

**TENTATIVE RULINGS
LAW & MOTION CALENDAR
Friday, September 6, 2024 3:00 p.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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PLEASE NOTE: The Court’s Official Court Reporters are “not available” within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

1. 23CV01326, Olmedo v. Ramirez Martinez

Plaintiff Pablo Olemedo and Elia Dominguez (together “Plaintiffs”), filed the complaint (the “Complaint”) against defendants Paulino Ramirez Martinez (“Defendant”), along with Does 1-10, arising out of an alleged auto collision. This matter is on calendar for the motion by Aspire General Insurance Company (“Intervenor”) for leave to intervene pursuant to Cal. Code Civ. Proc. (“CCP”) § 387 by filing an answer-in-intervention on behalf of its insured, the Defendant.

CCP § 387(d)(1) provides that the Court “shall” permit a nonparty to intervene in the action or proceeding if either of the following conditions is satisfied: (A) A provision of law confers an unconditional right to intervene. (B) The person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person’s ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties.” CCP § 387(d)(2) provides that the Court “may” permit a nonparty to intervene in the action or proceeding if the person has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both.

The factual basis for the Motion is that although Intervenor has agreed to provide a defense to Defendant, defense counsel cannot reach him because on information and belief he is currently unreachable, cannot accept service, and therefore is subject to a potential default judgment. The legal basis for the Motion is that because a liability insurer agrees to pay any judgment obtained against its insured (Cal. Insur. Code § 11580(b)(2)), it has the right to intervene when the insured is not capable of defending itself. *See, e.g. Reliance Ins. Co. v. Sup. Ct.* (2000) 84 Cal.App.4th 383, 386-387 (insurer entitled to intervene where insured barred from defending because its corporate status had been suspended for nonpayment of franchise tax); *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1468 (insurer permitted to intervene and file motion to set aside default judgment where insured defendant was in jail).

Defendant has still not appeared in the case. Intervenor has obtained Plaintiffs' stipulation to allow intervention. There appears to be good cause to allow intervention here to prevent default while Intervenor's interests are implicated.

Therefore, leave to intervene is GRANTED. After this order is signed by the Court, Intervenor shall file the answer in intervention within 15 days, and serve it as required by statute. See CCP § 387(e).

Intervenor's counsel 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).

2. 23CV01739, Black v. McDaniel

Plaintiff Richard Black ("Plaintiff") filed the presently operative first amended complaint against defendants Dayna N. McDaniel, "Defendants"), and Does 1-10, arising out of an automobile accident (the "FAC").

This matter is on calendar for the motion to compel further production of documents under Code of Civil Procedure ("CCP") § 2025.480. The Motion is **DENIED**.

I. Relevant Law

A. Compelling Further Answers After Depositions

A party may take the deposition of an entity by examining an officer or agent designated by the entity to testify on its behalf. In such a case, the notice of deposition must "describe with reasonable particularity the matters on which examination is requested" and the entity must "designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent." CCP § 2025.230. Additionally, when documents are requested pursuant to CCP § 2025.220, the witness must "make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held." *Maldonado v. Sup. Ct.* (2002) 94 Cal.App.4th 1390, 1396. After service of a deposition notice, a party may object to disclosure of privileged or

protected information. CCP § 2025.460. Objections to the sufficiency of the deposition notice must be served three court days prior to the deposition. CCP § 2025.410.

CCP § 2025.450 states that if a party fails to attend a deposition and produce documents without serving valid objections, the party seeking the deposition may request a court order compelling attendance. This applies where a party, “without having served a valid objection under subdivision (g), fails to appear for examination, or to proceed with it, or to produce... any document or tangible thing described in the deposition notice....” *Id.* The party moving to compel deposition attendance need only inquire as to what happened, not attempt to meet and confer. CCP §2025.450. CCP § 2025.450 expressly apply to motions to compel attendance where the party fails to appear “without having served a valid objection.” An objection to defects or errors in a deposition notice must be served at least 3 days before the deposition date. CCP § 2025.410(a), (b). If a party serves a timely objection, no deposition shall be used against the objecting party if that party does not attend the deposition and the objection was valid. CCP § 2025.410(b). Where a deponent appears, but refuses to answer questions, or fails to produce any document, the deposing party may move the court to compel that answer or production. CCP § 2025.480(a). A motion to compel answers or production under this section shall be made no later than 60 days after completion of the record of the deposition. CCP § 2025.480(b). The objections or other responses to a business records subpoena are the “deposition record” for purposes of measuring the 60-day period for a motion to compel. *Unzipped Apparel, LLC v. Bader* (2007)156 Cal.App.4th 123, at 132-133; *Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1192.

CCP § 2025.480(a), provides: “If a deponent fails to answer any question or to produce any document, electronically stored information, or tangible things under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production.” CCP, § 2025.480. A motion to compel further answers “shall be made no later than 60 days after the completion of the record of the deposition, and shall be accompanied by a meet and confer declaration under Section 2016.040.” CCP § 2025.480(b). Along with the motion, all supporting documentation papers must be filed within and 60 days of completion of the deposition record. *Weinstein v. Blumberg* (2018) 25 Cal.App.5th 316, 321. “Not less than five days prior to the hearing on this motion, the moving party shall lodge with the court a certified copy of any parts of the stenographic transcript of the deposition that are relevant to the motion.” CCP § 2025.480(h).

A deposition reporter shall give notice that the transcript is available for “reading, correcting and signing” to the deponent and all parties who attended the deposition. CCP § 2025.520 (a). For 30 days thereafter, the deponent may change the form or substance of the answer to a question and may either approve or refuse to approve the transcript. CCP § 2025.520 (b).

B. Collateral estoppel

Collateral estoppel applies when “[t]he prior judgment ... operates in a second suit ... based on a different cause of action ... as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (internal quotations and citations omitted).

Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. (Citation.) Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (Citation.) The party asserting collateral estoppel bears the burden of establishing these requirements.

Lucido v. Superior Court (1990) 51 Cal.3d 335, 341 (internal citations omitted).

Collateral estoppel is dependent on the previous determination of identical issues as those alleged in the current case. *Id.* at 342. The “identical issue” requirement addresses whether “identical factual allegations” are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. *Ibid.*

C. Reconsideration and Renewed Motions

“Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.” Code Civ. Proc., § 1003.

In general, a party may move for reconsideration of a motion within 10 days after the motion is denied, based upon “new or different facts, circumstances, or law.” (Code Civ. Proc., § 1008, subd. (a).) In addition, after expiration of the 10–day period to move for reconsideration, a party “may make a subsequent application for the same order upon new or different facts, circumstances, or law.” (Code Civ. Proc., § 1008, subd. (b).) Such a motion does not seek reconsideration of the earlier motion but, instead, is simply a new motion that is permitted by the existence of new law or facts—in effect, it renews the earlier motion by submission of a new motion raising the same issues. The overriding purpose of Code of Civil Procedure section 1008 is to prevent duplicative motions. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1106, 29 Cal.Rptr.3d 249, 112 P.3d 636.)

UAS Management, Inc. v. Mater Misericordiae Hospital (2008) 169 Cal.App.4th 357, 367.

“The nature of a motion is determined by the nature of the relief sought, not by the label attached to it. The law is not a mere game of words.” *California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 43, quoting *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193, 26 Cal.Rptr.3d 790. Where a party couches their request for identical relief under a different statute, that motion is still under the purview of CCP § 1008, and subject to analysis under that statute. *Ibid.*

Contentions that the court has made an error of law or refused to consider evidence is not a new fact as required for a motion under CCP § 1008. *Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 724 disapproved of on other grounds by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512. New facts mean facts which were not available to the party at the time of the hearing. *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468. To prevail on a motion for reconsideration based on new facts, a party must provide a satisfactory explanation for failing to offer the evidence in the first instance. *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212. The new facts offered must be accompanied by a showing of strong diligence in discovery and bringing the new facts, and absent a strong showing of diligence, the motion will be denied. *Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183, 202 disapproved of on other grounds by *Shalant v. Girardi* (2011) 51 Cal.4th 1164. Failure to show new facts or law is jurisdictional. *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 380. Where the motion for reconsideration brings no valid new fact to the merits of the underlying motion, and merely contends a collateral matter, reconsideration will be denied. *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500.

II. Analysis

A. Compelling Further Responses

This matter follows Plaintiff's original motion to compel further responses attempting to compel the production of call logs, hearing on April 5, 2024, and the Court's issuance of an order denying that relief issued on May 17, 2024. On that instance, Plaintiff sought production of Defendant's phone records for an eight-hour period within the date of the incident. Defendant raised several objections in opposition including for relevancy, privacy (personal and third-party), and improper non-party production. At oral argument, Plaintiff's counsel sidestepped all these objections and simply tried to rescue the motion by remedying the document request in narrowing the timeframe from eight hours to one hour. The Court eventually denied Plaintiff's motion on procedural and substantive grounds all which were detailed in its written order. However, prior to the trial court's issuance of the order, Plaintiff appealed by way of a writ. On May 15, 2024, the First Appellate District, Division One, also denied Plaintiff's writ and requested relief.

First, Plaintiff appears to have filed a motion predicated on the same deposition record, which was complete on February 15, 2024. Defendant has filed an opposition. The Court cautioned counsel on the prior motion to compel that "Counsel are expected to restrain themselves to "nonfrivolous argument(s)". Code Civ. Proc., § 128.7." Despite this, Counsel Kagel has filed the same motion **with a number of the same procedural deficiencies**. Additionally, the Court **has already denied the motion to compel as to this discovery request**. Plaintiff's writ of mandate on that order was denied as well on multiple grounds. These three independent facts would be sufficient to establish the frivolous nature of the present motion.

Second, beginning with the deficiency which is again present in the current motion despite mention in the prior order, Plaintiff has **again** failed to file a separate statement with the motion.

Cal. Rule of Court § 3.1345 (a)(5). Plaintiff's motion is, again, incomplete. This alone provides sufficient basis on which the Court once again denies the motion.

Third, Plaintiff's attempt to compel a second time on a deposition which was "complete" on February 15, 2024, is not well taken. Plaintiff had 60 days from the completion of the deposition record to file the motion to compel. CCP § 2025.480(b). Plaintiff's original motion to compel was filed on February 9, 2024. The deposition was complete on February 15, 2024, when the reporter signed the deposition. Plaintiff filed the instant motion on June 3, 2024. Far more than 60 days passed from when the deposition record was complete to the filing of the instant motion. Plaintiff makes vague reference on Reply to the denial of their writ of mandate on this precise issue, but provides no briefing regarding discovery deadlines, and the applicable effect of a request for writ relief. Regardless, Plaintiff's appeal was not filed until May 6, 2024, and the 60-day period lapsed between the Court's April 5, 2024 hearing, and the filing of Plaintiff's writ. The Court no longer has jurisdiction over the discovery responses at issue. Plaintiff's motion is untimely. Therefore, the motion is also denied on these grounds.

Fourth, as Defendant argues, this matter is precluded by the prior order. The Court provided a lengthy and substantive ruling on Plaintiff's February 9, 2024, motion. The motion was denied on both substantive and procedural grounds. Given the mixed nature of the denial, the court did not deny the motion without prejudice. Particularly, the Court found that Defendant had provided a well-supported privacy objection, which Plaintiff failed to rebut. Plaintiff avers without citation to authority that narrowing the scope of the motion somehow does not mean that the Court's prior order is controlling. Plaintiff erroneously refers to "res judicata". Defendant in turn argues that the issue is precluded under collateral estoppel. This also does not appear applicable, as collateral estoppel refers to final adjudication of facts in prior proceedings brought to judgment. Rather, as a motion for the same relief lodged within the same case, CCP § 1008 applies.

There is no mention of CCP § 1008 in Plaintiff's papers. As such, the notice of motion fails for not mentioning the applicable statute upon which possible relief is requested. Were the Court to reach the merits, and CCP § 1008 controlling the decision, the question before the Court would be whether the motion is one for reconsideration or a renewed motion. Regardless, the result is the same. On review, the motion would be one for reconsideration, as Plaintiff requests a merely narrowed version of the exact same relief as previously requested. The request has not substantively changed adequately to be a renewed motion.

As a motion for reconsideration, there are multiple fatal deficiencies.¹ First, the motion fails to include the information required for a motion for reconsideration. For a motion under CCP § 1008(a), "The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." Plaintiff avers no new facts beyond having narrowed the scope of the request. This is not a new fact as contemplated by the reconsideration statute. Second, even if this were to be considered a "new fact", Plaintiff makes no representation to the Court why the request was not narrowed prior to the first hearing. Third,

¹ The Court notes that as a motion for reconsideration, the motion is timely under both CCP § 1008 (the notice of entry of order was served on May 30, 2024), and CCP § 2025.480(b). Despite this, the other deficiencies would prevail.

there is no affidavit attached to the motion. Plaintiff has not demonstrated that the original motion was decided in error. The original motion remains procedurally deficient, and Plaintiff has not provided any persuasive reason why the originally sustained privacy objection should be determined in his favor.

As a renewed motion, Plaintiff's request does not fair better. A party seeking a renewed motion "may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." Code Civ. Proc., § 1008 (b). Again, Plaintiff does not couch their request under CCP § 1008, nor is it a "new" motion merely requesting the same relief. A renewed motion is *not* an opportunity for a party to reraise the same motion already denied on multiple grounds with the benefit of the Court's prior ruling. It is an opportunity to petition the court for identical relief because there were factors unweighted, unconsidered and unmentioned in the first motion. Plaintiff merely attempts to narrow the original request, an attempt made at the previous oral argument on the initial motions. This is neither a new fact as required by a new motion, nor has Plaintiff accompanied the motion with the required affidavit. The renewed motion also fails for the procedural reasons outlined above showing the deficiency of the instant request as a discovery motion.

Therefore, the request for production of cell phone records is DENIED.

Plaintiff hides a request for additional deposition time with Defendant in the memorandum, which is not addressed in the notice of motion. The relief not being requested in the notice of motion, it is not properly before the Court. Cal Rule of Court 3.1110. Therefore, it is DENIED.

As an additional matter, the variety of clear and obvious deficiencies to the motion raises further issues to be addressed. This motion represents either reckless disregard for legal authority or frivolous gamesmanship on the part of Plaintiff. It is a waste of both Defendant's efforts and the Court's resources. The motion is so devoid of merit and authority that the Court is compelled to enshonce mention of it in this decision as an appropriate corrective action.

B. Plaintiff's Sanctions Requests

Plaintiff has filed a "Notice" with the court alleging that Defendant failed to adequately meet and confer over the instant motion. Defendant elected to address this notice along with their opposition.

It is the preference of this Court that parties meet and confer by telephone or in person because it appears to be more effective in parties' resolution of the issues without court order. Here, after the notice filed by Plaintiff's Counsel, counsel for the parties did have a meet and confer via telephone. The Court also notes that prior to the Notice, there had been multiple emails exchanged in which Defendant's counsel made clear the lack of merit to Plaintiff's motion. The Court also found unproductive Plaintiff's Counsel misrepresentation of the Court's Notice of Informal Conference and Sanction. Contrary to Plaintiff counsel's assertion to Defense counsel, there is no language in the notice where the Court has 'ordered' the production of the cell

records. (See Opp., Decl. of Michelle D. Jew, Ex. 7b). Given the apparent frivolity of the instant motion, the Court does not find adequate basis to sanction Defendant's counsel for failure to meet and confer by telephone before the filing of Plaintiff's Notice with the Court. Further, a mere notice does not represent a motion, and does not therefore place the matter before the Court.

Therefore, Plaintiff's request for sanctions is DENIED.

III. Conclusion

For the reasons above, the Motion is **DENIED**.

Defendant's counsel 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).

3. 24CV01074, Zerah v. Guerneville School District

Plaintiff Jerry Zerah and John Ross Mendenhall (together "Plaintiffs") filed the complaint (the "Complaint") in this action against defendants the County of Sonoma ("County"), Sonoma County Water Agency ("Water Agency", together with County, "County Defendants"), Guerneville Unified School District ("School District", together with County Defendants, "Defendants"), and Does 1-10,000, for multiple alleged causes of action arising out of damage following flooding of Plaintiffs' properties.

This matter is on calendar for the motion by Plaintiffs for discovery. The motion is DENIED.

I. Governing Law

A. Purpose of Discovery

The central precept of the Civil Discovery Act is that civil discovery be essentially self-executing. *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1281. Each motion for discovery shall be accompanied by a declaration setting forth the meet and confer efforts of the moving party "showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." Code of Civil Procedure ("CCP"), § 2016.040. Various methods of discovery are available to parties. See CCP § 2019.010. However, said discovery is typically not filed with the court unless it becomes relevant to the proceeding, such as with a motion to compel. Cal. Rule of Court 3.250.

B. Interrogatories

Regarding interrogatories, a party responding to an interrogatory must provide a response that is "as complete and straightforward as the information reasonably available to the responding party permits" and "[i]f an interrogatory cannot be answered completely, it shall be answered to the extent possible." CCP §2030.220(a)-(b). "If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make

a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party.” CCP §2030.220(c).

Upon receipt of a response, the propounding party may move to compel further response if it deems that an answer to a particular interrogatory is evasive or incomplete, an exercise of the option to produce documents under Section 2030.230 is unwarranted or the required specification of those documents is inadequate, or an objection to an interrogatory is without merit or too general. CCP §2030.300(a). Any motion to compel further answers to interrogatories must be filed within 45 days of receipt of response unless the parties agree to extend the time in writing. CCP § 2030.300 (c). When such a motion is filed, the Court must determine whether responses are sufficient under the Code and the burden is on the responding party to justify any objections made and/or its failure to fully answer the interrogatories. *Coy v. Sup. Ct.* (1962) 58 Cal.2d 210, 220-21; *Fairmont Ins. Co. v. Sup. Ct.* (2000) 22 Cal.4th 245, 255.

C. Requests for Production of Documents

Regarding the RPODs, a demand for production may request access to “documents, tangible things, land or other property, and electronically stored information in the possession, custody, or control” of another party. A party to whom a document demand is directed must respond to each item in the demand with an agreement to comply, a representation of inability to comply, or an objection. CCP § 2031.210(a). If only part of an item or category demanded is objectionable, the response must contain an agreement to comply with the remainder, or a representation of the inability to comply. CCP § 2031.240(c)(1). If a responding party is not able to comply with a particular request, that party “shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand.” CCP § 2031.230. “This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party” and “[t]he statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item.” *Id.* CCP § 2031.240(c)(1) provides that when asserting claims of privilege or attorney work product protection, the objecting party must provide “sufficient factual information” to enable other parties to evaluate the merits of the claim, “including, if necessary, a privilege log.”

Upon receipt of a response to a request for production, the propounding party may move for an order compelling further response if the propounding party deems that a statement of compliance with the demand is incomplete; a representation of inability to comply is inadequate, incomplete, or evasive; or an objection in the response is without merit or too general. CCP § 2031.310(a). A motion to compel further responses to a request for production of documents must “set forth specific facts showing ‘good cause’ justifying the discovery sought by the demand.” CCP §2031.310(b)(1). Absent a claim of privilege or attorney work product, the party who seeks to compel production has met his burden of showing ‘good cause’ simply by showing that the requested documents are relevant to the case, *i.e.*, that it is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence under CCP § 2017.010. *See also Kirkland v. Sup. Ct.* (2002) 95 Cal.App.4th 92, 98. Once good cause is

shown, the burden shifts to the responding party to justify its objections. *See Coy*, 58 Cal.2d at 220–221. It is insufficient to claim that a requested document is within the possession of another person if the party has control over that document. *Clark v. Superior Court of State In and For San Mateo County* (1960) 177 Cal.App.2d 577, 579. “The protections of the attorney-client privilege and the work product doctrine may be waived by disclosure of privileged communications or work product to a party outside the attorney-client relationship if the disclosure is inconsistent with goals of maintaining confidentiality or safeguarding the attorney's work product.” *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1033.

II. Analysis

Plaintiff has filed a motion with the Court which avers that there is a basis to compel discovery from the Defendants, and specifies various documents to be produced and questions Plaintiffs would like Defendants to answer. As an initial matter, there is no proof of service in the file reflecting the Plaintiff has served any of the above motions on the Defendants. County Defendants have filed an opposition, but there is no filing from the School District. As such, the motions could not be granted even if they had merit, as there is no evidence that notice was given. See Code of Civil Procedure §§ 1005, 1010; Cal. Rule of Court 3.1300. There are clear substantive deficiencies and the Court elects to address them.

The County Defendants’ opposition makes clear that the discovery requests included with Plaintiffs’ motion were not served to the County Defendants prior to the filing of the motion. Motions to compel discovery under a court order are required to be preceded by an opportunity to respond to the discovery without court intervention. See CCP §§ 2030.260 (parties must respond to interrogatories within 30 days of service of the interrogatories); CCP § 2030.290 (motion to compel responses to interrogatories may only be filed “(i)f a party to whom interrogatories are directed fails to serve a timely response”.); CCP §§ 2031.260 (parties must respond to inspection demands within 30 days of service of the demand); CCP § 2031.300 (motion compelling responses to inspection demands may only be filed if responding party “fails to serve a timely response”.). Therefore, because the County Defendants have not properly been served with the discovery, the Court cannot compel a response.

The Court also notes that in addition to the substantive issues with Plaintiffs’ motion, the motion fails to include the format required by the Rules of Court. The County Defendants particularly note that the requirements of Rule of Court 3.1112 apply to motions, and this motion is lacking multiple requirements. See Rule of Court 3.1112 (a) & (d). These deficiencies do not even address the additional requirements for discovery motions. See Rule of Court 3.1345.

Based on the above deficiencies, Plaintiffs’ motion for discovery is DENIED without prejudice to Plaintiffs bringing a motion after complying with the provisions of the Civil Discovery Act.

III. Conclusion

Plaintiffs’ motion is DENIED.

The County 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).

4. SCV-267562, Wager v. Messana

Plaintiff Deborah Wagner (“Plaintiff”), in her capacity as trustee of the Separate Share Trust for Charles Joseph Messana (“Decedent”) filed the complaint in this action (“Complaint”) against Russell C. Messana (“Messana”) and Chris Merkel (“Merkel”), along with nominal defendant TJR & Boat Storage, LLC (“TJR”) (together “Defendants”) with Does 1-20 with causes arising out of controversies over the real property at 4266 Santa Rosa Avenue, Santa Rosa (“the Property”) which is subject to a partition judgment (“the Judgment”) in *Wagner v. Messana, et al.*, SCV-260727 (“the Partition Action”). This matter is on calendar for the motion by Defendants for leave to amend the answer to the Complaint (“Answer”) to assert a new affirmative defense pursuant to Cal. Code Civ. Proc. (“CCP”) § 473(a)(1) and § 576.

The California Code of Civil Procedure provides that a court “may in the furtherance of justice, and on any terms as may be proper” allow a party to amend any pleading to correct a mistake. CCP § 473(a)(1). Likewise, the court may “in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars”. CCP § 473(a)(1). “Any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order.” CCP § 576. The general rule is “liberal allowance of amendments.” *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; see *Lincoln Property Co., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 916. The “policy of great liberality” applies to amendments “at any stage of the proceedings, up to and including trial.” *Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 487. “Absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail.” *Board of Trustees v. Superior Court* (2007) 149 Cal. App.4th 1154, 1163. “(I)t is irrelevant that new legal theories are introduced as long as the proposed amendments relate to the same general set of facts.” *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048 [internal citations omitted]. Particular to answers, there is even greater liberality in allowing to amend, as “a defendant denied leave to amend is permanently deprived of a defense.” *Hulsey v. Koehler* (1990) 218 CA3d 1150, 1159.

Defendants merely seek to amend in order to plead a new legal defense of res judicata, omitted due to the error of counsel. Cross-Defendant does not intend to assert any new facts in relation to the new defense. Plaintiff has filed a non-opposition to the request to amend. Indeed, the parties have apparently stipulated to allowing amendment of the Answer. No prejudice has been alleged, nor is any found.

In consideration of the above, the Motion for leave to amend the Answer is **GRANTED**. Defendant shall submit a first amended answer within 20 days of notice of this order.

Defendants’ counsel shall submit a written order to the court consistent with this ruling and in compliance with Rule of Court 3.1312(a) and (b).

5. SCV-271759, Zepeda Aguilar v. Hollett

Plaintiff Marco Antonio Zepeda Aguilar (“Plaintiff”), individually and on behalf of other employees pursuant to the California Private Attorney General Act, filed the complaint against defendants Cattlemens, Inc. (“Cattlemens”), Russell Hollett (“Hollett”), John Frenzel (“Frenzel”), Peter Mrozik (“Mrozik”), John Geary (“Geary”), and Barbara O’Connor (“O’Connor”, together with Frenzel, Mrozik, and Geary, “Amendment Defendants”)(all together “Defendants”), and Does 1-100 for causes of action arising out of Defendants’ alleged Labor Code violations, and civil penalties thereon(the “Complaint”).

This matter is on calendar for Defendants’ motion to strike allegations from the Complaint pursuant to CCP §§ 435 and 436 et seq. The motion to strike is **DENIED**.

I. Legal Standards

Generally, a motion to strike lies where a pleading contains “irrelevant, false, or improper matter[s]” or is “not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.” CCP § 436(b). A motion to strike is properly brought within the time to respond to a pleading. CCP § 435 (b) (1). However, the Court may strike pleadings or portions thereof at any time in its discretion, and upon terms it deems proper. CCP § 436.

II. Analysis

Defendants move the Court to exercise its discretion in striking the allegations against Amendment Defendants and Hollett.

The Court notes that Hollett and Amendment Defendants sit in fundamentally different positions. Amendment Defendants are each only mentioned in two places, first at FAC pg. 2:1-5, and second at FAC ¶¶ 29-33. The FAC does not substitute Amendment Defendants as Doe Defendants. There are no factual allegations which incorporate Amendment Defendants. Hollett is specifically named in the FAC as the Chief Executive Officer of Cattlemens. FAC ¶ 28. Hollett is incorporated into a variety of other allegations, as he is named among “Defendants” as defined in the FAC. FAC ¶¶ 1 & 34. “Defendants” are named in virtually every factual allegation. Therefore, the allegations against Hollett are substantially more complete than those against the Amendment Defendants.

In substance, the Court finds that the argument of Defendants materially misses the purpose of striking conclusory allegations. Defendants contend that the failure to factually support any allegations against Amendment Defendants and Hollett renders the allegations conclusory, and therefore properly struck. Motions to strike are properly directed to individual allegations within a pleading, or the entire pleading, but not to a cause of action. The failure to state facts sufficient to constitute a cause of action is a basis for demurrer. CCP § 430.10(e).

The First Cause of Action is against “All Defendants”. FAC pg. 13:20-21. This appears distinguishable from the defined “Defendants” under FAC ¶¶ 1 and 34. The plain meaning of this is that the first cause of action is asserted against all defendants named in the action,

including Amendment Defendants. As a result, any argument that there are inadequate factual allegations against Amendment Defendants is not properly couched in a motion to strike. If Defendants believe that they are not adequately incorporated factually for the first cause of action to be asserted against them, a demurrer or motion for judgment on the pleadings would be a more appropriate vehicle. Defendants argue that the FAC does not provide allegations sufficient for them to respond, citing to *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 361. This case relates to demurrers, and not motions to strike. Simply striking their names does not appear proper when the cause of action has been levelled against Amendment Defendants. As such, granting a motion to strike appears to be an improper vehicle, and as to Amendment Defendants the motion is denied.

As to whether the allegations against Hollett are conclusory, the Court finds that Plaintiff has pled adequate facts against Hollett directly, in addition to relational allegations, sufficient to survive a motion to strike. The FAC is particular that Hollett is the Chief Executive Officer of Cattlemens. Thereafter, the FAC alleges that Hollett utilized Cattlemens as an alter ego. The specific factual pleading regarding Hollett's position renders the alter ego allegations as ultimate facts, not conclusory allegations. See *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6. The FAC alleges that "Defendants" had illegal policies. FAC ¶¶ 10-24, 42, 43, and 46. This appears to be sufficient assertion to factually plead a basis for Hollett's liability.

Based on the foregoing, the motion to strike is DENIED.

III. Conclusion

Based on the foregoing, the Motion to Strike is **DENIED**.

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).

6-7. SCV-272155, Axos Bank, FSB v. Wilcox

Plaintiff, Axos Bank, FSB ("Plaintiff" or "Axos"), filed a 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 in turn filed a cross-complaint alleging 13 causes of action derived from the underlying facts in 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. Defendants have filed a first amended cross-complaint ("FAXC")

This matter is on calendar for Plaintiff's Demurrer to each cause of action in the FAXC. Additional Cross-Defendants have also filed a Demurrer to multiple causes of action. Defendants have dismissed the second, seventh, ninth and tenth causes of action from the FAXC. Plaintiff's

demurrer is **SUSTAINED with leave to amend**. Additional Cross-Defendants' Demurrer is **SUSTAINED in part and OVERRULED in part**.

I. Procedural Issues

Defendants have filed their oppositions to the demurrers late. Due to the September 2, 2024, holiday, the oppositions were due on August 23, 2024, but were filed on August 26, 2024. Cross-Defendants claim no prejudice and therefore the Court considers the substance of the oppositions.

The Court also notes that Defendants have a pending motion to enter default against BW, due to suspended corporate status. Given that the demurrer below is sustained with leave to amend as to the other Cross-Defendants, the Court need not reach BW's standing to bring the demurrer at this point. The Court will examine the substance of Defendants' contentions as to BW at that time.

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. *Coshov 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. *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 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.” *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 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).

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 through 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.” *Rosberg 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 distress 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 if plaintiffs can show they had a property right in its credit card account, 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.

"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 *CellTech 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).

A written contract may be pleaded either by its terms—set out verbatim in the complaint or a copy of the contract attached to the complaint and incorporated therein by reference—or by its legal effect. *Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 401-402. In order to plead a contract by its legal effect, plaintiff must allege the substance of its relevant terms, which requires careful analysis of the contract, comprehensiveness in statement, and avoidance of legal conclusions. *McKell v. Washington Mutual Inc.* (2006) 142 Cal.App.4th 1457, 1489; *Construction Protective Services Inc. v. TIG Specialty Insurance Company* (2002) 19 Cal.4th 189, 198-192. “Where a party relies upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth *in haec verba*, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient.” *Gilmore v. Lycoming Fire Ins. Co.* (1880) 55 Cal. 123, 124.

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.

IV. Axos’s Demurrer

A. Negligence

First, claims based on negligence fail due to the economic loss rule. While Defendants have dropped their claims for breach of contract, the admission that a contract exists between Plaintiff and Defendant is still before the Court in the FAXC. Nothing here exceeds Cross-Defendants’ scope as a “mere lender of money”. A full reconveyance is a normal matter of mortgage servicing, and that Axos recorded one in error does not transmute the relationship of the parties

into something different than a lender and borrower engaged in economic activity. Axos owes no duty of care outside of those involved in contract claims.

While Defendants' argument regarding a general negligence duty is unpersuasive for the reasons outlined above, their argument is persuasive that RESPA outlines particular duties which Cross-Defendants have an obligation not to violate. Duties may also arise from statute. Given that those duties spring from statute, and particularly from statutes which obviously contemplate a contractual relationship between the parties, it is not persuasive at this juncture that the economic loss rule may preclude negligence couched under violations of RESPA.

However, Defendants have not pled adequate facts within the FAXC to assert a cause of action under RESPA. Defendants seek to invoke a statutory right, but merely conclusionary allege that Cross-Defendants failed to respond to their inquiries as is required under RESPA. The Court notes that 12 USC § 2605 (e) imposes two different and distinct requirements on lenders upon receipt of a request for information from borrowers. First, the lender must acknowledge receipt of the request within 5 days. 12 USC § 2605 (e)(1)(A). Second, the lender must provide a substantive response within 30 days. Defendants assert no facts about when they sent a request for information to Cross-Defendants, nor have they alleged facts sufficient to make clear which provision (or both) they aver Cross-Defendants have violated. As such, RESPA does not provide a basis for a negligence claim based on a breach of a statutory duty because the facts thereon are inadequately pled.

Therefore, as to Axos, the demurrer to the first cause of action is **SUSTAINED with leave to amend**.

B. Fraud, Negligent Misrepresentation and Fraud by Concealment

For the intentional and negligent misrepresentation causes of action, Defendants essentially assert the same facts with the only difference being Axos's intent. Axos argues that Defendants have failed to allege elements common to the causes of action.

Cross-Defendants repeatedly attack the reasonableness of Defendants' reliance on the alleged misrepresentations, and to this effect the Court finds a mixed result in whether Defendants' reliance was reasonable or not. Defendants' belief that they, due to the recording of the Full Reconveyance, suddenly owed no amounts on their mortgage is patently unreasonable. Defendants should have known that they still owed substantial amounts on their mortgage, and any reliance on a misrepresentation to the contrary is not reasonable. Defendants do not contend anywhere in the FAXC that they believe they paid the full amount owed on their mortgage.

However, contrasting this is the alleged misrepresentation that Defendants need not make any payments after the reconveyance. FAXC ¶ 123. The flaw in this position is that Defendants did not rely on this representation from Axos, continuing to make payments to AmeriHome while Axos's error was investigated. See FAXC ¶ 28(l). Defendants assert no legal basis to contend that they somehow have satisfied their obligations under the loan agreement. Indeed, before this Court during the hearing on Defendants' Motion to Expunge Lis Pendens, Defendant Alan Wilcox stated to the Court that he did *not* contest the validity of the loan itself, only the loan's

right to be secured against the Property after the full reconveyance. Defendants' FAXC itself contains admissions that the Defendants and Plaintiff entered into the loan agreement as part and parcel of Defendants' now abandoned breach of contract claims. Dropping the cause of action does not obviate the admissions included thereon. Despite this, in a conclusory fashion, the FAXC contends that all payments made after the full reconveyance would have been made if they had been given the full information to which they were entitled. See FAXC ¶ 28 ("out of fear" the Defendants continued making payments); *contra* FAXC ¶ 42 (Defendants aver they would have continued making payments if they had all the information that was concealed/misrepresented).

The claim that Axos concealed information raises similar deficiencies. Defendants repeatedly aver that information was concealed by Axos. However, fraud claims require that Defendants be specific as to the concealed information and the FAXC simply does not do this. Defendants aver that they would have continued to make payments to AmeriHome if they knew additional information, but have not described the additional information, nor why they *stopped* making payments beyond that they were not satisfied with the answers they were receiving.

The demurrer to the third through fifth causes of action is **SUSTAINED with leave to amend**.

C. Intentional Infliction of Emotional Distress

As to the allegations asserted against Axos, Defendants' argument that the underlying conduct is sufficient to meet the requirements for IIED claims is meritless.¹ Defendants' allegations of conduct are vague, speculative, and entirely lacking in specific factual allegations against Axos that would be sufficient to support an IIED claim. FAXC ¶ 55, 133. No factual allegation against Axos exceeds anything that might be incorporated into a mere breach of contract claim. Nothing here is sufficient to meet the standard of outrageous conduct. The 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.

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. Ambro 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. Ambro Engineering, Inc.* (1970) 2 Cal.3d

¹ Defendants make an additional factual allegation against AmeriHome specifically, which is addressed below.

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. There being no allegation of what could be outrageous conduct as a matter of law, no cause of action for intentional infliction of emotional distress may stand.

The demurrer to the sixth cause of action is therefore **SUSTAINED with leave to amend**.

D. 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. FAXC ¶ 48. This does not appear sufficient to allege a conversion claim against Axos. To the degree that Defendants generally aver that the Cross-Defendants are generally agents of each other (FAXC ¶ 16), 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. Therefore, there are no facts to support Axos being liable for conversion.

The demurrer to the eighth cause of action is therefore **SUSTAINED with leave to amend**.

E. Rosenthal Fair Debt Collection Practices Act

It is clear that the Rosenthal Fair Debt Collection Practices Act applies to mortgage loans. Defendants plead that Cross-Defendants attempted to collect the mortgage through "false representations" that the mortgage could be increased by the addition of attorney's fees, investigation fees, service fees, finance charges, and/or other charges" in violation of the RFDCPA. FAXC ¶ 191. Defendants plead these violations in a conclusory manner, and do not make any effort to elucidate how the fees imposed are themselves illegal. Defendants provide little to no detail as to what representations they received, when, or from which of the Cross-Defendants they came. Generally, statutory causes of action are held to higher pleading standards since the violations are issues of objective statutory construction. Defendants conclusionary plead that the averred inclusion of fees and costs violate the RFDCPA but provide no authority showing the particular fees alleged to be imposed are actually violations of law. The RFDCPA only prohibits falsely asserting the imposition of fees "if, in fact, such fees or charges may not legally be added to the existing obligation." Civ. Code § 1788.13.

Therefore, as to the RFDCPA claim, the demurrer is **SUSTAINED with leave to amend**.

F. Unfair Competition Law

UCL claims must be predicated on unlawful, fraudulent or unfair conduct. As is elucidated above, Plaintiffs have failed to adequately plead either violations of statute or fraud. This is a matter which is capable of remedy.

Defendants have also not adequately pled standing under the UCL. 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).

Therefore, as to the UCL claim, the demurrer is **SUSTAINED with leave to amend**.

G. Accounting

Defendants 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, for which a failure to reply is itself a cause of action not asserted here.

Therefore, as to the accounting claim, the demurrer is **SUSTAINED with leave to amend**.

H. Declaratory Relief

Defendants ask for several forms of declaratory relief. Axos demurs to the cause of action as a whole, instead of striking relief that is specifically unsupported. Therefore, any viable relief presents a basis to overrule the demurrer.

Defendants have pled facts to attempting to support a cause of action for declaratory relief as to attorney’s fees. This appears to be a prospective declaration of rights, which without judicial involvement may be added to the loan amounts for a case which, entirely admitted under Axos’s own complaint, derives from Axos’s unilateral error in recording the full reconveyance. Despite this, Defendants fail to plead either the contract verbatim or attach and incorporate by reference, so the FAXC is incomplete in that it requests that the Court interpret contractual rights without the contract’s terms. *Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 401-402. Therefore, the Defendants have not adequately stated a cause of action. Defendants’ other declaratory relief claims also fail for the same reason, without being able to reach the substance of the contentions.

Therefore, the demurrer to the fourteenth cause of action is **SUSTAINED WITH LEAVE TO AMEND**.

V. Additional Cross-Defendants Demurrer

A. 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 Plaintiffs 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 with leave to amend**.

B. 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. Defendants did not receive satisfactory answers to their requests to the original loan paperwork when they asked Additional Cross-Defendants. They stopped paying their mortgage as a result. Defendants do not allege that Additional Cross-Defendants ever had the paperwork, and no other material fact is alleged to be suppressed. The cause of action for concealment is therefore inadequately pled.

Therefore, as to this cause of action, Demurrer is **SUSTAINED with leave to amend**.

C. Intentional Infliction of Emotional Distress

The Court's analysis above applies in full to Defendants' IIED claims against Additional Cross-Defendants. The sole distinguishing pleading is that Defendants allege that Additional Cross-Defendants investigated the loan issues at their request. Defendants thereafter allege that Additional Cross-Defendants told Defendants of a fee for "some sort of "investigator" to purportedly be sent to the PROPERTY to surveil the CROSSCOMPLAINANTS in their home." FAXC ¶ 55. The phrasing of this allegation is inadequately clear to show that Defendants allege that they were told surveillance actually occurred, or that they conclusionary surmised that because an investigator was appointed, that the investigator then came and surveilled their home. While whether *actual* surveillance occurred does not appear relevant, whether Defendants were told they were surveilled, or whether they just assumed as much, appears central to any determination of outrageous activity. Outrageous conduct must be pled sufficiently that the outrageousness is apparent. *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832.

Additionally, some form of external surveillance of a home may not rise to the level of outrageous conduct, short of some alleged breach of privacy beyond what is viewable from public environs. Defendants certainly provide no legal authority to show that such conduct rises to the level of outrageousness required to meet the IIED claims.

Therefore, as to the IIED claims against Additional Cross-Defendants, the Demurrer is **SUSTAINED with leave to amend.**

D. Conversion

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.

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

E. RFDCPA

Defendants' claims under the RFDCPA fail against Additional Cross-Defendants for the same reasons they fail against Axos. Defendants fail to plead facts sufficient to appraise Additional Cross-Defendants of the claim, and they do not plead facts adequate to show that the alleged imposition of fees is a violation of law. No argument is provided in opposition showing that the allegedly imposed fees are unlawful, therefore the RFDCPA claim fails.

Therefore, as to the RFDCPA claim against Additional Cross-Defendants, the Demurrer is **SUSTAINED with leave to amend.**

F. 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 with leave to amend.**

G. Accounting

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

As to the thirteenth cause of action, the demurrer is **SUSTAINED with leave to amend**.

H. Declaratory Relief

Additional Cross-Defendants aver that they no longer have a contractual relationship with Defendants, however that fact is not properly before the Court. The cause of action for declaratory relief vaguely asserts that there is dispute under the operative contracts as to whether Additional Cross-Defendants may recover costs, but again no contracts are adequately pled by the FAXC. As a result, any request for declaratory relief thereon is incomplete.

As to the fourteenth cause of action, the demurrer is **SUSTAINED with leave to amend**.

VI. Conclusion

Based on the foregoing, the Demurrers by Cross-Defendants are each SUSTAINED with leave to amend, except as to the eighth cause of action against the Additional Cross-Defendants, which is OVERRULED.

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.****