**TENTATIVE RULINGS**
**LAW & MOTION CALENDAR**
**Friday, May 8, 2026 3:00 pm**
**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.**

**TO JOIN ZOOM ONLINE**:

**Department 19 Hearings**
MeetingID: 160-421-7577
Password: 410765
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## 1. 24CV02183, Nichols v. PHH Mortgage Corp

Defendant PHH Mortgage Corp. ("PHH") moves for summary judgment, or summary adjudication in the alternative, to Plaintiffs Linda Moore and Jeanette Nichols' (together as "Plaintiffs") Complaint pursuant to C.C.P. section 437c. Summary judgment is **DENIED**. Summary adjudication is **GRANTED in part** and **DENIED in part**.

Summary adjudication is **GRANTED** as to the First Cause of Action but **DENIED** as to the Second and Third Causes of Action. Plaintiffs' and PHH's requests for judicial notice are **GRANTED** and PHH's objection to Plaintiffs' request for judicial notice is **OVERRULED**.

### I. Material Facts

On or about May 17, 2007, Plaintiff Moore obtained a subject mortgage loan from Mortgageit, Inc. in the original principal amount of $807,000.00 (the "Loan"), which was secured by a deed of trust recorded against the property located at 4331 Panorama Drive, Santa Rosa, California 95404 (the "Property") in the Official Records of the Sonoma County Recorder's Office on June 1, 2007 (Document No. 2007060856). (Undisputed Material UMF"], No. 1.) On or about June

14, 2011, the Deed of Trust was assigned to GMAC Mortgage, LLC and then reassigned to on or about November 1, 2012, to HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities Mortgage Loan trust, Series 2007-OA5. (UMF, No. 2.) Ocwen Loan Servicing ("Ocwen") serviced the Loan on February 16, 2013, until June 1, 2019, when PHH began servicing the Loan after merging with Ocwen. (UMF, Nos. 3, 6.) On July 27, 2018, Plaintiff Moore applied for a loan modification application, which was denied for a Helping Homeowners Modification (because the account was greater than 90 days delinquent) and also denied for a Streamline Modification (because Ocwen could not offer Moore a payment that was within the guidelines of Ocwen's modification program). (UMF, No. 5.) It is disputed as to whether Plaintiff Moore made more than one loan modification application while Ocwen was servicing Plaintiff Moore's Loan from February 16, 2013, to June 1, 2019. (UMF and Response, No. 4.)

Plaintiff Moore then submitted 10 loan modification applications ("LMA") to PHH over the next few years: October 2021, November 2021, January 2022, July 2022, February 2023, April 2023, June 2023, July 2023, September 2023, and March 2024. (UMF, Nos. 41, 43, 46, 52, 55, 57–59, 62.) The facts and events after June 1, 2019, are as follows:

- October 2021 LMA
    - PHH stopped processing this LMA on November 9, 2021, because Plaintiff Moore had not provided documents in response to PHH's notice of incomplete application by the deadline. (UMF, Nos. 7–8.)
    - Plaintiff Moore disputes that this LMA was not submitted in October 2021, she was not assigned a direct means to contact her single point of contact, and she was informed by a PHH agent that any documentation would be reviewed even if submitted after the deadline. (UMF Response, Nos. 7–8.)
- November 2021 LMA
    - PHH stopped processing this LMA on January 3, 2022, because Plaintiff Moore had not provided documents in response to PHH's December 1, 2021, notice of incomplete application by the deadline. (UMF, Nos. 10–11.)
    - Plaintiff Moore disputes that she was assigned a direct means to contact her single point of contact, she was informed by a PHH agent that any documentation would be reviewed even if submitted after the December 31, 2021, deadline, and that she submitted the missing documents on January 3, 2022. (UMF Response, Nos. 9–11.)
- January 2022 LMA
    - On January 31, 2022, PHH sent Plaintiff Moore a letter deeming the LMA complete as of January 24, 2022, advising her that if further documentation was needed, they would send her another request with a reasonable timeframe for submission but that no documents were needed at this time. (UMF, No. 14.) PHH determined that further documentation and information were required and sent notices to Plaintiff Moore on February 22, 2022, and March 31, 2022 (UMF, No. 15.) The January 2022 LMA was deemed complete a second time on April 21, 2022, after Plaintiff submitted further documentation but was ultimately denied on May 13, 2022, for both a Helping Homeowners Modification (because the Loan was more than 90 days delinquent) and a Streamline Modification (because

the lowest modification payment that PHH could provide would exceed the current mortgage payment by more than 25 percent). (UMF, Nos. 16–17.)
    - Plaintiff Moore disputes that she was assigned an Account Relationship Manager to serve as a single point of contact for this LMA, that any of the requested documents in the February and March 2022 notices were "missing", and that the ultimate denial of the LMA was accurate. (UMF Response, Nos. 12–13, 15, 17.)
- July 2022 LMA
    - PHH deemed this LMA complete as of July 22, 2022, but denied it on August 4, 2022, for both a Helping Homeowners Modification (because the Loan was more than 90 days delinquent) and a Streamline Modification (because the lowest modification payment that PHH could provide would exceed the current mortgage payment by more than 25 percent). (UMF, Nos. 18–19.)
    - Plaintiff disputes that she was assigned an Account Relationship Manager to serve as a single point of contact. (UMF Response, No. 18.)
- January 31, 2023 – Default
    - A Notice of Default was recorded on January 31, 2023, and neither Plaintiff had a complete LMA pending on January 31, 2023. (UMF, No. 20.)
- February 2023 LMA
    - PHH deemed this LMA complete as of February 21, 2023, but ultimately denied it on March 13, 2023, for both a Helping Homeowners Modification (because the Loan was more than 90 days delinquent) and a Streamline Modification (because the lowest modification payment that PHH could provide would exceed the current mortgage payment by more than 25 percent). (UMF, Nos. 21–22.)
    - Plaintiff disputes that she was assigned an Account Relationship Manager to serve as a single point of contact. (UMF Response, No. 21.)
- April 2023 LMA
    - PHH deemed this LMA complete as of April 17, 2023, but denied it on May 3, 2023. (UMF, No. 23.)
    - Plaintiff disputes that she was assigned an Account Relationship Manager to serve as a single point of contact. (UMF Response, No. 23.)
- June 2023 LMA
    - PHH deemed this LMA complete as of June 2, 2023, but denied it on June 14, 2023. (UMF, No. 24.)
    - Plaintiff disputes that she was assigned an Account Relationship Manager to serve as a single point of contact. (UMF Response, No. 24.)
- July 2023 LMA
    - PHH deemed this LMA complete as of July 21, 2023, but denied it on August 18, 2023. (UMF, No. 25.)
    - Plaintiff disputes that she was assigned an Account Relationship Manager to serve as a single point of contact. (UMF Response, No. 25.)
- September 2023 LMA
    - PHH deemed this LMA complete as of September 18, 2023, but denied it on October 13, 2023. (UMF, No. 26.)
    - Plaintiff disputes that she was assigned an Account Relationship Manager to serve as a single point of contact. (UMF Response, No. 26.)
- February 21, 2024 – Notice of Trustee's Sale

    - A Notice of Trustee's Sale was recorded on February 21, 2024, and neither Plaintiff had a complete LMA pending on this date. (UMF, No. 27.)
- March 2024 LMA
    - PHH deemed this LMA complete as of April 12, 2024, but denied it on April 25, 2024, for both a Helping Homeowners Modification (because the Loan was more than 90 days delinquent) and a Streamline Modification (because the lowest modification payment that PHH could provide would exceed the current mortgage payment by more than 25 percent). (UMF, Nos. 28–29.) Plaintiffs did not appeal the April 25, 2024, denial of the March 2024 LMA. (UMF, No. 29.)
    - Plaintiff disputes that she was assigned an Account Relationship Manager to serve as a single point of contact. (UMF Response, No. 28.)
- July 9, 2024 – Trial Period Plan
    - On or about July 9, 2024, Plaintiff Moore was approved for a Trial Period Plan ("TPP") for loan modification, requiring Plaintiff Moore to accept the TPP in writing and make three TPP payments in the amount of $7,922.61 on August 1, 2024, September 1, 2024, and October 1, 2024. (UMF, No. 30.) Plaintiff Moore defaulted on the TPP by not accepting it in writing or making the First TPP payment by the end of August. (UMF, No. 31.)
    - Plaintiffs do not currently have an LMA pending and the Loan is currently in default for the March 1, 2022, payment. (UMF, Nos. 32–33.)
    - On January 30, 2024, Plaintiff Moore granted her interest in the Property to herself and Plaintiff Nichols as joint tenants but Plaintiff Moore remains as the sole borrower on the Loan. (UMF, No. 34.)

On April 18, 2024, Plaintiffs filed their Complaint against PHH alleging three causes of action: violations of Civil Code section 2923.6, violations of Civil Code section 2923.7, and violations of the California Business and Professions Code section 17200, et seq. PHH now moves for summary judgment, or summary adjudication in the alternative, to all three causes of action. The Court allowed a shortened timeline for an Opposition and Reply. (See *Ex Parte* Order Granting Leave to File Late Opposition, filed April 27, 2026.)

## II. Governing Law

### A. Standard at Summary Judgment/Adjudication Generally

A party moving for summary judgment must show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (CCP § 437c(c).) A party moving for summary adjudication of a cause of action must prove that the cause of action has no merit and summary adjudication may only be granted if it completely disposes of the cause of action. (C.C.P. § 437c(f)(1).) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (C.C.P. § 437c(p)(2).) "Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid*.)

"From commencement to conclusion," the moving party bears the burden of persuasion and production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) "There is no obligation on the opposing party…to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing every element…necessary to sustain a judgment in his favor." (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.) Defendants can meet their burden by showing a cause of action has no merit by showing that one or more elements of the cause of action "cannot be established." (See C.C.P. § 437c(p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense. (*Aguilar, supra*, 25 Cal.4th at p. 849.)

B. California Homeowner Bill of Rights

The California Homeowner Bill of Rights ("HBOR") is "a complex set of enactments focused specifically on residential mortgages and passed as a legislative response to the ongoing mortgage foreclosure crisis in 2012" and is "principally designed to ensure that 'as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.'" (*Morris v. JPMorgan Chase Bank, N.A*. (2022) 78 Cal.App.5th 279, 295 [citations omitted].) "For 'material violation' of any one of a list of nine statutory provisions within its scheme, it authorizes pre-foreclosure injunctive relief (§§ 2924.12, subd. (a)(1), 2924.19, subd. (a)(1)); post-foreclosure claims for 'actual economic damages pursuant to Section 3281' (§§ 2924.12, subd. (b), 2924.19, subd. (b)); the greater of trebled damages or $50,000 where the violation was 'intentional or reckless' or 'resulted from willful misconduct' (§§ 2924.12, subd. (b), 2924.19, subd. (b)); and attorney fees and costs as a reward to prevailing claimants (§ 2924.12, subd. (h); § 2924.19, subd. (h))." (*Ibid.*)

*Civil Code Section 2923.6*

The HBOR prohibits "dual tracking" which is a practice where "a lender or servicer pursues foreclosure while simultaneously going through the motions of reviewing a borrower's application for foreclosure mitigation, without a good faith intent to entertain the application." (*Morris, supra,* 78 Cal.App.5th at 296, citing *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 904.) In essence, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not initiate and pursue a trustee's sale until a completed and still pending application of loan modification is fully resolved. (*Morris, supra,* 78 Cal.App.5th at 296, citing Civ. Code § 2923.6, subds. (c)–(h).) "Where loan modification is denied, the bar on dual tracking prohibits the recording of a notice of default, the recording of a notice of sale, or the conduct of a sale, until the lender or servicer sends the borrower a written denial letter, giving reasons for the denial and advising the borrower she has 30 days to appeal. (§ 2923.6, subds. (c), (d), (f).)" (*Morris, supra,* 78 Cal.App.5th at 296.)

*Civil Code Section 2923.7*

Civil Code section 2923.7(a) provides that "[w]hen a borrower requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact" and Section 2923.7(b) provides that the single point of contact shall be responsible for:

> (1) Communicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions to be considered for these options.
> (2) Coordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application.
> (3) Having access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.
> (4) Ensuring that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any.
> (5) Having access to individuals with the ability and authority to stop foreclosure proceedings when necessary.

Section 2923.7(c) provides that the single point of contact shall remain assigned to the borrower's account "until the mortgage servicer determines that all loss mitigation options offered by, or through, the mortgage servicer have been exhausted or the borrower's account becomes current." A "single point of contact" is defined as "an individual or team of personnel each of whom has the ability and authority to perform the responsibilities described in subdivisions (b) to (d), inclusive" and "the mortgage servicer shall ensure that each member of the team is knowledgeable about the borrower's situation and current status in the alternatives to foreclosure process." (Civ. Code § 2923.7(e).)

C. Unfair Competition Law

Business and Professions Code section 17200 (commonly called the Unfair Competition Law, or "UCL"), 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.) "Prevailing plaintiffs [under the UCL] are generally limited to injunctive relief and restitution. Plaintiffs may not receive damages ... or attorney fees." (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371 [internal quotations omitted].) Punitive damages are not recoverable under the UCL. (*Id*. at 376.)

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.) "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].)

## III. Discussion

### A. Requests for Judicial Notice

The court may take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code § 452(h).) The court must take judicial notice of any matter requested by a party, so long as it complies with the requirements under Evidence Code section 452. (Evid. Code § 453.) The court may take judicial notice of court records (Evid. Code § 452(d).) Courts may "take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Harbolt* (1997) 61 Cal.App.4th 123, 126–127 [citations omitted]; Evid. Code §§ 452, 453.)

*PHH's Request*

In support of its motion for summary judgment or adjudication, PHH requests judicial notice of the January 30, 2024th Grant Deed recorded in the Official Records of Sonoma County (Document No. 2024004021). PHH's request for judicial notice is **GRANTED**.

*Plaintiffs' Request*

Plaintiffs request judicial notice of the Declaration of Linda Moore in Support of the *Ex Parte* Application for a Temporary Restraining Order to Restrain Trustee Sale filed in the instant case on April 22, 2024. Defendant objects to this request claiming that it is not judicially noticeable and contains inadmissible hearsay. The objection is **OVERRULED** and the request for judicial notice is **GRANTED**. However, the Court only takes judicial notice of the *existence* of the declaration but does not take judicial notice of the truth of any statement therein.

### B. First Cause of Action – Violation of Civil Code Section 2923.6

First, PHH argues that Plaintiffs cannot sustain a claim for dual tracking under Section 2923.6 because Plaintiffs did not have a complete loan modification application pending when the Notice of Default was recorded on January 31, 2023, or when the Notice of Trustee's Sale was recorded on February 21, 2024, as required by Section 2923.6(c).

Section 2923.6(c) forbids a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a notice of default or notice of sale or conduct a trustee's sales until any of the following occurs:

> (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) [30 days from the date of the written denial to appeal the denial] has expired.
> (2) The borrower does not accept an offered first lien loan modification within 14 days of the offer.
> (3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification.

PHH has shown that Notice of Default was recorded on January 31, 2023, and Notice of Trustee's Sale was recorded on February 21, 2024, and that Plaintiffs did not have a complete LMA pending during either of these times. (UMF, Nos. 20, 27.) Furthermore, it is undisputed that Plaintiffs did not appeal the denial of their March 2024 LMA (denied April 25, 2024) and that the 30-day appeal window has passed. (UMF, No. 29.) PHH still subsequently offered a TPP on July 9, 2024, which they rejected and currently do not have a complete LMA pending. (UMF, Nos. 30–31.)

Notably, Plaintiffs do not address this argument in their Opposition and do not dispute the material facts relevant to this claim. Therefore, Plaintiffs have failed to meet their burden to show that a triable issue of one or more material facts exists as to the First Cause of Action. Summary adjudication is **GRANTED** as to the First Cause of Action.

C. Second Cause of Action – Violation of Civil Code Section 2923.7

Next, PHH argues that it did not violate Section 2923.7 because it appointed a single point of contact ("SPOC") who communicated foreclosure prevention alternatives, coordinated receipt of all documents and assisted with Plaintiffs' LMAs, and informed Plaintiff Moore of the status of Plaintiffs LMAs. PHH contends that since Plaintiffs were not eligible for the many loan modifications for which they applied is not *per se* the result of a failure to appoint a single point of contact. PHH argues in the alternative that even if it violated Section 2923.7 any of the alleged violations are not material.

First, Plaintiffs allege a violation of Section 2923.7(a) by failing to provide a direct means to communicate with their SPOC because PHH communications dated August 8, 2021, October 7, 2021, October 13, 2023, November 24, 2021, December 1, 2021, April 25, 2024, and July 9, 2024 all contain various SPOCs (Jerold Ileto, Berto Gonzalez, Audrey WoodEarle, Dushaun Brockenbrough, Felicita Nunez, and Christopher Hall) for Plaintiffs' various LMAs but all SPOCs list the same direct phone number as (800) 750-2518. (Schwiner Decl., Exhibits G, Q, T, HH, KK, and LL.)

Second, Plaintiffs allege a violation of Section 2923.7(b)(1) by agents of PHH verbally telling Plaintiff Moore that it was permissible to submit documents after the submission deadlines on October 2021 and December 2021.

Third, Plaintiffs allege a violation of Section 2923.7(b)(4) by failing to ensure that Plaintiffs were evaluated for the Helping Homeowner's Modification program when Plaintiffs were not 90 days past due. Plaintiffs contend that all of these violations are material to this case because

when agents of PHH verbally told Plaintiff Moore that it was permissible to submit documents after the submission deadlines, this was during the 90-day window that Plaintiffs needed to have their LSA approved. Plaintiff emphasizes this gap in PHH's timing regarding the January 2022 application because it was deemed complete as of January 24, 2022, but then PHH requested further documentation as to Plaintiff Nichols' income documentation on February 22, 2022 (due March 24, 2022), and again on March 31, 2022 for a completed financial form attached to the letter (due May 1, 2022) that was not previously requested in the February 22, 2022 letter. (Schwiner Decl., Exhibit M–N.) The January 2022 LMA was then deemed complete for a second time on April 21, 2022 and later denied on May 13, 2022 for a Helping Homeowners Modification because the Loan was more than 90 days delinquent, but Plaintiff contends that on May 13, 2022, the Loan was not more than 90 days delinquent because the Loan is in default for the March 1, 2022 payment. (Schwiner Decl., Exhibits O–P.)

The Court finds that PHH has shifted its initial burden that its conduct did not violate section 2923.7. The Court is not persuaded that PHH violated Section 2923.7(a) by all SPOCs at PHH having the same direct phone number [(800) 750-2518] or that such a violation would have been a material violation. As defined by the statute, a SPOC is defined as "single point of contact" means an individual or team of personnel each of whom has the ability and authority to perform the responsibilities described in subdivisions (b) to (d), inclusive." (Civ. Code § 2923.7(e).) PHH's written communications contain the following standard language at the end of the letters:

> We are here to help! [Relationship Manager Name] has been assigned as your relationship manager and will be your designated representative for resolution, inquiries and submission of documents.
>
> For any questions, please contact us Monday through Friday 8:00am to 9:00pm ET at 800-750-2518 to speak with the assigned Relationship Manager. If [Relationship Manager Name] is not available, another dedicated member of our Home Retention Department will be available to answer any questions. Information concerning this loan may also be found online at www.mortgagequestions.com.
>
> Our Customer Care Center may also be contacted at 800-449-8767, Monday through Friday 8:00 am to 9:00 pm, Saturday 8:00 am to 5:00 pm ET.

(Schwiner Decl., Exhibits G, Q, T, HH, KK, and LL.) Plaintiffs do not produce any evidence that any PHH agent other than Plaintiff Moore's assigned Relationship Managers she spoke to did not have the ability or authority to assist her with any of the duties as listed in this section or that any of these agents were not knowledgeable about her situation and current status in the alternatives to foreclosure process. (Civ. Code § 2923.7(e).) Similarly, Plaintiff does not present any evidence that she tried to reach her Relationship Manager at a specific time and was unable to reach them or speak to another PHH agent that had the ability and authority to perform the responsibilities described in Section 2923.7(e). Furthermore, Plaintiffs fail to produce any evidence how each SPOC not having their own direct phone number or sharing one general phone line affected Plaintiff Moore's loan obligations, disrupted the loan-modification process, or otherwise harmed her in connection with her efforts to avoid foreclosure, i.e., a material

violation of Section 2923.7(a). (*Billesbach v. Specialized Loan Servicing LLC* (2021) 63 Cal.App.5th 830, 845 ["However, federal district courts applying California law have held that a violation is material if it affected the borrower's loan obligations, disrupted the loan-modification process, or otherwise harmed the borrower in connection with the borrower's efforts to avoid foreclosure."].) Therefore, Plaintiff has failed to show that a triable issue of one or more material facts exists as to a violation of Section 2923.7(a).

However, regarding violations of Section 2923.7(b), subdivisions (1) and (4) the Court finds that Plaintiffs have raised triable issues of fact related to the timing of the processing and ultimate denial of the January 2022 LMA and how Plaintiff Moore's claims that she was allowed to submit documentation beyond the listed deadlines factor into this issue, which all ultimately led to her Loan default for the March 1, 2022 payment. Eventually, PHH did offer Plaintiff Moore the TPP on July 9, 2024, but this came more than a year after a Notice of Default was recorded on January 31, 2023, and approximately four months after a Notice of Trustee's Sale was recorded on February 21, 2024. These are material violations because PHH's actions (or failure to act) all ultimately led to Plaintiff Moore's Loan default for the March 1, 2022, payment and the subsequent Notice of Default and Notice of Trustee's Sale. Summary adjudication is **DENIED** as to the Second Cause of Action.

For the first time in its Reply, PHH cites to Civil Code section 2924.12(c) which states that a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent "shall not be liable for any violation that it has corrected and remedied prior to the recordation of the trustee's deed upon sale, or that has been corrected and remedied by third parties working on its behalf prior to the recordation of the trustee's deed upon sale." Since this was raised in the Reply, Plaintiffs do not have adequate notice and opportunity to respond, and the Court shall not consider this argument. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 312–317 [finding that the trial court erred in considering new evidence submitted with reply papers that was omitted from the separate statement and not filed until after the opposing party had responded to the issues raised in the separate statement]; see also C.C.P. § 437c(b)(4) ["The reply shall not include any new evidentiary matter, additional material facts, or separate statement submitted with the reply and not presented in the moving papers or opposing papers."].)

D. Third Cause of Action – Violation of UCL

Lastly, PHH argues that Plaintiff's UCL claim fails as a matter of law because Plaintiffs lack standing and do not allege any unfair, unlawful, or fraudulent practice.

Plaintiffs contend that they have alleged standing as the Loan account has continued to accrue arrears and late fees and the Loan has remained in default. In the alternative, Plaintiff requests leave to amend the Complaint as to the Third Cause of Action because PHH has used a motion for summary judgment to test whether the complaint states a cause of action.

While the Court in *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 614 summarized *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 as "[nonjudicial foreclosure proceedings triggered by default are not economic injury caused by

UCL violations]," the Court finds that Plaintiff has sufficiently raised triable issues of fact surrounding PHH's actions, or nonactions, and the default. As discussed above, Plaintiff Moore's claims that two PHH agents stated that she was allowed to submit documentation beyond the listed deadlines, which factors into the issue of the timing of the processing and ultimate denial of the January 2022 LMA, and all ultimately led to her Loan default for the March 1, 2022, payment. Furthermore, the Court has found there to be triable issues of material fact related to the Section 2923.7(b) claims, which establishes a triable issue of fact as to whether PHH's conduct was "unlawful" as described under the UCL. Summary adjudication is **DENIED** as to the Third Cause of Action.

## IV. Conclusion

Summary adjudication is **GRANTED** as to the First Cause of Action and **DENIED** as to the Second and Third Causes of Action.

PHH's counsel 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. 25CV01119, Christian v. Rancho Grande Manufactured Home Community, LP

Plaintiff Emory Christian's ("Plaintiff") motion for leave to file the Second Amended Complaint is **DENIED** *without* prejudice. The motion is unopposed. However, there is no proof of service in the file reflecting that Plaintiff served the motion on Defendants with the May 8th hearing date. The only proof of service in the file for this motion is dated March 24, 2026, when the Court did not assign a hearing date until April 9, 2026. Parties are required to provide notice of a motion, including the hearing date assigned by the Clerk. (See Code of Civil Procedure §§ 1005, 1010; Cal. Rule of Court, Rule 3.1300(a); Sonoma Court Local Rule 5.1 (B).) Proof of service with the hearing date was required to be filed no later than Friday, May 1, 2026, and there is no such proof of service on file. Accordingly, the motion is **DENIED**.

## 3. 25CV01455, Estrela v. Genesis Motor America

Defendant Genesis Motor America ("Genesis") moves to compel Plaintiff Jaidan Estrela ("Plaintiff") into arbitration and stay the instant proceedings. The motion is **DENIED**.

### I. Factual & Procedural History

On Jun 6, 2022, Plaintiff purchased a 2022 Genesis GV70 (V.I.N. KMUMADTB8NU075495) (the "Vehicle"). (First Amended Complaint ["FAC"], ¶ 8.) Plaintiff presented the Vehicle for repairs on four different occasions:

- May 2023 for water intrusion into cabin from the rear right side;
- June 2023 for various warning indicator lights illuminating on the dashboard, including a warning message of "Forward Safety system disabled. Radar blocked" and the brakes engaging without manual operation;

- July 2023 for the warning message "Forward Safety system disabled. Radar blocked" repeatedly appearing; and
- November 2024 for water intrusion into the interior cabin via the front map lamp.

(FAC, ¶¶ 11–14.) Plaintiff then filed a Complaint alleging three violations of the Song-Beverly Act. (See Complaint, filed February 26, 2025.) Plaintiff subsequently filed the FAC on December 30, 2025, pursuant to a stipulation by the parties. (See Stipulation & Order for Leave to File a FAC, filed December 5, 2025.)

Defendant now moves the Court to compel Plaintiff into arbitration pursuant C.C.P. section 1281.2 and 9 U.S.C. section 3 under two arbitration provisions: (1) the arbitration agreement contained in the Owner's Handbook & Warranty Information ("Owner's Handbook") and (2) the arbitration agreement in the Genesis Connected Services Agreement ("CSA") when registering for Bluelink.

The Owner's Handbook provides that:

> If you purchased or leased your Genesis vehicle in the State of California, you and we, Genesis Motor America, each agree that any claim or disputes between us (including between you and any of our affiliated companies) related to or arising out of your vehicle purchase, advertising for the vehicle, use of your vehicle, the performance of the vehicle, any service relating to the vehicle, the vehicle warranty, representations in the warranty, or the duties contemplated under the warranty, including without limitation claims related to false or misleading advertising, unfair competition, breach of contract or warranty, the failure to conform a vehicle to warranty, failure to repurchase or replace your vehicle, or claims for a refund or partial refund of your vehicle's purchase price (excluding personal injury claims), but excluding claims brought under the Magnuson-Moss Warranty Act, shall be resolved by binding arbitration at either your or our election, even if the claim is initially filed in a court of law. If either you or we elect to resolve our dispute via arbitration (as opposed to in a court of law), such binding arbitration shall be administered by and through JAMS Mediation, Arbitration and ADR Services (JAMS) under its Streamlined Arbitration Rules & Procedures, or the American Arbitration Association (AAA) under its Consumer Arbitration Rules.
>
> IF YOU PURCHASED OR LEASED YOUR VEHICLE IN CALIFORNIA, YOUR WARRANTY IS MADE SUBJECT TO THE TERMS OF THIS BINDING ARBITRATION PROVISION. BY USING THE VEHICLE, OR REQUESTING OR ACCEPTING BENEFITS UNDER THIS WARRANTY, INCLUDING HAVING ANY REPAIRS PERFORMED UNDER WARRANTY, YOU AGREE TO BE BOUND BY THESE TERMS. IF YOU DO NOT AGREE WITH THESE TERMS, PLEASE CONTACT US AT OPT-OUT@GMAUSA.COM WITHIN THIRTY (30)

> DAYS OF YOUR PURCHASE OR LEASE TO OPT-OUT OF THIS ARBITRATION PROVISION.

(Villa Decl., Exhibit 2 at pp. 12, 14.)

The relevant portion of the CSA referenced in the registration to Bluelink services provides that:

> (a) Hyundai and you agree to arbitrate any and all disputes and claims between us arising out of or relating to this Agreement, Connected Services, Connected Services Systems, Service Plans, the vehicle, use of the sites, or products, services, or programs you purchase, enroll in or seek produce/service support for, whether you are a Visitor or Customer, via the sites or through mobile application, except any disputes or claims which under governing law are not subject to arbitration, to the maximum extent permitted by applicable law. This agreement to arbitrate is intended to be broadly interpreted and to make all disputes and claims between us subject to arbitration to the fullest extent permitted by law. This agreement to arbitrate otherwise includes, but is not limited to:
>
> > claims based in contract, tort, warranty, statute, fraud, misrepresentation or any other legal theory; claims that arose before this or any prior Agreement…

(Rao Decl., Exhibit B at Section 14(C)(a).)

## II. Governing Law

"Arbitration ... is a matter of consent, not coercion.... [Citation]. Whether an agreement to arbitrate exists is a threshold issue of contract formation and state contract law. [Citation.]" (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 843–844.)

C.C.P. section 1281.2 requires a court to order arbitration if it determines that an agreement to arbitration exists. (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842–843.) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation] The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination. [citation]." (*Id.* at 843.) "Whether the parties formed a valid agreement to arbitrate is determined under general California contract law" even when an agreement is governed by the FAA. (*Brockman v. Kaiser Foundation Hospitals* (2025) 114 Cal.App.5th 569, 584, quoting *City of Vista v. Sutro & Co.* (1997) 52 Cal.App.4th 401, 407, and quoting *Garcia v. Stoneledge Furniture LLC* (2024) 102 Cal.App.5th 41, 51.)

"The burden of persuasion is always on the moving party to prove the existence of an arbitration agreement with the opposing party by a preponderance of the evidence", but this burden of production may shift in a three-step process. (*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 164–165.) "First, the moving party bears the burden of producing 'prima facie

evidence of a written agreement to arbitrate the controversy, which can be accomplished by attaching to the motion or petition a copy of the arbitration agreement or pleading the terms of the agreement in the motion (*Id*. at 165 [citations omitted].) Second, if the moving party meets this initial burden and the opposing party disputes the agreement, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement, such as testifying under oath or declaring under penalty of perjury that they never saw or signed the agreement or that they do not remember seeing or signing the agreement. (*Id*. at 165 [citations omitted].) Third, if the opposing party meets its burden of producing evidence, then moving party must establish with admissible evidence a valid arbitration agreement between the parties by a preponderance of the evidence. (*Id*. at 165–166 [citations omitted].)

"While public policy favors contractual arbitration of disputes, arbitration is a matter of contract and a party who has not agreed to arbitrate a controversy cannot be compelled to do so." (*Brockman, supra,* 114 Cal.App.5th at 584–585.)

## III. Analysis

### A. Genesis' Request for Judicial Notice

The court may take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code § 452(h).) The court must take judicial notice of any matter requested by a party, so long as it complies with the requirements under Evidence Code section 452. (Evid. Code § 453.) Courts may "take judicial notice of the *existenc*e of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Harbolt* (1997) 61 Cal.App.4th 123, 126–127 [citations omitted]; Evid. Code §§ 452, 453.)

In support of its motion to compel arbitration, Gensis requests judicial notice of the FAC in the instant action and the Genesis 2022 Owner's Handbook and Warranty Information. Judicial notice of the FAC is **GRANTED with limitations** as the Court does not take judicial notice of the truth of the statements in the FAC. Additionally, Plaintiff raises an objection to the Warranty Handbook. Judicial notice of Warranty Handbook is **DENIED** because it is an evidentiary matter not properly subject to judicial notice. Plaintiff's objections are discussed below.

### **B.** Plaintiff's Evidentiary Objections

In support of his Opposition, Plaintiff asserts objections to the Declaration of Jovanni Villa, Declaration of Karla Osorio Montalvan, and Declaration of Vijay Rao for lack of personal knowledge, lack of foundation, and/or hearsay. In reply, Genesis filed a Response to Plaintiff's Evidentiary Objections.

Plaintiff's two objections to the Declaration of Jovanni Villa, including the Warranty Handbook, are **OVERRULED as moot**. Plaintiff's two objections to the Declaration of Karla Osorio

Montalvan are **OVERRULED**. Plaintiff's two objections to Declaration of Vijay Rao are **OVERRULED**.

### C. Genesis has Failed to Show a Valid Contract to Arbitrate Exists Between the Parties

#### 1. Vehicle's Owner's Handbook

Genesis contends that Plaintiff agreed to arbitration because an arbitration agreement was contained in the Owner's Handbook in the Vehicle and on the company's website and Plaintiff did not opt out of the arbitration provision within 30 days.

Plaintiff asserts that she was never shown a copy of Genesis' express warranty during pre-sale communications when she asked about warranty information or otherwise informed that any warranty claims against Genesis would be subject to binding arbitration provision contained within the Owner's Handbook. (Estrela Decl., ¶ 4.) Plaintiff does not recall being provided with a copy of the Owner's Handbook when she purchased the Vehicle, that Genesis informed her that the Owner's Handbook contained an arbitration provision, or that she was required to opt out of the post-sale arbitration agreement within 30 days of purchase of the vehicle. (Estrela Decl., ¶ 5.) The arbitration agreement in the Owner's Handbook did not require a signature or contain a signature line so Plaintiff never signed the Arbitration Agreement. (Estrela Decl., ¶ 6.)

Thus, Plaintiff raises issues of contract formation, which requires the application of state-law principles to determine whether an agreement to arbitrate exists. Both California state law and binding federal authority relinquish determinations of contractual construction of arbitration agreements to be governed by California law. (See *Brockman, supra,* 114 Cal.App.5th at 585; *Norcia v. Samsung Telecommunications America, LLC* (9th Cir. 2017) 845 F.3d 1279, 1283.)

Arbitration agreements are subject to the same rules of construction as any other contract with the fundamental goal of giving effect to the mutual intention of the parties. (*Brockman, supra,* 114 Cal.App.5th at 585.) "[T]he vital elements of a cause of action based on contract are mutual assent (usually accomplished through the medium of an offer and acceptance) and consideration." (*Pacific Bay Recovery, Inc. v. California Physicians' Services, Inc.* (2017) 12 Cal.App.5th 200, 215.) "Courts must determine whether the outward manifestations of consent would lead a reasonable person to believe the offeree has assented to the agreement." (*Norcia, supra,* 845 F.3d at 1283.)

Here, Genesis fails to show that Plaintiff expressly assented to the arbitration provision contained in the Owner's Handbook. There is no signature line on the arbitration agreement contained in the Owner's Handbook and Plaintiff claims that she does not remember being told about the arbitration agreement within the Handbook. (Estrela Decl., ¶¶ 4–6.) While Defendant claims that all vehicles sold at authorized Genesis dealerships include in its glovebox materials a copy of the Owner's Handbook made available and provided to the customer at the time of sale which means that a copy of the relevant Owner's Handbook, such argument is conclusory. (Osorio Decl., ¶¶ 5–6.) There is no evidence that Plaintiff affirmatively received the Owner's Handbook, that a copy was in the glovebox of the Vehicle she purchased, or any proof that Plaintiff was informed

that the Owner's Handbook contained a binding arbitration agreement with a time-sensitive opt-out provision. The Owner's Handbook being available online is not persuasive as there is no evidence that Plaintiff was informed about the Owner's Handbook containing an arbitration agreement. There is no evidence that Plaintiff demonstrated manifestations of consent that would lead a reasonable person to believe that she assented to the arbitration agreement.

The Court is not persuaded by Genesis' reliance on *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 and *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262 to support its arguments of estoppel as these cases are distinct from the case at hand. Both of these cases dealt with the primary contract (sales contract in *Felisilda* and an employment contract in *Boucher*) containing an arbitration provision that the plaintiffs in each case signed. The arbitration agreement in this case was contained in the Owner's Handbook in the glovebox of the Vehicle where there is no evidence that Plaintiff was notified of its existence in some manner and was not required to sign.

Therefore, the Court finds that Genesis has failed to meet its burden to show that a valid agreement to arbitrate exists regarding the Owner's Handbook.

2. Bluelink Connected Services Agreement

Genesis contends that Plaintiff agreed to arbitration when she enrolled her vehicle in Bluelink (a connected car services technology that provides several "smart" features for Genesis vehicle) because when enrolling the Vehicle in Bluelink, Plaintiff affirmatively acknowledged that she read and agreed to the Terms & Conditions, including the Genesis CSA, which contains an arbitration agreement covering any and all claims and disputes related to the Vehicle. Genesis states that on June 6, 2022, Plaintiff enrolled her Vehicle in Genesis Connected Services on the Dealer Web Portal ("DWP") through a process known as the Dealer-Assisted Enrollment process, which requires the customer to enter their personal details and review the CSA Terms and Conditions. (Rao Decl., ¶¶ 7–8, 18.) The CSA Terms and Conditions contain the arbitration agreement. Plaintiff accepted the terms and conditions of the CSA, which also contained a provision requiring Plaintiff to arbitrate any and all disputes relating to the Vehicle. (Villa Decl., Exhibit 3.) Plaintiff argues that she does not remember being presented with or clicking any electronic checkbox related to the Complimentary Subscription as it relates to Bluelink services. (Estrela Decl., ¶ 8.)

While the Director of Connected Ops & Owner Apps/Web, for Hyundai Motor America, Inc. confirmed employee training regarding the Dealer-Assisted Enrollment process and the steps necessary to assist a customer to enroll in CSA (Mr. Rao), he does not state that he was present when Plaintiff enrolled in CSA nor does Genesis present any declaration from the sales associate who assisted Plaintiff in enrolling in CSA.

Furthermore, in *Bannister v. Marinidence Opco, LLC* (2021) 64 Cal.App.5th 541, 546, plaintiff was not assigned a unique username and password to complete the on-boarding forms, and despite the fact that defendants had witnesses to plaintiff on the computer completing forms, that was insufficient evidence for the trial court that plaintiff was the individual that completed that particular form. (*Id.* at 548.) The Court of Appeal affirmed, noting that defendant's showing did not meet the standards provided under Civ. Code § 1633.9. "An electronic record or electronic

signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." (Civ. Code, § 1633.9(a).) Here, as proof of Plaintiff's signature or assent to the CSA, Gensis provides a redacted screenshot of its internal Hyundai AutoEver America Database that Plaintiff accepted the CSA. (Rao Decl., Exhibit A.) The only information shown that would relate this registration to Plaintiff is her name and V.I.N. This alone is insufficient to conclude that Plaintiff was the one who agreed to the CSA and affirmatively checked the checkbox as found in *Bannister*. There is no evidence that Plaintiff demonstrated manifestations of consent that would lead a reasonable person to believe that she assented to the arbitration agreement contained in the CSA by agreeing to a complimentary subscription of Bluelink.

Thus, Genesis has failed to meet its burden to show that a valid agreement to arbitrate exists regarding Bluelink and CSA.

### IV. Conclusion

Genesis' motion to compel arbitration is **DENIED**.

Plaintiff's counsel 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).

## 4. 25CV06095, Draper Enterprises, Inc. v. Lindwood Owners Association

Plaintiff Draper Enterprises, Inc. ("Plaintiff") filed the verified complaint in this action against defendants Linwood Owners Association ("Defendant") arising out of a management service contract (the "Complaint"). Defendant has in turn filed a cross-complaint ("Cross-Complaint") against Plaintiff. This matter is on calendar for the Plaintiff's motion to disqualify Defendant's counsel Zimmerman Pavone, LLP ("ZPL") as counsel for the Defendant under Code of Civil Procedure ("CCP") § 128. The motion is **GRANTED**.

### I. Facts and Procedure

Plaintiff[1] is a company which provides management services to homeowners' associations. Defendant is a former client. Defendant's counsel, ZPL, is a firm which provides legal services to over 300 homeowners associations, including 37 clients that are shared with Plaintiff. Plaintiff had direct contact with ZPL in the context of these mutual clients. As of the filing of this motion, that contact is continuing. As part of these direct contacts, Plaintiff will sometimes pose questions related to the management of multiple clients. When this occurs, ZPL bills Plaintiff directly. Plaintiff contends that ZPL provides direct legal services when this occurs. Plaintiff particularly raises an occurrence where ZPL appeared as counsel representing Plaintiff's president, Chelsea Draper, in a deposition. In the process of meeting and conferring, Plaintiff's

[1] Both the Complaint ¶ (3)(b)(1) and the Cross-Complaint, ¶ 3 contend that Plaintiff does business as "Premier Property Services" ("Premier"). All of the evidence relates to Premier, and neither party truly disambiguates between the two.

current counsel has insisted that ZPL not contact Plaintiff, despite the continued existence of mutual clients, due to the pendency of this litigation.

Defendant contends that the services provided by ZPL to Plaintiff are solely in their role as an agent of the various mutual clients, and that there is no direct attorney-client relationship between ZPL and Plaintiff. Defendant also contends that ZPL's appearance on behalf of Plaintiff's president at deposition was only in the context of her role as agent of the mutual clients. Ms. Draper had independent counsel present for herself in her individual role. Defendant also contends that ZPL has never received any confidential information of Plaintiff in the context of their interaction, and particularly no information adverse to ZPL's existing clients.

## II. Governing Authorities

### A. The Attorney Client Relationship

"An attorney-client relationship is not created by the unilateral declaration of one party to the relationship. (Citation) Rather, the relationship can only be created by contract, express or implied." *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729. "No formal contract or arrangement or attorney fee is necessary to create the relationship of attorney and client. It is the fact of the relationship which is important." *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126. "Whether an attorney-client relationship exists is a question of law." *De Meo v. Cooley LLP* (2025) 115 Cal.App.5th 17, 30.

"When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established *prima facie.*" *Beery v. State Bar* (1987) 43 Cal.3d 802, 811. "Payment is but one indicia; the contractual intent and conduct of the parties are critical to formation of such relationship." *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 285.

### B. Motions to Disqualify

The court's power to disqualify counsel is based in the court's inherent power under CCP section 128(a)(5) to control the affairs and people before it in order to ensure justice. *Collins v. State of California* (2004) 121 Cal.App.4th 1112, 1123; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145. "Exercise of that power requires a cautious balancing of competing interests. The court must weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest." *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1048. "Disqualification is only justified where the misconduct will have a 'continuing effect' on judicial proceedings." *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 744; *Sheller v. Sup.Ct*. (2008) 158 Cal.App.4th 1697, 1711.

A party may only seek to disqualify an opponent's counsel if the party has standing to do so. *Great Lakes Const., Inc v. Burman* (2010) 186 Cal.App.4th 1347; *Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 485. As the court in *Blue Water Sunset* stated, discussing the general standing requirement for seeking disqualification before noting an exception for vicarious standing in a derivative shareholder action or action on behalf of the party's corporation,

> A complaining party who files a motion to disqualify is required to have standing. [Citation.] Some cases hold that the complaining party must prove a present or past attorney-client relationship with the attorney who is the target of the motion. [Citations.] Other courts permit disqualification on a different basis, holding that standing is established so long as the lawyer owed a duty of confidentiality to the complaining party and breached it. [Citation.]

In the words of *Great Lakes Const*., at 1356, '[a] "standing" requirement is implicit in disqualification motions. Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney.' As stated in *Collins, supra,* at 1124:

> [u]ltimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.

California Rule of Professional Conduct ("RPC"), Rule 1.7, formerly found in Rules 3-310 and 3-320, governs conflicts of interest in representation of current clients. An attorney, among other things, may not represent a client if the representation is directly adverse to another client in the same or a separate matter. See Rule 1.7 (a). Representation against the interest of former clients cannot occur without informed written consent of each client. Rule 1.7(c-d). Even so, representation is only permitted if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, and the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding. Rule 1.7(d).

However, "cases have consistently concluded that mere exposure to confidential information of the opposing party does not require disqualification." *Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 841; see also *Fox Searchlight Pictures, Inv. v. Paladino* (2001) 89 Cal.App.4th 294, 302-304. When an attorney represents a client whose interests may clash with a former client, the court must disqualify the attorney if there is a "substantial relationship" between the subjects of the two lawsuits. *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1430-1431. The court must focus not on the similarities of the litigation, but on ensuring that the attorney can give the clients undivided loyalty. *Id.*

Disqualification of the entire firm is mandatory when an attorney who was actually involved in representing a client in a matter "switches sides" in the same case and no "ethical wall" can remedy that. *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1139. Disqualification of an entire law firm may also be required where an attorney has been "tainted" but it is not automatic. *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 801. In such instances, the firm seeking to prevent disqualification may rebut the presumption of exposure to confidential information by demonstrating that the tainted attorney is not involved in the case and that there is an "ethical screen" preventing the tainted attorney from transmitting the confidential information to the other attorneys. *Kirk, supra*, 807-814. Once the side seeking disqualification had demonstrated that an attorney is tainted with confidential information, this creates a rebuttable presumption that the attorney shared that information with the new firm. *Kirk supra*, 809-810. As the court explained in *Kirk, supra*, at 810, this puts the burden on the side trying to prevent disqualification:

> … to establish "that the practical effect of formal screening has been achieved. The showing must satisfy the…court that the [tainted attorney] has not had and will not have any involvement with the litigation, or any communication with attorneys or [ ] employees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed." [Citation.]

The *Kirk* court, at 810, explained that specific elements for demonstrating such a screen "vary from case to case" but two are "necessary": first, "the screen must be timely imposed; a firm must impose screening measures when the conflict first arises. It is not sufficient to wait until the trial court imposes screening measures as part of its order on the disqualification motion"; second, "it is not sufficient to simply produce declarations stating that confidential information was not conveyed or that the disqualified attorney did not work on the case; an effective wall involves the imposition of preventive measures to guarantee that information will not be conveyed." This should involve a memorandum circulated in the firm instructing the attorneys and other employees not to communicate with the tainted attorney about the matter and to prevent access to files and information. The result, in the words of *Henriksen, supra*, at 116, fn. 6, and quoted again in *Kirk, supra*, at 810-811, is that:

> [t]he typical elements of an ethical wall are: [1] physical, geographic, and departmental separation of attorneys; [2] prohibitions against and sanctions for discussing confidential matters; [3] established rules and procedures preventing access to confidential information and files; [4] procedures preventing a disqualified attorney from sharing in the profits from the representation; and [5] continuing education in professional responsibility.

The *Kirk* court, at 813, added that notice to the former client should be required as well.

The key standard involving issues of disqualification in subsequent or different cases is the "substantial relationship test," which focuses on whether there is a "substantial relationship" between the former and current representations. *City Nat. Bank v. Adams* (2002) 96 Cal.App.4th 315, 324; *Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70, 78. The former client

only needs to show "the requisite substantial relationship between the subjects of the prior and the current representations" at which point "access to confidential information by the attorney in the course of the first representation... is presumed and disqualification...is mandatory; indeed the disqualification extends vicariously to the entire firm." *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283. Due to the vagaries of the term "substantial relationship," court focus on the practical consequences and specifically whether confidential information material to the current dispute normally would have been imparted to the attorney as a result of the former representation. *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445, 1454; *Brand v. 20th Century Ins. Co./21st Century Insurance Company* (2004) 124 Cal.App.4th 594.

The court can determine whether a substantial relationship exists by examining the facts and legal issues involved in the two cases along with the nature and extent of the attorney's involvement in both, including the time spent and possible exposure to policy or strategy. *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445, 1455. As the *Ahmanson* court explained, at 614, it adopted a "pragmatic approach, which focuses on the nature of the former representation" so that:

> …the attorney's possession of confidential information will be presumed only when ' "a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney...." ' [Citations.] [¶] Under [this] formulation of the test, the courts focus less on the meaning of the words 'substantial' and 'relationship' and look instead at the practical consequences of the attorney's representation of the former client. The courts ask whether confidential information material to the current dispute would normally have been imparted to the attorney by virtue of the nature of the former representation. [Citation.]

In other words, "it is not the services performed by the attorney that determines whether disqualification is required, it 'is the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation.' [Citation.]" *Farris v. Fireman's Fund Ins. Co*. (2004) 119 Cal.App.4th 671, 681. Should the party seeking disqualification demonstrate the requisite "substantial relationship," and "if the nature of the representation is such that confidences *could have* been exchanged... courts will conclusively presume that they *were* exchanged, and disqualification will be required." *City National Bank, supra,* 327, citing *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1331 (emphasis original); *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 489.

"(W)ith few exceptions, an attorney may not simultaneously represent clients (even as to unrelated matters) whose interests are adverse to one another." *Havasu Lakeshore Investments, LLC v. Fleming* (2013) 217 Cal.App.4th 770, 777.

> In evaluating conflict claims in dual representation cases, the courts have accordingly imposed a test that is more stringent than that of demonstrating

> a substantial relationship between the subject matter of successive representations.[3] Even though the simultaneous representations may have *nothing* in common, and there is *no* risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be *required.* Indeed, in all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or "automatic" one."

*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284.

## III. Analysis

Each party strongly contends that there is or is not a basis for the motion. Plaintiff contends that disqualification is mandatory due to the existence of a current attorney client relationship. However, in the alternative, Plaintiff contends that countless representations have occurred as a result of disclosures of actual client confidences in the context of ZPL's prior representation of mutual clients. Defendant contends that ZPL has only provided legal services to Plaintiff in the context of legal work for the benefit of the parties' mutual clients, and that no attorney-client relationship, express or implied, was ever formed with Plaintiff. Analysis here does not proceed past the issue of concurrent representation, which results in automatic disqualification.

The Court notes that ZPL concedes the facts most relevant to this determination. ZPL concedes that it bills Plaintiff directly for the work. It communicates with Plaintiff regarding questions that affect multiple clients simultaneously by answering questions asked by Plaintiff and not necessarily approved by the mutual clients. Zimmerman Declaration, ¶ 10; Ziskin Declaration ¶ 5. ZPL has offered legal advice to Plaintiff related to "advice or training on compliance with the Davis Stirling Common Interest Development Act or other common interest development laws, which advice or training would be applied to all of our mutual clients." Zimmerman Declaration, ¶ 12. ZPL's provision of legal advice to Plaintiff, not regarding any one of their mutual clients in particular constitutes a direct relationship.

Plaintiff's remittance of payment for such legal advice is a secondary consideration. Remittance of payment alone is not sufficient to create an attorney client relationship, but it is relevant. *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 285. While Defendant's position that there is no relationship would render those payments subject to their own ethical rules and queries (RPC, Rule 1.8.6), what appears relevant here is that Plaintiff asked for legal advice (which ZPL admits they performed without evidence of approval of the mutual client), received that advice, and remitted payment thereon directly. These are all the indicia of an attorney-client relationship. ZPL's claim of ignorance regarding who bore the eventual cost appears insufficient to raise a genuine defense.

Based on these facts, the Court finds that an independent attorney-client relationship was formed between Plaintiff and ZPL. There is also evidence that ZPL continues to be in contact with Plaintiff directly regarding the remaining mutual clients. Whether this has stopped since the motion was filed appears immaterial. "(T)he 'automatic disqualification rule applicable to concurrent representation [cannot] be avoided by unilaterally converting a present client into a

former client prior to hearing on the motion for disqualification[.]'" *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 288, quoting *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1057.

Given that there is evidence of a current, direct attorney-client relationship, analysis does not proceed further. Disqualification becomes "automatic". *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 285. Whether confidential information was remitted to ZPL is secondary and would only be relevant for the determination of disqualification due to previous representation. The Court does not reach that determination.

Plaintiff's request is **GRANTED**. Defendant shall obtain different counsel.

## V. Conclusion

The motion is **GRANTED**. ZPL is disqualified effective 30 days after of notice of this order. Plaintiff 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.*****