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

Law and Motion Calendar
HONORABLE NANCY L. FINEMAN
Department 4
800 N Humboldt Street, San Mateo
Courtroom Central-G

Tuesday, April 09, 2024

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

1. **EMAIL Dept4@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**

2. **YOU MUST CALL (650) 261-5104 BEFORE 4:00 P.M. AND FOLLOW THE INSTRUCTIONS ON THE MESSAGE.**

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

Failure to do both items 1 or 2, *and* 3 will result in no oral presentation.

At this time, *appearances can be in person or by Zoom*. When you sign in to Zoom, use your first and last name. Mute your line until your case is called. RECORDING OF A COURT PROCEEDING IS PROHIBITED.
Please check in by 1:50 pm.

Zoom Video/Computer Audio Information:

https://sanmateocourt.zoomgov.com/

Meeting ID: 161 964 0802
Password: 734616

Zoom Phone-Only Information Please note: You must join by dialing in from a telephone; credentials will not work from a tablet or PC. VIDEO APPEARANCES ARE PREFERRED.

Phone number: 1-669-254-5252

Meeting ID: 161 964 0802
Password: 734616

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.

2:00 PM

20-CIV-03642 CYNTHIA A. SMITH VS. STEPHANIE A BEDROSSIAN, ET AL.

CYNTHIA A. SMITH	PRO SE
STEPHANIE A BEDROSSIAN	QUENTIN L. KOPP

PLAINTIFF CYNTHIA SMITH'S MOTION TO CONTINUE TRIAL DATE

TENTATIVE RULING:

For the reasons set forth below, the court GRANTS plaintiff Cynthia A. Smith's unopposed motion to continue trial.

Trial dates are firm and disfavored, may be granted only on an affirmative showing of good cause. (Cal. Rules of Court, rule 3.1332(a), (c) (hereinafter all references to a rule refers to the California Rules of Court).) A motion for continuance is addressed to the sound discretion of the trial court. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395 (*Oliveros*).)

Rule 3.1332(c) sets forth seven grounds for continuance upon a showing of good cause, mostly related to the unavailability of a party, essential lay or expert witness, or trial counsel due to death, illness, or other excusable circumstances. The grounds for continuance also include the addition of a new party, if: (1) the new party has not had a reasonable opportunity to conduct discovery and prepare for trial; or (2) the other parties have not had a reasonable opportunity to conduct discovery and prepare for trial with regard to the new party's involvement in the case. (rule 3.1332(c)(5).) Lastly, grounds for continuance on the basis for good cause are: (1) a party's excused inability to obtain essential evidence despite diligent efforts; or (2) significant and unanticipated change in the status of the case that renders it not ready for trial.

Pursuant to subdivision (d) of Rule 3.1332, this court may consider: (1) the proximity to the trial date; (2) whether there was any previous continuance, extension of time, or delay of trial due to any party; (3) length of the continuance requested; (4) availability of alternative means to address the problem that gave rise to the motion; (5) prejudice that parties or witnesses will suffer as a result of the continuance; (6) court's calendar and the impact of granting a continuance; (7) trial counsel's availability due to other trials; (8) whether all parties have stipulated to a continuance; and (9) whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance.

On March 4, 2024, Plaintiff Cynthia Smith filed an amendment to her complaint, substituting DOE 1 for WVJP 2017-1, LP ("WVJP"). Smith has not stated this as the reason for continuing the trial, instead citing to a plethora of motions that she wishes to file with this Court. However, it is undeniable that, after at least half a year has elapsed since discovery has closed and less than two months before trial is slated to start, Smith has added another party to the case. Defendant Wolverine Ventures Management, LLP ("Wolverine") has stated its non-opposition to Smith's

motion for continuance for this very reason. Moreover, counsel for Wolverine has stated that his client intends to file a motion to dismiss WVJP from this case.

While Rule 3.1332(c) states that this court must find a showing of good cause requiring the continuance, there is no verbiage in the rule explicitly stating that the showing of good cause must come from the moving party, though it is heavily implied. The court in considering the reason that Smith proffers to support her motion for a continuance finds that her reasons do not constitute good cause because she had knowledge that she had waived her right to a jury trial and the identify of WVJP for quite some time before bringing this motion ex parte. However, the reason that Wolverine proffers in its response do constitute good cause. In addition, the court is currently in a trial that is scheduled to conclude on April 19, 2024. Further, defendants stated at the pretrial conference that they are still searching for the process server, who is a critical witness.

According, after balancing all the factors and exercising its discretion, the court continues the trial. (*See, Schwartz v. Magyar House, Inc.* (1959) 168 Cal.App.2d 182, 189 [trial court continuing trial on its own motion]). While there is the policy to expedite litigation in order to achieve judicial efficiency, judicial efficiency is not in and of itself an end to be pursued. (*Oliveros, supra*, 120 Cal.App.4th at p. 1396.) Instead, judicial efficiency is sought because it promotes the just resolution of cases upon their merits. (*Ibid*.) This court recognizes that to commence trial when a party has been added a mere month ago will work substantial injustice upon the newly-added party, when that party has neither the opportunity to file motions and engage in discovery. The continuance will allow defendants additional time to try to locate the process server and will not require the parties to need to trail because of the court's current trial calendar. The court's unavailability is another factor this court is considering.

Therefore, the April 10, 2024, trial date is VACATED and a trial setting conference will be held on June 18, 2024 at 9:30 a.m.

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 California Rules of Court, 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 California Rules of Court. The court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00 PM

20-CLJ-04225 DISCOVER BANK VS. WENDY BUENDIA

DISCOVER BANK THOMAS J. SEBOURN
WENDY BUENDIA

CLAIM OF EXEMPTION

TENTATIVE RULING:

Judgment creditor filed an opposition to a claim of exemption as well as a notice of hearing on claim of exemption on March 6, 2024. However, Judgment debtor has failed to file a claim of exemption, including required documents pursuant to Code of Civil Procedure section 703.520.

After a creditor opposes the claim for exemption, the levying officer shall promptly file the claim of exemption with the court (Code Civ. Proc., § 703.550.) A hearing will be held no later than 30 days after the notice of the motion was filed unless continued for good cause. (*Id*.., § 703.570.) If the evidence is sufficient, the court may make its determination therein; however, if there is insufficient evidence, the court shall order the hearing continued for further production of evidence. (*Id*., § 703.580.)

The court does not have sufficient evidence to decide the motion since it does not have judgment creditor's documents. Therefore, the court CONTINUES the hearing to June 18, 2024. The court orders judgment debtor to file the necessary documents with the court and suggests that judgment creditor file the documents.

2:00 PM

23-CIV-03497 ARI LAW, P.C. VS. AUTONATION.COM, INC., ET AL.

ARI LAW, P.C.	ALI A AALAEI
AUTONATION.COM, INC., A CORPORATION	JON C ABRAMSON

DEFENDANT BMW FINANCIAL SERVICES NA, LLC'S GENERAL DEMURRER TO PLAINTIFF'S COMPLAINT

TENTATIVE RULING:

The Demurrer of Defendant BMW Financial Services NA, LLC ("Defendant") to the First through Seventh Causes of Action in Plaintiff Ari Law, P.C.'s ("Plaintiff") First Amended Complaint ("FAC") is SUSTAINED WITH LEAVE TO AMEND, for the reasons set forth below.

(1) Initially, the court notes that Plaintiff has provided the improper address for the hearing. Department 4 is not located in Redwood City as the notice states, but instead at the Central Courthouse, Courtroom G, 800 North Humboldt St., San Mateo, CA 94401. (See Cal. Rules of Court, Rule 3.1110 [the Notice "must specify" the location of the hearing].) Plaintiff is cautioned to comply with this rule in the future.

(2) Defendant also has not established compliance with the meet and confer requirement under Code of Civil Procedure section 430.41. A demurring party shall file and serve with the demurrer a declaration stating either of the following: (A) the means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer, or (B) that the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith. (Code Civ. Proc., § 430.41, subd. (a)(3).) Defendant's counsel states only that "[d]espite Defendant BMW FS's counsel's efforts to meet and confer with Plaintiff regarding his inadequate FAC and its failure to state any sufficient facts to constitute any cause of action against BMW FS, Plaintiff refused to amend the FAC." (Messinger Decl., ¶ 2.) This statement is insufficient to comply with section 430.41, subdivision (a)(3). While the court proceeds to rule on the merits of the Demurrer, Defendant's counsel is cautioned to comply with this requirement in the future or the court may drop any future demurrer for failure to comply with this statutory requirement.

(3) The Demurrer to the First through Seventh Causes of Action is SUSTAINED WITH LEAVE TO AMEND based on uncertainty. A demurrer for uncertainty will be sustained where the complaint is so bad that the defendant cannot reasonably respond. (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.) Plaintiff brings this action against seven named Defendants, but the FAC contains only boilerplate allegations that Defendants were acting in concert and aiding and abetting one another to get Plaintiff to enter into the agreements. A

defendant may be liable for aiding and abetting the commission of an intentional tort if the defendant: (1) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144.) The FAC fails to include any allegations as to how Defendants worked in concert and aided and abetted one another though. Further, the only specific allegations against Defendant pertain to alleged harassment of Plaintiff in attempting to collect a purported debt for the vehicle purchased by Plaintiff. (FAC ¶¶ 28-30.) Other than the Sixth Cause of Action then, it is uncertain what the basis is for Defendant's liability for these other causes of action.

(4) The Demurrer to the First Cause of Action for Breach of Contract is also SUSTAINED WITH LEAVE TO AMEND based on failure to allege facts sufficient to support this 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.) Although the motor vehicle lease agreement supports that Defendant, as the lessor's assignee, is a party to the agreement, the lease agreement also states that "BMWFS [Defendant] will administer this Lease on behalf of itself or any assignee." (FAC, Exh. A.) Plaintiff has not alleged facts sufficient to support how Defendant breached the agreement, and caused damage to Plaintiff as a result of said breach.

(5) The Demurrer to the Second Cause of Action for Breach of Express Warranty and Third Cause of Action for Breach of Implied Warranty under the Song-Beverly Consumer Warranty Act is SUSTAINED WITH LEAVE TO AMEND based on failure to allege facts sufficient to support these causes of action. ("Song-Beverly Act"). Plaintiff alleges that "Defendants are the warrantor of the vehicle." (FAC ¶ 40.) However, the definitions in the Song-Beverly Act serve as a mechanism for identifying those parties that are subject to its provisions and protections. (*Dagher v. Ford Motor Co*. (2015) 238 Cal.App.4th 905, 916-918.) Under the Song-Beverly Act, "distributor" means any individual, partnership, corporation, association, or other legal relationship that stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale of consumer goods. (Civ. Code, § 1791(e).) A "manufacturer" means any individual, partnership, corporation, association, or other legal relationship that manufactures, assembles, or produces consumer goods. (*Id*., § 1791(j).) "Retail seller," "seller," or "retailer" means any individual, partnership, corporation, association, or other legal relationship that engages in the business of selling or leasing consumer goods to retail buyers. (*Id*., § 1791(l).) The express and implied warranties under the Song-Beverly Act apply to retailers, distributors or manufacturers. (See *id*., §§ 1791.1, 1791.2.) Accordingly, Plaintiff has not alleged facts sufficient to show that Defendant is liable for these claims as a distributor, manufacturer or retailer. Moreover, Plaintiff fails to allege facts sufficient to show that Defendant may be held liable as an aider and abettor to a retailer or distributor.

(6) The Demurrer to the Fourth Cause of Action for Violation of California Unfair Business Practices Act is SUSTAINED WITH LEAVE TO AMEND based on failure to allege facts sufficient to support this cause of action. Under California law, unfair competition means "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising…" (Bus. and Prof. Code, § 17200.)

The FAC alleges that Defendant's conduct constitutes an unlawful, unfair and fraudulent business practice in violation of section 17200. (FAC ¶ 59.) The FAC also alleges that Defendant's conduct violated Vehicle Code section 11713.1, et seq., and section 260.04(b). (FAC ¶ 62.) Defendant also violated Civil Code section 2982. (FAC ¶ 63.)

To the extent that this cause of action is derivative of the other causes of action, the court finds that this cause of action also fails. (See *Miyahara v. Wells Fargo Bank, N.A.* (2024) 99 Cal.App.5th 687, 318 Cal.Rptr.3d 112, 125.)

Plaintiff also fails to sufficiently allege a claim under the remaining statutes. Vehicle Code section 11713.1 sets out violations for holder of a dealer's license. (See Veh. Code, § 11713.1.) The FAC fails to allege facts sufficient to support that Defendant holds a dealer's license. Additionally, it does not appear that Vehicle Code section 260.04 exists. Lastly, Civil Code section 2982 addresses disclosures that must be contained in a conditional sales contract. (See Civil Code, § 2982.) Plaintiff has not alleged facts as to how Defendant allegedly violated section 2982.

(7) The Demurrer to the Fifth Cause of Action for Fraud is SUSTAINED WITH LEAVE TO AMEND based on failure to allege facts sufficient to support this cause of action. The elements of a cause of action for fraud are: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Sup. Court* (1996) 12 Cal.4th 631, 638.) Fraud must be alleged with specificity. (*Id.* at p. 645.) General and conclusory allegations do not suffice. (*Ibid*.) This specificity requirement necessitates pleading facts showing how, when where, to whom and by what means the misrepresentations were tendered. (*Ibid*.) A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. (*Ibid*.) In such a case, the plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Ibid*., citing *Tarmann v. State Farm Mutual Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

The FAC alleges that Defendant made fraudulent statements regarding the vehicle around the date of the lease, in person and in writing, in Mountain View, in August 2021. (FAC ¶ 67.) The alleged misrepresentations were made by sales agents, Davoodi and Majid, representing that Plaintiff would never be required to pay anything related to tires or cosmetic issues for the vehicle, and that the vehicle would not require any maintenance. (FAC ¶¶ 16-21, 67.) Plaintiff fails to allege facts sufficient to support Davoodi's and Majid's authority to speak for Defendant

though. Furthermore, these alleged misrepresentations do not appear to pertain to the lease agreement, but rather to the other agreements attached to the FAC, i.e. the BMW Ultimate Protection Tire & Wheel Protection with Optional Cosmetic Coverage agreement ("Ultimate Protection Agreement") and Vehicle Protection + agreement. ("Vehicle Protection Agreement"). (FAC, Exh. A.) The Ultimate Protection Agreement and Vehicle Protection + Agreement are between Plaintiff and Defendant Safe-Guard Products International, LLC. (*Ibid*.) Thus, Plaintiff fails to allege facts sufficient to support this fraud claim against Defendant with the required specificity.

(8) The Demurrer to the Sixth Cause of Action for Violation of the Rosenthal Fair Debt Collection Practices Act ("FDCPA") is SUSTAINED WITH LEAVE TO AMEND based on failure to allege facts sufficient to support this cause of action.

In support of the Demurrer to this cause of action, Defendant provides emails that it asks the court to consider. (Messinger Decl., Exh. B.) However, a demurrer challenges only defects that appear on the face of the pleading under attack or any matters outside of the pleading which are the proper subject of judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) No extrinsic evidence may be considered. (*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.) The court therefore has not considered these emails.

Nevertheless, Plaintiff fails to allege facts sufficient to support a violation of the FDCPA. The FAC claims that Defendant is a "debt collector" within the meaning of Civil Code section 1788.2(c), and that the money owed by Plaintiff is a debt within the meaning of Civil Code section 1788.2(d). (FAC ¶ 71.) Plaintiff also alleges that Defendant violated the FDCPA by: (a) making false representations concerning the character, amount, or legal status of any debt in asserting that the alleged debt to be owed by Plaintiff; (b) making false representations or using deceptive means to collect or attempt to collect on any debt; and (c) using unfair or unconscionable means to collect or attempt to collect ay debt, including collecting amounts which were not expressly authorized by the agreement creating the debt or permitted by law. (FAC ¶ 71.) The FAC does not allege what section(s) of the FDCPA that these actions allegedly violated though.

(9) The Demurrer to the Seventh Cause of Action for Declaratory Relief is SUSTAINED WITH LEAVE TO AMEND based on failure to allege facts sufficient to support this cause of action.

"Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another…may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract." (Code Civ. Proc., § 1060.)

The declaratory relief claim alleges that an actual controversy exists in that Defendants each claim that they are not a party to the contract, and blames the other Defendants for liability. (FAC ¶ 75.) Based on the way that Defendants hold themselves out uniformly under the mark "BMW," Plaintiff alleges that all Defendants are alter egos, agents, or proxies of one another through a unified scheme. (FAC ¶ 75.) Plaintiff seeks a declaration of its rights under the contract including the identification of who are the parties, their respective roles and relationships among Defendants. (FAC ¶ 77.) Such facts are insufficient to support that an actual controversy exists though, as the agreements attached to the FAC set forth the parties to each agreement.

Furthermore, Plaintiff appears to be asserting that all seven named Defendants are the alter ego of each other. In order to rely on an alter ego theory of liability, Plaintiff must allege facts to support a unity of interest between the alleged alter ego and corporation and that the failure to recognize alter ego relationship would lead to an inequitable result. (See *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 411.)

(10) Plaintiff has ten days from service of written notice of entry of order by Defendant to file and serve a Second Amended Complaint. (Cal. Rules of Court, rule 3.1320(g); Code of Civ. Proc., § 472b.)

In light of the Court's ruling, the Court VACATES that demurrer of Allison Bavarian dba BMW of Mountain View and AutoNation.com's demurrer currently set for hearing on April 16, 2024. The Court has not reviewed the demurrer, but strongly suggests that Plaintiff consider the arguments made in the demurrer and include in the Second Amended Complaint facts which address arguments raised by these defendants and, thereafter, the parties have significant meaningful meet-and-confer before any demurrer is filed.

If the tentative ruling is uncontested, it shall become the order of the court. Thereafter, counsel for the County shall prepare a written order consistent with the court's ruling for the court's signature, pursuant to California Rules of Court, 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 California Rules of Court. The court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00 PM

23-CIV-04190 YIFAN JIANG VS. XUAN XU, ET AL.

YIFAN JIANG	PRO SE
XUAN XU	JACQUELINE N VU

DEMURRER TO VERIFIED FIRST AMENDED COMPLAINT FOR PARTITION OF REAL PROPERTY

TENTATIVE RULING:

The Court understands that Plaintiff has requested a Mandarin interpreter. Due to a shortage of Mandarin interpreters, if the tentative is properly contested, the Court continues the motion for argument to April 23, 2024 at 2:00 p.m. If the tentative is not properly contested by informing the Court and all parties by 4:00 p.m. on April 8, 2024 that the tentative is contested, then the Court will adopt the tentative at the April 9, 2024 hearing and there will be no oral argument on the motion.

Defendant Xuan Xu's Demurrer to Plaintiff Yifan Jiang's Verified First Amended Complaint for Partition of Real Property is SUSTAINED in part with leave to amend and OVERRULED in part.

Defendant Xuan Xu's Request for Judicial Notice is GRANTED as to all items.

Plaintiff Yifan Jiang's Request for Judicial Notice is GRANTED as to all items.

The First Amended Complaint (the "FAC") requests partition of real property owned by Plaintiff Yifan Jiang and Defendant Xuan Xu as joint tenants as well as reimbursement for certain expenditures Jiang made for the benefit of their joint interest. Here, Xu demurs specially to the first cause of action for partition on the grounds of abatement as well as specially and generally to the second through fourth causes of action on the grounds of uncertainty and failure to state facts sufficient to constitute a cause of action. (See Code of Civ. Proc., § 430.10, subds. (c), (e)–(f).)

A. Amendments within Scope of Order

Jiang first raises a procedural objection to the FAC, contending that Jiang was not authorized to amend the Complaint to add any of the causes of action now asserted in the FAC.

> Following an order sustaining a demurrer … with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. [Citation.] The plaintiff may not amend the complaint to add a new cause of action without having

> obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend.

(*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.) "This rule is inapplicable [where] the new cause of action directly responds to the court's reason for sustaining the earlier demurrer." (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.)

The prior form Complaint indicated that it was asserting causes of action for breach of contract and common counts, but requested reimbursement for payments and sale of the real property. (Sep. 8, 2023 Complaint, § 8.) In sustaining the demurrer to the prior Complaint, the Court ruled that the existence of a contract was not adequately alleged and that the common counts were derivative. (Jan. 30, 2024 Order.) Jiang was granted leave to amend, and the scope of the amendment was not specified. (*Ibid.*, ["Plaintiff may file a first amended complaint within ten days of notice of entry of this order"].)

The FAC appears based on the same facts asserted in the Complaint and seek the same relief: reimbursement from Xu as a fellow joint tenant and for partition of the property by sale. Thus, while the two pleadings are based on dissimilar legal theories, the amendments were an attempt to cure the non-existence of an enforceable contract and may be considered within the scope of the leave granted by the Court's order.

This conclusion is further supported by the liberal policy of permitting amendment of the pleadings in addition to judicial efficiency—a demurrer should not be sustained without leave to amend when a viable theory of liability has been pleaded, and a motion for leave would appear to be merely pro forma. Accordingly, the demurrer to the first cause of action cannot be sustained on this basis.

B. Abatement Improper

Xu also contends the first cause of action should be abated, given that her Cross-complaint seek partition of the same property and was filed earlier. A demurrer on the grounds that at another action is pending between the same parties on the same cause of action "is dilatory in its nature and is not favored." (*Lord v. Garland* (1946) 27 Cal.2d 840, 848.)

More importantly, "[a]batement does not lie with respect to cross suits pending in the same court where the relationship of the parties to the suits is reversed." (*Hamm v. San Joaquin & Kings River Canal Co.* (1941) 44 Cal.App.2d 47, 56.) "The general rule is to the effect that the plea of a prior action pending applies only where plaintiff in both suits is the same person, and both are commenced by himself, and not to cases in which there are cross suits by a plaintiff in one suit who is defendant in the other." (*Ibid.*)

This is particularly applicable here, where both actions are already confined to a single lawsuit, thus satisfying abatement's purpose of efficiency. As for the other purpose—stymieing vexatious plaintiffs—"[t]he defendant in the second action cannot say that the plaintiff is harassing him or her with two actions, for the … defendant was the party who brought the first action as the plaintiff." (5 Witkin, Cal. Procedure (6th ed. 2024) Pleading, § 1187.)

Accordingly, the demurrer to the first cause of action is overruled.

C. 2nd–4th Causes of Action Derivative or Unsupported

The second through fourth causes of action seek money from Xu on the basis that Jiang has paid more than fifty percent of the costs of (1) insurance premiums, termite fumigation service fees, and other expenses, (2) mortgage repayments, and (3) water bills incurred at certain times. (See Jan. 25, 2024 First Amended Complaint ("FAC"), ¶¶ 52–56.) Xu contends that they are either derivative of the partition cause of action or otherwise fatally uncertain and fail to state a claim.

These counts appear to seek contribution from Xu as a joint tenant. "When a cotenant makes advances from his own pocket to preserve the common estate, his investment in the property increases by the entire amount advanced. Upon sale of the estate he is entitled to be reimbursed his entire advancement before the balance is equally divided." (*Southern Adjustment Bureau, Inc. v. Nelson* (1964) 230 Cal.App.2d 539, 541.) However, the right of contribution cannot be enforced via a separate action seeking to hold a cotenant personally liable; a right of contribution only creates a lien on the property to be satisfied when the property is sold. (See *Conley v. Sharpe* (1943) 58 Cal.App.2d 145, 156.) Thus, contribution is properly sought by partition.

Therefore, to the extent the second, third, and fourth causes of action are premised on a right of contribution, they are already encompassed by the cause of action for partition and adequately pleaded by the preceding factual allegations. (See FAC, ¶¶ 10–41.) To the extent that they are intended to be assertions of other unspecified legal theories such as contract, quasi-contract, estoppel, or unjust enrichment, none independent of the right of contribution is intelligibly and sufficiently alleged.

Accordingly, the demurrer to these causes of action is sustained with leave to amend. Amendment is limited to the addition of allegations necessary to specify the theories of liability and facts in support thereof to the extent these causes of action are not based on a right of contribution.

On the morning of April 8, 2024, Jiang emailed to Department 4 an opposition to the reply. Xu properly objected to this pleading. Plaintiff failed to request the right to file it and an opposition to a reply is not authorized by the Code of Civil Procedure. The court has not considered the opposition.

Plaintiff has 10 days from service of written notice of entry of order to file and serve a Second Amended Complaint. (Cal. Rules of Court, rule 3.1320(g); Code of Civ. Proc., § 472b.)

If the tentative ruling is uncontested, it shall become the order of the court. Thereafter, counsel for Defendant shall prepare a written order consistent with the court's ruling for the court's signature, pursuant to California Rules of Court, 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 California Rules of Court. The court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00 PM

23-CIV-06121 IAN LASKY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED VS AVEN FINANCIAL, INC.

IAN LASKY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED	SCOTT EDELSBERG
AVEN FINANCIAL, INC.	REBECCA HARLOW

UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TENTATIVE RULING:

The court DENIES without prejudice plaintiffs' motion for preliminary approval of class action settlement.

In ruling on settlements involving class, this court has a duty to independently determine whether a settlement is fair, reasonable and adequate. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129 (*Kullar*) [" 'The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement.' "]; *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723.) After conducting its independent review, the court concludes that plaintiffs have failed to show that the settlement is fair, reasonable and adequate.

While the court places reliance on counsel's opinion, the court "must also receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed. We do not suggest that the court should attempt to decide the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys. However, as the court does when it approves a settlement as in good faith under Code of Civil Procedure section 877.6, the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness. (See *Tech–Bilt, Inc. v. Woodward–Clyde & Associates* (1985) 38 Cal.3d 488, 499–500, 213 Cal.Rptr. 256, 698 P.2d 159.) While the court is not to try the case, it is ' 'called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.' ' (*City of Detroit v. Grinnell Corp*., 2nd Cir. 1974] *supra*, 495 F.2d [448] at p. 462, italics added.) This the court cannot do if it is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Kullar*, *supra*, 168 Cal.App.4th at p. 133.) Plaintiffs' counsel provides only conclusory statements rather than providing information about the strength of weaknesses of each claim, the defenses asserted, the potential maximum recovery, the viability of a national class when all plaintiffs sue for violations of California statutes and under the common law, where the burdens of proof may vary based upon the state in which a plaintiff resides. For a national class, plaintiffs "must credibly demonstrate, through a thorough analysis of the applicable state laws, that state law variations will not swamp

common issues and defeat predominance." (*Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 926.) Plaintiffs fail to provide any breakdown of the states in which putative class members reside, including the number in California. The court cannot determine if the settlement is fair, reasonable, and adequate for putative class members who live outside California and would not receive the up to $75 statutory award without knowing the consumer laws of other states. While the burden for preliminary approval of a class certification is less stringent than for class certification, plaintiffs must make a sufficient enough showing of these issues so that the court can make an assessment of whether the settlement is fair, reasonable and adequate. Plaintiffs have not met the burden for preliminary approval of a class action.

Plaintiffs fail to explain why putative class members need to opt into the settlement when they are ascertained, based upon their receiving notice of the breach. Plaintiffs need to explain why this process is allowed in light of the holding in *Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527. Plaintiffs have failed to explain who is going to adjudicate the requests for additional compensation.

While plaintiffs state that there are more than 63,000 individuals in the class which certainly satisfies the numerosity requirement, as stated above, they provide no breakdown of the class and subclass to allow the court to make any type of determination about the size of the class in California and in each of the other 49 states. While the court assumes that the class identify is based upon the letter that the defendant sent out regarding the data breach, plaintiffs fail to confirm that information and explain how they are obtaining the email addresses for email notice when letters were sent.

Plaintiffs fail to show a well-defined community of interest for the national class because each state may have different requirements for the state law claims. Further, plaintiffs have failed to demonstrate that a class action is a superior method to resolve this case in light of the individual issues the putative class may be able to assert in individual actions. The release is a broad release of all claims and there is no discussion regarding the superiority of a class action in light of this brought release. For example, the complaint alleges that plaintiffs have suffered emotional distress, which could be a large component of a damage award and there is no evidence that these emotional distress claims could be litigated on a class wide basis.

The court does not find that the named plaintiffs are adequate representatives to represent a nationwide class because there is no showing of the typicality of their claims for any states other than California and New Jersey. Further, the court does not find Andrew Shamis to be an adequate class counsel in that he is not a California lawyer and has not been admitted pro hac vice into this case and thus cannot practice law in California.

The proposed settlement administrator does not adequately address its experience in processing, reviewing, and determining of claims as presented in the settlement agreement.

The claims forms are confusing rather than being written in lay person terms. The deadlines for putative class members to act are too short. Plaintiffs do not explain why the settlement would be disbursed electronically rather than by a physical check.

If the tentative ruling is uncontested, it shall become the order of the court. Thereafter, counsel for plaintiffs shall prepare a written order consistent with the court's ruling for the court's signature, pursuant to California Rules of Court, 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 California Rules of Court. The court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00 PM

23-CLJ-02382 MARY WANG OSKAMP VS. YU WANG, ET AL.

MARY WANG OSKAMP	PRO SE
YU WANG	PRO SE

DEFENDANT LILI YANG AND YU WANG'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND AMENDED RESPONSES TO REQUESTS FOR PRODUCTION AND FOR MONETARY SANCTIONS AGAINST PLAINTIFF MARY WANG OSKAMP

TENTATIVE RULING:

The Court understands that Defendants have requested a Mandarin interpreter. Due to a shortage of Mandarin interpreters, if the tentative is properly contested, the Court continues the motion for argument to April 23, 2024 at 2:00 p.m. If the tentative is not properly contested by informing the Court and all parties by 4:00 p.m. on April 8, 2024 that the tentative is contested, then the Court will adopt the tentative at the April 9, 2024 hearing and there will be no oral argument on the motion.

For the reasons stated below, Defendants Lili Yang's and Yu Wang's Motion to Compel further/amended responses to Requests for Production of Documents to compel production of documents, and requesting sanctions, filed Feb. 16, 2024, is GRANTED-IN-PART and DENIED-IN-PART.

Opposition briefs must be served by means of overnight delivery. Plaintiff's Opposition papers were mailed by regular mail. All parties are reminded that Opposition and Reply papers must be served "to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed." (Code Civ. Proc, § 1005, subd. (c).)

As to the motion filed by Defendant Yu Wang, the Motion is DENIED. The Motion seeks to compel Plaintiff to serve further/amended responses to request for production of documents served *by Defendant Lili Yang*. Defendant Yu Wang did not serve the subject request for production of documents, and therefore, he lacks standing to compel further responses to them.

As to the motion filed by Defendant Lili Yang, the Motion to Compel Further Responses to the request for production of documents is GRANTED. Plaintiff opposes the motion, arguing that (a) the two request for production of documents violate Code of Civil Procedure section 94, because Defendants exceeded the 35 discovery request limit, and (b) the request for production of documents are unclear and do not expressly seek Plaintiff's emails. The Court finds that Plaintiffs'

objections and arguments were waived, or otherwise lack merit, and that Plaintiff shall serve further responses to Request for Production of Documents Nos. 1 & 2.

First, Plaintiff already served written responses to Request for Production of Documents Nos. 1 & 2, apparently after the deadline to do so, without asserting any objections. Thus, Plaintiff's objection based on Code of Civil Procedure section. 94 has been waived. (Code Civ. Proc., § 2031.300, subd. (a).)

Second, Plaintiff attended Informal Discovery Conferences (IDC) on both 12-13-23 and 2-6-24, at which the parties discussed the request for production of documents, but Plaintiff never raised a Section 94 objection during either of the IDCs. At the 12-13-23 IDC, the Court noted that Plaintiff had "identified various email correspondence" as being relevant to the request for production of documents. (12-13-23 Minute Order ["Plaintiff is to produce copies of all such email correspondence."]) At the 2-6-24 IDC, the Court noted that Plaintiff had not produced the email correspondence. (2-6-24 Minute Order ["On Plaintiff's Response to Request for Production of Documents, Plaintiff was required to produce copies of all such email correspondence but has not complied. Plaintiff instead summarized the emails, which is not the same as production."]) Having failed to raise a Section 94 objection either in Plaintiff's responses or at the IDCs, Plaintiff has waived any such objection.

Further, even if the Section 94 objection had not been waived, it would lack merit, because Section 94 permits each party to serve 35 discovery requests. There is no indication that Defendant Lili Yang, as separate from Defendant Yu Wang, exceeded the 35 limit.

Plaintiff's contention that the two request for production are unclear and/or do not expressly emails lacks merit. The request for production of documents is broad enough to encompass relevant emails, and Plaintiff has herself identified emails that are relevant to the case and responsive to the request. The parties discussed this issue at the IDCs, and Commissioner Mau already informed Plaintiff that her emails are relevant and responsive to the requests, and should be produced.

Plaintiff's written responses to Request for Production of Documents Nos. 1 & 2 are not code-compliant, because they only identify documents, but they do not state whether Plaintiff *agrees to produce the requested documents*. Pursuant to Code of Civil Procedure sections 2031.210, subdivision (a)(1) and 2031.220, a responding party must state unequivocally that it will comply or not comply with the request for production of documents, or explain any claimed inability to comply under sections 2031.210, subdivision (a)(2) and 2031.230. Merely identifying documents is not sufficient.

The Motion to Compel production of the documents is DENIED as premature, on grounds that Defendant's remedy here is an order compelling Plaintiff to serve further responses. Where, as here, a response to an request for production of documents *has* been made, but the demanding party is not satisfied with it, the remedy is a motion to compel *further responses*. (Code Civ. Proc., § 2031.310.) If the responding party *has agreed* to comply with a Section 2031.010 demand but then fails to do so, compliance may be compelled on appropriate motion. (Code Civ. Proc., § 2031.320.) Defendant Lili Yang's remedy here is an order compelling further responses to the request to the

production of documents. The Court is not stating that the documents do not need to be produced, but only that the court cannot make that order at this time.

The request for sanctions against Plaintiff is GRANTED-IN-PART, in the amount of $875.00. The amount is based upon Brian Cohen's hourly rate of $350 per hour, which the Court finds a reasonable hourly rate and a reasonable amount of time, two and one-half hours. Code of Civil Procedure section 2031.310, subdivision (h) mandates sanctions on this Motion unless the Court finds that Plaintiff acted with substantial justification, or finds that other circumstances render the imposition of sanctions unjust. The Court finds that sanctions are appropriate here, in part because the Code of Civil Procedure section 94 objection lacks merit, for each of the reasons explained above. Further, at the IDCs, Commissioner Mau already informed Plaintiff that her emails were relevant and should be produced. Defendants' requests for a substantially larger amount of sanctions is denied because the motion is a common motion to compel involving only two document requests and defendants were only partially successful on their motion.

Conclusion. Within seven (7) days of notice of entry of this Order, Plaintiff shall serve further, verified code-compliant responses to Defendant Lili Yang's Request Nos. 1 and 2, without objections. The further responses shall agree to produce the requested documents, including relevant emails. Within 21 days of notice of entry of this Order, Plaintiff shall pay to Defendant Lili Yang the ordered monetary sanctions. The Court urges Plaintiffs to produce the requested documents without delay so that further motion practice is unnecessary.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, defendant Lili Yang shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, 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 California Rules of Court. The court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

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