IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Law and Motion Calendar
HONORABLE JEFFREY R. FINIGAN
Department 24

400 County Center, Redwood City
Courtroom 2F

Friday, April 26, 2024 at 9:00 AM

IF YOU *INTEND TO APPEAR* ON ANY CASE ON THIS CALENDAR, YOU MUST DO THE FOLLOWING:

1. **EMAIL Dept24@Sanmateocourt.org BEFORE 4:00 P.M. CONTEMPORANEOUSLY COPIED TO ALL PARTIES OR THEIR COUNSEL OF RECORD. IF BY EMAIL, IT MUST INCLUDE THE NAME OF THE CASE, THE CASE NUMBER, AND THE NAME OF THE PARTY CONTESTING THE TENTATIVE RULING OR;**

2. **CALL (650) 261-5124 BEFORE 4:00 P.M. WITH THE CASE NAME, NUMBER, AND THE NAME OF THE PARTY CONTESTING.**

3. **GIVE NOTICE BEFORE 4:00 P.M. TO ALL PARTIES OF YOUR INTENT TO APPEAR PURSUANT TO CALIFORNIA RULES OF COURT 3.1308(A)(1).**

Failure to comply with 1 or 2, and 3 will result in no oral presentation.

At this time, personal appearances are allowed but not required. Parties may appear via Zoom. Advance authorization is not required for remote appearances. Mute your line until your case is called. RECORDING OF A COURT PROCEEDING IS PROHIBITED.

Zoom Video Information:

https://sanmateocourt.zoomgov.com/

Meeting ID: 160 195 4264
Password: 738358

Please note: Zoom Meeting can be joined directly from Judge Finigan's page on the court's website.

TO ASSIST THE COURT REPORTER, the parties are ORDERED to: (1) state their name each time they speak and only speak when directed by the Court; (2) not to interrupt the Court or anyone else; (3) speak slowly and clearly; (4) use a dedicated land line if at all possible, rather than a cell phone; (5) if a cell phone is absolutely necessary, the parties must be stationary and not driving or moving; (6) no speaker phones under any circumstances; (7) provide the name and citation of any case cites; and (8) spell all names, even common names.

Case	Title / Nature of Case

9:00
LINE 1
18-CLJ-06758 CAPITAL ONE BANK (USA), N.A. VS. DONALD J JONES, ET AL

CAPITAL ONE BANK (USA), N.A.	ROBERT S. KENNARD
DONALD J JONES	PRO SE

MOTION FOR JUDGMENT ON THE PLEADINGS BY PLAINTIFF CAPITAL ONE BANK (USA), N.A.

TENTATIVE RULING:

Plaintiff Capital One Bank (USA), N.A.'s ("Capital One") Unopposed Motion for Judgment on the Pleadings is **GRANTED**.

Preliminarily, the Court notes this case is beyond the 5-year limit from when it was filed, which ordinarily requires an automatic dismissal pursuant to CCP § 583.360. The five-year period begins to run on the date the action is filed against the defendant. *Davalos v. County of Los Angeles* (1983) 142 Cal.App.3d 57, 63. However, Emergency Rule of Court 10 extended that five-year time period by six months for all actions filed on or before April 6, 2020. This case was filed on December 18, 2018. The deadline to litigate this case to a conclusion was December 18, 2023, which normally makes this case subject to the five-year mandatory dismissal rule. However, with the application of Emergency Rule of Court 10, the deadline extends to June 18, 2024. Thus, this motion is timely.

A motion for judgment on the pleadings is proper when the complaint states facts sufficient to constitute a cause of action against the defendant and the answer does not state fact sufficient to constitute a defense. CCP § 438(c)(1)(A). In ruling on a motion for judgment on the pleadings, the court may consider all properly pleaded facts as truth, but not contentions, deductions, or conclusions of fact or law. *Sepanossian v. National Ready Mix Company, Inc.* (2023) 97 Cal.App.5th 192, 199. In addition, courts may consider judicially noticeable matters in the motion as well. *People v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777.

Capital One's complaint makes a common count claim for a credit card debt, which is a viable cause of action. Jones' answer accepts all allegations as truth. In fact, his answer acknowledges the existence and validity of the debt. There are no disputes as to matters of fact or law between the parties, and this Court accordingly grants Capital One's motion for judgment on the pleadings.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Plaintiff shall prepare a written order consistent with the court's ruling for the court's signature, pursuant to CRC Rule 3.1312, and provide written notice of the ruling to all parties

who have appeared in the action, as required by law and the CRC. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

Further, simultaneously with the above-referenced order, Plaintiff shall submit a Proposed Judgment for the Court's signature with a declaration justifying the costs requested therein.

9:00
LINE 2

19-CIV-04881 RUTH NOAH GIUSTO, ET AL VS. GIUSTO'S SPECIALTY FOODS, LLC, ET AL

RUTH NOAH GIUSTO	TODD A. ROBERTS
GIUSTO'S SPECIALTY FOODS, LLC, ET AL	KATHRYN C CURRY

GIUSTO'S SPECIALTY FOODS, LLC'S MOTION TO REDUCE JURY AWARD BY PRIOR SETTLEMENT AMOUNTS

TENTATIVE RULING:

Defendant, Giusto Specialty Foods, LLC's (GSF) Motion to Reduce Jury Award by Prior Settlement Amounts (Motion) is **GRANTED** and the jury's award is reduced to $0.

Plaintiff's case against GSF went through a jury trial that culminated with jury verdicts on February 29, 2024, awarding damages to Plaintiff as follows:

- Late charges and interest $5,0621
- Tenant expenses $91,284
- Lost rent from 11/2018 to 6/2022 $8,425
- Repair and remediation expenses $9,875

Prior to trial, Plaintiff settled with co-defendants the Polettis, for $400,000, and Alexander Malaspina, for $187,500, for a total of $587,500. Plaintiff's First Amended Complaint (FAC) alleged a number of causes of action against the defendants, including breach of contract, nuisance, trespass, fraud, and elder abuse, among others. The gist of the allegations was that all of the defendants together, albeit under different legal theories, induced Plaintiff to enter into an unfair lease with GSF, were responsible for GSF breaching the lease in various ways during GSF's occupancy, and were responsible for GSF leaving Plaintiff's property in an unrentable state upon vacating it. The jury only found in Plaintiff's favor with respect to breach of contract, nuisance and trespass against GSF. GSF argues the jury award must be offset in its entirety because Plaintiff sought the same damages against all defendants regardless of the legal theories and causes of action alleged. Plaintiff argues in opposition that offset is not allowed because the defendants were not "joint tortfeasors" and the breach of contract causes of action against GSF and the Polettis were based on different contracts. The Court finds that the law supports GSF's position.

In *Goodman* the plaintiffs sued numerous defendants related to construction defects in their new home and alleged "various causes of action (including negligence, fraud, breach of warranties and negligent misrepresentation), but sued only the Lozanos for breach of contract." *(Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1331.) The import of this is that §877 is not confined to joint tortfeasors or co-obligors on a single contract as argued by Plaintiff herein. Indeed, as the *Lozano* Court pointed out: "[u]nder section 877, subdivision (a), a plaintiff's

settlement with a defendant serves to reduce the *claims* against the remaining codefendants." (*Id*., at 1334; emphasis in original.) All defendants except the Lozanos settled before trial for a total of $230,000 in good faith settlements. (*Id*. at p. 1331.) After court trial, the trial court found against Lozano for a total of $146,000 with $64,000 designated for the contract claim. *Ibid*. The trial court offset plaintiff's entire damages (including the breach of contract damages) against Lozano with the settlements and "determined that the Lozanos were the prevailing party because they paid nothing under the judgment." (*Ibid*.) The trial court was affirmed. (*Id*., at p. 1340.) Similarly, here Plaintiff sought the same damages awarded by the jury from all defendants and the fact that she had a distinct breach of contract claim against GSF and did not name every defendant in every cause of action does not automatically make §877 inapplicable.

Plaintiff sought the same damages she recovered, *i.e*. late charges and interest, tenant expenses, lost rent, and repair expenses, from all defendants. (See e.g. FAC ¶¶44, 60, 61, 64, 132 and 136.) Although she did not prevail, Plaintiff also sued all defendants as joint tortfeasors in the Eighth cause of action for elder abuse, which claimed the defendants "wrongfully acquired, retained, or failed and refused to collect monies owed" to Plaintiff. (FAC ¶116.) "[S]ection 877 requires that an offset be given reducing the judgment by the amount of the consideration paid for a dismissal given to one or more of a number of tortfeasors *claimed* to be liable for the same tort ... it does not require any defendant to prove that settling codefendants were in fact liable, only that they were claimed to be liable for the same tort." (*Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 832 – 833.) Plaintiff is correct that she sued GSF and the Polettis based on different contracts, but that alone is not dispositive. The nature of the breaches were identical, e.g. compare FAC ¶¶50 – 55 to ¶¶60 – 61. The only material differences between the breach of contract causes of action were the alleged damages cause by the Polettis in FAC ¶60.i. – iii. Further, even if there were a distinction – which was not articulated in the Polettis' settlement agreement – there is no logical way the Polettis were liable for $400,000 based solely on distinct breaches of the property management agreement, while GSF was only liable for $114,000 for distinct breaches of the Lease. To illustrate this point, Plaintiff only claimed separate and distinct damages for $29,554.50 attributed to compensation to the Polettis under the property management agreement. (Motion at p. 2.) Plaintiff consistently maintained throughout the litigation that the Polettis and Malaspina were responsible for the Lease with GSF and all of the alleged problems flowing from it. Other than their respective compensation as her property managers and accountant, respectively, Plaintiff claimed no different damages from any of the defendants.

Plaintiff's reliance on *Tiffin Motorhomes, Inc. v. Superior Court* (2011) 202 Cal.App.4th 24, seems slightly misplaced and, perhaps more importantly, inconsistent with having stipulated the Polettis' settlement was in good faith pursuant to CCP §877.6. In *Tiffin*, the plaintiff owned an RV plaintiff claimed was defective and sued the manufacturers of the engine (Cummins), the coach (Tiffin), and the chassis (Freightliner). (*Id*., at p. 28.) The Court found it significant that Cummins and Tiffin were being sued "on the *separate* warranties … for which each is separately responsible." (*Id*., at p. 29; emphasis in original.) They went on to find that "manufacturers of separate component parts, that are liable to a plaintiff (if at all) **only** on the theory of breach of an express or implied warranty attached to those parts, are *not* 'co-obligors on a contract debt.'" (*Id*., at p. 30; *italics* emphasis in original; **bold** emphasis added.) Notably, there was no claim for

tort damages in *Tiffin*. (*Id*., at p. 31.) And, that was determinative: "But in this case, there is no tort claim and no tort damages. Tiffin and Cummins owed separate duties to plaintiffs and the remedies for the breaches would be separately calculable … [t]he complaint … sounds solely in warranty." (*Id*., at p. 32; emphasis added.) By contrast, and as noted previously, there were allegations of joint liability and significant overlap in this case with respect to alleged damages caused by the defendants.

Relevant cases focus on whether the actions arose from "one indivisible injury." (*May v. Miller* (1991) 228 Cal.App.3d 404; *Lafayette v. County of Los Angeles* (1984) 162 Cal.App.3d 547.) Reducing GSF's jury verdict also makes sense in light of §877's purpose to ensure "that a plaintiff will not be enriched unjustly by a double recovery." (*Reed v. Wilson* (1999) 73 Cal.App.4th 439, 444.) Notably, *May* involved causes of action in tort and breach of contract. (*May*, 228 Cal.App.3d at p. 408.) The Court found:

> The reduction of an award pursuant to this section is normally applied one of two ways: (1) by the jury after evidence is submitted to it of the settlement with instructions to reduce the award by the amount paid in settlement; or (2) by the court when the settlement is not presented to the jury. The trial court found the Hamlins and Lloyds were, in fact, joint tortfeasors, and there is substantial evidence in this record supporting that finding. It is irrelevant whether one was the insurance company and one a broker. The only relevant question in applying section 877 is whether there was one indivisible injury caused by two or more parties. May refers us to no evidence and our independent review of the record has found none which demonstrates separate and distinct damages were demonstrated as the result of any actions by the Hamlins not encompassed by the acts of Lloyds. Thus, we conclude the court correctly found the Hamlins and Lloyds were joint tortfeasors for purposes of section 877.

(Id., at pp. 409 – 410.) Although Plaintiff herein, unlike the plaintiff in *May*, can demonstrate separate and distinct damages, they are only for the $29,554.50 attributed to the Poletti's payments. (Motion at p. 2.) The evidence at trial and jury verdicts support no other conclusion than the damages awarded were the only additional damages Plaintiff suffered and all of the defendants, settling and non-settling, were claimed to be liable for them by Plaintiff throughout this litigation.

In *Lafayette*, plaintiff sued his attorney for legal malpractice in handling plaintiff's medical malpractice claim, and later amended to also sue the County for medical malpractice. (*Lafayette*, 162 Cal.App.3d at p. 553.) Plaintiff settled with his attorney for $15,000 and after a verdict against the County, the verdict was reduced by the amount of the settlement, under §877. (*Id*., at p. 554.) Like Plaintiff herein, the plaintiff in *Lafayette* contended that §877 was not applicable because the section "requires that there be joint tortfeasors" and (again, like Plaintiff herein) relied on *Carr v. Cove* (1973) 33 Cal.App.3d 851. The *Lafayette* Court found that *Carr* "does not hold that the section only applies where there are joint tortfeasors." (*Ibid*.) "Two tortfeasors can both be liable for the same tort without being joint tortfeasors in the sense of concert of action and unity of purpose." (*Ibid*.) "For section 877 to apply, it was not necessary that [attorney] be liable for the same tort for which a verdict was returned against the County. The section applied

if [attorney] was *claimed* to be liable for the same tort. Plaintiff clearly claimed [attorney] was liable for the damages resulting from the County's tort." (*Id*., at p. 555.) "[T]he purpose of section 877 is to avoid double recovery for the same injury." (*Id*., at p. 556.) Likewise, Plaintiff herein claimed all defendants were liable for the damages awarded by the jury, including the Polettis and Malaspina, who were employed by Plaintiff in various capacities akin to the attorney/client employment in *Lafayette*.

The Court finds that the decision herein is compelled by the above authorities. Plaintiff argues the Court has discretion to reduce the offset on purely equitable grounds. (Opposition at pp. 3 – 4.) However, the cases cited by Plaintiff in support of that specific argument did not deal with CCP §877, but addressed statutory offsets not involved here, and are therefore not directly on point. (*Wm. R. Clarke Corporation v. Safeco Insurance Company of America* (2000) 78 Cal.App.4th 355; *Jess v. Herrmann* (1979) 26 Cal.3d 131; *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352.) Nevertheless, even assuming this Court has independent discretion to deviate from an entire offset, the Court would decline to do so. In the Court's view, the jury's verdict represents the total amount of damages Plaintiff suffered in the case as a result of all of her allegations with the only arguable additional damage being compensation paid to the Polettis and Malaspina for their respective professional services to Plaintiff. Accordingly, it is unclear what the $587,500 paid to Plaintiff so far should go towards if not the exact damages this case has been about since the beginning and only what the jury awarded. Plaintiff is unable to identify any damages the Poletti and Malaspina settlements could apply to other than their compensation from Plaintiff and none were articulated in the respective settlement agreements. Along those lines, as GSF points out, that figure for the Polettis was $29,554.50. Thus, even subtracting that from the total settlement leaves over $557,000. As for Malaspina, Plaintiff offers no specifics regarding what his settlement represents other than the same damages awarded by the jury. This Court, having heard the evidence at trial and considered the jury's verdicts, finds Malaspina's settlement to be rightfully encompassed within the categories of damages awarded.

Plaintiff also relies on *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, for the argument that a "fair setoff" requires the Court to consider her "claim for contractual attorney's fees" against GSF. (Opposition at p. 9.) However, the quote Plaintiff cites from *Erreca's* is not in context and does not support this argument. The focus of the case was "the effect that a settlement agreement has on a settling defendant's potential liability to other defendants for contribution or comparative indemnity" (*Id*., at 1481; emphasis added.) Further, the Court in *Erreca's* was reviewing challenges by non-settling defendants to good faith settlements that specifically allocated settlement funds to a distinct issue/liability and the trial court's discretion in setting/approving the parties' allocations. (*Ibid*.) Those are very different circumstances. Here, the good faith settlements were stipulated to by all parties and made no allocations and the issue is to what extent they offset the jury's verdict. Plaintiff is correct that she has a right that the "setoff not be excessive" and that GSF is also "entitled to a fair setoff." (Opposition at 9.) However, the Court in *Erreca's* was tasked with evaluating fairness before trial and without a final determination of liability against the non-settling defendants. (*Id*., at p. 1501.) Under those circumstances, the California Supreme Court has made it clear that "although a good faith settlement does not call for perfect or nearly perfect apportionment of liability, such a settlement must not be grossly disproportionate to the settlor's fair share in order to be approved by the

court." (*Id*., at 1488 (citation omitted).) The concern in *Erreca's* was whether the non-settling defendants were getting a fair credit for the settlements and the Court found they were not because the settling defendants paid $1.5 million, but the non-settling defendants only received a $500,000 credit and therefore faced an unfair amount of liability at trial. The Court noted the difficulty for trial courts in that position of estimating future liability:

> We recognize that none of the figures reached in settlement will necessarily be the same as those that might result from trial, judgment, and collection attempts. Settlement figures at best are estimates, discounted for various reasons. With the benefit of hindsight it may be possible to say that the value placed upon particular settlement consideration was too high or too low, thus undoing the benefit of the settlement bargain for someone. However, that is one of the unavoidable risks to all parties of litigation in general and pretrial settlements in particular.

(Id., at p. 1499.) This Court is in a much different position and can actually see that the settling defendants here arguably overpaid and covered more than five times what Plaintiff recovered at trial. Lastly, Plaintiff's final argument on this point that lost rent and repair and remediation damages "were not alleged on any tort theory against the Polettis … or Malaspina" is simply not true. The FAC at ¶61 specifically alleges that Polettis caused damages of "loss of rents … [and] repair costs." The FAC at ¶132 specifically alleges the Polettis and Malaspina "failed to maintain and preserve the Premises in accordance with the terms of the 2013 Lease." The FAC at ¶136 specifically alleges that the Polettis and Malaspina caused Plaintiff to suffer harm, including loss of "rental income." The FAC Prayer for Relief at ¶4 seeks such damages against all defendants as well.

The Court is not making any ruling regarding interest, as that issue was not raised in the motion, but rather in the Opposition for the first time. (Opposition at p. 9.) The Reply then only addressed the issue cursorily. (Reply at p. 7.) The ruling herein reducing the jury's award to $0 may make that a moot point. To the extent it doesn't, the parties will need to address it as they deem necessary.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for GSF shall prepare a written order consistent with the court's ruling for the court's signature, pursuant to CRC Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the CRC. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

9:00
LINE 3

20-CIV-00754 REMUS CONTRACTORS, INC. VS. MARIA FREEDLAND, ET AL

REMUS CONTRACTORS, INC.	PRO SE
MARIA FREEDLAND	FREDRICK A HAGEN

MOTION TO BE RELIEVED AS COUNSEL BY PLAINTIFF REMUS CONTRACTORS, INC.

TENTATIVE RULING:

The unopposed motion of Stafford Hamlin to be relieved as counsel of record for plaintiff Remus Contractors, Inc. is **GRANTED**.

An attorney may apply to the court for an order to withdraw after giving notice. CCP §284(2). Pursuant to CRC 3.1362(a), a motion for this relief must be made on Judicial Council Form MC-051 and be accompanied by a declaration on Form MC-052 which states, generally, the reasons why a motion is brought rather than a consent under CCP §248(1). CRC 3.1362(a) and (c). In addition, counsel must serve a copy of the notice, declaration and proposed order on the client and all other parties who have appeared and lodge a copy of the order with the court. CRC 3.1362(d) and (e). These requirements have been satisfied, but the Court advised Mr. Hamlin of concerns related to service of the Motion at the last hearing on March 15, 2024, and ordered Mr. Hamlin to attempt additional service upon Remus at an Alaska address Remus' owner sent a letter to the Court from. Although the Court's file does not show Mr. Hamlin complied with that order, the Court finds that his Motion sufficiently sets forth the required proof of service and the Court also sent Notice of the hearing to Remus' owner at the Alaska address and no opposition has been filed. Accordingly, Mr. Hamlin's Motion is granted.

If the tentative ruling is uncontested, the Court will execute the Order submitted by Mr. Hamlin on Judicial Council Form MC-053 and have it filed. **Mr. Hamlin is ordered to thereafter comply with the proof of service requirements in CRC 3.1362(e)**.

9:00
LINE 4
21-CIV-01470 OPEN TEXT, INC. VS. MICHELLE BEASLEY

OPEN TEXT, INC.	MINDY M WONG
MICHELLE BEASLEY	S RAYE MITCHELL

DEFENDANT MICHELLE BEASLEY'S MOTION FOR JUDGMENT ON THE PLEADINGS

TENTATIVE RULING:

Defendant Michelle Beasley' Motion for Judgment on the Pleadings is **CONTINUED** on the Court's own motion to Friday, June 28, 2024 at 9:00 a.m. in light of the pending hearing on Defendant/Cross-Complainant's Motion to File Verified Third Amended Cross-Complaint set for hearing on May 10, 2024.

9:00
LINE 5
22-CIV-04304 MARIAN LARATTA VS. CORY L. COOPER, ET AL

MARIAN LARATTA	JOSHUA J.K. HENDERSON
CORY L. COOPER	PETER C. CATALANOTTI

DEFENDANTS CORY L. COOPER AND DWELL REALTORS, INC.'S MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

TENTATIVE RULING:

The Motion of Defendants Cory L. Cooper ("Cooper") and Dwell Realtors, Inc. ("Dwell") (also collectively "Defendants") for Summary Judgment/Summary Adjudication to the Complaint of Plaintiff Marian Laratta ("Plaintiff") is **DENIED** as follows:

BACKGROUND

Plaintiff brings this action against her former real estate agent Cooper, arising from the sale of her former residence at 236 24th Avenue in San Mateo ("property"). At the time Plaintiff lived at the property for over 50 years and was 87 years old. Plaintiff retained Cooper, who worked for Dwell at the time, to assist her with selling the property. Plaintiff claims that Cooper pressured her not to list the property on the multiple listing service ("MLS") and told Plaintiff she would get a better offer from an active real estate investor, Gregory Driker ("Driker"), for the property. Plaintiff claims that Cooper took financial advantage of her because she was elderly, and as a result she agreed to sell the property to Driker on March 13, 2020 ("2020 agreement").

Subsequently, Plaintiff instructed Cooper to cancel the 2020 agreement, and signed the cancellation addendum on March 23, 2020. Cooper allegedly informed Plaintiff thereafter that the 2020 agreement was canceled, which was untrue because Driker never signed the cancellation addendum. When Plaintiff decided to pursue sale of the property in 2021 with Cooper's assistance again, Cooper once against persuaded her not to list the property on the MLS and contacted Driker. Plaintiff received correspondence from Driker's attorney demanding that she perform under the 2020 agreement or else face litigation. Plaintiff terminated Cooper as her broker, and claims she sold the property to Driker under duress for $2,025,000. Five months later, Driker allegedly sold the property for $2,300,000. Plaintiff now brings this action against Defendants for: (1) Financial Elder Abuse, and (2) Breach of Fiduciary Duty.

Defendants seek summary judgment or alternatively summary adjudication to both causes of action.

Preliminarily, the Court notes that Defendants raised a critical issue for the first time in their Reply that was not argued in their Motion. Specifically, whether the Plaintiff has any evidence that she even suffered damages at all regardless of causation. (Reply at pp. 3, 4, 6 and

7; "Plaintiff has offered no evidence that the Property was sold for less than it was valued.") Defendant's Notice of Motion and Motion only identified and argued the issue of causation of damages. (Motion at pp. 3, 6 and 29.) Plaintiff then obviously only addressed causation in the Opposition. (Opposition at p. 10.) Defendants therefore have not properly raised whether damages occurred at all and the Court does not reach the issue at this stage of the proceedings. (*Maleti v. Wickers* (2022) 82 Cal.App.5th 181, 228; "it is a serious mistake to leave key arguments for the reply brief.")

FIRST CAUSE OF ACTION FOR FINANCIAL ELDER ABUSE

The elements of a claim for financial elder abuse under W&I Code §15610.30 are: (1) defendant took, hid, appropriated, obtained or retained plaintiff's property or assisted in taking, hiding, appropriating, obtaining or retaining plaintiff's property; (2) plaintiff was sixty-five years of age or older at the time of the conduct; (3) defendant's conduct with respect to the plaintiff's property was committed for a wrongful use, or with the intent to defraud or by undue influence; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm. (CACI 3100.)

As to the first element, §15610.30(a) sets out three ways in which financial elder abuse occurs:

> (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
>
> (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
>
> (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
>
> (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.

Defendants raise five arguments as to why this cause of action fails. Specifically, Defendants identify as Issue 1 that Plaintiff's financial elder abuse claim fails as a matter of law because Plaintiff: (1) alleges that Defendants *attempted* to commit financial elder abuse against her; (2) has failed to establish what property Defendants attempted to take from her, or that she has any property right related to the $275,000 that Driker allegedly profited by selling the property to a third party purchaser approximately four months after he purchased the property from Plaintiff; (3) fails to prove that Defendants "knowingly assisted" Driker with taking her property; (4) has failed to establish that Defendants unduly influenced her; and (5) has not established that Defendants caused her alleged financial elder abuse damages.

Defendants argue that this financial elder abuse claim fails because Plaintiff only alleges that Defendants are responsible for "attempting" to take Plaintiff's property, and not a taking of Plaintiff's property by Defendants. (Complaint, ¶ 31.) Defendants are therefore challenging whether Plaintiff sufficiently pleads facts to support this claim.

Defendants' summary judgment motion necessarily includes a test of the sufficiency of the complaint. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118.) When treating the summary judgment motion as a motion for judgment on the pleadings, the court treats the properly pleaded allegations of the complaint as true. (*Ibid*.) Notwithstanding the Complaint refers to "attempting" a taking of Plaintiff's property instead of a taking, the factual allegations nevertheless are sufficient to support a financial elder abuse claim under W&I Code §15610.30. (Complaint ¶¶ 10-20, 26-28.) The Complaint alleges that Defendants relentlessly pressured Plaintiff into not listing her property on the MLS where she could have received multiple offers and that she did not have time to get advice from others regarding the sale, which resulted in her selling the property to Driker for under market value. Receiving a reduced financial distribution may constitute a taking under §15610.30(c). (*Ring v. Harmon* (2021) 72 Cal.App.5th 844, 855-857.) Thus, the facts alleged are sufficient to support a taking of Plaintiff's property.

Second, Defendants argue that Plaintiff fails to establish that she was deprived of any property right by Defendants because Cooper was not her agent at the time the property was sold and Defendants received no commission. (See Defendants' Undisputed Material Facts ("UMF") nos. 51-52, 57-58.) However, Defendants apply too narrow an interpretation of deprivation of a property right. "[A] person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult." (W&I Code, §15610.30(c).) The deprivation of a property right includes the right to strike the best bargain possible in selling a property. (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 480.) The property at issue in *Bounds* was similarly encumbered, e.g. an agreement to sell the property was being asserted, which prohibited, or at least hindered, Bounds' ability to sell her property. *Id*., at pp. 479 – 480. Likewise here, Plaintiff claims the March 2020 agreement to sell to Driker, which Plaintiff claims Cooper never told Plaintiff was not cancelled, encumbered her property and her ability to sell it on the open market in early 2021. (Plaintiff's Response to UMF nos. 41 – 45.) Furthermore, the deprivation of a property right under section 15610.30 does not require the direct taking by one person of the property of another. (*Mahan v. Charles W. Chan Insurance Agency, Inc.* (2017) 14 Cal.App.5th 841, 861-862 [finding that the fact that money was given by plaintiffs to a trust rather than the defendants was still a deprivation of a property right].) Defendants therefore fail to meet their initial burden of showing that there is no triable issue of fact regarding whether they deprived Plaintiff of any property right.

Third, Defendants argue that Plaintiff fails to prove that Defendants knowingly assisted

Driker with taking Plaintiff's property. This does not appear to be Plaintiff's theory. Regardless, Plaintiff does not need to prove this in light of the above theory that Cooper deprived Plaintiff of a property right by negotiating the March 2020 sale with Driker and then failing to advise Plaintiff that Driker refused to cancel it, which then arguably required Plaintiff to forgo the open market and sell to Driker in 2021.

Fourth, Defendants argue that Plaintiff fails to establish that Defendants unduly influenced her. This argument pertains to the third way in which financial elder abuse may be established under §15610.30(a)(3). However, as discussed above, a triable issue of material fact exists as to financial elder abuse under §15610.30(a)(1), and therefore the Court need not address this argument because it would not dispose of the cause of action. Moreover, in determining whether there has been undue influence for purposes of this financial elder abuse claim, the Court considers: (1) the victim's vulnerability; (2) the influencer's apparent authority; (3) the tactics used by the influencer; and (4) the inequity of the result. (W&I Code, § 15610.70; *Keading v. Keading* (2021) 60 Cal.App.5th 1115, 1125.) Defendants fail to meet their initial burden as they do not address all four of these considerations. (See Defendants' Memorandum and Separate Statement.) The issue of whether undue influence has been exerted also frames a question of fact. (*In re Marriage of Dawley* (1976) 17 Cal.3d 342, 354.) Therefore, even if Defendants' evidence was sufficient to meet their initial burden, triable issues of material fact exist as to whether Defendants unduly influenced Plaintiff regarding the property, including Plaintiff's vulnerability and Cooper's authority and tactics. (Plaintiff's Response to UMF nos. 9-12, 14, 26, 36, 37.)

Fifth, Defendants contend that Plaintiff has not established that Defendants caused her alleged financial elder abuse damages. Defendants claim that Plaintiff's damages were not caused by them because they were not involved at the time that Plaintiff sold the property to Driker, and did not earn a commission from the sale. (UMF nos. 34, 49, and 57.) This evidence is insufficient for Defendants to meet their initial burden because it misses the mark and this argument focuses only on the ultimate sale of the property and not Defendants' alleged wrongful conduct in the Complaint that allegedly tied Plaintiff to the 2020 agreement with Driker and hindered her ability to sell the Property on the open market in 2021, regardless of who the selling agent was. *Bounds, supra*. Thus, a triable issue of material fact exists as to whether Defendants' conduct was a substantial factor in causing Plaintiff harm. Now, whether Plaintiff actually suffered any harm, *i.e.* is there any evidence the Property was sold below market value, is not addressed here for the reason stated above.

SECOND CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

"The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." (*Tribeca Companies, LLC v. First American Title Insurance Company* (2015) 239 Cal.App.4th 1088, 1114.) Defendants acknowledge that a real estate broker generally owes a broad fiduciary duty to his or her principal. (*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1567.) A real estate agent's fiduciary duty of disclosure extends to all material facts, i.e. all facts that might affect the principal's willingness to enter into or complete a transaction. (*Ibid*.)

The Complaint alleges that Defendant breached their fiduciary duty to Plaintiff by: (1) not listing the property on the MLS and to try to get multiple bids on the property to obtain the best sale price, (2) by not obtaining a fully executed cancellation addendum, and (3) preparing and serving a demand on Driker to close escrow if Driker refused to cancel the sale. (Complaint ¶¶ 41-43.) Defendants argue that each of these alleged breaches fail, and also that Plaintiff cannot establish she suffered any damages as a result these alleged breaches of fiduciary duty.

First, a triable issue of material fact exists as to whether Defendants breached their fiduciary duty by not listing the property on the MLS. Although Defendants argue that they could not place the property on the MLS because of the Seller Instruction to Exclude Listing from the Multiple Listing Service, the wrongful conduct alleged is that Cooper falsely told Plaintiff that she would get a better offer if the property was not listed on the MLS and pressured her to agree not to list the property on the MLS. (Complaint ¶ 10.) Plaintiff's evidence raises a triable issue of material fact. Plaintiff wanted to list her property on the MLS, but Cooper persuaded her not to do so and persistently advised her against it. (Plaintiff's Exh. G, ¶ 2.) The evidence by Alana Corso ("Corso"), the managing broker for Dwell, and Plaintiff's expert, Randall Barkan ("Barkan"), support that Defendants breached the standard of care by failing to list the property on the MLS. (See Plaintiff's Additional Facts ("PAF") nos. 1, 3; see also Plaintiff's Exh. I, Barkan Decl. ¶¶ 4-8.)

Second, triable issues of material fact also exist as to whether Defendants breached their fiduciary duty by not obtaining a fully executed cancellation addendum, and/or preparing and serving a demand on Driker to close escrow when Driker refused to cancel the sale. Plaintiff presents evidence that she was led to believe by Cooper that the 2020 agreement with Driker had been canceled, and was taken aback when she was threatened with litigation if she did not subsequently sell the property to Driker. (Plaintiff's Decl. ¶ 4.) After Plaintiff terminated Cooper's services, Plaintiff discovered that Driker did not deposit the earnest money into escrow, which she also was not aware of. (*Id.* at ¶ 5.) If she had been aware, she claims that she could have compelled Driker to fulfill his obligations under the agreement. (*Ibid.*) Plaintiff could have issued a notice to perform or notice to close escrow, and if Driker failed to comply, Plaintiff could have unilaterally canceled the agreement. (*Ibid*.) Cooper admitted at his deposition that he did not tell Plaintiff that Driker refused to sign the cancellation form because he made a decision that the contract was not enforceable. (PAF no. 4.) Cooper also acknowledged that if the buyer had not put money into the escrow account, it would show a lack of intent/performance on behalf of the buyer. (PAF no. 5.) Corso also testified that it was a breach of a real estate agent's fiduciary duty to conceal the buyer's failure to deposit money into escrow and conceal the buyer's refusal to sign the cancellation. (PAF nos. 6-7.) Barkan opines that this constitutes a breach of the standard of care as well. (Plaintiff's Exh. I, ¶ 12.) The buyer continued to tie up the property while refusing to meet the minimal financial requirement of making his initial deposit. (*Ibid*.) Barkan claims it is serious malfeasance on Cooper's part to keep Plaintiff ignorant of the facts and potential consequences. (*Ibid.*)

Defendants rely heavily on Plaintiff changing her mind in March 2020 and deciding not to

sell the Property as proof there could not have been a breach of fiduciary duty. (Motion at p. 28; UMF nos. 94 – 95.) However, Plaintiff raises a triable issue of whether she would have acted differently had she been advised Driker refused to cancel the agreement thereby potentially encumbering her property and ability to sell in the future. (Plaintiff's Exh. G, ¶5.)

Lastly, Defendants contend that they did not cause Plaintiff to suffer any damages because she subsequently moved forward with selling the property to Driker. This argument fails for the same reasons stated above related to the first cause of action.

REQUESTS FOR JUDICIAL NOTICE

Defendants' and Plaintiff's Requests for Judicial Notice are GRANTED, with the caveat that Plaintiff's proposed First Amended Complaint, while technically a "record" of this Court, is not considered for the truth of the matters asserted therein and only to the extent information therein is relied upon by Plaintiff's witnesses in support of the Opposition. (Evid. Code §452(d).)

DEFENDANTS' OBJECTIONS

Objection Nos. 1, 2, 5, 13 and 15 are OVERRULED: These declarations originally failed to comply with C.C.P. §2015.5, but Plaintiff has since filed amended declarations in compliance. Defendants also objected to the entirety of these declarations on the ground that they also fail to state that the affiant is competent to testify to the matters stated in the declarations in violation of CCP §437c(d). That issues also appears to have been remedied in the amended declarations. Regardless, even if it is not specifically articulated, section 437c(d) states that the declarations "shall show affirmatively that affiant is competent to testify to the matters stated in the affidavits or declarations." (CCP §437c(d).) The other facts set forth in the declarations show that the declarants are sufficiently competent to testify to the matters set forth in their declarations.

Objections Nos. 3, 4, 6-12, 14 and 16 are OVERRULED.

Objection 17 is SUSTAINED.

Objection 18 is OVERRULED subject to limitation stated re Request for Judicial Notice.

PLAINTIFF'S OBJECTIONS

"All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion." (CRC Rule 3.1354(b).) The Court has not considered any evidentiary objections raised in Plaintiff's Response to Defendants' Separate Statement based on failure to comply with the CRC. (*Hodjat v. State Farm Mutual Automobile Insurance Company* (2012) 211 Cal.App.4th 1, 8-9 [trial court did not abuse its discretion where it refused to rule on evidentiary objections included in separate statement in violation of rule 3.1354's requirement that the objections not be stated or argued in the separate statement].)

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendants shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to CRC Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the CRC. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

9:00
LINE 6
23-CIV-01195 KENNETH BRONFIN ZAMVIL VS. SCOTT SAVAGE ZAMVIL, ET AL

KENNETH BRONFIN ZAMVIL	DONALD C SCHWARTZ
SCOTT SAVAGE ZAMVIL	PHILIPPE G. DAVIS

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

TENTATIVE RULING:

Plaintiff's unopposed Motion for Leave to File Amended Complaint is **GRANTED**.

Section 473(a)(1) of the CCP provides in relevant part that:

> The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect . . . .

The proposed amendments to add defendants fall within this provision of section 473(a)(1).

Section 473(a)(1) further provides that "The court may likewise, 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."

Public policy considerations favor the use of the court's discretion to grant a party's request for leave to amend a pleading. For example, the California Supreme Court in *Norton* stated that "In the matter of amending pleadings, this court has always counseled and sanctioned great liberality. No discussion upon so plain a proposition is necessary." (*Norton v. Bassett* (1910) 158 Cal. 425, 426–27.)

As to timeliness of the motion, Plaintiff cites *Hirsa*, which construing section 473 states that:

> Trial courts are vested with the discretion to allow amendments to pleadings in furtherance of justice. (Code Civ. Proc., § 473.) That trial courts are to liberally permit such amendments, at *any* stage of the proceeding, has been established policy in this state since 1901.

(Hirsa v. Superior Court (1981) 118 Cal.App.3d 486, 488–89 (emphasis in original).)

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Plaintiff shall prepare for the Court's signature a written order consistent with the Court's ruling, pursuant to CRC Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and by the CRC. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

9:00
LINE 7

23-CIV-05022 400 CONCAR DRIVE TENANT LLC, ET AL VS. 2000 SIERRA POINT PARKWAY LLC, ET AL

400 CONCAR DRIVE TENANT LLC, ET AL	JACOB DEAN
2000 SIERRA POINT PARKWAY LLC, ET AL	MARISSA M. DENNIS

DEMURRER TO FIRST AMENDED COMPLAINT BY DEFENDANTS 2000 SIERRA POINT PARKWAY LLC, DIAMOND MARINA LLC AND DIAMOND MARINA II LLC

TENTATIVE RULING:

The Demurrer of Defendants 2000 Sierra Point Parkway LLC, Diamond Marina LLC and Diamond Marina II LLC ("Defendants" or "Landlord") to the First Amended Complaint ("FAC") by Plaintiffs 400 Concar Drive Tenant LLC ("Tenant") and WeWork Companies U.S. LLC ("WeWork") (also collectively "Plaintiffs") is ruled on as follows:

(1) Demurrer to the First Cause of Action for Breach of Contract and Second Cause of Action is **OVERRULED** on the ground that WeWork lacks standing to bring this action.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (CCP § 367.) A real party in interest is a party that has an actual and substantial interest in the subject matter of the action, and that would be benefited or injured by the judgment in the action. (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525; *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031–1032.)

The FAC alleges that pursuant to the lease, WeWork delivered to Landlord a Letter of Credit ("LOC") on Tenant's behalf. (FAC ¶ 1.) The lease provides that the LOC shall be reduced by nearly $2 million as long as Tenant satisfies the Reduction Conditions under the lease. (*Ibid*.) According to the FAC, Landlord has refused to provide Tenant with the reduction in the LOC despite Tenant satisfying the Reduction Conditions and requesting such reduction. (*Ibid*.) Landlord's action has allegedly caused and continues to cause damage to WeWork, who must pay fees to keep the LOC active at a significantly higher amount than required under the lease. (*Id*. at ¶ 2.) These allegations are therefore sufficient to support WeWork's standing because it has an actual and substantial interest in the subject matter of the action, and it would be benefited or injured by the judgment in the action. The Court notes an apparent inconsistency in the FAC at ¶31, where Plaintiffs seem to allege "Tenant" is responsible for the aforementioned higher fees. Nevertheless, this issue was not raised/argued by Defendants and the facts that the LOC is drawn on WeWork's bank account and that a judgment could potentially reduce WeWork's exposure on the LOC by approximately $2 million suffices for standing purposes.

Defendants' argument against WeWork's standing by framing the controversy as entirely between "Tenant and Landlord" is not persuasive. (Demurrer at p. 21.) Further, it seems inconsistent that Landlord is arguing WeWork's lack of standing to bring this action, but at the

same time arguing that WeWork's filing of a Form 10-Q constitutes an insolvency event under the lease. In other words, Landlord contends that WeWork's actions apply such that there was no breach, but at the same time WeWork cannot bring a breach of contract claim.

(2) Demurrer to the First Cause of Action for Breach of Contract is **OVERRULED** based on failure to allege facts sufficient to support a cause of action.

The elements of a breach of contract claim are: (1) the contract, (2) plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach of the contract, and (4) the resulting damage to plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.)

Section 26.2.6 of the lease provides in relevant part for a reduction in the LOC amount if the Reduction Conditions are satisfied. (FAC, Exh. A, § 26.2.6.) "Reduction Conditions" means "(a) that no default then exists under this Lease and no more than two late payments or one insolvency event have/has occurred in the previous 12-month-period immediately preceding the time that a reduction in Tenant's Letter of Credit Amount is to be effectuated by the issuer of Tenant's Letter of Credit and the parties hereto, and (b) that (1) with respect to "Reduction #1" referenced below, Tenant has paid in full 60 consecutive months of Basic Rent and Additional Rent…." (*Ibid*.) "At any time following Tenant's satisfaction of the applicable Reduction Conditions, Tenant may notify Landlord that Tenant requests the then-applicable reduction in the Tenant's Letter of Credit Amount." (*Ibid*.)

The FAC alleges facts sufficient to support that Tenant satisfied the Reduction Conditions for Reduction #1. (FAC, ¶¶ 11-23, 25.) Plaintiffs allege that no insolvency event occurred because Section 17.8 of the lease defines "insolvency" as the filing of a petition by or against tenant, none of which occurred during the relevant time frame. (FAC, ¶ 23, and Exh. A, § 17.8.) Therefore, the FAC alleges that no insolvency event occurred under the lease. (*Ibid.*)

Despite these allegations though, Landlord contends that the Court cannot interpret "insolvency event" based on Section 17.8 of the lease, but instead must look at facts of which Landlord requests judicial notice. (See Landlord's Request for Judicial Notice ("RJN"), Exhs. 1-5.) Landlord contends that "insolvency event" is not defined in the lease. Landlord urges the Court to find that an "insolvency event" occurred based on 11 U.S.C. §547(f), the dictionary definition of "insolvency" and "event" and WeWork, Inc.'s Form 10-Q filing with the SEC. (See 11 U.S.C. § 547(f) ["For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition."]; see also Landlord's Request for Judicial Notice ("RJN"), Exh. 5 [Merriam-Webster dictionary definitions of "insolvency" and "event"]; see also Landlord's RJN, Exh. 1-3, Bankruptcy Petitions filed on November 6, 2023 for Tenant and WeWork, and Form 10-Q filing by WeWork Inc.)

Landlord's arguments are not sufficiently persuasive at this stage. The lease in this case contains an integration clause. (FAC, Exh. A, § 25.13.) "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as

the same is ascertainable and lawful." (Civil C. § 1636.) "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title." (Civil C. § 1639.) Plaintiffs' alleged interpretation relies on language contained in the lease. Although Landlord argues that section 26.2.6 would be redundant because it refers to both a "default" and "insolvency event," Landlord does not point to any other language in the lease to assist with how the parties intended for "insolvency event" to be determined. As Plaintiffs point out, there is no reference to 11 U.S.C. §547(f) in the lease.

In *Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, the trial court sustained defendant's demurrer to the first amended complaint without leave to amend, and the Court of Appeal reversed. (*Id*. at pp. 10, 21.) The plaintiff brought a breach of contract claim against defendant asserting that the 30-day termination clause in the contract was understood and intended by the parties to require good cause, as evidenced by the custom and usage in the trade. (*Id.* at p. 10.) On appeal, the plaintiff argued that a demurrer may not be granted where the complaint alleges an interpretation for which the contract is reasonably susceptible. (*Id.* at p. 11.) The trial court sustained the demurrer without leave to amend based on the court's assessment of the meaning of the terms of the contract, and rejected the plaintiff's allegations in the complaint concerning alternative meanings to which the contract language was reasonably susceptible. (*Id.* at pp. 11-12.) The Court of Appeal found that for purposes of a demurrer, the allegations must be assumed as true, and the trial court's rejection of such allegations as a factual matter constituted reversible error. (*Id*. at p. 12.) "Unless the interpretation proffered in the complaint is conclusively negated by a provision in the contract, a demurrer is improper." (*Ibid*.)

Here, the FAC alleges an interpretation of "insolvency event" that is reasonably susceptible as Plaintiffs are relying on other language within the lease. Landlord's reliance on matters outside the pleading of which they request judicial notice do not conclusively negate Plaintiffs' allegations as to their interpretation of an "insolvency event." Even if "insolvency event" is ambiguous under the lease, parol evidence may be relevant to resolving this issue. (See *Hayter, supra,* 18 Cal.App.4th at p. 20 [extrinsic evidence relevant to interpretation can no longer be barred simply because of a judicial determination that a writing appears to have only one interpretation].) Thus, Landlord has not shown that this issue may be resolved by this Demurrer.

Landlord also argues that Tenant's August 7, 2023 email was invalid notice because it failed to comply with Section 25.6 of the lease, which requires written notice by mail. (See FAC, ¶ 20, and Exh. A, § 25.6.) Irrespective of whether the email was sufficient notice requesting a reduction in the LOC though, the FAC alleges that Tenant also subsequently sent a letter on September 13, 2023 requesting a reduction in the LOC. (See FAC, ¶ 23.) Therefore, the allegations are sufficient to support that Tenant complied with the notice requirement for Reduction #1.

(3) Demurrer to the Second Cause of Action for Declaratory Judgment is **OVERRULED** based on failure to state facts sufficient to support this cause of action. Landlord contends that this declaratory relief claim is derivative of the breach of contract claim, and therefore fails. As

discussed above though, Plaintiffs adequately allege facts to support a breach of contract claim.

(4) Landlord's Request for Judicial Notice is **GRANTED**. As to Exhibit 5 though, the Court takes judicial notice of the dictionary definitions, but it does not find those definitions to be controlling here.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, Landlord's counsel shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to CRC Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the CRC. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

9:00
LINE 8
24-CIV-00762 CANYON LAKES TITLE, LLC VS. DE'ANGELO SALONGA

CANYON LAKES TITLE, LLC JUAN CARLOS LOZANO
DE'ANGELO SALONGA

MOTION FOR APPROVAL TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS BY PETITIONER CANYON LAKES TITLE, LLC

TENTATIVE RULING:

For the reasons stated below, Petitioner Canyon Lakes Title, LLC's First Amended Petition for Approval for Transfer of Payment Rights" ("FAP"), filed April 4, 2024, and Petitioner's related "Motion" filed 2-15-24, is **DENIED WITHOUT PREJUDICE**. (Ins. Code § 10134, *et. seq*.)

The Court's primary concerns are: (1) the financial terms of the transaction may not be fair and reasonable; (2) the payee does not fully understand the proposed transaction and independent legal or financial advice regarding the transaction should be obtained by Mr. Salonga; and (3) interested party Berkshire Hathaway (Berkshire) has called other factors to the Court's attention that should be addressed before final approval of the proposed transfer. Cal. Ins. Code §§10139.5(b)(9), (14) and (15).

Specifically, Berkshire raised the following issues in its Response to the FAP. First, Petitioner's omission of the Payee's name and address creates a notice problem and makes it difficult for interested parties to respond. Petitioner's initial Petition violated the Transfer Act, including Ins. Code §10139.5(c)(1)), by omitting *both* the Payee's name and address. The FAP still violates it by omitting the Payee's address. Although Mr. Salonga's declaration (FAP, Ex. G) states that he lives in Daly City, it provides no address. The payee's name and address are required, in part, to enable interested parties (such as Berkshire) to communicate with payees at their current address. Petitioner creates a notice problem by omitting key information in the original Petition, only to provide the information just days before the hearing via the FAP. This practice makes it more likely that interested parties will not have sufficient time to respond to the FAP and potentially runs afoul of the notice provisions in §10139.5(f)(2)(K).

Second, Petitioner failed to provide required documents. Canyon Lakes is required to support its Petition with key documents, including the subject annuity contract, the qualified assignment, and the underlying structured settlement agreement, absent a showing that those documents are unavailable. Canyon Lakes has not satisfied this requirement. Unlike the original Petition, the FAP now attaches a copy of the Minor's Compromise, but the FAP does not provide the three documents mandated under the Transfer Act, per §10139.5(f)(2)(E-G). Those documents are required unless the transferee makes an affirmative showing that the documents

are not available or are confidential.

The FAP does not establish that these required documents are unavailable. The procedure for establishing an excuse from production is set forth in §10139.5(f)(2)(H), which requires a showing of reasonable effort to locate these required documents. FAP, Ex. F is an "Affidavit In Lieu of Settlement Agreement" signed by Mr. Salonga explaining Petitioner's failure to provide the settlement agreement. This declaration states that Mr. Salonga tried but was unable to obtain a copy of the settlement agreement, but it does not explain what steps were taken to do so. Berkshire's Opposition states that Canyon Lakes and its counsel know that these required documents are available to Mr. Salonga from Berkshire, upon Mr. Salonga's written request. But no documents have been requested from Berkshire. The Court finds that Canyon Lakes has failed to adequately explain its failure to provide the annuity contract, the settlement agreement, and the qualified assignment agreement, and has not shown that it took reasonable steps to obtain them.

Third, Petitioner has not shown that the proposed transfer would be in Mr. Salonga's "best interest." The original Petition contained virtually no information about Mr. Salonga's intended use of the proceeds or why the transfer would be in his best interests. Having now considered the FAP, the Court finds that it does not sufficiently show that the proposed transfer would be in Mr. Salonga's best interest based on the state of the record. The Court notes that Mr. Salonga waived his right to receive free independent professional advice about this proposed transfer. While that is certainly Mr. Salonga's right, the Court has some concern as to why and would find a more detailed explanation from Mr. Salonga helpful. Further, Berkshire describes an alternative option that might be more financially beneficial to Mr. Salonga, and that he may have chosen, assuming he knew about it. (See Neville Decl., para. 11-20 [discussing the "BIFCO Hardship Exchange Program Option"].) This program, for which Mr. Salonga may qualify, appears to offer much more favorable terms. As described in the 4-12-24 Neville Declaration, compared to Canyon Lakes' proposed offer of a lump-sum payment to Mr. Salonga of $50,483.82, BIFCO could offer him $90,081.62. Thus, Canyon Lake's failure to timely provide Mr. Salonga's name and current address may have prevented Berkshire from contacting Mr. Salonga to discuss a better alternative.

Having considered the FAP and Berkshire's 4-12-24 Response, the Court cannot conclude that Petitioner Canyon Lakes has met its burden under the Transfer Act, and cannot conclude that the proposed transfer to Canyon Lakes, at least based on the present FAP, would be in Mr. Salonga's "best interests." Accordingly, the FAP is denied without prejudice. Mr. Salonga has the right to make decisions about his own finances and the Court is not ruling it will never approve this proposed transfer. But the Court has an independent duty to ensure that this Petition complies with the Transfer Act. Based on the information provided, including the procedural concerns expressed above, the Court is not yet convinced that Petitioner has enabled Mr. Salonga to make an informed decision after considering the options available to him.

Although he is not ordered to do so, if Mr. Salonga wishes to appear at the hearing in person and provide the Court with any information related to the Petition, the Court will, of course, afford him that opportunity.

Petitioner is granted leave to file a Second Amended Petition. If Petitioner chooses to file a Second Amended Petition, it shall address the defects identified above, and shall include a declaration stating that Petitioner has served Mr. Salonga with a copy of this Order.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Petitioner shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to CRC Rule 3.1312, and provide written notice of the ruling to Mr. Salonga and Berkshire. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

9:00

23-UDL-01135 EQUITY RESIDENTIAL MANAGEMENT, LLC VS. THERESE GENDRON, ET AL

EQUITY RESIDENTIAL MANAGEMENT, LLC	DANA R. WARES
THERESE GENDRON	PRO SE

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT PURSUANT TO STIPULATION

TENTATIVE RULING:

Plaintiff Equity Residential Management, LLC's Motion for Entry of Judgment Pursuant to Stipulation is **DENIED WITHOUT PREJUDICE**.

The proof of service of the motion is defective. The proof of service states the server "placed a true and correct copy of the documents in a package for delivery by an express mail or overnight courier service" and attaches a printed shipping label. (Apr. 2, 2024 Proof of Service, p. 2, exh. 1.) The proof of service omits whether "the notice or other paper [was] deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served … ." (CCP § 1013(c).)

Thus, the proof of service is consistent with the documents having been placed in a package but never actually sent. "Service by overnight delivery is valid under [Code of Civil Procedure section 1013, subdivision (c)] only when the document is: 1) 'deposited in a box or other facility regularly maintained by the express service carrier,' or 2) delivered to an authorized courier or driver.'" (*Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1250 [proof of service's statement that envelope was placed "at our office's designated pick-up location" for Federal Express was insufficient].)

Accordingly, there is no indication Gendron has received notice of this motion. A "court lacks jurisdiction to rule on a motion that has not been properly noticed for hearing on the date in question." (*Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1204–1205.) The motion is therefore denied without prejudice.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, Plaintiff's counsel shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to CRC Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the CRC. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.