TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, May 8, 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.

TO JOIN ZOOM ONLINE:

Department 19 Hearings
MeetingID: 160-421-7577
Password: 410765
https://sonomacourt-org.zoomgov.com/j/1604217577

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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. 23CV001631, County of Sonoma v. Jimenez

In this property abatement action, the County of Sonoma (the "County") seeks a Default Judgment and Permanent Injunction against defendant Arturo M. Jiminez and Rosa A. Jiminez ("Defaulted Defendants"), as owners of the property commonly known as 200 Calle Monte, Sonoma, California (the "Property"), in the County of Sonoma. The Judgment requested in this motion would include an order permanently enjoining Defaulted Defendants, and their agents and assigns, from maintaining ongoing violations of the Sonoma County ordinances and the unlawful use of the property.

The County filed the underlying Complaint on August 28, 2023, for injunctive relief related to multiple public nuisances on the Property. The County personally served Defendant Arturo Jiminez on September 13, 2023, at 999 West Spain Ave, Sonoma. The County substitute served Defendant Rosa Jiminez on November 26, 2023, at the Property. She was also substitute served at the time of service on the other defendant. On November 27, 2023, when Arturo Jimenez had not filed a response to the Complaint, the County filed a Request for Entry of Default against him, and the default was entered the same day. Thereafter, on February 22, 2024, when Rosa

Jimenez had not filed a response to the Complaint, the County filed a Request for Entry of Default against her, and the default was entered the same day.

The County moves for a default judgment against Defaulted Defendant under Code of Civil Procedure section 585(b) and requests that the Court issue a permanent injunction enjoining Defaulting Defendant from, among other things, "from maintaining any condition or use upon the Property contrary to the ordinances of the County of Sonoma; and . . . immediately cease the present unlawful uses of the Property in Violation of the Sonoma County Code". (Proposed Order at ¶ 6-7.) The County also requests an Order requiring Defaulted Defendants to pay unrecovered abatement costs, County Counsel costs, civil penalties and unrecovered attorneys' fees. The County requests $1,811.50 in abatement costs, $16,956.00 in attorneys' fees, $1,085 in legal costs and $154,290 in civil penalties to this point. The County states that these penalties and fees will continue to accrue through the final satisfaction of the case. The County served the motion by mail on March 20, 2024.

Defaulted Defendants have not filed an opposition. Having received no opposition, the Court rules as follows:

The County's Request for Judicial Notice is GRANTED. The County's Motion for a Default Judgment and Permanent Injunction is GRANTED and the County's requests for abatement costs, civil penalties, and attorneys' fees are also GRANTED.

The CCP provides that if the defendant has been served, other than by publication, and no response has been filed, "the clerk, upon written application of the plaintiff, shall enter the default of the defendant" and "[t]he plaintiff thereafter may apply to the court for the relief demanded in the complaint." (Code Civ. Proc. §585(b).) "The court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor for that relief, not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115, as appears by the evidence to be just." (*Ibid*.) "If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose." (*Ibid*.) Additionally, Sonoma County Code section 1-7 allows for the assessment of civil penalties and recover of costs, including "any administrative overhead, salaries and expenses incurred by the following departments: health services, permit and resource management, county counsel, district attorney, transportation and public works, agriculture/weights & measures, and fire and emergency services." (See, SCC at §1-7(d).)

In this case, the County's Complaint; entry of default; and this motion for a default judgment and permanent injunction provide a sufficient basis for the Court to enter the judgment and injunction as requested. Accordingly, the motion is GRANTED.

Unless oral argument is requested, the Court will sign the Proposed Order lodged with the motion.

2. <u>SCV-265714, County of Sonoma v. Castagnola</u>

At Defendant's request this matter will be continued to June 5, 2024, at 3:00pm in Dept. 19.

3-4. SCV-269472, Dana v. Fidelity National Title Company

Plaintiffs Campo de Santa Rosa LLC, Don Dana, and Jeanne Dana ("Plaintiffs"), filed the currently operative second amended complaint against defendants Fidelity National Title Company ("Defendant") and Does 1-50 arising out of alleged misconduct in a real estate transaction (the "SAC"). The SAC contains causes of action for: 1) promissory estoppel; 2) breach of fiduciary duty; 3) negligent misrepresentation; 4) fraud; and 5) declaratory relief. This matter is on calendar for Defendant's demurrer to the Complaint pursuant to Cal. Code Civ. Proc. ("CCP") § 430.10(e) for failure to state facts sufficient to constitute a cause of action, as well as Defendant's motion to strike types of damages pursuant to CCP § 435 et seq. The Demurrer is **SUSTAINED IN PART WITH LEAVE TO AMEND**. The Motion to Strike is **GRANTED in part with leave to amend**.

I. Request for Judicial Notice

Judicial notice of official acts and court records is statutorily appropriate. See Cal. Evid. Code § 452(c) and (d) (judicial notice of official acts). Yet since judicial notice is a substitute for proof, it "is always confined to those matters which are relevant to the issue at hand." *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301. Factual findings found within a prior judicial opinion are not an appropriate subject of judicial notice. *Kilroy v. State* (2004) 119 Cal.App.4th 140, 148. Courts may take judicial notice of the existence and legal effect of legally operative documents. *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754. Courts may take notice of public records, but not take notice of the truth of their contents. *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375. The scope of the judicial notice taken is limited to the action of the executive agency. *Herrera* at 1375. It is not appropriate for the Court to take notice of additional information which is included in the documentation or contentions as to the truth of the contents *Id.*

Defendant filed a request for judicial notice of two grant deeds and two death certificates. The Court notes the content and legal effect of these documents but does not take judicial notice of the truth of the contents. In this manner, the request for judicial notice is GRANTED.

II. Legal Standards

A. Demurrers

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. Furthermore, 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).

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

"On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. [Citation.] 'A demurrer is simply not the appropriate procedure for determining the truth of disputed facts.' [Citation.] The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. [Citation.]"). *Bounds v. Sup. Ct.* (2014) 229 Cal.App.4th 468, 477-478. "(A) court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." *Fremont Indem. Co. v. Fremont Gen. Corp*. (2007) 148 Cal.App.4th 97, 115.

B. Promissory Estoppel

"Promissory estoppel is a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced. … Because promissory estoppel is an equitable doctrine to allow enforcement of a promise that would otherwise be unenforceable, courts are given wide discretion in its application." *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901–902 (internal citations and quotations omitted). "Thus, because promissory estoppel claims are aimed solely at allowing recovery in equity where a contractual claim fails for a lack of consideration, and in all other respects the claim is akin to one for breach of contract, it is logical and proper to require that any claimed damages be caused by a defendant's breach of the agreement. *Id*. at 904. "The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 945.

"Unless a contract contains an unconditional promise to perform at a fixed time, a demand is "usually necessary" in order to give the promissor an opportunity to perform and may be a

condition precedent to the obligation to perform." *Drake v. Martin* (1994) 30 Cal.App.4th 984, 998–999.

> Where a demand is an integral part of a cause of action, the statute of limitations does not run until demand is made. The plaintiff cannot, however, indefinitely suspend the running of the statute by delaying to make a demand. (2) The general rule is that where demand is necessary to perfect a right of action and no time therefor is specified in the contract, the demand must be made within a reasonable time after it can lawfully be made. (3) What is a reasonable time depends upon the circumstances of each case; but in the absence of peculiar circumstances, a time coincident with the running of the statute will be deemed reasonable, and if a demand is not made within that period, the action will be barred. (*Citations.*) (4) Where, as here, a plaintiff has it in his power at all times to fix his right of action by making a demand on defendant, such demand must be made within a reasonable time after it can be lawfully made, and such a demand must be made within the period of the statute of limitations. (*Citation*.)

Stafford v. Oil Tool Corp. (1955) 133 Cal.App.2d 763, 765–766.

"An important exception to the general rule of accrual is the "discovery rule," which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807. "The discovery rule protects those who are ignorant of their cause of action through no fault of their own." *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832.

C. Breach of Fiduciary Duty

"Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client [citation], whereas a 'confidential relationship' may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship. [Citations.] The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." *Hudson v. Foster* (2021) 68 Cal.App.5th 640, 663 (internal quotations omitted). "The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach." *Mendoza v. Cont'l Sales Co.* (2006) 140 Cal.App.4th 1395, 1405; *Gutierrez v. Girargi* (2011) 194 Cal.App.4th 925, 932.

Title insurers generally do not owe any duty in issuance of title reports, as they are prepared to limit the risk to the insurer and not for the benefit of third parties. *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1193. To the degree a title insurer may also owe duties in a separate role as part of the escrow process, those duties are generally limited and distinguishable from their work as a title insurer. *Id*. at 1194.

D. Negligent Misrepresentation

"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. "The tort of negligent misrepresentation is similar to fraud, except that it does not require scienter or an intent to defraud." *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 845.

E. Laches

"The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359. The question of laches may be raised by demurrer. *Livermore v. Beal* (1937) 18 Cal.App.2d 535, 548. However, displaying the death of a grantee is not adequate to sustain laches that the demurrer stage in title actions. *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 726.

F. Motion to Strike

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). However, "falsity," must be demonstrated by reference to the pleading itself of judicially noticeable matters, not extraneous facts. *See* CCP § 437. A motion to strike is also properly directed to unauthorized claims for damages, meaning damages which are not allowable as a matter of law. *See, e.g. Commodore Home Systems, Inc. v. Sup. Ct.* (1982) 32 Cal.3d 211, 214 (motion to strike lies against request for punitive damages when the claim sued upon would not support an award of punitive damages as a matter of law). Punitive damages may be stricken where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. *See, e.g. Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.

Civil Code § 3294 authorizes the recovery of punitive damages in noncontract cases "where the defendant has been guilty of oppression, fraud, or malice…" "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. Civ. Code § 3294. 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 (superseded by statute on other grounds).

For an employer to be liable for punitive damages for the actions of an employee, it must be shown that "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." Civ. Code § 3294(b). "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." *Ibid.* An employer's failure to discipline an employee after the employee commits an intentional tort, can be found to be ratification of that tortious conduct. *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 228. Where punitive damages are alleged against an employer under Civ. Code § 3294 (b), the knowledge on the part of the employer stands as their equivalent of oppression, fraud or malice otherwise required under Civ. Code § 3294 (a); no oppression, fraud or malice on the part of the employer need be shown. *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1154. Plaintiff must plead facts sufficient to show either knowledge or ratification by an officer, otherwise claims for punitive damages are inadequately pled. *Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1433.

III. Demurrer

A. Statute of Limitations

1. Promissory Estoppel

Defendant argues that Plaintiffs cannot establish their promissory estoppel cause of action because the cause of action as pled is precluded by the statute of limitations. They argue that Plaintiffs were required to make the demand on Defendant for title insurance within a "reasonable time" after the condition precedent was fulfilled. Plaintiffs have pled that the initial promise to provide title insurance occurred in 2011 and 2012. The judgment in the quiet title action was obtained in August 15, 2013. Defendant cites to *Ginther v. Tilton* (1962) 206 Cal.App.2d 284, 286 and *Stafford v. Oil Tool Corp.* (1955) 133 Cal.App.2d 763, 765–766, averring that the obligation was on Plaintiffs to demand the title be insured within a reasonable period. As is noted, a demand is necessary to trigger an obligation to perform where there is a condition precedent present and no time period for performance specified thereon. *Drake v. Martin* (1994) 30 Cal.App.4th 984, 998–999. Plaintiffs never made a demand for performance of the title insurance after obtaining their quiet title more than two years after the promise was made. There is no indication that Defendant should have been somehow aware that Plaintiffs' quiet title action was successful without a demand for insurance being made. Plaintiffs cannot indefinitely suspend their cause of action by refusing to make the demand. *Stafford v. Oil Tool Corp.* (1955) 133 Cal.App.2d 763, 766

Plaintiffs argue in response that the cause of action for breach of contract generally only accrues when the injury occurs, which did not occur until after Plaintiffs attempted to sell. This is thoroughly rebutted by Defendant's cited caselaw due to the conditional nature of the promise.

While Plaintiffs aver that neither *Stafford* nor *Ginther* is applicable, as both of those cases hinged upon a demand for payment as opposed to a demand to insure. Plaintiffs provide no authority to support this distinction, and it is not persuasive. Plaintiffs aver that Defendant "made to (Plaintiffs) a promise clear and unambiguous to wit, that, if (Plaintiffs) obtained a Judgment quieting title, Defendant would at all times, guarantee a full and clear title to the Properties…" See SAC ¶ 36; see also, Plaintiff's Opposition, pg.3:27-4:2. Nothing is ambiguous about the conditional nature of this pleading, despite Plaintiffs' arguments to the contrary. Simple norms of construction make clear that "***if***" Plaintiffs obtained a judgment quieting title, Defendant would guarantee title. The condition precedent is Plaintiff's judgment quieting title. Therefore, a demand must be made to trigger Defendant's obligation to insure. Any other construction is illogical. The SAC contains no allegation that Defendant somehow obscured or hid the refusal to insure. No demand was made, and therefore no title insurance was issued. The case law cited by Defendant is clear and controlling. Defendant having not received a demand for guarantee of the clear title, and the statute of limitations having run, Plaintiffs cannot now seek to enforce the promise to insure.

The arguments regarding delayed discovery are equally unavailing on the promissory estoppel cause of action. Plaintiffs cannot aver that they did not discover the alleged breach by Defendant triggered by their own failure to perform a condition precedent. Were Plaintiffs diligent in demanding performance after completing their condition precedent, they would have discovered a lack of title insurance within the statute of limitations. They did not. Delayed discovery only serves to protect plaintiffs who are ignorant of their cause of action through no fault of their own. *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832. Plaintiffs cannot now attempt to revive their lapsed claims by claiming that the breach was not apparent due to their own lack of diligence.

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

2. Negligence and Fraud

Defendant claims that the Plaintiffs' failure to demand performance implicates the statute of limitations for each cause of action, including the claims for negligence and fraud, and that Plaintiffs cannot show the diligence necessary to support delayed discovery of those claims.

Here, the argument regarding statute of limitations is not availing. The negligent misrepresentation cause of action clearly has an adequately pled basis for the delayed discovery rule. Contrasted to the promissory estoppel cause of action, the claim of negligence derives from the original title mistake made in 1989, and the subsequent representations that the quiet title action performed by Plaintiffs would be adequate to clear the title. Plaintiffs' subsequent failure to demand insurance is immaterial to the cause of action for the failure to perform the functions of a title officer with adequate care. Plaintiffs have adequately pled facts to support to delayed discovery of the negligent misrepresentation, because their very reliance in 2012 is what is at issue. Had Plaintiffs made the demand timely, it would not have affected the nature of the misrepresentation made to Plaintiffs, or the resulting damage.

The cause of action for fraud turns upon the same considerations. The cause of action for fraud relies upon the 2012 misrepresentation that title would be cleared by the Plaintiffs' quiet title action. Plaintiffs have adequately pled the delayed discovery of the nature of that misrepresentation. Plaintiff's failure to make their demand does not implicate any diligence which would affect the cause of action. As such, the demurrer as to these causes of action is OVERRULED.

3. Declaratory Relief

As the negligence and fraud causes of action have overcome the demurrer, declaratory relief appears to survive statute of limitations arguments as well. Plaintiffs' SAC is not specific as to the nature of the declaration sought other than the "rights and duties of Plaintiffs and Defendant". It is conceivable that a declaration of a duty derived from the surviving causes of action may be appropriate relief. The declaratory relief cause of action appears to be entitled to the same delayed discovery as those causes of action. Therefore, the statute of limitations does not appear to preclude the declaratory relief cause of action.

B. Laches

Defendant's arguments regarding laches are unavailing at demurrer. The request for judicial notice of the death of witnesses allows the Court to notice that the documents exist, but not the truth of the matters asserted therein. Such a matter is more appropriately addressed through an evidentiary motion. Therefore, the only matter properly before the Court is the pleadings, and those are entitled to liberal construction. CCP § 452; *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238, (where allegations are subject to different reasonable interpretations, court must draw "inferences favorable to the plaintiff, not the defendant."). Defendant has not shown laches are appropriately applied here.

C. Second Cause of Action for Breach of Fiduciary Duty

Plaintiffs argue in opposition that they have pled that Defendant owed them a fiduciary duty. Plaintiffs conclusory allegation that Defendant owed them a fiduciary duty does not mean that they have pled ultimate facts which support that element. Plaintiffs have not pled facts establishing a fiduciary relationship between themselves and Defendant. Plaintiffs cannot create such a relationship by pleading that it exists as a conclusion. Title companies are not a fiduciary to parties to an escrow transaction, as the function of their title examination is to determine whether to underwrite the title. *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1193. To the degree that Defendant held multiple roles here, the duties owed thereon are limited to the scope of that agency. *Id*. at 1194. Plaintiffs offer no authority to the contrary, and plead no cognizable duty.

The demurrer as to the cause of action for breach of fiduciary duty is SUSTAINED with leave to amend.

D. Fifth Cause of Action for Declaratory Relief

Defendant also demurs to the cause of action for declaratory relief stating that Plaintiffs have not adequately pled a justiciable controversy. In this regard, the demurrer to declaratory relief is well taken. As is noted above, the Court could not apply the statute of limitations arguments to the declaratory relief cause of action, because the particular rights and duties of the parties that Plaintiffs seek is not pled.

The demurrer to the fifth cause of action is SUSTAINED with leave to amend.

E. Leave to amend

In ruling on the motion, the trial court should, ordinarily, permit the party whose pleadings are attacked to amend if it so desires. *Hardy v. Admiral Oil Co*. (1961) 56 Cal.2d 836, 841–842. Defendant cites *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343, arguing that the Court should deny leave to amend when the responding party does not produce facts which show a reasonable possibility that amendment may be effective. This misstates at what stage the burden applies. As stated in *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636, the burden to show reasonable possibility that amendment will cure the defect applies **where the trial court does not grant leave to amend, the burden is present for appellant on appeal**. Indeed, even the decision is *Larson* is quite clear on this point. See *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 342–343 ("'When a demurrer is sustained without leave to amend, **the reviewing court must determine** whether there is a reasonable probability that the complaint could have been amended to cure the defect....' [Citation.] The abuse of discretion standard governs our review of that question. [Citation.] 'The plaintiff bears the burden of proving there is a reasonable possibility of amendment.'")
Here, while Plaintiffs have not stated how they could amend their objection to state a valid claim, there does not appear to be an affirmative requirement for them to do so. This is only the second complaint that has been demurred to, and the first ruling on demurrer issued by the Court. Certainly, at the first ruling on demurrer, leave to amend appears proper. *Cf*. CCP § 430.41(e)(1)(A trial court shall not allow amendment more than three times in response to demurrer without some additional showing by the plaintiff).

IV. Motion to Strike

Defendant avers that the SAC fails to plead sufficient facts to show that the Plaintiffs are entitled to punitive damages or attorney's fees. See CCP § 473; CCP § 435(b)(1). Relief not supported by law is immaterial (CCP § 431.10(b)), and therefore capable of being struck as irrelevant. The Court finds it proper to do so here. While Defendant argues that Plaintiffs have not pled adequate conduct to support a punitive damages, the Court has overruled the demurrer as to the fraud cause of action. Therefore, Plaintiffs may have offered adequate conduct to support punitive damages. Plaintiffs aver that the SAC alleges that the causes of action were approved and ratified by Defendant's Chief Title Officer. While this is a particular factual allegation which *may* support punitive damages, Plaintiffs have not averred either facts that would support a finding that he is a corporate officer as contemplated by Civ. Code § 3294, nor have they alleged as an ultimate fact that he meets that status. The underlying facts offered clearly would rise to the level required in order to plead punitive damages if it were punctuated by this conclusion, so leave to amend is proper.

Plaintiffs offer neither factual support nor legal authority supporting their claims regarding attorneys' fees other than vague platitudes regarding pleading practices. This is insufficient. Striking the prayer for attorney's fees is therefore proper.

As to the sections which Defendant avers should be struck for lack of relevance, the portions at issue both illustrate the continuing relationship between the parties and the lack of issues in title for the neighboring property also purchased from the same individual. The Court finds this adequately relevant that striking these portions as surplusage would be improper.

Therefore, the Motion to Strike is **GRANTED with leave to amend as to Paragraph 67 and paragraph 68**. **The remainder is DENIED.**

V. Conclusion

Based on the foregoing, the Demurrer is **GRANTED WITH LEAVE TO AMEND as to the first, second, and fifth cause of action, and OVERRULED as to the third and fourth cause of action**.

The Motion to Strike is **GRANTED with leave to amend as to Paragraph 67 and paragraph 68**. **The remainder is DENIED.**

If Plaintiffs are to amend their complaint, they shall do so within 20 days notice of entry of this order. If Plaintiffs do not amend, Defendant's time to answer will begin running at the expiration of this period.

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).

5. SCV-270073 Martinez v. Hanson

Plaintiff Jorge Martinez ("Plaintiff") filed the complaint in this action against Starr Holdings, LLC, Bricoleur Vineyards, and Mark Hanson (together "Defendants") with causes arising out of the alleged violent incident occurring on June 24, 2017 (the "FAC"). This matter is on calendar for the motion by Defendants to continue trial due to the unavailability of Plaintiffs' counsel, Eric G. Young ("Plaintiffs' Counsel").

The Court set the July 12, 2024, trial date in the instant case on July 13, 2023. This was the first time the trial had been set in this matter. Defendants have filed a motion to continue the trial, as Plaintiff's counsel is occupied with substantial health concerns, affecting his ability to dedicate the additional time this case requires before trial. This includes discovery matters still being exchanged between the parties.

The Rules of Court state that "[t]o ensure the prompt disposition of civil cases, the dates assigned for trial are firm" and "[a]ll parties and their counsel must regard the date set for trial as certain…" Cal. R. Ct. 3.1332(a). "The party must make [a] motion or application [to continue

trial] as soon as reasonably practical once the necessity for the continuance is discovered." Cal. R. Ct. 3.1332(b).) Among the ground for a continuance is the unavailability of counsel through "death, illness, or other excusable circumstances". Cal. R. Ct. 3.1332(c)(3); see also *Fejer v. Paonessa* (1951) 104 Cal.App.2d 190, 195 (even one trial counsel among three being familiar with the case cuts against continuing trial so new counsel may become more familiar with the facts). "Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits." Cal. R. Ct. 3.1332(c). "The court may grant a continuance only on an affirmative showing of good cause requiring the continuance…" (*Ibid*.)

Other factors the Court should consider include:

1. The proximity of the trial date;
2. Whether there was any previous continuance, extension of time, or delay of trial due to any party;
3. The length of the continuance requested;
4. The availability of alternative means to address the problem that gave rise to the motion or application for a continuance;
5. The prejudice that parties or witnesses will suffer as a result of the continuance;
6. If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay;
7. The court's calendar and the impact of granting a continuance on other pending trials;
8. Whether trial counsel is engaged in another trial;
9. Whether all parties have stipulated to a continuance;
10. Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and
11. Any other fact or circumstance relevant to the fair determination of the motion or application.

(Cal. R. Ct. 3.1332(d).)

A motion for continuance is a matter for the "sound discretion of the trial court" *Link v. Cater* (1998) 60 Cal.App.4th 1315, 1321.

Defendants' request, particularly with the addition of Plaintiff's counsel's declaration establishing the particulars of his health condition, more than adequately supports the continuance of trial. There have been no previous continuances of trial, the continuance appears adequately tailored to the need, there are no alternative means to allow counsel to both address his health and the trial, no prejudice is displayed, and all parties appear to have agreed to the continuance. A continuance here is in the interests of justice.

Therefore, based on the above, the Court finds that the need for continuance stems from excusable circumstances. Plaintiffs' motion to continue trial is GRANTED.

The trial in this matter currently set for July 12, 2024 is CONTINUED to February 14, 2025, at 8:30 am in Department 19. All deadlines are extended to apply to the new trial date.

Individual Defendant 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. SCV-270889 Smith v. Poncia

Plaintiff Karin A Smith, as trustee of the Leroy W. Poncia Revocable Trust date September 30 2014 ("Plaintiff") filed the complaint (the "Complaint", subsequently supplemented by the first amended complaint, "FAC") in this action against Clarence R. Poncia, Truste of the Clarence R. Poncia Revocable Trust dated September 16, 2004 ("Clarence[1]"), William Michael Poncia ("William"), and all other persons owning an interest in the properties named as Does 1-10, arising out of Plaintiff's request to partition the parties jointly owned properties.
This matter is on calendar for the motion by William for leave of court to file a cross-complaint pursuant to CCP §§ 426.30 & 428.10.

I. Legal Authority

Where the defendant's cause of action is against the plaintiff, is related to the subject matter of the complaint, and failure to plead the cause of action will bar defendant from raising it in a future lawsuit, the cross-complaint is compulsory. CCP § 426.30. As to compulsory cross-complaints, CCP § 428.50(c) provides: "The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action." If the proposed cross-complaint is permissive, leave of court may be granted "in the interests of justice" at any time during the course of the action. CCP § 428.10 (b). On the other hand, if the proposed cross-complaint is compulsory, leave must be granted so long as defendant is acting in good faith. CCP § 426.50. Cross-complaints are only compulsory when the cause of action existed at the time the answer was filed, and causes of action which arise from facts which occurred after the filing of the answer are always permissive, regardless of their relation to the complaint. *Crocker Nat. Bank v. Emerald* (1990) 221 Cal.App.3d 852, 864.

II. Cross-Complaint is Compulsory, and Proper

This matter, based on the facts, is clearly permissive, but proper. As Clarence points out, the standard applied to permissive cross complaints is in the interests of justice, and rests soundly within the Court's discretion.

William argues the Cross-Complaint is compulsory. At the time of this ruling, the Court notes that the Plaintiff has filed a first amended complaint which relays many of the same facts as those alleged in the Cross-Complaint. The case offers a unique procedural posture in that the First Amended Complaint asserts facts and causes of action clearly related to those asserted in the Cross-Complaint. Plaintiff just recently filed the FAC on April 19, 2024, which William has yet to answer. That Plaintiff has now asserted the causes of action within the FAC appears to

[1] The parties Clarence, William, and the decedent Leroy Poncia all share familial affiliation and last names, therefore first names are utilized for clarity. No disrespect is intended.

have converted what otherwise would have been a permissive cross complaint into one that is compulsory. However, in reading the FAC, it is clear that the facts in the Cross-Complaint rely on the same facts and transactions, that William is a party to the FAC, and that his claims of affirmative relief must be asserted now or be potentially lost.

The Court notes that the Cross-Complaint contains multiple allegations which include dates after the Complaint in this action was filed. However, the requirement in finding a compulsory cross-complaint is merely that the cause of action existed at the time William's answer was filed, and that the cause of action be asserted against Plaintiff. *Chao Fu, Inc. v. Chen* (2012) 206 Cal.App.4th 48, 55. Otherwise, the Cross-Complaint is permissive. *Crocker Nat. Bank v. Emerald* (1990) 221 Cal.App.3d 852, 864. The Court can find no requirement that individual factual allegations need to be restricted to the time before the answer was filed. The underlying causes of action here clearly predated William's Answer. The Cross-Complaint fulfills these conditions. As such, the Cross-Complaint is compulsory. No bad faith has been displayed, and as such leave to file is necessary.

Assuming, arguendo, that the Cross-Complaint is permissive, leave to file still appears proper.

A. Sufficiency of the Cross-Complaint

The majority of Clarence's arguments against William's request to file a cross-complaint take the form of attacks on the sufficiency of the Cross-Complaint itself. Clarence cites to *Glogau v. Hagan* (1951) 107 Cal.App.2d 313, 320 ("*Glogau*") contrasting *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048 ("*Kittredge*"). As to *Glogau*, that case is unpersuasive for two reasons. First, the decision in *Glogau* relies upon a prior version of CCP § 426.50 and does not turn on any distinction regarding permissive versus compulsory cross complaints. See *Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 98. Second, in *Glogau*, the decision of the trial court rested upon several deficiencies with the request to file a cross complaint, and not just that the cross complaint was demurrable. To quote that court:

> (1) When the motion was made the answers had been on file 11 months. Such dereliction of defendants was sufficient cause for denying the motion. (*Davies v. Symmes*, 49 Cal.App.2d 433, 439 [122 P.2d 102].) (2) The cross-complaint was demurrable. This was ample ground for rejecting it. (*Pollard v. Forest Lawn Memorial Park Assn.*, 15 Cal.App.2d 77, 82 [59 P.2d 203].) (3) A prior action based upon the causes alleged in the cross-complaint was still pending. The pendency of a suit involving the same matters alleged in a proposed cross-complaint is justification for rejecting the latter. (*Hilton v. Reed*, 46 Cal.App.2d 449, 454 [116 P.2d 98].) (4) When J. A. Hagan presented his cross-complaint the causes therein alleged had been assigned to Evert and he was then the owner thereof. (*Staley v. McClurken*, 35 Cal.App.2d 622, 625 [96 P.2d 805].)

Glogau v. Hagan (1951) 107 Cal.App.2d 313, 320–321.

In the totality of those circumstances, the trial court clearly was not erroneous in denying the request to file a cross-complaint. The contention that the demurrable nature of a proposed pleading is grounds alone for denial of the motion has been repudiated since, including by *Kittredge*. In ruling on a motion to amend, the *Kittredge* court quotes *California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 280, stating that where a proposed amendment is deficient, "the preferable practice would be to permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings or other appropriate proceedings." *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048. While Clarence argues multiple deficiencies with the Complaint, they all appear better addressed through demurrer. None of the alleged deficiencies appear to be of the type which may not be remedied through proper amendment of the Cross-Complaint.

Though this argument is raised as to the sufficiency of the breach of fiduciary duty cause of action, the application of this conclusion applies to all of Clarence's attacks on the Cross-Complaint. The sufficiency of William's pleading of delayed discovery (and by extension an exception to the statute of limitations) is a matter again best addressed at demurrer. *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048. As such, this would not form a basis to deny leave to file a permissive cross-complaint.

B. Prejudice

Clarence argues that the necessity of discovery and unwarranted delay justify denial of the motion. Clarence's arguments of unwarranted delay are adequately addressed by the moving papers. Clarence provides no argument or authority that shows matters borne out by an expert somehow may provide constructive knowledge before that expert is engaged. As the Court previously noted, the complicated nature of forensic accounting does not result in the Court assuming that mere access to the accounts in question results in the presumption of unwarranted delay. The time between the Aho Report and the filing of this motion has been adequately addressed by William and his counsel in light of counsel's health concerns.

As to the costs of discovery, the Court has already granted Plaintiff leave to assert very similar claims against Clarence which are alleged within the newly filed FAC. Clarence provides no evidence that his costs of preparation will be substantially increased by the filing of the Cross-Complaint. He argues no critical loss of evidence. Clarence elucidates no articulable prejudice. That Clarence will have to now litigate Moving Defendant's Cross-Complaint does not amount to "prejudice". *See, e.g. Carbondale Machine Co. v. Eyraud* (1928) 94 Cal.App. 356, 360 (under CCP § 473 (b), prejudice is defined as a party being less able to establish their cause of action due to the ruling); *accord. Aldrich v. San Fernando Valley Lumber Co.* (1985), 170 Cal.App.3d 725, 740 (having to litigate the merits of claims is not prejudice). Adjudication of these connected facts is clearly in the interests of justice, and Clarence offers no persuasive arguments to the contrary. The Cross-Complaint is sufficient for the Court to grant the permissive filing in these circumstances. Filing of the Cross-Complaint is clearly in the interests of justice.

III. Conclusion

William's motion is **GRANTED**. William shall file his Cross-Complaint within 30 days of notice of this order.

Moving 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).

7. SCV-272661, Calderon v. Hernandez

The motion to withdraw on behalf of Defendant Deisy Hernandez is CONTINUED to May 15, 2024, at 3:00 p.m. to coincide with Counsel's other four motions for withdrawal.

8. SCV-273065, Bergmen v. Brookwood Park, Inc.

Plaintiffs Earl Bergmen and Diane Bergmen (together "Plaintiffs") filed the complaint in this action against Brookwood Park, Inc. ("Defendant") arising out of causes of action for: 1) Violation of Cal Civ Code § 798.37.5(c); 2) Negligence; 3) breach of the warranty of habitability; and 4) Violations of the Unfair Competition Law ("Complaint"). This matter is on calendar for the motion to quash subpoena by Sonoma Land Company ("Deposed Party") as to Plaintiffs' subpoena for business records under CCP § 2020.020. The motion is **GRANTED in part**. The request for sanctions is **DENIED**.

I. Evidentiary Issues

Plaintiff's first through third objections are **OVERRULED**. The evidence offered appears to be a display of qualifications that would be sent to the request for attorney's fees. Plaintiff's fourth and fifth objections are **SUSTAINED**.

II. Governing Law

Code of Civil Procedure Section 1987.1 states in relevant part that "[w]hen a subpoena requires the…production of books, documents or other things ... the court, upon motion reasonably made…may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders..." CCP §1987.1; see also, *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1287-1288. "In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." *Ibid.*

Although Code of Civil Procedure section 1985(b) states in part that "an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena," Code of Civil Procedure section specifically states that "[a] deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the business records designated in it." See CCP §§1985(b) and 2020.410(c); see also, *City of Woodlake v. Tulare County Grand Jury* (2011) 197 Cal.App.4th 1293, 1301 ["good cause affidavits are not always required…[f]or example, under the statutes providing for pretrial

discovery in civil proceedings, a party may seek the production of business records for copying…" and "[a] deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the business records designated in it."], quoting Code Civ. Proc. §2020.410(c); Cal. Prac. Guide Civ. Pro. Before Trial Ch. 8E-6, §8:547.5 ["A subpoena for the production of business records need not be accompanied by an affidavit or declaration showing good cause for production of the records."].

The scope of discovery is one of reason, logic and common sense. *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612. The right to discovery is generally liberally construed. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 540. "California law provides parties with expansive discovery rights." *Lopez v. Watchtower Bible & Tract Society of N.Y., Inc.* (2016) 246 Cal.App.4th 566, 590-591. Specifically, the Code provides that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." CCP § 2017.010; see also, *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 712, fn. 8. ("For discovery purposes, information is relevant if it 'might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement…") See *Lopez, supra,* 246 Cal.App.4th at 590-591, citing *Garamendi, supra*, 116 Cal.App.4th at 712, fn. 8. "Admissibility is not the test and information[,] unless privileged, is discoverable if it might reasonably lead to admissible evidence." *Id*. "These rules are applied liberally in favor of discovery, and (contrary to popular belief), fishing expeditions are permissible in some cases." *Id.* "When discovery requests are grossly overbroad on their face, and hence do not appear reasonably related to a legitimate discovery need, a reasonable inference can be drawn of an intent to harass and improperly burden." *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431.

Good cause should be shown on requests for production from non-parties as well as parties. *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223–224 ("*Calcor Space Facility*"). Good cause can be met through showing specific facts of the case and the relevance of the requested information. *Associated Brewers Distributing Co. v. Superior Court of Los Angeles County* (1967) 65 Cal.2d 583, 586–587. "(T)he good cause which must be shown should be such that will satisfy an impartial tribunal that the request may be granted without abuse of the inherent rights of the adversary. There is no requirement, or necessity, for a further showing." *Greyhound Corp. v. Superior Court In and For Merced County* (1961) 56 Cal.2d 355, 388. As the right to discovery is liberally construed, so too is good cause. *Id.* at 377-378. "(A) party seeking to compel production of records from a nonparty must articulate specific facts justifying the discovery sought; it may not rely on mere generalities. (Citation). In assessing the party's proffered justification, courts must keep in mind the more limited scope of discovery available from nonparties." *Board of Registered Nursing v. Superior Court of Orange County* (2021) 59 Cal.App.5th 1011, 1039; citing *Calcor Space Facility* at 567; *see also Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358, 366.

California's constitution establishes privacy rights for her citizens, but those rights are not boundless or inviolate. The privacy privilege is not absolute, but qualified. *Palay v. Sup. Ct.*

(County of Los Angeles) (1993) 18 Cal.App.4th 919, 933. The balancing test in applying the privacy privilege is aptly described in *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 658, and requires the analysis of four factors: 1) the purpose of the information sought; 2) the effect the disclosure will have on the affected persons and parties; 3) the nature of the objections urged by the party resisting disclosure; and 4) whether less obtrusive means exist for obtaining the requested information. The constitutional right of privacy does not provide absolute protection against disclosure of personal information; rather it must be balanced against the countervailing public interests in disclosure. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 552. While some instances of disclosure may require a compelling state interest be shown, other less private information does not require the same showing. *Id.* at 556. The seriousness of the prospective invasion of privacy must be established by the party asserting the privacy interest. *Ibid.*

Generally, failure to assert a discovery objection in a response waives that objection later. *Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1140.

CCP § 2031.310(h) (relating to requests for production of documents) provides that a monetary sanction "shall" be imposed against the party losing a motion to compel further responses unless the court finds "substantial justification" for that party's position or other circumstances making sanctions "unjust." For the court to order sanctions against an attorney, the Court must find that the attorney advised their client to engage in discovery misconduct. *Kwan Software Engineering, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 81. Additionally, the motion must advise the attorney that joint and several liability against the attorney is sought for the sanctions. *Blumenthal v. Superior Court* (1980) 103 Cal.App.3d 317, 319

III. Analysis

A. Good Cause

First, it is worth noting that Plaintiffs have established good cause in this litigation for the production of the documents at issue. Plaintiffs have served similar discovery requests to Defendant, but has received confirmation that Deposed Party has different documents than those produced by Defendant. Just as Plaintiffs displayed the relevance of the previously requested documents from Defendant, Plaintiffs have adequately displayed the relevance of the documents to meet the higher burden accorded to third party discovery. The time period is adequately restrained, the documents requested are adequately defined, and Plaintiffs have shown that they relate to the claims at issue.

B. Undue Burden

Deposed Party asserts seven broad objections for the Court to address. Deposed party avers that the request would cause undue burden. Claims of undue burden in response to a subpoena are contained in CCP § 1985.8, which specifically applies to electronically stored information. That section provides that "(t)he subpoenaed person opposing the production, inspection, copying, testing, or sampling **of electronically stored information** on the basis that information is from a source that is not reasonably accessible because of undue burden or expense shall bear the

burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense." Code Civ. Proc., § 1985.8. Deposed Party provides no citation to authority in their argument to show that the undue burden applies to paper documents. Further, Deposed Party's argument that the documents must be sought by an attorney and therefore will quickly exceed the value of this entire action is effectively rebutted by Plaintiff. As Plaintiffs accurately point out, Deposed Party is entitled to **reasonable costs** as defined by Evid. Code § 1563(b)(1). This means they are entitled to $24 per hour per person for clerical expense. The code clearly does not contemplate the necessity of attorney review. It is not persuasive that clerical review would be inadequate. Therefore, the arguments of undue burden have not been adequately supported by the Deposed Party.

C. Uncertain Description

The description provided is adequately certain to make clear the precise nature of the documents requested by Plaintiffs. Plaintiffs request documents regarding the construction of the Brookwood Mobilehome Park produced between 1975 and 1982. Plaintiffs request any site plans, inspections, permits, quotes, estimates, invoices and photographs regarding this subject matter. There does not appear to be anything uncertain about these definitions. Plaintiffs may serve a subpoena request so long as they involve a reasonablely particularized category of documents. CCP § 2020.410 (a).

D. Invades Consumer Privacy

Deposed Party's assertion regarding third-party privacy is also inadequately supported. Deposed Party blandly asserts that there are third-party privacy rights implicated to each category of the document requests, but their opposition provides no specific category of protected information implicated by the documents requested. Rather, the motion flatly avers that third-party privacy is implicated, and Deposed Party makes no effort to support the objection with any citation to law or analysis of facts. As such, the Court cannot balance the privacy concerns against the materiality of the information, and the objection is overruled.

E. No Notices to Consumer

Deposed Party asserts that Plaintiffs have failed to provide notices to consumer as required by CCP § 2020.410. Plaintiffs accurately point out that the records presented are not "personal records" as defined by CCP § 1985.3 (a)(1). Deposed Party simply is not one of the entities contemplated by the definition of personal records. Plaintiffs must only give a notice to consumer if the "business records described in the deposition subpoena **are personal records** pertaining to a consumer". CCP, § 2020.410 (d). As such, no notice of consumer records need be given. Further, there is no logic to the requirement that Plaintiffs be required to provide notice to consumers, who they cannot identify until such time that the records are produced.

F. Harassment by Plaintiffs

Deposed Party avers that the subpoena is intended to harass. Deposed Party does not aver that the documents requested are not entirely distinguishable. Plaintiffs have provided evidence that

the documents held by Deposed Party are distinct from those already produced by Defendant. There is no evidence presented that the motivation of the motion was to harass Deposed Party.

G. Not Calculated to Discover Admissible Evidence

As the Court already addressed, good cause has been met. As to the various arguments as to the sufficiency of the complaint, they are generally unpersuasive. Deposed Party's own argument regarding the Mobilehome Residency Law shows that the arguments about the underlying contract are not per se adequate to defeat the Complaint. Civ. Code, § 798.37.5 provides statutory duties that Plaintiffs Complaint pleads facts to utilize. Additionally, Deposed Party is not a party to the case, and as such the propriety of their arguments does not appear to be supported by any authority.

H. Overly Broad

However, the Court does note that both Plaintiffs and Deposed Party seem to misapprehend the purpose and restrictions upon business records subpoena. A subpoena for business records under CCP § 2020.020 (b) requires that the records custodian affirm that the records were prepared by the personnel of the business. See Evid. Code § 1561(a)(3). This means that subpoenas of this type are restricted to records *actually prepared by the deposed entity*, and does not extend to records within their control but not prepared by the entity. *Cooley v. Superior Court* (2006) 140 Cal.App.4th 1039, 1045. This is a restriction on the type of subpoena issued. The Court lacks the power to order Deposed Party to affirm matters not contemplated by Evid. Code § 1561. As such, the subpoena is overbroad, although not for the reasons propounded by Deposed Party.

Therefore, the Court will restrict the request to any documents (site plans, inspections, permits, quotes, estimates, invoices and photographs) regarding the construction of the Brookwood Mobilehome Park produced between 1975 and 1982 **which Deposed Party prepared**.

The motion is GRANTED to limit the production to the above documents.

IV. Sanctions

Deposed Party has prevailed in part. However, Deposed Party's request for sanctions is procedurally defective. Deposed Party requests that the Court grant monetary sanctions equal to attorney's fees with the amount "according to proof". There is no evidentiary support offered for this proposition, and the discovery code particularly militates against such surprise sanctions orders.

> "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought.

Code Civ. Proc., § 2023.040.

The obvious policy is that parties should be as informed as possible regarding the possibility and extent of sanctions. Deposed Party has provided neither any figure as to the amount of sanctions sought, nor any evidence of actual expenses necessary to grant discovery sanctions. The Court will not write Deposed Party a blank check for sanctions which they do not see fit to adequately support. Deposed Party's request for sanctions is DENIED.

V. Conclusion

Based on the foregoing, Deposed Party's motion to quash is GRANTED in part. Deposed Party is to produce any documents (site plans, inspections, permits, quotes, estimates, invoices and photographs) regarding the construction of the Brookwood Mobilehome Park produced between 1975 and 1982 which Deposed Party prepared.

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.*****