SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 06/03/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV1903799

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:	CLERK:
PLAINTIFF: KOFI OPONG-MENSAH vs. DEFENDANT: MARIN COMMUNITY COLLEGE DISTRICT, ET AL	

NATURE OF PROCEEDINGS: MOTION – OTHER: NEW TRIAL

RULING

The Court is without jurisdiction to rule on Plaintiff Kofi Opong-Mensah's ("Plaintiff") Motion for New Trial. (Code Civ. Proc., Code § 660, subd. (3); *Reyes v. Kruger* (2020) 55 Cal.App.5th 58, 73–74, as modified on denial of reh'g (Oct. 21, 2020), review denied (Dec. 23, 2020). Internal citations omitted.) The matter is therefore **ORDERED** off-calendar.

Defendant Marin Community College District's ("Defendant") Requests for Judicial Notice A-E are GRANTED. (Evid. Code, § 452, subd. (d).)

Legal Standard

Plaintiff brings the Motion pursuant to Code of Civil Procedure section 657, subdivisions (1) and (3) which provide:

> "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: …
> 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. …
> 3. Accident or surprise, which ordinary prudence could not have guarded against."

(Code Civ. Proc., § 657, subds. (1), (3).)

Because new trial motions are creatures of statute, the procedural steps for making and determining such a motion are mandatory and must be strictly followed. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1193.) The trial court loses jurisdiction to hear a new trial motion if no notice of intent is filed within 15 days of the mailing or service of notice of entry of judgment. (*Reyes v. Kruger, supra,* 55 Cal.App.5th at p. 73–74.) Further, the power of the court to rule on a motion for a new trial expires 75 days after the mailing of notice of entry of judgment by the clerk or 75 days after service on the moving party by any party of written notice of entry of judgment, whichever is earlier. (Code Civ. Proc., § 660, subd. (3).)

Discussion

The Order of Entry of Judgment dismissing this case was served and filed on July 19, 2024. (See RFJN A and B.) The Notice of Entry of the Court's November 12, 2024 Order denying Plaintiff's Motion for Relief from Settlement was filed and served on November 25, 2024. (See RFJN C and D.)

Plaintiff failed to file a notice of his intent to move for new trial within fifteen (15) days from the service of the July 19, 2024 Order dismissing the case. The motion is therefore untimely. Moreover, even if it were not, at the latest, the Court lost jurisdiction to hear any motion for new trial on February 9, 2025 (75-days after the November 25, 2024 mailing of the Notice of Entry of the Court's November 12, 2024 Order). Plaintiff did not file this Motion until February 18, 2025.

The Court therefore has no jurisdiction to rule on the motion.

Defendant's Objection to Reply Brief is MOOT after the Court considered the matter on Plaintiff's ex parte application and entered an order permitting an oversized Reply brief. (See May 9, 2025 minutes.)

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for June, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1605267272?pwd=908CbP6TV2mhCAyai1nzo6lyz2dKaw.1
Meeting ID: 160 526 7272
Passcode: 026935

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 06/03/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV2001451

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:	CLERK:
PLAINTIFF: MARK V. JACOBSON, ET AL vs. DEFENDANT: SUN PACIFIC MORTGAGE & REAL ESTATE, ET AL	

NATURE OF PROCEEDINGS: 1) MOTION – OTHER: CHARGING JUDGMENT DEBTOR'S LLC
2) MOTION – TAX COSTS

RULING

There are two matters before the Court.

1. The unopposed motion for a charging order against judgment debtor Rodney Herson's interest in Bay Hill Holdings, LLC is **GRANTED**. (Code Civ. Proc., §§ 708.310 & 708.320; Corp. Code, § 17705.03.)

2. Defendants Sun Pacific Mortgage & Real Estate ("Sun Pacific") and Lynn Tardibuono's (together, "Defendants") motion to strike costs is **DENIED**. The motion to tax costs is **GRANTED in part** to the extent described in this order. (Cal. Rules of Court, rule 3.1700(b); Code Civ. Proc.,[1] § 1033.5, subd. (c).)

Background

The Court entered judgment in favor of this case's more than one dozen plaintiffs ("Plaintiffs") in this fraud and elder abuse case on January 8, 2025. Defendants now move to strike Plaintiff's January 27, 2025 Memorandum of Costs or, alternatively, to tax certain costs stated therein.

Legal Standard

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) Code of Civil Procedure, section 1033.5 specifies what types of costs are recoverable under Section 1032(b). All allowable costs must be "reasonably necessary to the conduct of the litigation rather than merely

[1] All further undesignated code sections are to the Code of Civil Procedure.

convenient or beneficial to its preparation" and "reasonable in amount." (§ 1033.5, subd. (c).) "[B]ecause the right to costs is governed strictly by statute a court has no discretion to award costs not statutorily authorized." (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.)

To recover costs, a prevailing party must file and serve a memorandum of costs. (Cal. Rules of Court, rule 3.1700(a)(1).) The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items therein are correct and were necessarily incurred in the case. (*Ibid.*)

The opposing party may dispute items in the memorandum of costs through a motion to strike costs (if the entire memorandum of costs is challenged) or a motion to tax costs (if only particular items are challenged). (Cal. Rules of Court, rule 3.1700(b); Fairbank et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2024) ¶ 17:517 [the difference is semantic; there is no procedural difference between a motion to strike costs and a motion to tax them].) Unless the movant is objecting to the entire memorandum of costs, the motion "must refer to each item objected to by the same number and appear in the same order as the corresponding cost item claimed on the memorandum of costs and must state why the item is objectionable." (Cal. Rules of Court, rule 3.1700(b)(2).) The motion must be filed and served within 15 days of service of the prevailing party's memorandum of costs. (Cal. Rules of Court, rule 3.1700(b)(1).)

"If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that [they] were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs." (*Ladas*, *supra*, 19 Cal.App.4th 761, 774; accord *Oak Grove School Dist. of Santa Clara County v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 698-699.) That an item "appear[s] to be proper" means that, on its face, it either falls within one of the categories expressly included as allowable costs under Section 1033.5 or appears reasonably necessary to the litigation. (See *Ladas*, *supra*, 19 Cal.App.4th 761, 775-776 [placing burden on the party claiming costs where neither of these conditions was satisfied]; see also *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131.) Whether a particular cost was reasonably necessary is a question of fact to be determined by the trial court. (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1487.)

Discussion

Timeliness

"A prevailing party who claims costs must serve and file a memorandum of costs with 15 days after the date of service of the notice of entry of judgment or dismissal by the clerk . . . or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first." (Cal. Rules of Court, rule 3.1700(a)(1).) This period is extended by two court days when service is made electronically. (§ 1010.6, subd. (a)(3)(B).)

The Court entered judgment in this case on January 8, 2025 and electronically served the judgment the same day. (See Proof of Service [dated Jan. 8, 2025].) Fifteen calendar days after that date was January 23, 2025, and two court days after that date was January 27, 2025. The Memorandum of Costs was timely served on that date.

Defendants rely on *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th 1042, contending that it held that deadline extensions for electronic service do not apply where the court is the entity making service. That is not what *Westrec* held. First, *Westrec* interpreted Code of Civil Procedure, section 1013, subdivision (a). (*Id.* at p. 1047.) That provision concerns service by mail. No part of Section 1013 mentions electronic service except subdivision (g), which merely states that the rules governing electronic service can be found in Code of Civil Procedure, section 1010.6 and the California Rules of Court. Those authorities, and not Section 1013, are the basis for Plaintiffs' claim to a deadline extension. (See Opposition, p. 1.) Second, *Westrec* addressed whether Section 1013 "extends the deadline for *the court* to act." (*Westrec*, *supra*, 85 Cal.App.4th 1042, 1047 [emphasis added].) The question presented here is not whether the Court acted in a timely fashion, but whether Plaintiffs did.

Challenge to All Costs for Lack of Detail

Defendants challenge "all costs sought" on the ground that "Plaintiffs' costs memorandum, the attached worksheets, and the attached exhibits" are "wholly lacking in detail." (Memorandum, p. 3.) Defendants do not offer any authority establishing that Plaintiffs needed to provide any more detail than they did. "Initial verification [of the memorandum of costs] will suffice to establish the reasonable necessity of the costs claimed. There is no requirement that copies of bills, invoices, statements, or any other such documents be attached to the memorandum. Only if the costs have been put in issue via a motion to tax costs must supporting documentation be submitted." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267.)

The Court disregards the unsupported argument that "many" of the costs at issue are "uncertain," "not recoverable," or "unnecessary." (Memorandum, p. 3.) The word "many" indicates that Defendants are not challenging every single cost stated on these grounds. This means they were required to refer to the items at issue by number and state why each specific item is objectionable. (Cal. Rules of Court, rule 3.1700(b)(2).)

Item 1(c): $577.50 for Answer to Cross-Complaint

Plaintiffs request $577.50 in "Filing and Motion Fees" associated with "Answer to Cross-Complaint." This item is suspect on its face because the amount requested is much higher than is typical for a court-mandated filing fee for a single answer. Accordingly, Plaintiffs carried the burden of showing that this charge was reasonable and necessary. (See *Ladas*, *supra*, 19 Cal.App.4th 761, 775-776; *Nelson*, *supra*, 72 Cal.App.4th 111, 131.)

Plaintiffs argue that this $577.50 charge is associated with both Mr. Jacobson's answer to Sun-Pacific's cross-complaint *and* the first appearance fee paid upon the filing of his initial case management statement. Plaintiffs present documentation showing that Beyers Costin Simon, Plaintiffs' prior counsel[2] in this action, incurred a $142.50 vendor fee for filing "Answer to Cross-Complaint" on May 4, 2021 (*id.* at Ex. A) and a $502.50 expense ($435 court filing fee associated with a Case Management Statement, plus $67.50 in related vendor fees) on May 12, 2021 (*id.* at Ex. B).

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[2] Defendants repeatedly argue that "Plaintiffs' counsel may not claim costs of a party they did not represent." (Reply, p. 2; see also Memorandum, p. 3.) "Plaintiffs' counsel" is not claiming costs. Plaintiffs are claiming costs.

The $502.50 expense is not associated with any answer to a cross-complaint, which is the only expense described in Item 1(c). The only expense in fact incurred in connection with Jacobson's answer to the cross-complaint, as shown in Plaintiff's evidence, was the $142.50 vendor charge. Accordingly, the $502.50 charge was not described in the Memorandum of Costs and cannot be timely asserted now. (See *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 929 ["[I]f the claimant fails to present a cost bill, a waiver of the right to costs results. The time provisions relating to the filing of a memorandum of costs, while not jurisdictional, are mandatory."].)

The question of whether the $142.50 vendor fee is recoverable remains. The evidence presented does not indicate that the answer at issue was ever actually filed. Beyers Costin Simon's litigation support vendor billed the firm for filing a document entitled "Answer to Cross-Complaint" on May 4, 2021, so presumably, Mr. Jacobson filed his answer around that date. (Saunders Dec., ¶ 2(i) and Ex. A.) The Court has reviewed every document filed in this case from February 1, 2021 (the date Sun Pacific filed its cross-complaint) through July 2021 and has been unable to locate an answer to Sun Pacific's cross-complaint on behalf of Mr. Jacobson. In their opposition to Defendants' response to the Court's December 3, 2024 Order to Show Cause, Plaintiffs referred to and attached an answer Mr. Jacobson supposedly filed to Sun Pacific's cross-complaint, pro per, on January 26, 2021. (Pltf.'s Opp. to Defs.' Resp. to Dec. 3, 2024 OSC [filed Jan. 3, 2025], p. 2 & Ex. A.) That document is not file-stamped and does not appear in the Court's record. The date it was purportedly signed, and the date Plaintiffs say it was filed, predate Sun Pacific's filing its cross-complaint. Despite Defendants clearly placing the existence of Mr. Jacobson's answer to the Sun Pacific cross-complaint at issue in their moving papers, Plaintiffs did not present any evidence that it was ever filed or even contradict Defendants' accusation that it was not.

The Court cannot deem a charge associated with an event that evidently never occurred either "reasonable in amount" or "reasonably necessary to the conduct of the litigation." (§ 1033.5, subd. (c)(4).) Accordingly, the motion tax costs is granted in full as to this item.

Item 1(d): $157.50 Filing or Motion Fee for Motion for Order Substituting Personal Representative

Filing fees are expressly recoverable as costs, and this charge does not appear excessive on its face like Item 1(c)'s $577.50, so Defendants must show that this expense was either unreasonable or unnecessary. (See *Ladas, supra*, 19 Cal.App.4th 761, 775-776; *Nelson, supra*, 72 Cal.App.4th 111, 131; § 10335, subd. (a)(1).) Defendants argue that this item is too high because the filing fee for a motion requiring a hearing is $60. Defendant is relying on the Superior Court of California's fee schedule effective January 1, 2024. (RJN,[3] Ex. 1.) Plaintiffs

[3] Defendants' request for judicial notice, which is unopposed, is granted as to Exhibits 1-4. (Evid. Code, § 452, subd. (h).) It is denied as to Exhibits 5-6. Deposition and trial transcripts are not "matters of public record" (RJN, p. 2) unless they have been filed with the court and appear in the record for the case, which would make them judicially noticeable under Evidence Code, section 452, subdivision (d). A party cannot file a document with the court for the purpose of requesting judicial notice of it (as Defendants have evidently done here, see Deimer Dec., Exs. A-B) and, on that basis alone, transform it into a "court record" meriting practically automatic judicial notice under Section 452(d). If that were allowed, *any* document would be automatically judicially noticeable provided the party requesting judicial notice included a copy of it with the request.

incurred these charges in July 2021, and the invoice reflects that the applicable filing fee at that time was $90. (Saunders Dec., Ex. C.) This still leaves $67.50 unaccounted for.

Plaintiffs' counsel paid $67.50 in litigation support vendor fees for their vendor's assistance in filing this document. (*Ibid.*) Defendant could not have mounted any argument as to the impropriety of this portion of the $157.50 charge because Plaintiffs' Memorandum of Costs lists the total expense incurred to file papers without identifying which portion is attributable to court fees and which is attributable to their litigation support vendor's service charges. It is appropriate for Plaintiffs to carry the burden of establishing that its litigation support vendor fees are reasonable and necessary because Section 1033.5 does not expressly deem such costs recoverable, these charges are not reasonably necessary on their faces, and the reasonableness and necessity of hiring a litigation support vendor are matters "peculiarly within the knowledge" of Plaintiffs. (*Corns v. Miller* (1986) 181 Cal.App.3d 195, 200.) Plaintiffs do not present any evidence that it was reasonably necessary, as opposed to convenient, to hire a litigation support vendor in this case.

In their reply, Defendants argue for the first time that *no* portion of this expense is recoverable because Plaintiffs never actually filed a motion to substitute "as required by Code of Civil Procedure[,] section 377.31[,]" but merely filed a document entitled "Notice of Substitution." (Reply, p. 2.) Section 377.31 does not require a party to file a motion to effect a substitution. Defendants concede that Plaintiffs had to file *some* document to achieve that outcome, so it makes sense that they incurred a filing fee. In any event, this is an argument that could and should have been brought in Defendants' moving papers and so cannot be raised now. (*Contractors' State License Bd. v. Superior Court* (2018) 23 Cal.App.5th 125, 130, fn. 3; see also *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.)

The motion is granted as to Item 1(d), and it is taxed from $157.50 to $90.

Item 1(f) and Certain Attachment 1(g) Items: $448.75 Total in Filing Fees for Case Management Statements

Item 1(f) requests $176.25 in filing fees for filing a case management statement. Defendants additionally challenge four entries on Attachment 1(g) for filing fees associated with case management statements, three for $67.50 each and one for $70. Defendants' argument that there is no filing fee for case management statements is based on an outdated fee schedule, but it doesn't matter, because these charges were not, in fact, for filing fees. Plaintiffs' evidence shows that *all* of these charges consisted solely of litigation support vendor service charges. (Saunders Dec., Ex. D.) There is no evidence before the Court that it was reasonable or necessary to hire a litigation support vendor in this case. The motion to tax is granted as to the entire $448.75.

Item 1(s): $140.75 Filing Fee for Waiver of Jury Trial

Defendants carry the burden of showing that this cost was not reasonable or necessary. (See *Ladas, supra*, 19 Cal.App.4th 761, 775-776; *Nelson, supra*, 72 Cal.App.4th 111, 131; § 1033.5, subd. (a)(1) ["filing fees" expressly allowable as costs].)

Defendants moved to strike Plaintiffs' jury demand on the basis that they did not timely file their jury fee. (See Defs.' Mot. to Strike [filed Nov. 9, 2023].) That motion was set to be heard on February 13, 2024, but the hearing was vacated when Plaintiffs declined to oppose the motion.

Instead, Plaintiffs filed a consent to waiver of jury trial on Nov. 13, 2023, and Plaintiffs state that this is the basis for the charge in Item 1(s).

It was neither reasonable nor necessary for Plaintiffs to file a consent to waiver of jury trial given that they had already waived the right to trial by jury by failing to pay their jury fees on time, as discussed below. The motion to tax is granted as to the whole of this item.

Item 2(a): $240 for Jury Fee Deposit

Defendants carry the burden of showing that this cost was not reasonable or necessary. (See *Ladas*, *supra*, 19 Cal.App.4th 761, 775-776; *Nelson*, *supra*, 72 Cal.App.4th 111, 131; § 1033.5, subd. (a)(1) [jury fees are expressly recoverable as costs].) Defendants argue that this cost is irregular because the Memorandum of Costs states that Plaintiffs incurred this charge on November 1, 2024, but Plaintiffs expressly waived their right to a jury trial on November 13, 2023.

To secure the right to a trial by jury, "[a]t least one party demanding a jury on each side of a civil case shall pay a nonrefundable fee of one hundred fifty dollars ($150)" to "offset the costs to the state of providing juries in civil cases." (§ 631, subd. (b).) That fee is due "on or before the date scheduled for the initial case management conference in the action[.]" (§ 631, subd. (c).) A party waives the right to trial by jury by failing to timely pay the fee. (§ 631, subd. (f)(5).)

Plaintiffs, stating that the Memorandum of Costs' reference to November 1, 2024 was a clerical error, offer evidence that they actually posted jury fees on or around November 1, 2023. (Saunders Dec., Ex. F.) The initial case management conference in this case took place on December 1, 2020, meaning the jury fees were well overdue by November 2023. It is not reasonable or necessary to pay a fee designed to preserve a right where the payment is futile because the right has obviously been waived. To the extent Plaintiffs are arguing that they did not, in fact, waive their right to trial by jury by paying the fee three years late, they needed to state that clearly and explain why, with citations to evidence and/or the record in this case. The Court does not accept Plaintiffs' invitation to pore over the entire record in this matter unguided to figure this out for itself. (Opposition, p. 4.) The motion to tax is granted as to the whole of this item.

Item 5(d): $500 for Service of Process on Rodney Henderson by Registered Process Server

Defendants carry the burden of showing that this charge was not reasonable or necessary. (See *Ladas*, *supra*, 19 Cal.App.4th 761, 775-776; *Nelson*, *supra*, 72 Cal.App.4th 111, 131; § 1033.5, subd. (a)(4)(B) [cost of service of process by registered process server is recoverable].) The Court disregards Defendants' argument that this cost is not awardable against Sun Pacific and "may only be connected from Mr. Henderson" because Defendants' have not offered any authority to support that. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, [the court] consider[s] the issues waived."].) Defendant also argues that Mr. Henderson's default was entered on October 7, 2021. The Court does not understand the point Defendants are trying to make here. The fact that the Court entered a default against Mr. Henderson does not mean that he was never served. The motion is denied as to this item.

Item 8(a): $990 for Ordinary Witness Fees for Allan Wallace

This item appears improper on its face because Plaintiffs did not provide even the minimal information requested in the Judicial Council's Memorandum of Costs form. The form requires the party completing it to include the number of days the witness was needed, the charge per day, the number of miles the witness traveled to attend, and their cost of travel per mile. This is because the "ordinary witness fees" that are expressly recoverable as costs under Section 1033.5 are "the witness' fees for each day's actual attendance, when legally required to attend a civil action or proceeding in the superior courts" at statutorily-defined rates. (Gov. Code, § 68093; § 1033.5, subd. (a)(7).) Plaintiffs' Memorandum of Costs left the blanks provided for this information empty and merely stated that Plaintiffs request a total of $990 in connection with Mr. Wallace. Accordingly, Plaintiffs have not shouldered the burden of proving the reasonableness and necessity of this expense. (See *Ladas*, *supra*, 19 Cal.App.4th 761, 775-776; *Nelson*, *supra*, 72 Cal.App.4th 111, 131.)

Plaintiffs state that this charge was for "witness fees [they] paid to Allen Wallace for his deposition." (Opposition, p. 4.) They have not presented any evidence to establish that this charge was either reasonable in amount or reasonably necessary to the conduct of the litigation, or even to substantiate the basis for this $990 charge. (§ 1033.5, subd. (c)(4).) The Court grants the motion to tax as to the whole of this item.

Item 15: $126.72 for Birth Records for Proof of Age

Plaintiffs must prove the reasonableness and necessity of this expense. (See *Ladas*, *supra*, 19 Cal.App.4th 761, 775-776; *Nelson*, *supra*, 72 Cal.App.4th 111, 131.) They state that they incurred this expense to procure Joe and Judy Passantino's notarized birth certificates, which was necessary because Defendants would not stipulate that the Passantinos were seniors. (Babb Dec., ¶ 3.) Plaintiffs have not offered any evidence to substantiate the amount of this charge or what it was for. Argument in a brief is not evidence. (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 139.) The Court grants the motion to tax as to the whole of this item.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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Meeting ID: 160 526 7272
Passcode: 026935

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 06/03/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV2301767

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:	CLERK:
PLAINTIFF: JAMES HUTTON, ET AL vs. DEFENDANT: BERNARD KAUFMAN, ET AL	

NATURE OF PROCEEDINGS: 1) MOTION – ADMISSIONS; DISCOVERY FACILITATOR PROGRAM
2) MOTION – SANCTIONS; DISCOVERY FACILITATOR PROGRAM
3) MOTION – RELIEF; DISCOVERY FACILITATOR PROGRAM
4) MOTION – SUMMARY ADJUDICATION

RULING

Plaintiffs' motion for an order that requests for admission are deemed admitted is **DENIED**. The Court awards sanctions against the Vanguard Defendants jointly and severally in the amount of $5,000, to be paid to Plaintiffs' attorneys' office within twenty (20) days of the date of this Order.

Defendants' motion for relief from waiver from objections is **DENIED**. The Court awards sanctions against the Vanguard Defendants jointly and severally in the amount of $2,300, to be paid to Plaintiffs' attorneys' office within twenty (20) days of the date of this Order.

Plaintiffs' motion for sanctions is **GRANTED** in part and **DENIED** in part. The motion for evidentiary and/or issue sanctions is denied. The motion for monetary sanctions is granted in the amount of $87,053.50. The Vanguard Defendants shall pay this amount to Plaintiffs' attorney's officer within twenty (20) days from the date of this Order.

Plaintiffs' motion for summary adjudication of Issue Nos. 1, 4 and 7 is **GRANTED** and is **DENIED** as to Issue Nos. 2, 3, 5, 6 and 8-13.

Allegations in the Second Amended Complaint

Plaintiffs James Hutton, Jamie Rushing and John Hutton allege that on or about October 4, 2021, Defendants Bernard Kaufman, individually and as Co-Trustee of the Bernard A. Kaufman and Mishel W. Kaufman Revocable Trust, Mishel W. Kaufman, individually and as Co-Trustee of

the Bernard A. Kaufman and Mishel W. Kaufman Revocable Trust, and Yvette Simone Kaufman, individually and as Trustee of the Yvette Simon Kaufman Revocable Trust dated December 18, 1997 (the "Kaufman Defendants") entered into a contract with Plaintiffs to sell real property at 1761 Mar West Street in Tiburon (the "Property"), which includes two dwelling units. (Second Amended Complaint ("SAC"), ¶¶1-3, 11 and Exh. A.) Escrow closed on November 3, 2021. (*Id.*, ¶11.) The Kaufman Defendants only provided a limited Exempt Seller Disclosure ("ESD") form, even though they were not exempt, and not the more detailed Seller Property Disclosure Questionnaire ("PDQ") called for by the parties' contract. In the ESD form, the Kaufman Defendants answered "No" to all questions, including the question as to whether they knew of any material facts or defects affecting the Property. (*Id.*, ¶13.)

After the close of escrow, Plaintiffs learned from a neighbor that one of the seller's father had been sued by former tenants of one of the units on the Property for mold-related claims. The neighbor also stated that she had contacted Vanguard Properties, Inc. ("Vanguard"), Link Allen and Nancy Allen (together, the "Vanguard Defendants"), who were the Kaufman Defendants' listing broker and agents, because she was concerned a prospective buyer of the Property would need to be informed about various issues affecting the Property. However, the Vanguard Defendants did not disclose any of this information to Plaintiffs, and instead marketed the property as "move-in ready". (*Id.*, ¶17.) Plaintiffs later opened up inaccessible areas of the flooring in the rental unit and discovered a concealed sump pump and inadequate framing, neither of which was previously disclosed. (*Id.*, ¶20.) Plaintiffs have also discovered problems with the other dwelling unit, namely, an unsafe fireplace and a leak in the ceiling. (*Id.*, ¶22, 23.)

The First through Fourth Causes of Action for breach of contract, violation of Civil Code Sections 1102 et seq., fraud, and deceit, are asserted against the Kaufman Defendants. The Fifth Cause of Action for non-disclosure and the Sixth Cause of Action for negligence are asserted against the Vanguard Defendants.

Plaintiffs' Motion for Order Deeming RFAs Admitted

I. Standard

A party must respond to requests for admission within 30 days after service. (Code Civ. Proc., § 2033.250(a).) If the responding party does not provide a timely response, the propounding party may move for an order that the truth of the matters specified in the requests be deemed admitted. (*Id.*, § 2033.280(b).) In addition, a party who fails to provide a timely response generally waives all objections. (Code Civ. Proc., § 2033.280(a).)

The court shall make an order that the truth of the matters specified in the request be deemed admitted unless the court "finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220." (*Id.*, § 2033.280(c); see *St. Mary v. Super. Ct.* (2014) 223 Cal.App.4th 762, 778-780.)

II. Factual and Procedural Background

On December 9, 2024, Plaintiffs served Vanguard and Link Allen each with Requests for Admissions ("RFAs"), Set One. (Declaration of Scott Phillips ("Phillips Decl."), ¶ 2.) On January 10, 2025, Plaintiffs granted the Vanguard Defendants an extension of time to serve their responses to the RFAs. The extended deadline for service of responses to the RFAs was January 20, 2025. (*Id.*, at ¶ 3.) The Vanguard Defendants did not serve responses on or before January 20, 2025. (*Id.*, at ¶ 4.)

On January 29, 2025, the Vanguard Defendants served unverified responses to the RFAs that contained only objections and a statement that ". . . Responding party is preparing further verified responses to this set of discovery." (See Phillips Decl., Exh. E and D.) The Vanguard Defendants served further RFA responses on May 6, 2025.

III. Discussion

In their Opposition, the Vanguard Defendants argue that Plaintiffs were required to first file a motion to compel, and also that the Plaintiffs failed to comply with California Rule of Court 3.1345(3) by not including a separate statement. Both of these arguments are without merit.

There are three types of motions that a party propounding RFAs may initiate: (1) motions to deem RFAs admitted based upon the responding party's failure to serve responses in a timely fashion (Code Civ. Proc., § 2033.280(b)); (2) motions to compel further responses to RFAs where the responses are claimed to be inadequate or the objections improper (§ 2033.290(a)); and (3) motions to deem responses admitted and/or for sanctions based upon the responding party's disobedience of an order compelling further responses (§ 2033.290(e)). (*St. Mary,* 223 Cal.App.4th at p. 777.) A motion to deem RFAs admitted may be made even where tardy responses are served *before* the motion was filed. (*Id.* at p. 778.) However, a responding party's service of a tardy proposed RFA response that is substantially Code-compliant will defeat a deemed admitted motion. (*Ibid.)*

Accordingly, while Plaintiffs *could* have filed a motion to compel, they also had the right to elect to file a motion to deem the RFAs admitted and chose to do so. A court's role in determining each motion is different. Here, the key question is whether the tardy responses substantially complied with the requirements of section 2033.220 *as a whole*. (*Id.*) The Court does not engage in individual analysis of the sufficiency each response. (*Id.* at pp. 779-780.) It appears this different focus between each of the motions is the likely reason motions to deem RFAs admitted are not included in California Rules of Court, rule 3.1345's list of motions which require a separate statement. Since this is not a motion to compel further responses, no separate statement was required.

Vanguard and Mr. Allen's January 29th RFA responses were not substantially compliant with Code requirements. First, they appear to be unverified. Second, they contained only waived objections and a statement "Responding party is preparing further verified responses to this set of discovery." There was no attempt to admit or deny *any* RFA. However, Vanguard and Link Allen served further, verified, RFA responses on May 6, 2025. The further responses are attached as Exhibits E and F to the Declaration of Michael Smith filed on May 7, 2025. The

Court must consider whether these further responses are substantially compliant responses as they were served before the hearing on Plaintiffs' motion to have the RFAs deemed admitted. (*St. Mary*, 223 Cal.App.4th at p. 776.) [1]

Responses that contain language explaining an admission or denial may be Code-compliant. (*St. Mary,* 223 Cal.App.4th at p. 780.) "Although '[a] denial of all or any portion of the request must be unequivocal . . . reasonable qualifications are not improper.'" (*Ibid.* [citations omitted].) Moreover, the assertion of waived objections does not necessarily prevent substantial compliance with Section 2033.220. (*Katayama v. Cont'l Inv. Grp.* (2024) 105 Cal.App.5th 898, 909–910.) Compliance analysis should prioritize the nature of the substantive answers in the proposed response. (*Ibid.*) While waived objections should be a factor in the assessment, their presence should primarily be addressed through the amount of mandatory monetary sanctions imposed. (*Ibid.*)

While some of the responses served on May 6, 2025 provide no substantive information based on claims of privilege or other objections, and several others claim an inability to admit or deny, the responses are substantially Code-compliant. Plaintiffs' motion is therefore denied.

IV. Sanctions

"It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion [to deem admitted the matters contained in the requests for admission]." (Code Civ. Proc., § 2033.280(c).) The Court awards sanctions against the Vanguard Defendants jointly and severally in the amount of $5,000. (Phillips Supp. Decl., ¶ 2.)

Motion for Relief from Waiver

After Plaintiffs' motion to deem the RFAs admitted was fully briefed, Defendants Vanguard and Link Allen filed a motion for an order granting them relief from waiver of objections to the RFAs. They argue that their failure to serve timely responses was the result of mistake, inadvertence or excusable neglect based on the busy schedule of the partner on this case, Michael Smith, and the fact that one associate on the case, Loan Dao, gave two days' notice that she was leaving the firm just as she was set to return from leave in January 2025. Mr. Smith inadvertently failed to keep track of the discovery deadlines to provide instruction to another associate on the case, Tanner London. (Declaration of Michael Smith ("Smith Decl."), ¶¶4, 5, 10.)

"If a party to whom requests for admission are directed fails to serve a timely response, the following rules apply: (a) The party to whom the requests for admission are directed waives any objection to the requests, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010). The court, on motion, may relieve that party from this waiver on its determination that both of the following conditions are satisfied: (1)

[1] The further responses were served before the initial hearing date of May 13, which was later continued to June 3, 2025.

The party has subsequently served a response that is in substantial compliance with Sections 2033.210, 2033.220, and 2033.230. (2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect." (Code Civ. Proc. § 2033.280(a)(1), (2).)

As noted above, the further responses served on May 6th were in substantial compliance with Sections 2033.210, 2033.220, and 2033.230. The issue then becomes whether Vanguard and Link Allen's failure to serve timely responses was the result of mistake, inadvertence, or excusable neglect.

The analysis under Section 2033.280(a) is similar to the analysis under Section 473(b). (See *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1418.) "There is nothing in section 473 to suggest it was intended to be a catch-all remedy for every case of poor judgment on the part of counsel . . ." (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611–612] [citation and internal quotations omitted omitted].) "Mistake is not a ground for relief under section 473, subdivision (b), when 'the court finds that the 'mistake' is simply the result of professional incompetence, general ignorance of the law, or unjustifiable negligence in discovering the law . . . .'" (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206 [citation omitted].) The term "surprise" refers to "'some condition or situation in which a party ... is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.'" (*Ibid.* [citation omitted].) Counsel's neglect is not excusable where the conduct falls below the professional standard of care. (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1414; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1423.)

Defendants have failed to show mistake, inadvertence or excusable neglect. In short, their counsel failed to calendar the due date for discovery responses. This conduct does not warrant the relief they seek. (*Huh*, 158 Cal.App.4th at p. 1423-1424 ["'press of business' alone generally does not constitute grounds for relief . . . the fact that counsel 'was busy with other matters during the relevant period . . . standing alone would not constitute excusable neglect'"] [citation omitted].) According to Mr. Smith's declaration, there were three attorneys on the case during the relevant time period. He states that he missed the deadline due to his busy calendar and, while one associate left the firm, there is no explanation as to why the other associate also missed the deadline. The neglect was not excusable. Defendants' motion is therefore denied. As a result, although the RFAs are not deemed admitted for the reasons discussed above, Defendants have waived their objections to the RFAs.

Plaintiffs are entitled to an award of sanctions under Section 2033.280(c). Their request for sanctions in the amount of $2,300 is granted. Plaintiffs' counsel's declaration references $7,300 incurred "seeking the Vanguard Defendants' compliance with the duly served Requests for Admission." As the Court already awards $5,000 in connection with Plaintiffs' motion to deem the RFAs admitted, it awards $2,300 in connection with this motion for relief from waiver. (Declaration of Scott Phillips, ¶12.)

Motion for Sanctions

Plaintiffs seek an award of evidentiary, issue and/or monetary sanctions against the Vanguard Defendants for alleged spoliation of evidence relating to emails sent to Mr. Allen by a neighbor

before the sale closed. Specifically, a few months before Plaintiffs purchased the Property, neighbor ML Walker-Jourard emailed Mr. Allen stating, among other things, that "the downstairs has mold and a gal called a mold person and won $30k." Mr. Allen contends that he did not disclose the contents of the email to Plaintiffs before the sale closed because the email had been redirected to a junk folder on his personal Apple laptop computer and he did not find the email until after the sale was completed and he received notice of Plaintiffs' claims. Plaintiffs contend that Mr. Allen did see the email when it was sent in August 2021 and that he made up the junk folder story after-the-fact because his failure to disclose it to Plaintiffs would result in his liability to Plaintiffs, as mold at the property is a material fact that would have impacted Plaintiffs' decision to purchase the Property.

I. Plaintiffs' Requested Sanctions

Plaintiffs seek sanctions under Code of Civil Procedure Sections 2023.030 and 2030.230 based on the Vanguard Defendants' alleged spoliation of native emails and related data. Evidentiary and/or monetary sanctions are generally available against a party who destroys or suppresses evidence. (See *Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 56.) Specifically, Plaintiffs seek: (1) an issue sanction designating the following fact as established: the Vanguard Defendants had actual knowledge on August 18, 2021 of statements made by Ms. Walker-Jourard in her August 18, 2021 email to Mr. Allen; (2) an issue sanction prohibiting the Vanguard Defendants from opposing Plaintiffs' contention that the Vanguard Defendants had actual knowledge on August 18, 2021 of the statements made by Ms. Walker-Jourard in her August 18, 2021 email to Mr. Allen; (3) an evidentiary sanction prohibiting the Vanguard Defendants from introducing any evidence contradicting Plaintiffs' contention that the Vanguard Defendants had actual knowledge on August 18, 2021 of the statements made by Ms. Walker-Jourard in her August 18, 2021 email to Mr. Allen; (4) an order that the Vanguard Defendants pay $98,952.00 in sanctions to Buyers for excess costs attributable to the Vanguard Defendants' spoliation of evidence, dilatory discovery tactics and other discovery abuses; and (5) an order that the Vanguard Defendants pay $73,313.00 in sanctions to Plaintiffs, in addition to the above sanctions, for the fees and costs associated with this motion.

II. Plaintiff's Showing

Plaintiffs state that when they first requested production of the emails between Mr. Allen and Ms. Walker-Jourard in discovery (which they had originally learned about directly from Ms. Walker-Jourard, who no longer had the emails in her possession), Mr. Allen did not include the emails in his document production in September 2023 and Vanguard did not include a copy in its production in December 2023. (Declaration of Scott Phillips ("Phillips Decl."), ¶¶8, 12.) Mr. Allen and Vanguard's general counsel Jennifer Supman, however, conceded in their depositions that they had the neighbor's emails in their possession at the time of these document productions. (*Id.*, ¶19.)

Defendants did not produce the emails until Mr. Allen's deposition in June 2024, and even then only photocopies of emails were produced. (*Id.*) Mr. Allen testified that he found the August 18th email from Ms. Walker-Journad regarding mold at the property when searching his "junk" email folder on his personal Apple laptop computer in 2023, and he turned it over to Vanguard in March 2023 after receiving notice of Plaintiffs' non-disclosure claims. Notably, other emails

between Mr. Allen and Ms. Walker-Journad were not flagged as junk. (*Ibid.*) During meet and confer discussions after Mr. Allen's testimony, the Vanguard Defendants' counsel provided a single-page copy of the August 18th email as a PDF without metadata or other information from the native email. Counsel stated that this version of the email was a complete copy that came from Mr. Allen's junk folder on his personal computer. He also stated that the original native version of the email "is no longer on" the Vanguard system. (*Id.*, ¶21.) A day before Mr. Allen's continued deposition, Defendants' counsel produced a third version of the email as a PDF without metadata, which was part of a larger email exchange. This version did not have a "junk" mail header but no explanation was provided as to its source. (*Id.*, ¶22.) Mr. Allen testified that he found this version in March 2023 in his Microsoft Outlook email inbox, which is his primary business email account. When he found it, he moved it into his desktop folder along with other documents he had collected, including the email found in his Apple "junk" mail folder, and forwarded the contents of the folder to Ms. Supman in March 2023. (*Id.*, ¶24.) Mr. Allen also testified that he did not open or read the August 18th email until 2023. (*Ibid.*)

Plaintiff attempted for months to schedule Vanguard's person most qualified to testify regarding Vanguard's email system and document retention policies and finally deposed Chief Technical Officer Nina Dosanjh on August 22, 2024. (*Id.*, ¶¶25-30.) Ms. Dosanjh testified among other things that emails could only be deleted manually by moving an email to the "delete" folder where it would be permanently deleted in 30 days, that emails sent to Mr. Allen's Vanguard Outlook account should still reside on the system, and Vanguard (Mark Hasha) searched its system for Ms. Walker-Jourard's email without success. (*Id.*, ¶30.) Plaintiffs also deposed Mr. Hasha as a second PMQ witness. Mr. Hasha testified that he performed three searches of Vanguard's email server at the direction of Ms. Supman and that he turned over the results without reviewing them. He also testified that he implemented a litigation hold but it did not extend to Mr. Allen's devices. (*Id.*, ¶31.)

Ms. Supman was deposed as the final Vanguard PMQ witness in November 2024. Ms. Supman testified that she relied on Vanguard's three-year document retention policy in deciding to not initiate a litigation hold until June 2024 and that she forwarded any emails she received from Mr. Allen to outside defense counsel before the September 2023 document production. (*Id.*, ¶¶31, 33.) Ms. Supman also testified that she did not instruct Mr. Allen or Vanguard's technology staff to preserve the native version of Ms. Walker-Jourard's emails. She also testified there is no trace of the native version of the August 18, 2021 email on the Vanguard system. (*Id.*, ¶33.) Ms. Supman refused to answer a number of questions on privilege, work product, and other grounds. (*Id.*, ¶34.) Plaintiffs have served further discovery requests to obtain information about the emails, ESI, and Vanguard's email system, but the Vanguard Defendants have stonewalled these efforts with delayed information and blanket objections. Recently, Mr. Allen produced yet another version of the email, this time showing it was printed on March 17, 2023. (*Id.*, ¶¶36-38.) Plaintiffs still do not have any metadata for any emails that come from the Vanguard email domain. (*Id.*, ¶44.)

Plaintiffs submit the declaration of Michael Kunkel, who attaches the emails between Mr. Allen and Ms. Walker-Jourard, produced at Mr. Allen's June 4th deposition, as Exhibit CC. Mr. Kunkel states that the emails appear to be scanned images and are not in chronological order. The emails discuss rat problems in the area, and one of the emails from Ms. Walker-Jourard states: "Also the downstairs has mold and a gal called a mold person and won $30k." A header

above that email states: "Mail thinks this message is Junk Mail." (Declaration of Michael Kunkel ("Kunkel Decl."), ¶5, Exh. CC.) Mr. Kunkel states that page VAP1230 has the content in its right side missing, causing the "Junk-Exchange" emblem disclosing syncing of Apple Mac Mail folders with the Microsoft Exchange server for Outlook to be missing. He further states that the missing "Junk-Exchange" emblem would inform Plaintiffs of the syncing of Mr. Allen's Mac Apple Mail to his Outlook using Microsoft Exchange server. (*Id.*, ¶5.) The PDF version provided by counsel after Mr. Allen's deposition on June 7th is attached as Exhibit DD. Mr. Kunkel states that this Exhibit DD appears to contain the same e-mails depicted in VAP1230-1231 of Exhibit CC, except that Exhibit DD contains all the content that was missing from the right side of page VAP1230 of Exhibit CC. (*Id.*, ¶6.) He also states that a user can download an email and move it to any folder, including a junk folder, and if moved the email would have the same header depicted in the PDF. (*Id.*, ¶7.) The embedded metadata from Exhibit DD shows the PDF was created on June 7, 2024 by Defendants' counsel. (*Ibid.*) Mr. Kunkel opines that because the emails show Mr. Allen had previously emailed with Ms. Walker-Jourard, Exhibit DD would not be routed automatically to Mr. Allen's junk folder but rather to his inbox. The implication is that Mr. Allen transferred the email from his inbox to his junk folder at a later date. (*Id.*, ¶8.) Moreover, a header such as "Mail thinks message is Junk Mail" should not show up in a review platform like Relativity once the email is removed from the Apple Mac Mail application. (*Id.*, ¶9.) Also, given the different protocols for downloading email, Mr, Kunkel deduces that the email was in Mr. Allen's Mac Mail inbox at the same time it was in his Outlook inbox (where Mr. Allen testified he found the same email thread) and that he had moved it to his junk email. (*Id.*, ¶11.) The third version provided by Defendants' counsel on June 12, 2024 is attached as Exhibit GG. Mr. Kunkel states that a review of the metadata associated with this exhibit shows it was created by Mr. Allen within Outlook from an Apple Mac on March 17, 2023 and was then modified on June 12, 2024, meaning it was in Vanguard's possession before it produced the less complete versions in Exhibits CC and DD. Mr. Kunkel opines that because Mr. Allen testified he collected Exhibit GG from his Outlook inbox, the same thread should have resided in his Apple Mail inbox due to how the synching process works, meaning Mr. Allen must have moved the email thread in Exhibit GG to his junk mail in Apple Mail after locating it in his inbox in Outlook. (*Id.*, ¶14.) He also states that because Exhibit GG was created on March 17, 2023, the native version of that exhibit must have existed at the same time, but it has not been produced. (*Id.*, ¶20.) The native email file would have included routine metadata showing how it was routed, including to a junk folder or otherwise, and could also indicate unread status and when the email was first opened. (*Id.*, ¶¶14-17.)

III. The Vanguard Defendants' Showing

The Vanguard Defendants argue that they should not be sanctioned because Mr. Allen testified that the August 18th email referencing mold landed in his Apple email junk folder, where it remained unseen until 2023. Mr. Allen also testified that he did not remember reading the email at the time it was sent. The Vanguard Defendants argue that Plaintiffs' motion is essentially a motion for the Court to adjudicate whether Mr. Allen should be believed, which they contend should be an issue for the jury to decide.[2]

The Vanguard Defendants concede that the August 18th email was, at one time, on the Vanguard servers, but state that it is no longer on Vanguard's servers. (Opp., p. 6:14-17.) Before September 2023, if an email was deleted, it would go to a deleted email box where it would be permanently purged after 30 days. (Declaration of Michael Smith, Exh. A, 72:7-24, 73:4-16.) The Vanguard Defendants contend that there is no evidence the email was intentionally deleted in order to hide incriminating evidence. They submit the declaration of Berne Fitzpatrick to rebut and/or call into question statements made in Mr. Kunkel's declaration. Plaintiffs' objections to Mr. Fitzpatrick's declaration are overruled. Mr. Fitzpatrick states that a "native" version of the email would not indicate whether the email was intentionally or accidentally deleted, or whether it was moved to a junk folder automatically or intentionally. (Declaration of Berne Fitzpatrick, ¶¶5, 6, 9.) A "native" version also could not definitively determine whether Mr. Allen actually read the email. (*Id.*, ¶7.) While Plaintiffs have submitted a "rebuttal" declaration from Mr. Kunkel, this only highlights the evidentiary dispute as to what happened to the email sent by Ms. Walker-Jourard.

IV. Discussion

A. Evidentiary/Issue Sanctions

The motion for evidentiary and/or issue sanctions is denied, without prejudice. In light of the fact that Plaintiffs' evidentiary showing does not definitively establish that the Vanguard Defendants were aware of the August 18th email at the time it was sent, or that they intentionally deleted it or moved it to a junk folder, such sanctions are not warranted at this time. However, as noted above, Vanguard and Mr. Allen have waived their objections to a number of RFAs, and several of Vanguard's responses (e.g., Nos. 3, 9, 19) contained only objections. Plaintiffs are entitled to further responses to the RFAs, without objections. To the extent the further responses support Plaintiffs' request for evidentiary or issue sanctions based on alleged spoliation,

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[2] The Vanguard Defendants also argue that there has been no violation of any court order, as Plaintiffs never moved to compel further responses to the document requests. This argument misses the point. First, Plaintiffs challenge the adequacy of the production, not the responses, and the Vanguard Defendants represented that their productions were complete. To the extent the Vanguard Defendants contend Plaintiffs failed to file a motion to compel further production of documents now that they suspect documents are missing, the Vanguard Defendants ignore the facts that they have represented the native version of the email had been deleted, and that it is their obligation to produce responsive documents in the first instance. They cannot shift responsibility to Plaintiffs for their own inaction, particularly where they already contend (in connection with the request for monetary sanctions) that Plaintiffs have already spent too much time seeking to recover the missing native emails. Moreover, monetary sanctions can be awarded for a pattern of discovery abuse and the Vanguard Defendants have engaged in discovery abuse here. Finally, the trial date is less than two months away, leaving Plaintiffs little or no time for additional motion practice.

Plaintiffs may file another motion to the extent they believe it is warranted based on the new responses.

B. Monetary Sanctions

A trial court has the authority to impose monetary sanctions against a party for a pattern of discovery abuse. (See *City of Los Angeles v. PricewaterhouseCoopers, LLP* (2024) 17 Cal.5th 46, 51.)

Plaintiffs' motion for monetary sanctions is granted. Defendants had the email when Mr. Allen produced documents in September 2023, and when Vanguard produced documents in December 2023, they but did not include it in their productions. They then produced three different versions of the email threads at Mr. Allen's deposition in June 2024 and shortly thereafter. Plaintiffs spent significant time and expense attempting discover when Defendants had this email and whether the "junk" email theory advanced by Defendants was fabricated. This time and expense included additional written discovery and depositions. However, the sanctions Plaintiffs seek are excessive, given that much of the time upon which they base their request was unrelated to discovery of these emails. For example, Mr. Lombardi's declaration references discovery efforts in general (e.g., ¶¶4, 5), groups together time related to these emails specifically with general discovery efforts (e.g., ¶¶7, 8, 10-12), and groups together time related to these emails specifically with clerical or administrative tasks (e.g., ¶15),

The Court will award $87,053.50 in attorneys' fees as sanctions for the following time spent on discovery with respect to the Walker-Jourard emails and Plaintiffs' motion for sanctions:

Mr. Phillips: .4 hours in January 2024, 1.5 hours in February 2024, 8 hours (4.75+1.75+1.5) in June 2024, 5.5 hours in July 2024, 14.75 hours in August 2024, 3.5 hours in September 2024, 15.5 hours in October 2024 (4.25+8.5+1.5+1.25), 20 hours in November (10.5+8+1.5), and 15 hours total for December 2024 and January 2025, for a total of 84.15 hours. (See Phillips Decl.) Mr. Phillips' rate of $400 is reasonable. Total: $33,660.

Mr. Lombardi: .2 hours in February 2024 (Lombardi Decl., ¶6), 10.6 hours in June 2024 (¶9), 9.1 hours in November 2024 (¶12), and 40 hours for preparation of this motion from December 2024-February 2025 (¶¶13-15). Mr. Lombardi's rate of $665/hour is reasonable. Total: $39,833.50.

Mr. Fels: 20 hours for the preparation of this motion in December 2024 and January 2025. Mr. Fels' rate of $675 is reasonable. Total: $13,560.

The award does not include any of the time spent by Mr. Phillips (1) responding to the demurrer and motion to strike, as these pleadings were based on numerous grounds; (2) addressing discovery issues generally or assembling chronologies; and (3) preparing for, scheduling, and/or taking Mr. Allen and Ms. Walker-Jourard's depositions as those depositions involved other topics in addition to the August 21st email. The Court has also reduced the time Mr. Phillips claims he spent on this motion in December 2024 and January 2025, from 29.75 to 15, as the time incurred on this motion by all three defendants (almost 120 hours) is excessive.

The award also reflects reduced time claimed by Mr. Lombardi and Mr. Fels in connection with this motion. Mr. Lombardi states that he spent 9 hours in December 2024 (¶13), 23.2 in January 2025 (¶14), and 23 hours in February 2025 (¶15), for a total of 55.2 hours. He also states that Mr. Fels spent 10 hours in December 2024 in connection with this motion (¶13) and another 23.4 hours in January 2025 (¶14), for an additional 33.4 hours, making the total claimed time spent on preparation of the motion by Mr. Lombardi and Mr. Fels 88.6 hours. The Court finds that 75 hours for the motion is reasonable, and will award fees for that time (60 hours by Mr. Lombardi and Mr. Fels, and 15 by Mr. Phillips).

Costs: Mr. Phillips' declaration states only that Plaintiffs incurred $11,750.50 in costs for filing fees and depositions. He does not explain how this amount is broken down or provide documentation supporting this statement. As it is unclear if the costs Plaintiffs seek to recover were incurred with respect to discovery of the August 21st email specifically, the Court will not award these costs as there is an insufficient evidentiary basis to do so.

Motion for Summary Adjudication

Plaintiffs move for summary adjudication of thirteen (13) issues of duty.

I. Summary Adjudication Standard

A plaintiff may move for summary adjudication as to one or more issues of duty if the plaintiff contends that one or more defendants either owed or did not owe a duty to the plaintiff. The motion shall be granted only if it completely disposes of an issue of duty. (Code Civ. Proc. § 437c(f)(1).) A contractual duty may be the subject of a motion for summary adjudication provided that the adjudication completely disposes of the issue of duty. (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 519.) Where a party's duty to another is fact-dependent, the issue of duty is one of fact and not of law. (*See Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 614; *see also Mayes v. La Sierra University* (2022) 73 Cal.App.5th 686, 704-705 [finding triable issue of fact as to existence of a duty]; *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, 1136 [same]; *Southland Corporation v. Superior Court* (1988) 203 Cal.App.3d 656, 665 [same].)

The moving party bears the burden of persuasion that there is no triable issue of material fact on the issue of duty. (*David v. Queen of Valley Medical Center* (2020) 51 Cal.App.5th 653, 660.) Once the movant has met that burden, the burden shifts to the opposing party to show that a triable issue of one or more material facts exists. A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.* [citation and internal quotations omitted].) In ruling on a motion for summary adjudication, the court views the evidence and reasonable inferences drawn therefrom in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; Edmon & Karnow, Cal. Prac. Guide: Civil Procedure Before Trial (The Rutter Group 2024) ¶10:269.)

II. Request for Judicial Notice

Plaintiffs' request for judicial notice of the deeds and Affidavit Death of Trustee (Exhibits 8-30 to Plaintiffs' Compendium of Evidence) is granted. (Evid. Code §§ 452, 453.) However, "[t]aking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein. When judicial notice is taken of a document, . . . the truthfulness and proper interpretation of the document are disputable." (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 [citations and internal quotations omitted].)

III. Evidentiary Objections

A. Kaufman Defendants' Objections

Objection Nos. 1 (to Phillips Declaration, ¶¶11, Exh. 48) and 3 (to Phillips Declaration, ¶14 and Exh. 51) are overruled. While counsel does not have personal knowledge of the emails themselves, he describes the exhibits as documents that were introduced as exhibits in depositions. Specifically, Exhibit 48 to Mr. Phillips' declaration was introduced as Exhibit 52 in the deposition of Link Allen, and Exhibit 51 to Mr. Phillips' declaration was introduced as 13 in the deposition of Bernard Kaufman. In Plaintiffs' Separate Statement, Exhibits 48 and 51 to Mr. Phillips' declaration are cited along with deposition testimony which authenticates the exhibits. (See Separate Statement Fact No. 26, 36 and 39.) Objection No. 2 (to Phillips Declaration, ¶13, Exh. 50) is sustained on authentication, foundation and hearsay grounds. This exhibit was not authenticated in the cited testimony from Mr. Kaufman's deposition testimony.

B. Plaintiffs' Objections

Objection Nos. 1-18 (to Kaufman Declaration, ¶¶3-16, 18-21) are overruled. However, as discussed below, the Court disregards some statements in the declaration regarding Mr. Kaufman's memory as they do not contradict or supersede Mr. Kaufman's deposition testimony which established that he had actual knowledge of certain issues at the time he made the disclosures.

IV. Issue No. 1: The Kaufmans had a duty to complete and deliver a TDS and a SPQ form to Plaintiffs.

Civil Code Section 1102.3 generally requires the seller of a single-family real property to deliver disclosures before transfer of title. The form of the required disclosures is set forth in Section 1102.6 and in the Real Estate Transfer Disclosure Statement, or TDS. Section 1102.2 outlines certain exceptions to the TDS requirement, including "[s]ales or transfers by a fiduciary in the course of the administration of a trust, guardianship, conservatorship, or decedent's estate. This exemption shall not apply to a sale if the trustee is a natural person who is a trustee of a revocable trust and is a former owner of the property or was an occupant in possession of the property within the preceding year."

Plaintiffs cite to 13 facts, Nos. 1-13 in support of this issue. Fact Nos. 1-12 are undisputed by the Kaufman Defendants, and establish that the Kaufman Defendants sold the Property to Plaintiffs, Bernard Kaufman and Yvette Kaufman were each individually gifted 43.72% interest in the property from their father in 1993, the Kaufmans entered into a listing agreement with Defendant Vanguard, Link Allen and Nancy Allen were the listing agents, the Property is improved with two separate residential dwelling units, the Residential Purchasing Agreement between Plaintiffs and the Kaufmans required the Kaufmans to provide a completed TDS form and a Seller Property Questionnaire ("SPQ") form unless exempt, the Kaufmans did not complete or deliver a TDS and SPQ form to Plaintiffs, the Kaufmans claimed to be exempt from the obligation to provide a TDS and SPQ and instead completed an Exempt Seller Disclosure form ("ESD"), and the Kaufmans answered "no" to each of the questions in the ESD form, including questions about recent insurance claims and knowledge about any material facts or defects affecting the Property.

The Kaufman Defendants dispute Fact No. 13, which states that the Kaufman Defendants did not qualify for an exemption from the obligation to provide a completed TDS form and SPQ form to Plaintiffs.[3] The Kaufman Defendants argue that Plaintiffs waived any right to insist on those forms, and/or that the Kaufman Defendants did not qualify for an exemption from the obligation to provide a TDS and SPQ form, because Plaintiffs proceeded with the sale despite not receiving them.

The evidentiary record supports Plaintiffs' Issue No. 1 that the Kaufman Defendants had duty to deliver completed TDS and SPQ forms to Plaintiffs. Fact Nos. 1 and 2, which are undisputed, show that Bernard and Yvette Kaufman were former owners of the property before they transferred their interests to their trusts in 1998. Accordingly, the exemption does not apply. The Kaufman Defendants do not raise a triable issue of fact as to this issue. First, the issue is whether they had a duty to submit a completed TDS and SPQ, which is different than the issue of whether that obligation was later waived by Plaintiffs' conduct. Second, the Kaufman Defendants fail to submit evidence to support their defense of waiver other than that the sale occurred even though they did not provide a TDS or SPQ. This is insufficient as there is no evidence that Plaintiffs *knew* the Kaufman Defendants were not exempt and proceeded with the sale anyway, and waiver requires an "intentional" relinquishment of a right by the waiving party. (See *Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 678; *Pease v. Brown* (1960) 186 Cal.App.2d 425, 429.) The Court also notes that the Kaufman Defendants fail to even address Issue No. 1 in their memorandum in support of their Opposition.

Plaintiffs' motion as to Issue No. 1 is therefore granted.

V. Issue No. 2: Vanguard, Link and Nancy had a duty to Plaintiffs to ensure that the Kaufmans complete and deliver a TDS and Seller Property Questionnaire form to them.

Plaintiffs argue that the Vanguard Defendants, as the Kaufman Defendants' listing agent, had a duty to ensure that their clients provided the correct forms, i.e., the TDS and SPQ, to Plaintiffs. They argue that Link Allen sent the wrong form to Plaintiffs, i.e., the ESD form, without

[3] The Vanguard Defendants did not respond to Plaintiffs' Separate Statement as to Issue Nos. 1, 4-9, 12 or 13, which relate to alleged duties owed by the Kaufman Defendants, and do not address these issues in their memorandum in support of their Opposition.

independently verifying that Plaintiffs were exempt and based on statements made to him by Plaintiffs that were insufficient to support use of the ESD form.

Under Civil Code Section 2079.16, a seller's agent has a duty to both the buyer and seller to diligently exercise reasonable skill and care in the performance of the agent's duties.

Plaintiffs cite to Fact Nos. 1-14 in support of this issue. The Vanguard Defendants do not dispute Fact Nos. 2-12.[4] They dispute Fact No. 1 but the dispute is not material as the parties agree the Kaufman Defendants sold the Property to Plaintiffs. The Vanguard Defendants also dispute Fact No. 13, arguing it is an issue of fact, as well as Fact No. 14, which states: "The listing agent, Link Allen, provided the Kaufmans with the ESD form. Mr. Allen indicated to the Kaufmans that the ESD form "replaces" the TDS and SPQ and would "make [the Kaufmans'] life easier." Mr. Allen did not independently investigate or verify whether the Kaufmans qualified for the exemption to the requirements of Civil Code section 1102 or from the contractual obligation to complete and provide both a TDS and SPQ disclosure forms. Mr. Allen, who was unfamiliar with the exemption requirements, assumed the Kaufmans met the exemption requirements because: (a) title to the property was held in trusts; and (b) the Kaufmans had told him that they had recently inherited the property upon their father's death."

The Court's review of the evidentiary record shows that Fact No. 14 is partially established, specifically: Mr. Allen provided the Kaufmans with the ESD form, Mr. Allen told Mr. Kaufman by text that the ESD form replaces the "long forms" and will make his life easier, Mr. Allen believed the Kaufmans qualified for an exemption from the TDS requirements because they told him they had owned the property in a trust and that they had not lived in the property forever, Mr. Allen had not discussed in detail the requirements for exemption with a manager or attorney, the Kaufmans did not tell Mr. Allen they had been on title outside the trust since 1993 or that their father had gifted them 43% interest in 1993, and the Kaufmans did tell Mr. Allen that they acquired the property in trust from their father and Mr. Allen never saw any documents that contradicted that representation. There is no evidence submitted to support the statement in Fact No. 14 that Mr. Allen assumed the Kaufmans were exempt because they told him they had recently inherited the property upon their father's death. The Vanguard Defendants also submit their own fact, Fact No. 19 which states that on June 17, 2021, Mr. Kaufman executed a document titled "Trust Advisory" (Smith Decl., Exh. H) which informed the buyer and seller of the seller's disclosure obligations when a property being held in trust is sold and the conditions under which the seller may be exempt from disclosure. Plaintiffs do not dispute Fact No. 19 but argue that representations by Mr. Kaufman to Plaintiffs are not relevant to the Vanguard Defendants' duty to use appropriate care in advising the Kaufman Defendants.

The Vanguard Defendants argue that they did not owe a duty to provide a TDS and SPQ to the Kaufman Defendants because the information provided to them by the Kaufman Defendants supported the use of a ESD form. They point to Mr. Allen's testimony in which he states that he believed the Kaufmans were exempt because the Kaufmans told him they had owned the property in a trust and had not lived in the property forever. Mr. Allen also testified that the Kaufmans told him they acquired the property in trust from their father, and Mr. Allen did not

[4] The Kaufman Defendants do not address Issue Nos. 1-3, 10 or 11 in their memorandum in support of their Opposition.

see any documents that contradicted that representation. Further, Mr. Kaufman's execution of the Trust Advisory indicated he understood the requirements for an exemption.

"In making the required disclosures, the seller's agent is required only to act in good faith and not convey the sellers' representations without a reasonable basis for believing them to be true." (*Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 644.) The agent does not have "a duty to independently verify or disclaim the accuracy of the seller's representations." (*Id.* at p. 643; see also *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 450.)

The Court denies the motion as to Issue No. 2 as there are triable issues of fact as to whether the Vanguard Defendants had a duty to provide different disclosure forms based on the information the Kaufman Defendants provided to Mr. Allen.

VI. Issue No. 3: Vanguard, Link and Nancy had a duty to disclose the facts known to Link that led Link to privately write to Bernard A. Kaufman on August 5, 2021 "...the [Mar West Rental Unit] has significant enough issues that the structure might be a total renovation or tear down".

In support of this Issue, Plaintiffs cite to Fact Nos. 1-16. The Vanguard Defendants' response to Fact Nos. 1-14 is discussed above. Plaintiffs' Fact No. 15 states "In a transaction in which a TDS is required, the real estate agents are required to complete Section III of the TDS ('Agent's Inspection Disclosure'). Neither the Kaufmans nor the real estate agents completed their portion of a TDS." The Vanguard Defendants dispute Fact No. 15, arguing that whether the agents or seller is required to complete a TDS is a legal conclusion. Plaintiffs' Fact No. 16 states: "Prior to listing the Property for sale, Link Allen formed the opinion that one of the two dwellings needed so much renovation work that it was a 'tear down'. Link Allen published on the Multiple Listing Service that the two dwellings were 'move-in' ready." The Vanguard Defendants dispute Fact No. 16, citing to the email Mr. Allen sent to Mr. Kaufman, in response to Mr. Kaufman's email asking for Mr. Allen's thoughts on the pest report, in which Mr. Allen stated among other things: "My opinion is the lower house has significant enough of issues that the structure might be a total renovation or tear down."

Plaintiffs' memorandum does not discuss Issue No. 3 specifically, and Plaintiffs provide no argument as to why summary adjudication of this issue is proper. A memorandum must include a discussion of the facts and law supporting the position advanced. (See Cal. Rule of Court 3.1113(b); *Nationwide Ins. Co. of America v. Tipton* (2023) 91 Cal.App.5th 1355, 1365.) Moreover, Plaintiffs do not identify the specific facts they contend should have been disclosed as part of this duty. Mr. Allen made this statement after receiving with the pest report, and the pest report was provided to Plaintiffs. (Vanguard Defendants' Additional Fact Nos. 1-4.) It is unclear what additional facts Plaintiffs contend Mr. Allen knew about in concluding the unit might be a tear down but did not disclose. The "issue" is too vague for summary adjudication. The motion as to Issue No. 3 is therefore denied.

VII. Issue No. 4: The Kaufmans had a duty to disclose that a lawsuit had been filed by a former tenant regarding the Mar West Rental Unit alleging that "Defendants were aware, but failed to disclose, that the Premises were defective in that it failed to provide adequate protection from moisture within and without the Premises, resulting in water intrusion and the development of toxic surface and airborne contaminants, including mold" and that

John Kaufman "admitted he was aware that there was moisture and water under the house since 1972, and he was aware of the presence of mold."

Plaintiffs rely on Fact Nos. 1-13, 17 and 18 in support of this issue. Fact Nos. 1-13, and the Kaufman Defendants' response to those facts, is discussed above. Fact No. 17 states: "At the time of completing the ESD, Bernard Kaufman had direct knowledge of a habitability (mold) lawsuit filed by a former tenant at the Property, Kimberly Larkin." The Kaufman Defendants dispute this fact, arguing that the cited deposition testimony only revealed Mr. Kaufman's current knowledge, after engaging in discovery, and not his knowledge at the time of the sale. Further, Mr. Kaufman states in his declaration in support of the Kaufman Defendants' Opposition that he did not have knowledge of this at the time of the sale. Fact No. 18 states: "The lawsuit filed by former Property tenant Kimberly Larkin against John Kaufman alleged that 'Defendants were aware, but failed to disclose, that the Premises were defective in that it failed to provide adequate protection from moisture within and without the Premises, resulting in water intrusion and the development of toxic surface and airborne contaminants, including mold.' The lawsuit further alleged John Kaufman 'admitted he was aware that there was moisture and water under the house since 1972, and he was aware of the presence of mold.'" The Kaufman Defendants do not dispute Fact No. 18 but argue it is irrelevant because Mr. Kaufman testified in his deposition that he never read the mold lawsuit.

In the deposition testimony cited in support of Fact No. 17, Mr. Kaufman was shown the complaint from the prior lawsuit, and then answered questions as follows:

> Q. So Mr. Kaufman, have you ever seen this document before?
> A. I have never read through this document before.
> Q. Have you seen it though somewhere?
> A. It's definitely possible that I saw the lawsuit between Kimberly Larkin and my father.
> Q. You said it's possible. Do you have a time frame when that possibility may have occurred?
> MR. JOHNSON: Objection, vague and ambiguous, calls for speculation. Go ahead,
> THE WITNESS: I would imagine at the time of the lawsuit.
> BY MR. PHILLIPS:
> Q. And do you have a recollection of your father informing you about the lawsuit?
> A. I don't know the specifics of the lawsuit, but yes, I remember him being upset about what was going on.
> Q. And did he express to you the reason for the lawsuit?
> MR. JOHNSON: Objection, vague and ambiguous. Go ahead.
> THE WITNESS: From what I recall, Mrs. Larkin was suing him for mold issues in the Mar West house.

Mr. Kaufman's testimony adequately establishes that he was aware of the lawsuit at the time it was ongoing, and that he was aware the lawsuit was about mold issues in one of the buildings. The Kaufman Defendants do not dispute that the Mold Lawsuit was a material fact, but argue that Mr. Kaufman had forgotten about the lawsuit when he submitted the disclosures. Mr.

Kaufman submits a declaration in support of his Opposition in which he states: "At the time of completing the Exempt Seller Disclosure ('ESD'), I did not have knowledge of a habitability (mold) lawsuit filed by a former tenant at the Property, Kimberly Larkin ('Mold Lawsuit'). It is only since this litigation has commenced that I have remembered that my father told me he was sued for mold issues relating to the Mar West dwelling. I was never served in this action, or any other action related to the Property until this case. Plaintiffs' counsel has propounded multiple requests for admission relating to the Mold Lawsuit and questioned me extensively about it at my deposition. Since after completing the ESD, and only in response to Plaintiffs' extensive examination of my memory, I have recalled that my father told me he was being sued by a former tenant for mold issues, and that he was upset about it. I never directly knew Kimberly Larkin. I don't remember having ever seen or read the Mold Lawsuit until it was shown to me consequently to this litigation." (Declaration of Bernard Kaufman, ¶¶3, 4.)

"A real estate seller has both a common law and statutory duty of disclosure. The court in *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544, 76 Cal.Rptr.2d 101, outlined the common law duty, explaining: 'In the context of a real estate transaction, '[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property ... and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.]" A seller's duty of disclosure is limited to material facts; once the essential facts are disclosed a seller is not under a duty to provide details that would merely serve to elaborate on the disclosed facts. Where a seller fails to disclose a material fact, he may be subject to liability "for mere nondisclosure since his conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation]." (*Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161 [citations and internal quotations omitted][emphasis in original].)

Civil Code section 1102.6 requires the sellers of residential property and their real estate agents to complete a disclosure form including "information about the buildings and any significant defects, as well as information about the land itself, including disclosure of hazardous materials, encroachments, easements, fill, settling, flooding, drainage problems, neighborhood noise, major damage from natural disasters, and lawsuits by or against the seller affecting the property." (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 200.) Civil Code Section 1102.7 provides that "Each disclosure required by this article and each act which may be performed in making the disclosure, shall be made in good faith. For purposes of this article, 'good faith' means honesty in fact in the conduct of the transaction." Section 1102.4(a) provides that a seller shall not "be liable for any error, inaccuracy, or omission of any information delivered pursuant to this article if the error, inaccuracy, or omission was not within the personal knowledge of the seller . . ." Section 1102.13 provides in part that "any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this article shall be liable in the amount of actual damages suffered by a transferee."

Plaintiffs' motion as to Issue No. 4 is granted. Mr. Kaufman's testimony establishes that he had actual knowledge of the lawsuit at the time of the disclosures, and even a "negligent" violation of the disclosure requirement can result in an award of damages to the buyer. This testimony cannot be avoided through a self-serving declaration filed with the Kaufman Defendants'

Opposition. (*Vatalaro v. County of Sacramento* (2022) 79 Cal.App.5th 367, 399 ["Even at the summary judgment stage, courts may give great weight to admissions made in discovery and disregard contradictory and self-serving affidavits of the party"] [citation and internal quotations omitted].

VIII. Issue No. 5: The Kaufmans had a duty to disclose the Mold Status Report dated September 2, 2014, regarding the Mar West Rental Unit.

In support of this issue, Plaintiffs cite to Fact Nos. 1-13, 17, 19 and 20. The Kaufman Defendants' responses to Nos. 1-13 and 17 are discussed above. The Kaufman Defendants do not dispute Fact No. 20, which describes the contents of the mold report. Fact No. 19 states: "At the time of completing the ESD, Bernard Kaufman had direct knowledge of a Mold Status Report ("Mold Report") prepared in connection with Kimberly Larkin's lawsuit having submitted the Mold Report with a claim to Farmers Insurance on the Kaufman property liability property." As support for this fact, Plaintiffs cite to an email Mr. Kaufman sent to Farmers Insurance on April 8, 2016, with an attachment, stating: "This is Bernard Kaufman. I am emailing you the attached documents for my father John Kaufman regarding a pending lawsuit . . . ." Plaintiffs also cite to deposition testimony of a Farmer's representative, Nicole Ward, who opined that the attachment was the Mold Report based on the organization of Farmer's claim file.

The Kaufman Defendants dispute Fact No. 19, arguing that Ms. Ward's testimony was conjecture and she only assumed the attachment was the Mold Report.

The motion as to Issue No. 5 is denied as there is a disputed issue of material fact as to the identity of the specific document Mr. Kaufman sent to Farmer's, and therefore whether Mr. Kaufman was aware of the Mold Report. The testimony of Ms. Ward does not definitively establish this fact and Plaintiffs provide no other evidence of the Kaufman Defendants' knowledge of the report.

IX. Issue No. 6: The Kaufmans had a duty to disclose that the subfloor of the Mar West Rental Unit was directly in contact with the ground.

In support of this issue, Plaintiffs cite to Fact Nos. 1-13 and 21. The Kaufman Defendants' responses to Nos. 1-13 are discussed above. Fact No. 21 states: "At the time Bernard Kaufman completed the ESD, he had direct knowledge of the conditions in the area below the flooring in the Mar West rental unit." The Kaufman Defendants dispute Fact No. 21, noting that the testimony cited does not support the fact.

As support for Fact No. 21, Plaintiffs cite to Mr. Kaufman's deposition in which he testified that he recalled his father had replaced the flooring in the downstairs in the Mar West dwelling and that he (Bernard) helped his father bring lumber to the house for flooring. Mr. Kaufman further testified that he did not participate in demolishing the existing floor or laying the new floor, but he did observe there was not much space between the floor and the ground. He also stated that he did not remember all of the exact details of what was underneath there, but he remembered crushed rock.

The motion as to Issue No. 6 is denied as there is nothing in the cited testimony that establishes Mr. Kaufman knew "the subfloor of the Mar West Rental Unit was directly in contact with the ground." There is also a disputed issue of fact as to whether this fact was material enough to be

a fact that must have been disclosed. (See *Calemine*, 171 Cal.App.4th at p. 161.) This is not an item specifically included on the TDS or SPQ form.

X. Issue No. 7: The Kaufmans had a duty to disclose that there was a sump pump below the floor of the Mar West Rental Unit that was inaccessible and could not be seen without tearing out the floor.

In support of this issue, Plaintiffs cite to Fact Nos. 1-13 and 22. The Kaufman Defendants' responses to Nos. 1-13 are discussed above. Fact No. 22 states: "At the time Bernard Kaufman completed the ESD, he had direct knowledge that his father had installed a sump pump that was hidden from view under the floor in a closet. The sump pump was in a bucket on the ground." The existence of a sump pump is one of the items included in the TDS form and is also referenced in the SPQ form.

The Kaufman Defendants dispute Fact No. 22, stating the testimony does not support the fact. As support for Fact No. 22, Plaintiffs cite to Mr. Kaufman's deposition in which he testified that he remembered his father installing a sump pump underneath the floor in the closet where it was not visible. Plaintiffs also cite to a photograph of the sump pump taken by James Hutton on or about December 13, 2021 after Plaintiffs purchased the property, and a photograph Mr. Hutton took of the closet under the floor.

The Kaufman Defendants argue that while Mr. Kaufman may have known this at some point before the sale, there is no evidence that he recalled this fact at the time of the sale. This issue is similar to No. 4 in that Mr. Kaufman's actual knowledge is established by his deposition testimony, but he claims he did not remember it in his declaration filed in support of the Kaufman Defendants' Opposition.

The Court grants summary adjudication of Issue No. 7 for the same reason as Issue No. 4, i.e., Mr. Kaufman had actual knowledge of the issue at the time of the sale.

XI. Issue No. 8: The Kaufmans had a duty to disclose that the Mar West Rental Unit was susceptible to seasonal flooding.

In support of this issue, Plaintiffs cite to Fact Nos. 1-13, 17, 18, 21, 23 and 24. The Kaufman Defendants' responses to Nos. 1-13, 17, 18 and 21 are discussed above. Fact No. 23 states: "At the time Bernard Kaufman completed the ESD, he had direct knowledge of a recurring water leak at the entry of the Centro West Dwelling." Fact No. 24 states: "At the time of completing the ESD, Bernard Kaufman was aware that his father had installed a sump pump below the floor in the Mar West unit but had no knowledge of whether it was operable." The Kaufman Defendants dispute Fact Nos. 23 and 24.

The motion as to Issue No. 8 is denied. Even if these facts were established, they do not show that the Kaufmans knew the Mar West Rental Unit was "susceptible to seasonal flooding" at the time of the sale.

XII. Issue No. 9: The Kaufmans had a duty to disclose that they made multiple attempts to stop a continuing water leak from the entry landing in the Centro West dwelling into the first floor of the dwelling below.

In support of this issue, Plaintiffs cite to Fact Nos. 1-13 and 23. The Kaufman Defendants' responses to Nos. 1-13 are discussed above. Fact No. 23 states: "At the time Bernard Kaufman completed the ESD, he had direct knowledge of a recurring water leak at the entry of the Centro West dwelling." Plaintiffs cite to Mr. Kaufman's deposition in which he testified that that he

was aware of leaking in the ceiling of the room as you enter the house, below the laundry room. He stated that there was one instance that probably took two fixes – he tried to fix it, and then he had his handyman fix it. Mr, Kaufman and the handyman concluded the source of the leak was a crack below the threshold of the door which allowed water to get in. Water had migrated to the light fixture. A tenant first noticed the problem and told him there was a leak in the laundry room, after there had been rain. The handyman did not report dry rot to Mr. Kaufman and Mr. Kaufman did not look for any dry rot. Mr. Kaufman applied sealant at the door threshold but the leak returned the next winter. They also replaced the light fixture, repaired drywall damage around the light, and painted the ceiling, but it is unclear from Mr. Kaufman's testimony when these repairs occurred.

The motion as to Issue No. 9 is denied as there is a disputed issue of fact as whether "multiple attempts" were made to stop a "continuing water leak".

XIII. Issue No. 10: Vanguard, Link and Nancy had a duty to disclose the statements from ML Walker-Jourard that the Mar West Rental Unit was infested with rats.

In support of this issue, Plaintiffs cite to Fact Nos. 1-12, 14, 15, 25, and 26. The Vanguard Defendants dispute Fact No. 1, but the dispute is not material to this issue. They do not dispute Fact Nos. 2-12. The Vanguard Defendants' response to Fact Nos. 14 and 15 is discussed above. Fact No. 25 states: "After the Kaufmans engaged Vanguard Properties and the Allens, and prior to listing the property for sale on the Multiple Listing Service, the adjacent neighbor ML Walter-Jourard and Link Allen exchanged a series of emails in which Walker-Jourard informed Allen of "mold" issues in the same lower dwelling unit, rat infestation problems which she attributed to the Kaufmans, a lawsuit by one of the Kaufmans' tenants which resulted in a $30,000 settlement payment to the tenant, and general acrimony and contention between Walker-Jourard and the Kaufmans." Fact No. 26 states: "Link Allen stated in an email to the neighbor (Walker-Jourard) that he would inform the buyer of complaints that she had with the Kaufmans. Link Allen did not disclose the neighbor emails or the information contained therein to plaintiffs."

The Vanguard Defendants dispute both Fact No. 25 and 26. The Kaufman Defendants dispute Fact No. 25 and argue that Fact No. 26 is not supported by the cited evidence.
As support for Fact No. 25, Plaintiffs cites to Mr. Kaufman's deposition in which he testified that his agent sent him the ESD form, Mr. Allen's deposition in which he discussed his process and rationale in sending the ESD form, and Mr. Allen's text messages with Mr. Kaufman regarding the ESD form. The cited evidence does not establish Fact No. 25.

As support for Fact No. 26, Plaintiffs cite to Mr. Allen's deposition in which he testified that he believed he found Exhibit 52 to his deposition in his Outlook inbox and about his use of the words "tear down" in Exhibit 18 to his deposition. Plaintiffs also cite to Exhibit 52, which reflects emails between Mr. Allen and Ms. Walker-Jourard. In response to an email from Ms. Walker-Jourard about the rat population in the neighborhood and the house, Mr. Allen stated "I'll make sure the buyer knows . . . ." There is no evidence supporting the statement that Mr. Allen did not disclose the rat issue with Plaintiffs.

The motion as to Issue No. 10 is denied as there is insufficient evidence that Mar West unit was "infested with rats" or that the Vanguard Defendants knew it was "infested with rats".

XIV. Issue No. 11: Vanguard, Link and Nancy had a duty to disclose that ML Walker-Jourard told Link that the downstairs of the Mar West Rental Unit had mold and that there was a prior lawsuit with the tenant regarding mold.

In support of this issue, Plaintiffs cite to Fact Nos. 1-15, 25 and 26. The Vanguard Defendants' and Kaufman Defendants' responses to these facts are discussed above. The motion as to this issue is denied as there is insufficient evidence establishing that the Vanguard Defendants knew about mold or a lawsuit about mold.

XV. Issue No. 12: The Kaufmans had a duty to disclose Material Information (Items 4-9) on the TDS and SPQ form.

The Material Information, Items 4-9, refer to the information discussed in Issue Nos. 3-6, above. Because the Court denies the motion as to Issue Nos. 3, 5 and 6, it denies the motion as to this issue as well.

XVI. Issue No. 13: The Kaufmans had a duty to disclose Material Information (Items 4-9) on the ESD form they provided the Huttons.

The Court denies the motion as to Issue No. 13 for the same reason it denies Issue No. 12.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for June, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1605267272?pwd=908CbP6TV2mhCAyai1nzo6lyz2dKaw.1
Meeting ID: 160 526 7272
Passcode: 026935

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 06/03/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV0000402

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK:

PLAINTIFF: KATHRYN KELSON vs. DEFENDANT: PAUL KELSON	

NATURE OF PROCEEDINGS: MOTION – RELIEVE COUNSEL

RULING

The unopposed motion of Attorney Stefan O'Grady and Keystone Law Group, PC to be Relieved as Counsel for Plaintiff Kathryn Kelson is **GRANTED**. (Code Civ. Proc., § 284.)

Plaintiff is ordered to appear, either in person or through new counsel, at the hearing. In the event Plaintiff does not appear, Attorney O'Grady is ordered to notify Plaintiff in writing that the next hearing is set for **June 6, 2025 at 9 am** in Courtroom A, and further, that Plaintiff is ordered to appear, either in person or through new counsel, at that time.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 06/03/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV0002347

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK:

PLAINTIFF: GARY BEAVERS vs. DEFENDANT: CDCR	

NATURE OF PROCEEDINGS: MOTION – ISSUE; DISCOVERY FACILITATOR PROGRAM

RULING

This is a petition for a writ brought by a self-represented inmate at San Quentin seeking return of personal property. Petitioner has filed two essentially identical petitions, one on March 22, 2024 and one on December 27, 2024. Neither petition appears to have been properly served, although Petitioner has sent correspondence to the Court asserting he has completed service.

It is not clear what relief Petitioner is presently seeking from the Court. The docket of the action reflects that a summons was recently issued on April 16, 2025. Petitioner should take steps to have the petition and summons served on Respondent, together with all the required paperwork, in a manner prescribed by law. Petitioner should contact the Litigation Coordinator for the institution to assist with proper service.

To extent Petitioner is requesting further relief, the request is **DENIED**.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 06/03/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV0003225

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:	CLERK:
PLAINTIFF: SILVEIRA PROPERTIES II, LLC vs. DEFENDANT: CALIFORNIA DEPARTMENT OF TRANSPORTATION	

NATURE OF PROCEEDINGS: DEMURRER

RULING

Defendant's demurrer to the First Cause of Action is **OVERRULED.**

Allegations in Plaintiff's Second Amended Complaint

On February 11, 2025, Plaintiff Silveira Properties II, LLC filed its Second Amended Complaint against the California Department of Transportation ("Caltrans"), alleging that Plaintiff's property known as the Silveira Ranch, adjacent to Highway 101, suffered fire damage after a fire erupted on Caltrans' right of way. The fire burned approximately 112.5 acres of ranch land and destroyed the pasture fencing. Plaintiff alleges that Caltrans failed to mow the brush along its right of way, allowing grass and other vegetation to dry out and pose a fire hazard. The Marin County Fire Department determined that sparks from two tow chains on the right of way struck the pavement, which then ignited the vegetation along the right of way. Plaintiff alleges that the Marin County Municipal Code ("MCMC") imposes a mandatory duty on all landowners to mitigate fire risks. Plaintiff asserts causes of action for breach of mandatory duty imposed by enactment and dangerous condition of public property.

Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law, and it raises only a question of law." (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint "ordinarily is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the plaintiff's claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076,

1099 [citation and internal quotations omitted].) Legal conclusions are insufficient. (*Id.* at 1098–1099; *Doe,* 42 Cal.4th at 551, fn. 5.) The court "assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

Request for Judicial Notice

Plaintiff's request for judicial notice of MCMC Section 16.16.040 is granted. (Evid. Code §§ 452, 453.)

Section 16.16.040 of the MCMC

Section 16.16.040 provides in part:

> Section 4907.2 of Chapter 49 is hereby amended to read as follows:
>
> . . .
>
> *Section 4907.4 Fire Hazard Reduction.* Any person who owns, leases, controls or maintains any building or structure, vacant lands, open space, and/or lands within specific Wildland Urban Interface areas of the jurisdiction of the Marin County Fire Department, shall comply with the following . . .
>
> 2. Remove accumulated dead vegetation on the property.
>
> . . .
>
> Section 4907.5 of Chapter 49 is hereby added and shall read as follows:
>
> *Section 4907.5 Fire Hazard Reduction from Roadways.* The Fire Code Official is authorized to cause areas within 10 feet (3048 cm) on each side of portions of highways, fire apparatus access roads (improved or unimproved), and driveways (improved or unimproved), which are improved, designed, or ordinarily used for vehicular traffic to be cleared of flammable vegetation and other combustible growth. Corrective action, if necessary, shall be the same as the actions required in section 4907.4. The Fire Code Official is authorized to enter upon private property to carry out this work . . .

Discussion

The First Cause of Action alleges that Caltrans has a mandatory duty under Section 16.16.040 to cut back the vegetation on its property to mitigate fire hazards, that Caltrans breached that duty

when it failed to cut back the vegetation on the right of way, and that Caltrans' breach was a substantial factor in causing Plaintiff's harm when the fire extended onto Plaintiff's property.

Mandatory Duty

Government Code Section 815.6 provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." "'[T]he enactment at issue be *obligatory,* rather than merely discretionary or permissive, in its directions to the public entity; it must *require,* rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.]. It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion.'" (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 256 [citation omitted] [emphasis in original].)

Caltrans argues that neither Section 4907.4 nor Section 4907.5 imposes any mandatory duties on it.

Section 4907.4

Caltrans argues that its right of way on Highway 101 is not encompassed by Section 4907.4, which applies only to "any building or structure, vacant lands, open space, and/or lands within specific Wildland Urban Interface areas of the jurisdiction of the Marin County Fire Department." Plaintiff argues that Caltrans' right of way could be vacant land, open space, or land within the Wildland Urban Interface area, which is a factual issue inappropriate for determination on demurrer. The Court agrees with Plaintiff and overrules the demurrer to the extent it is based on the absence of a mandatory duty under Section 4907.4.

Section 4907.5

Caltrans argues that while Section 4907.5 appears to apply to portions of highways, it does not actually impose any mandatory duty. The section does not require Caltrans to perform any mandated act or obligation, but rather simply authorizes action by a fire official. Plaintiff does not address this argument in its Opposition. The Court agrees with Caltrans that there is no mandatory duty under Section 4907.5, but overrules the demurrer because Plaintiff adequately states a cause of action sufficient to survive a demurrer based on Section 4907.4. (*Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 61 [demurrer must be overruled where complaint states any cause of action].)

Preemption

Caltrans argues that Section 16.16.040, and specifically Sections 4907.4 and 4907.5, are preempted by state law. "A . . . ordinance will be preempted if the ordinance conflicts with state law, and a conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. If an actual conflict exists between the charter city ordinance and state law, and the matter implicates municipal affairs, the question then becomes whether the state law qualifies as a matter of statewide

concern." (*Gonzales v. City of San Jose* (2004) 125 Cal.App.4th 1127, 1134-1135 [citations and internal quotations omitted].)

Caltrans contends that the California Constitution gives public entities the discretionary authority to determine how public monies are budgeted and spent in connection with operating and maintaining public improvement projects (Cal. Const art. I, § 9; art. IV, § 1; art. XI §§ 1, 2) and that Caltrans, specifically, is vested with the authority to "do any act necessary, convenient or proper for the construction, improvement, maintenance or use of all highways which are under its jurisdiction, possession or control." (Str. & Hwy. Code § 92.) Streets and Highways Code section 23 defines "highway" as including "bridges, culverts, curbs, drains, and all works incidental to highway construction, improvement, and maintenance." (Str. & Hwy. Code § 23 (emphasis added).) Thus, Caltrans argues, any local ordinance mandating Caltrans to perform a specific duty with regard to maintenance of the public highway is preempted by state law.

It is unclear from the facts alleged in the Second Amended Complaint where the Caltrans property at issue is located. Plaintiff alleges only that Caltrans has a right-of-way adjacent to Silveira Ranch. If Plaintiff alleged the property was part of the highway itself, and that the MCMC imposed a duty on Caltrans to remove accumulated dead vegetation on that property, then Caltrans could have a valid argument regarding preemption. If the property is open space or vacant land adjacent to the highway but not part of the highway itself, then its preemption argument may not be as strong. Because preemption is not clear from the face of the Second Amended Complaint, the demurrer based on this ground is overruled. (See *Brinsmead v. Elk Grove Unified School Dist.* (2023) 95 Cal.App.5th 583, 593 ["'A general demurrer will lie where the complaint 'has included allegations that *clearly* disclose some defense or bar to recovery'"] [citation omitted] [emphasis in original]; *McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72, 85 [finding demurrer should have been overruled; "In the case presently before us, Purepac has not called our attention to anything in the allegations of McKenney's fourth amended complaint that would demonstrate the necessary applicability of a preemption defense to those allegations"].)

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for June, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1605267272?pwd=908CbP6TV2mhCAyai1nzo6lyz2dKaw.1
Meeting ID: 160 526 7272
Passcode: 026935

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 06/03/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV0004971

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK:

PLAINTIFF: GEORGE RED and DEFENDANT: RALPH DIAZ, ET AL	

NATURE OF PROCEEDINGS: MOTION – QUASH

RULING

Defendants' unopposed motion to quash purported service of the summons and the complaint is **GRANTED.**

Discussion

This is the second time this case has come before the Court based on a motion to quash the summons and complaint. The underlying action is a complaint brought by a self-represented inmate at San Quentin against various prison personnel for alleged negligence. Plaintiff has filed a similar lawsuit against many of the same parties based on identical or nearly identical allegations. A motion to quash service of the summons and complaint in that action was granted in December of 2024. On March 6, 2025, the Court granted Defendants' previous unopposed motion to quash purported service of the summons and complaint.

In the present case, Defendants Diaz, Davis, Pachynski, Escobell, Borders, and Bick, have appeared specially and filed another motion to quash the purported service of the summons and complaint. The motion again appears to be unopposed.[1] A failure to oppose a motion may be deemed consent to the granting of the motion. (Cal. Rules of Court, rule 8.54, subd. (c).) The only proofs of service in the record reflect the mailing of unspecified papers by Plaintiff and another individual to the office of the Attorney General. On their face, these proofs are insufficient to constitute proper service on the individual Defendants.

Accordingly, Defendants' motion to quash service of the summons and complaint is hereby **GRANTED**.

[1] Plaintiff filed a "response" to the motion to quash on March 8, 2025, but that was nearly sixty days before Defendants filed this present motion.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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