of the notice to AmeriHome is not adequately related to servicing, so much as the Defendants' contention that the loan was no longer valid. As such, it fails to be a QWR as required to trigger

AmeriHome's obligation to reply. Defendants have accordingly pled no RESPA claim against AmeriHome.

AmeriHome avers that Defendants' RESPA cause of action should be disallowed because it exceeds the scope of the allowable amendment on the prior demurrer. The proper method to raise improper amendment is a motion to strike. However, to this effect, to allow further amendment of an unpermitted cause of action appears improper. Defendants cannot appropriately amend the cause of action, because the inclusion of the cause of action was not proper in the first place. The demurrer is SUSTAINED without leave to amend without prejudice absent a motion seeking a procedurally proper amendment.

B. Negligence

As is stated above, Defendants failed to plead any form of duty owed by Cross-Defendants, and therefore there is no negligence cause of action under the common law. Further, particularly as to Additional Cross-Defendants, it is not clear what act is alleged to breach any duty of care, as Plaintiffs fail to provide any particularize allegation of negligent act beyond acts which may be proscribed exclusively to Axos. Defendants' subsequent efforts to claim duties owed under RESPA also fail, as Defendants have not pled adequate facts to support a showing that RESPA was violated.

Therefore, as to the negligence cause of action, the Demurrer is SUSTAINED without leave to amend.

C. Fraudulent Concealment

As the Court has elucidated above, Defendants have not adequately shown what information was concealed, nor have they pled anything which can be said to have been undertaken due to some concealed fact. Similarly, there is no reasonable reliance. Defendants make no allegations as to what information Additional Cross-Defendants had which may have impacted their course of action. No fact being concealed, the cause of action for concealment is therefore inadequately pled.

Therefore, as to this cause of action, Demurrer is SUSTAINED without leave to amend.

D. Intentional Infliction of Emotional Distress

The conduct alleged against Additional Cross-Defendants appears to also fail to meet the standard for outrageous conduct as described above. Previously, the Court pointed out that the allegations of the FAXC distinguished between Cross-Defendants only in that AmeriHome allegedly intimated some surveillance of Defendants had occurred. Defendants have added (limited) additional specificity as to this claim so the Court could adequately determine whether this was outrageous conduct. SAXC ¶ 69.

The Court previously pointed out that even the allegations of surveillance may not raise an allegation of outrageous conduct as a matter of law. Even having the benefit of the Court's prior

ruling, Defendants have provided no authority to this effect. Meanwhile, there exists authority to the contrary. *Teague v. Home Ins. Co.* (1985) 168 Cal.App.3d 1148, 1153 (in workers compensation action, surveillance and even breaking and entering were insufficient to state outrageous conduct for an IIED claim at demurrer).

Therefore, as to the IIED claims against Additional Cross-Defendants, the Demurrer is SUSTAINED without leave to amend.

E. Conversion

The Court previously overruled the demurrer as to the conversion claim. Procedurally, this constitutes a basis alone for overruling the demurrer. *See Bennett v. Suncloud* (1997) 56 Cal.App.4th 91, 96-97; *cf. Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 877 (It is within the Court's power to reexamine the sufficiency of the pleading, regardless of whether the prior order was issued by the same judge or a prior judge on the case). The cause of action was previously adequately pled, and it remains so. Without some coherent explanation for what has changed, the assertion to the contrary is ill taken. To quote the prior order:

> As to the conversion claim against Additional Cross-Defendants, the claim is adequately pled. Defendants plead that the escrow account held $5,931.63, that Additional Cross-Defendants had no right thereon, and that Defendants now cannot recover those funds to which they have a property interest. There is nothing before the Court at this juncture which would state that Additional Cross-Defendants are entitled to the money in the escrow account as a matter of law. The FAXC states the opposite.

The expressed logic still applies. Defendants' escrow account was intended to cover taxes and fees and was their property. AmeriHome seized the excess funds. The SAXC does not disclose a legal basis for AmeriHome to seize the account contents. Accordingly, the cause of action for conversion is still adequately pled.

Therefore, as to the conversion cause of action against the Additional Cross-Defendants, the Demurrer is OVERRULED.

F. RFDCPA

Unlike their allegations against Axos, Defendants allege that AmeriHome threatened and in fact collected fees associated with their attempts to collect on the mortgage. However, Defendants still have not provided any factual allegations supporting the conclusion that the fees "may not be legally added to the existing obligation." Civ. Code § 1788.13. The Exhibits to the SAXC provide evidence to the contrary. See Exhibit 2, ¶ 9. Defendants have therefore not pled a violation of the RFDCPA.

Therefore, as to the RFDCPA claim against Additional Cross-Defendants, the Demurrer is SUSTAINED without leave to amend.

G. Unfair Competition Law

As noted above, Defendants fail to state a UCL claim for multiple reasons. The FAXC fails to state fraudulent conduct by Additional Cross-Defendants (indeed, they are omitted from the affirmative fraud claims), and no violation of statute has been adequately pled. Defendants have not alleged a taking of property caused by the alleged UCL violations.

Therefore, as to the UCL cause of action against Additional Cross-Defendants, the Demurrer is SUSTAINED without leave to amend.

H. Accounting

For the reasons described above, the cause of action for accounting against Additional Cross-Defendants also fails.

As to the tenth cause of action, the demurrer is SUSTAINED without leave to amend.

I. Declaratory Relief

While Defendants aver that they have a declaratory relief cause of action against "Cross-Defendants", the only facts asserted apply to Axos, and not Additional Cross-Defendants. The only controversy remaining in this cause of action is the attorney's fees dispute addressed above. There are no facts attributing this cause of action to Additional Cross-Defendants

As to the eleventh cause of action, the demurrer is SUSTAINED without leave to amend.

VI. Issuance of Order to Show Cause

Defendants' Opposition, as is addressed in several instances above, is rife with errors of law. In opposing both demurrers to intentional infliction of emotional distress, Defendants have provided a quotation from a case which fails to contain the quoted material. *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946. Defendants miscite cases by name. See *Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377 (cited by Defendants as "*Knight v. CashCall, Inc.*"). Defendants repeatedly misattribute cases for legal propositions that they do not support. For example, Defendants cite *Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377 for the proposition that "what constitutes a notice clear to a 'reasonable borrower'" is a question of fact which should be resolved by a trier of fact. That case in no way relates to RESPA, or the reasonable borrower standard therein, but rather reasonable expectations of privacy under eavesdropping statutes. The principles are not analogous.

This is to say nothing of Defendants' countless citations to federal cases that are irrelevant to the instant matter. While Defendants may have a prospective argument for the persuasive value of decisions of other Circuits on interpretation of federal statutes, there is no coherent explanation for why Defendants would cite federal district courts interpreting the law of another state (Illinois, Indiana), and how that would be relevant to this Court's determination of California law. To cite a particularly egregious example, Defendant's Opposition to Axos, pg. 10:16-17

cites *Rosen v. MLO Acquisitions LLC* (N.D. Ind. 2020) 505 F.Supp.3d 823, to support the argument that outrageous conduct is best determined by a jury. This raises several problems. *Rosen* does not relate to outrageous conduct as averred, it is from the federal district court from the Northern District of Indiana, and it does not even relate to intentional infliction of emotional distress causes of action *at all*. Such pettifoggery is wasteful of Court resources and opposing counsel's time.

The confluence of issues raised here causes the Court concern that large language models may have been utilized without appropriate review by counsel.

Therefore, the Court finds a basis to issue an order to show cause to Defendants' Counsel. Defendants Counsel are to show cause why sanctions should not be issued under CCP § 128.7, and a report to the California State Bar should not issue. Defendants' Counsel are to file a declaration 21 days prior to hearing stating the names of the attorneys who drafted the oppositions, the relevant time expended thereon, and the resources used in producing the material. Counsel Julie Bonnel-Rogers must also submit a declaration in response to the OSC and appear in-person at the hearing, owing to her status as signatory on each of the submitted papers.

The OSC re: sanctions is set for June 4, 2025, at 3:00 pm in Department 19.

VII. Conclusion

Based on the foregoing, the Demurrer by Axos each **SUSTAINED without leave to amend as to the second through tenth causes of action and OVERRULED as to the first and eleventh causes of action.**

The Demurrer by Additional Cross-Defendants is **SUSTAINED without leave to amend except as to the seventh cause of action, which is OVERRULED.**

Defendants' counsel will show cause why they should not be sanctioned on June 4, 2025 at 3:00 pm in Department 19. Defendants' Counsel are to file a declaration 21 days prior to hearing.

Axos shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

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