SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 07/15/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV1903516

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK:

PLAINTIFF: JASON S. SOLOMON vs. DEFENDANT: THE REALREAL, INC., ET AL	

NATURE OF PROCEEDINGS: MOTION – OTHER: CLASS CERTIFICATION

RULING

Plaintiff Rita Azrelyant's ("Plaintiff") Motion to Certify Class is **DENIED**. The moving party has failed to show that significant portions of the proposed class are ascertainable and that the remaining portion (2 members) is sufficiently numerous to justify class treatment.

Objection to Response to Sur-reply

The Court granted Defendants leave to file a sur-reply. (10/14/24 Order.) There was no corresponding authorization for Plaintiff to file a response to the sur-reply. Defendants' objection to the response is therefore well-taken and the Court strikes the unauthorized response to the sur-repy.

Background

This is a putative securities class action filed on behalf of all persons who purchased The RealReal, Inc. Class A common stock pursuant or traceable to the Registration Statement and incorporated Prospectus issued in connection with the Company's initial public offering that closed on July 2, 2019 ("IPO").

On September 10, 2019 a putative securities class action was filed in San Mateo County. Two nearly identical actions were filed in this court on September 16, 2019 and October 7, 2019. The San Mateo action was dismissed and later refiled in this court. By ordered stipulation, the three actions were consolidated (the "state action") and the Robbins Geller firm was appointed lead plaintiffs' counsel. (See December 26, 2019 Stipulation and Order.)

On November 25, 2019 a putative class action asserting violations of the Securities Act was filed in the United States District Court for the Northern District of California (the "federal action"), entitled *Sanders v. The RealReal, Inc. et al.*, Case No. 5:19-cv-07737-EJD. Michael Sanders was appointed lead plaintiff and The Rosen Firm was appointed lead counsel. On March 31, 2020, lead plaintiff in the federal action filed an amended complaint (the "federal complaint") that alleged the following counts:

1) Violation of Section 11 of the Securities Act;
2) Violation of Section 15 of the Securities Act;
3) Violation of Section 10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder; and
4) Violation of Section 20(a) of the Exchange Act.

In August of 2020, this state action was stayed in light of the pendency of the federal action. The stay was lifted in or around October 2022 and the First Amended Consolidated Class Action Complaint ("FAC") was filed on October 31, 2022. The state FAC alleges causes of action for:

1) Violation of Section 11 of the Securities Act;
2) Violation of Section 12(a)(2) of the Securities Act; and
3) Violation of Section 15 of the Securities Act.

According to the FAC, defendant The RealReal, Inc. ("The RealReal") operates an online marketplace for consigned luxury goods. Unlike other online resellers, The RealReal actually takes possession of the goods and items sold on its website. According to the Registration Statement, after receiving an item an expert at The RealReal would put the item through a "rigorous, multi-point authentication process," which was a major competitive advantage over other luxury resellers due to the inundation of counterfeit items. Thus, buyers could "trust" The RealReal.

However, the FAC alleges that an investigation discovered that there was no alleged "rigorous process" overseen by experts and the authentication for the most part "was conducted by over-worked and stressed copywriters who had little to no training authenticating items." (FAC, ¶ 3.) As a result, many counterfeit items slipped through the "almost non-existent authentication process and complaints about counterfeit items became a material issue for the Company." (*Ibid.*)

Additionally, the FAC alleges that statements made in the Registration Statement in regard to the "average order value" ("AOV"), a metric described as a "key driver of [The RealReal's] operating leverage" were misleading and that the Registration Statement incorrectly touted in multiple places that the Company's AOV was increasing. (FAC, ¶ 4.) Contrary to these representations, however, the FAC alleges that the Company's AOV was actually stagnant because of competing retailers and promotion activity requiring The RealReal to drop its own prices prior to the IPO. (FAC, ¶ 5.)

The FAC further alleges that pursuant to the misleading Registration Statement, The RealReal and Underwriter Defendants sold 17.25 million shares of The RealReal common stock to the investing public at $20 per share, generating $345 million in gross offering proceeds. (FAC, ¶ 6.) Embroiled in scandal and media reported problems regarding failures in their authentication process and misrepresentations in the Company's Prospectus to investors, The RealReal's stock price closed at a low of $12.80 per share on August 27, 2019, representing a decline of 36% from the IPO price, and by March of 2020 shares had fallen to below $7 per share, with the stock still trading well below the IPO price to this day. (FAC, ¶¶ 7-9.)

Presently before the Court is Plaintiff's motion to certify a class consisting of: all persons who either opted out of the Federal Settlement Class or who purchased The RealReal, Inc. ("RealReal," "REAL," or the "Company") common stock issued pursuant to the Registration Statement during the period of November 21, 2019 through March 9, 2020. The motion also seeks the appointment of Plaintiff Azrelyant as Class Representative on behalf of the Class and Robbins Geller Rudman & Dowd LLP ("Robbins Geller") as Class Counsel.

Defendants The RealReal, Inc., Julie Wainwright, Matt Gustke, Steve Lo, Maha Ibrahim, Michael A. Lumin, Gilbert L. Baird III, Rob Krolik, Stefan Larsson, Niki Leondakis, and James Miller's (collectively "Defendants") oppose the motion.

Legal Standard

Code of Civil Procedure section 382 allows the Court to certify a class action "when the question is one of a common interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court..." Additionally, "[t]here must be questions of law or fact common to the class that are substantially similar and predominate over the questions affecting the individual members; the claims of the representatives must be typical of the claims or defenses of the class; and the class representatives must be able to fairly and adequately protect the interests of the class." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 237-238. Disapproved of on other grounds in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

Stated differently, there are two broad requirements for a class action: 1) an ascertainable class; and 2) a well-defined community of interest. (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 913; See also *Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1021 (a plaintiff seeking certification "must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives").

In determining whether the class is ascertainable, courts consider the size of the class, the class definition, and the means to identify class members. (*Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1274; *Nicodemus v. Saint Francis Mem'l Hosp.* (2016) 3 Cal.App.5th 1200, 1212, as modified on denial of reh'g (Oct. 6, 2016).) The community of interest factor is established by showing: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 *as modified* (Aug. 9, 2000).)

The burden of proof on a motion for class certification is on the party seeking certification. (*Washington Mutual Bank, N.A. v. Superior Court (Briseno)* (2001) 24 Cal.4th 906, 922; *Soderstedt v. CBIZS. California, LLC* (2011) 197 Cal.App.4th 133, 154.) The Court must examine together all of the evidence presented by the moving and opposing parties under the prism of plaintiff's theory of recovery. (See *Department of Fish & Game v. Sup. Ct. (Adams)* (2011) 197 Cal.App.4th 1323, 1349). Importantly, in weighing the evidence, the Court does not evaluate whether the claims asserted are legally or factually meritorious. (*Linder, supra,* 23 Cal.4th at p. 440.) However, it may be necessary to examine the merits during a certification motion. A court may properly scrutinize a proposed class cause of action to determine whether, assuming its merit, it is suitable for resolution on a class wide basis. Indeed, issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses. (See *Miller v. Bank of America, N.A.* (2013) 213 Cal.App.4th 1, 11 (internal quotes omitted); *Harrold v. Levi Strauss & Co.* (2015) 236 Cal.App.4th 1259, 1268; *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 351).

Courts long have acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system. (*Linder v. Thrifty Oil Co., supra,* at pp. 434–35.) But because group action also has the potential to create injustice, trial courts are required to "carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." (*Ibid.)*

Discussion

A. Ascertainability/Numerosity

Ascertainability requires a class definition that is "precise, objective and *presently* ascertainable." (*Global Minerals & Metals Corp. v. Sup.Ct. (National Metals, Inc.)* (2003) 113 Cal.App.4th 836, 858 (emphasis added)). Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating. (*Ibid.*) The class should be defined in terms of objective characteristics and common transactional facts that will enable identification of the class members when such identification becomes necessary. (*Hicks v. Kaufman & Broad Home Corp., supra,* 89 Cal.App.4th at p. 915.) The goal is to use terminology that will convey sufficient meaning "to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent." (*Global Minerals & Metals Corp. v. Sup.Ct. (National Metals, Inc.), supra,* 113 Cal.App.4th at p. 858.) No set number is required as a matter of law for the maintenance of a class action. (*Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030.) California case law indicates that as few as ten (10) or twenty-eight (28) members satisfies numerosity. (*Bowles v. Superior Court* (1955) 44 Cal.2d 574; *Hebbard, supra,* at p. 1030.)

The "ascertainable class" requirement does not however require plaintiff to establish the existence and identity of the individual class members. (*Reyes, supra,* 196 Cal.App.3d at p. 1274; *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 419.) "Whether a class is

ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." (*Reyes, supra*, at p. 1271.)

Here, Plaintiff defines the proposed class as "all persons who either opted out of the Federal Settlement Class or who purchased The RealReal, Inc. common stock issued pursuant to the Registration Statement during the period of November 21, 2019 through March 9, 2020."

Defendants assert that after the federal action was settled, and only Plaintiff and one other class member opted out, her class was reduced to two members. In an attempt to solve this issue, Plaintiff seeks to add a second class to the original class of two – investors who purchased The RealReal's shares after the cut-off date for the federal settlement.

Plaintiff argues that this proposed Class is "defined by objective, transactional facts – by the acquisition of newly issued [The RealReal] common stock during a particular time period and/or by affirmatively opting out of the federal settlement class. These objective facts are readily identifiable by reference to Class members' and Defendants' records." Thus, Plaintiff contends, the class is ascertainable. (Memo P. & A p. 14:1-9; See also See Jaconette Decl., Ex. 1 ("Mitts Decl."), ¶¶27-28, 31, 34.)

Defendants counter by asserting that ascertaining who purchased shares pursuant to the Registration Statement becomes impossible once registered shares are commingled with unregistered shares that were not issued in the IPO. Defendants' expert explains that this is because in the securities trading and clearing system that has existed in the U.S. for decades, purchases are not tied to particular shares that can be identified as having been issued under a particular registration statement—rather, the publicly available shares are commingled as part of a pool such that no investor knows whether they purchased registered or unregistered shares. (See 2024 Bugni Decl., Ex. A ("2024 Attari Decl.") ¶¶ 35-39.) Defendants contend that here commingling occurred no later than November 5, 2019, when unregistered shares were deposited with the Depository Trust Company ("DTC"), where they were held in fungible bulk indistinguishable from shares issued in the IPO. (*Id.*, ¶¶ 40-43.)

Plaintiff's expert Dr. Mitts proposes a tracing formula using a first in or first out methodology to "trace" which shares were purchased pursuant to the Registration Statement. However, from the Court's review of Dr. Mitts' declaration, along with Defendants' expert's declaration in response thereto, the methodology proposes more of an educated estimate, not a proposal to accurately trace individual shares. (See Mitts Decl., ¶¶ 28-30; 2024 Attari Decl., ¶¶ 45-67; See 2025 Bugni Decl., Ex. Q ("2025 Attari Decl.") ¶¶ 5-6, 8-33.) Plaintiff responds to this critique by contending that Dr. Mitts' proposed formula will work, but even if it doesn't, it will succeed or fail on a consistent class basis, rendering class certification appropriate.

However, this argument relies on circular logic. While it is true that a consideration of the merits is not generally appropriate when evaluating a motion for class certification, and the cause of action for violation of Section 11 of the Securities Act will ultimately require a merits analysis of tracing to the Registration Statement, this is not the analysis presently before the Court. Rather, the proposed Class definition includes individuals who "purchased [the RealReal] common stock issued pursuant to the Registration Statement during the period of November 21, 2019 through March 9, 2020." The analysis before the Court is to determine if moving party has met its

burden to demonstrate whether or not this proposed class is presently ascertainable and sufficiently numerous. The Court finds that Plaintiff has failed to do so.

Plaintiff then counters that the expiration of the lock-up could only potentially complicate tracing for putative class members' purchases after the expiration, i.e., after December 26, 2019. As such, there remains a portion of the putative class period – November 21, 2019 through December 26, 2019 – that suffers none of the supposed tracing complications posited by Defendants. At the very least, the Court is free to certify that narrower, wholly unencumbered class period.

However, Defendants' expert opines that certain employees were allowed to sell their unregistered shares prior to the expiration of the 180 day lock-up and that on November 5, 2029, 89,542 such unregistered shares became part of the fungible bulk and investors purchasing shares on or after that date would therefore be unable to differentiate whether the shares they purchased were shares issued in the IPO or non-IPO shares. (See 2024 Attari Decl., ¶¶ 40-41; 2025 Attari Decl., ¶¶ 13-21.) On this issue, the Court finds Dr. Attari's opinions more persuasive and credible than those of Dr. Mitts.

Because the traceability issue began prior to the proposed class period (on November 5, 2019 as opposed to November 21, 2019), the only portion of the proposed class which does not suffer from ascertainably problems are the two members who opted out of the federal suit. With only two proposed class members remaining, however, they have failed to show sufficient numerosity to justify class treatment.

For these reasons, the motion for class certification 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.

The Zoom appearance information for July 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: 07/15/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV0000005

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:	CLERK:
PETITIONER: FRIENDS OF HAUKE PARK vs. DEFENDANT: CITY OF MILL VALLEY	

NATURE OF PROCEEDINGS: 1) HEARING – OTHER: ON OBJECTIONS TO THE ADMINISTRATIVE RECORD
2) CASE MANAGEMENT CONFERENCE

RULING

The administrative record for *Hauke Park I* will include the documents relating to the Hamilton Project, as requested by Petitioner. This ruling is not intended to be a ruling on the merits of the parties' substantive positions but rather addresses only the scope of the administrative record based on the broad language of Public Resources Code Section 21167.6 and the case law interpreting that section.

I. Procedural Background

A. *Hauke Park I*

On January 10, 2024, Petitioner Friends of Hauke Park filed its First Amended Petition in Case No. 0000005 (*Hauke Park I*), challenging the City's action to adopt the 2023-2031 Housing Element Update and amendments to the City's General Plan Land Use Element and Land Use Map and to certify an Environmental Impact Report ("EIR") for the HEU.

On June 21, 2021, the City Council voted to proceed with issuing a request for qualifications to solicit interest from developers to construct affordable housing at 1 Hamilton. On September 20, 2021, the City adopted a resolution designating 1 Hamilton as "surplus land" and a separate resolution authorizing the City Manager to negotiate an agreement with developer EAH Housing ("EAH") to develop and operate 1 Hamilton as an affordable housing development. Petitioner raised objections, including that the City proposed only 1 Hamilton as exempt surplus and could later use that designation to support its decision to exclude

consideration of other properties. On February 7, 2022, the City Council approved the EAH agreement.

On June 30, 2022, the City released a public review draft HEU and received comments. On July 20, 2022, the city released a Notice of Preparation ("NOP") of an EIR for the HEU. On December 21, 2022, the City released a NOP for the 1 Hamilton project (the "Hamilton Project"). The City released its Draft EIR for the HEU on January 17, 2023. The Final HEU was released to the public on February 16, 2023 and the Final EIR for the HEU was released on May 5, 2023. On May 15, 2023, the City certified the HEU EIR and approved the HEU, including the change to 1 Hamilton's land use designation that would allow residential uses for the first time at that site.[1]

On July 28, 2023, the California Department of Housing and Community Development ("HCD") issued a letter finding the HEU to not be in substantial conformance with the Housing Element Law. The City began working on a Revised HEU while simultaneously continuing to prepare project-level CEQA analysis for the Hamilton Project. The City approved the Revised HEU on October 16, 2023.

The First and Third Causes of Action allege that the City violated the Housing Element Law. The Second Cause of Action alleges that the City violated CEQA by piecemealing the Hamilton Project, and also by approving an EIR that fails to adequately analyze significant environmental impacts, fails to adequately analyze project alternatives, includes mitigation measures that are improperly deferred or are unenforceable, and fails to adequately respond to public comments. The Fourth Cause of Action alleges that the City violated CEQA by relying on the deficient EIR as its CEQA document for the Revised HEU and failing to prepare a supplemental EIR. Among other things, Petitioner seeks a peremptory writ of mandate directing the City to vacate and set aside all HEU and Revised HEU approvals, including the Hamilton Project, and to comply with CEQA by preparing a legally adequate environmental document under CEQA for the HEU or Revised HEU, including the Hamilton Project.

B. *Hauke Park II*

On March 5, 2024, Petitioner filed its Petition in Case No. 0002212 ("*Hauke Park II*"), challenging the City's actions to certify an EIR for the Hamilton Project and to approve various entitlements authorizing an affordable housing project at that location. Petitioner recites many of the same background facts as it does in the First Amended Petition in *Hauke Park I*, and also alleges that in a memo between the City and its environmental consultant dated July 21, 2022, the City acknowledged that a list of all entitlements and permits needed for project approval

[1] Petitioner argues that this EIR should be referred to as the "General Plan EIR" rather than the "HEU EIR", but Petitioner used the term "HEU EIR" in its own Petition. (See e.g., First Amended Petition, ¶¶46, 47, 52.)

included a general plan amendment to change the 1 Hamilton site from community facility ("C-F") to multi-family ("MFR-2") to allow the site to be developed with an affordable housing project. The land use designation change was done via the Housing Element process. The HEU DEIR released on January 13, 2023 did not limit the "project" to the Housing Element Update but also included changing 1 Hamilton's land use designation to advance the Hamilton Project. When the City released the Final EIR for the HEU on May 5, 2023, it asserted that adequate information was unavailable to include an analysis for the Hamilton Project in that EIR, even though it had already completed several project-level analyses at the time.
Petitioner alleges that in violation of its duty to analyze the "whole of the action", the City engaged in a truncated CEQA review for the project by piecemealing review of its approvals. The First Cause of Action alleges that the EIR for the Hamilton Project violates CEQA because the City's action to change the site's General Plan land use designation was analyzed as a separate CEQA "project" from all other actions to implement the project. The Hamilton Project was reasonably foreseeable at the time the HEU DEIR was prepared and the HEU DEIR acknowledged that the land use designation change was solely to facilitate the Hamilton Project. Further, the HEU FEIR asserts that constructing the Hamilton Project was necessary for the City's Housing Element Update to comply with state law. The change in 1 Hamilton's land use designation and including 1 Hamilton in the RHNA site inventory were inextricably intertwined with the Hamilton Project and required all actions to be analyzed at the same time, as a single project in a single EIR. Petitioner also alleges that the EIR fails to adequately analyze significant environmental impacts, includes mitigation measures that are improperly deferred or are unenforceable, and fails to adequately respond to public comments. Among other things, Petitioner seeks a peremptory writ of mandate directing the City to set aside all approvals for the Hamilton Project and to comply with CEQA by preparing a legally adequate environmental document for the Hamilton Project.

C. Related Cases; No Consolidation

Hauke Park I and *Hauke Park II* were ordered related by Order dated April 24, 2024. The Court denied Petitioner's motion to consolidate the two actions by Order dated August 13, 2024.

II. Request for Judicial Notice

Petitioner's request for judicial notice of Exhibit 7 of Patrick Soluri's declaration is granted, although the Court notes that the *Committee of Tiburon* decision is currently on appeal and is persuasive authority only.

III. Standard of Review

When a public agency prepares and certifies an administrative record, it exercises no discretion and performs a ministerial task under Section 21167.6. "As a result, when a trial court applies section 21167.6, subdivision (e) and determines the contents of the administrative record, it does so in its role as a trier of fact, not a court of review, and it resolves the factual and legal disputes between the parties without deference to the agency's certification. [Citation.]" (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 65, questioned on other ground in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 451.)

IV. Scope of An Administrative Record; Extra-Record Evidence

A. Public Resources Code Section 21167.6

Public Resources Code Section 21167.6(e) provides relevant parts:

> The record of proceedings shall include, but is not limited to, all of the following items:
>
> (1) All project application materials.
>
> (2) All staff reports and related documents prepared by the respondent public agency with respect to its compliance with the substantive and procedural requirements of this division and with respect to the action on the project.
>
> (3) All staff reports and related documents prepared by the respondent public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the respondent agency pursuant to this division . . .
>
> (6) All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.
>
> (7) All written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project . . .
>
> (10) (A) (i) Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including the initial study,

any drafts of any environmental document or portions of the initial study or drafts that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division, but not including communications that are of a logistical nature, such as meeting invitations and scheduling communications, except that any material that is subject to privileges contained in the Evidence Code, or exemptions contained in the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code), shall not be included in the record of proceedings under this paragraph, consistent with existing law . . .

(B) (i) Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions of the initial study or drafts, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including memoranda related to the project or to compliance with this division, but not including communications that are of a logistical nature, such as meeting invitations and scheduling communications, except that any material that is subject to privileges contained in the Evidence Code, or exemptions contained in the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code), shall not be included in the record of proceedings under this paragraph, consistent with existing law.

(ii) This subparagraph applies to any project that is not subject to subparagraph (A).

(iii) For purposes of this subparagraph, internal agency communications does not include electronic internal agency communications, including emails, that were not presented to the final decision making body, other than those communications and documents consulted, or reviewed by the lead agency executive or a local agency executive, as defined in subdivision (d) of Section 3511.1, or other administrative official in a supervisory role who is reviewing the project. The public

> agency may, but is not required to, include any documents in the record of proceedings that are not specifically set forth in this subparagraph.[2]

The language in Section 21167.6 "is mandatory – *all* items described in any of the enumerated categories *shall* be included in the administrative record." (*San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 532 [italics in original].) "A trial court has no discretion to exclude matters the statute makes a mandatory part of the record." (*Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 762.) Further, "'the statutory phrase 'include, but is not limited to' indicates the extensive list provided in the statute is *not exclusive.* 'It has been observed that this section 'contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development.'" (*San Francisco Tomorrow*, 229 Cal.App.4th at p. 532 [citation omitted] [emphasis in original].)

B. *Western States*

"[E]xtra-record evidence is generally not admissible in traditional mandamus actions challenging quasi legislative administrative decisions on the ground that the agency 'has not proceeded in a manner required by law' within the meaning of Public Resources Code section 21168.5." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576.) "Extra-record evidence is admissible under this exception only in those rare instances in which: (1) the evidence in question existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record." (*Ibid.* at p. 578 [citations in original].) "[E]xtra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on . . . or to raise a question regarding the wisdom of that decision." (*Ibid.* at 579.)

V. Discussion

The parties have each filed a motion, opposition, and reply relating to the scope of the administrative record in this action. With some exceptions (e.g., Exhibits 8-12 of Mr. Soluri's declaration), the parties do not submit copies of the approximately 178 documents in dispute but instead describe them in general terms as relating to the Hamilton Project.[3]

A. Relevant Authority Regarding EIRs and Future Conduct

[2] The cited language includes language from SB 131 which became effective on July 1, 2025.

[3] There is some confusion over how many documents are in dispute, but it appears to be somewhere between 165-178.

"Environmental review of a project under CEQA must encompass the whole of an action affecting the environment. This means a lead agency may not chop 'a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.'" (*Planning & Conservation League v. Department of Water Resources* (2024) 98 Cal.App.5th 726, 751 [citations omitted].) Improper piecemealing also occurs 'when the reviewed project legally compels or practically presumes completion of another action.'" (*Id.* at p. 752 [citation omitted].) "[A]n EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 ("*Laurel Heights I*").)

There are two types of EIRs: program EIRs and project EIRs. (*In re Bay–Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1169.)[4] The degree of specificity required in an EIR corresponds to the degree of specificity involved in the underlying project. An EIR on the adoption of a general plan need not be as precise as an EIR on the specific projects which might follow. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 746.)

Program EIRs are a type of report prepared for "a series of actions that can be characterized as one large project and are related" in some respect. (Guidelines, § 15168.) A program EIR is appropriate when prepared "[i]n connection with issuance of rules regulations, plans, or other general criteria to govern the conduct of a continuing program." (Guidelines, § 15168(a)(3).) A program EIR "evaluates the broad policy direction of a planning document, such as a general plan, but does not examine the potential site-specific impacts of the many individual projects that may be proposed in the future consistent with the plan." (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1047.) On the other hand, a project EIR is prepared for a construction-level project once specific development plans are available, and "should focus primarily on the changes in the environment that would result from the development project [and] examine all phases of the project including planning, construction, and operation." (Guidelines, § 15161; *In re Bay-Delta,* 43 Cal.4th at p. 1169.)

However, a program EIR intended for use as a first-tier EIR must still comply with CEQA's standards for an adequate environmental analysis in an EIR for a planning level action. The focus should be placed on secondary effects and the level of detail should correspond to the level of detail of the program that is proposed. (Guidelines, §§ 15146, 15152(b); see *In re Bay-Delta,* 43 Cal.4th at p. 1176.)

When a lead agency is preparing a first-tier EIR for a broad planning action such as adoption of a general plan, development of detailed, site-specific information may not be feasible. The agency

---

[4] A portion of this discussion is taken from the well-reasoned Order of Judge Lichtblau in *Committee for Tiburon v. Town of Tiburon*, Case No. CV0000086, as it pertains to program and project EIRs.

may leave a detailed analysis to later second-tier EIRs prepared for projects that implement the plan. (Guidelines, § 15152(c); see e.g., *Chaparral Greens v City of Chula Vista* (1996) 50 Cal.App.4th 1134; *Koster v County of San Joaquin* (1996) 47 Cal.App.4th 29; *Al Larson Boat Shop,* 18 Cal.App.4th at p. 747; *Rio Vista Farm Bureau Ctr. v County of Solano* (1992) 5 Cal.App.4th 351.) Tiering may be used to defer analysis of environmental impacts and mitigation measures to later phases of a program when impacts or mitigation measures are specific to later phases and are not determined by the first-tier approval decision, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand. (*In re Bay-Delta,* 43 Cal.4th at pp. 1169-1170; *Vineyard Area Citizens for Responsible Growth v City of Rancho Cordova* (2007) 40 Cal.4th 412, 431; *Town of Atherton v California High-Speed Rail Auth.* (2014) 228 Cal.App.4th 314, 346; *California Clean Energy Comm. v City of Woodland* (2014) 225 Cal.App.4th 173, 200.)

"However, as the Guidelines explain: 'Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental impacts of the project and does not justify deferring such analysis to a later tier EIR or negative declaration.'" (*Vineyard Area,* 40 Cal.4th at p. 431 [citations omitted].) "Tiering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases." (*Ibid.*) "For example, to evaluate or formulate mitigation for 'site specific effects such as aesthetics or parking' [citation] may be impractical when an entire large project is first approved; under some circumstances analysis of such impacts might be deferred to a later tier EIR. But the future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis. An EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project." (*Ibid.*)

A significant environmental impact is ripe for evaluation in a first-tier EIR when it is a reasonably foreseeable consequence of the action proposed for approval and the agency has "'sufficient reliable data to permit preparation of a meaningful and accurate report on the impact.'" (*Los Angeles Unified Sch. Dist. v City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1028 [citation omitted]; see *Vineyard Area,* 40 Cal.4th at p. 421.) The sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. (*Treasure Island,* 227 Cal.App.4th at p. 1051.)

B. Petitioner's Arguments

Petitioner states that it prepared an AR for *Hauke Park I* which consists of 383 index entries and that the City contends that 178 of these documents should be excluded on the ground that they pertain to the Hamilton Project. Petitioner argues that these documents should be included in the *Hauke Park I* AR because the actions at issue are the City's approval of the HEU and amendment of the General Plan Land Use designation for the express purpose of allowing the Hamilton Project. Petitioner contends that documents relating to the Hamilton Project fall squarely within the category under Section 21167.6(e)(10), above, providing that an AR should

include "[a]ny other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project."

Petitioner argues that the Hamilton Project falls within the scope of the "project" that the City analyzed in the HEU EIR. A "project" is "the whole of the action" that is "undertaken, assisted, or authorized by a public agency that may have a significant effect on the environment." (Guidelines, § 15378(a); *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 512; see also § 21065.) The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies," but "does not mean each separate governmental approval." (Guidelines, § 15378(c).) "This definition ensures that the action reviewed under CEQA is not the approval itself but the development or other activities that will result from the approval." (*Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 106.)

Petitioner argues that under the rationale of *Laurel Heights I, supra*, documents relating to the Hamilton Project should be included in the *Hauke Park I* AR because the City's amendment to the site's General Plan land use designation, at issue in *Hauke Park I*, was done expressly to allow for the Hamilton Project. Petitioner contends that these documents are necessary to show that the HEU EIR failed to analyze the impacts of the Hamilton Project based on evidence that was available to the City.

To show that the Hamilton Project should have been evaluated in the HEU EIR, Petitioner cites to Exhibits 3-6 of the Declaration of Patrick Soluri.

Exhibit 3 is an excerpt from the City's Draft HEU EIR which states, among other things, that "Mill Valley City Council has declared the northern portion of 1 Hamilton Drive (030-250-01) as "exempt surplus land" for the sole purpose of building affordable rental housing on the site . . . In order to build affordable housing on the site, the City will create a separate parcel and amend the General Plan Land use designation and zoning for the site."

Exhibit 4 is a memorandum between the City and its environmental consultant WRA for the Hamilton Project EIR. The memorandum includes a table with columns for "data needed" and "response". In response to a "data needed" item for "a list of all entitlements and permits needed for project approval", the City responded among other things: "General Plan Amendment to change the land use classification for the project site . . . to allow the project site to be developed with an affordable housing project . . . ."

Exhibit 5 is an excerpt from the Draft Hamilton Project EIR which includes the sentence: "The land use designation for the Housing Site was changed from CF to MFR-2 (Multi-Family Residential-2) with the adoption of the Housing Element Update on May 15, 2023. . . . The City intends to execute a long-term ground lease agreement with EAH Housing for the Housing Site as part of the proposed Project."

Exhibit 6 is an email from a City planner to representatives of EAH Housing, the proposed developer for the Hamilton Project, which states among other things: "FYI – As part of the hearing and adoption process, 1 Hamilton land use will be redesigned to Multi-Family to facilitate the housing on the property."

Petitioner also cites to Exhibits 8-12 to Mr. Soluri's declaration, which it obtained in discovery, to show that the City had ample information about the Hamilton Project to perform project-legal review in the HEU EIR. Exhibits 8-12 are among the documents Petitioner seeks to include and the City seeks to exclude from the *Hauke Park I* AR.

Exhibit 8 is an arborist report for the Hamilton Project dated April 1, 2022, Exhibit 9 is a delineation of aquatic resources for the Hamilton Project dated April 1, 2022, Exhibit 10 is preliminary grading, drainage, and utility plans dated November 5, 2022, Exhibit 11 is fire department access diagrams dated February 8, 2023, and Exhibit 12 is a drainage report for the Hamilton Project dated April 17, 2023. All of these documents were prepared before the HEU EIR was certified in May 2023.

C. City's Arguments

The City argues that the HEU EIR is a program-level EIR prepared for a series of actions that can be characterized as one large project and are related geographically (all within the City of Mill Valley), as logical parts in the chain of contemplated actions (all housing projects pursuant to the proposed housing element update require future actions to be taken by the City), in connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program (future housing projects consistent with the housing element program). The HEU identified 265 parcels or cites, with 170 of those sites identified in the Housing Elements sites inventory, and 1 Hamilton was only one of those sites. A separate, project-level EIR was prepared for that site, the Hamilton Project, which is at issue in *Hauke Park II*. The Hamilton EIR states that it tiered from the HEU EIR, but the Hamilton EIR served a different purpose of analyzing project-level impacts of the actual development and not the broad, potential impacts of residential development on hundreds of sites throughout the City.

The City argues that Petitioner was aware of and participated in the administrative proceedings on the HEU, and had the opportunity to submit to the City any documents it wanted to ensure they would be in the AR for this case. It contends that the Petitioner failed to do so and is now trying to use the City's certification of the AR to backfill the record with documents that were not before the decision-makers in connection with the HEU.

The City further contends that Petitioner cannot meet its burden under *Western States* because (1) some documents Petitioner seeks to add did not exist at the time the HEU EIR was certified and adopted, and (2) Petitioner cannot show that the remaining documents were presented to the City to be part of the HEU record. Further, the City argues, Petitioner is offering the documents solely "to contradict the evidence the administrative agency relied on . . . or to raise a question regarding the wisdom of that decision" as prohibited by *Western States*, because the City already decided what documents it would consider at the time it certified the EIR. The City states that

the mere fact it possessed certain documents at the time of the HEU EIR does not make them part of an administrative record where they were not maintained *for the challenged project*. The City contends it would be prejudiced by the inclusion of 165+ additional documents because it would be forced to defend its decisions based on a record that does not actually reflect what it did or considered.

D. Decision

In light of the broad language of Section 21167.6 and the case law interpreting it, the Court will allow additional documents proposed by Petitioner, to the extent they existed at the time the HEU EIR was approved and/or certified, to become part of the AR in *Hauke Park I.* According to the parties' briefs, with minor exceptions, these documents relate to 1 Hamilton or the Hamilton Project *and* existed at the time the City prepared and/or approved the EIR. Excluding these documents at this stage may prevent Petitioner from making a showing that the City improperly piecemealed environmental review, as Petitioner would be unable to argue the City failed to consider certain documents if those documents are not even part of the record. Petitioner could also be prevented from showing that the Hamilton Project was a foreseeable consequence as discussed in *Laurel Heights I* and that the City improperly piecemealed environmental review.

This ruling is not intended in any way to be a substantive ruling on the merits or any of the parties' arguments. This is particularly true as neither party has submitted the actual documents in question to the Court. Thus, the Court cannot discern the specific nature of the documents, who prepared them, when they were prepared, and when (if at all) the City had the documents in its possession during the HEU EIR process. The City can still argue that it was not required to consider these documents or conduct a larger scale environmental review of 1 Hamilton or the Hamilton Project at that time. The Court is allowing these documents in the *Hauke Park I* AR out of an abundance of caution so that Petitioner is not prejudiced in its ability to establish its case.

While the City argues that including these documents would be improper under *Western States*, "*Western States* did not concern the issue of what documents were properly included in the administrative record. Rather, it addressed the issue whether evidence admittedly *not contained in the administrative record* was admissible in a traditional mandamus action under CEQA to determine that the agency had abused its discretion within the meaning of section 21168.5." (*San Francisco Tomorrow*, 229 Cal.App.4th at pp. 532-533 [emphasis in original]; see also *Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 766-767 [issue of what should be included in AR is different than what can be added as extra-record evidence under *Western States*].) "As a general proposition, the proper method of analysis for determining whether a particular item should be considered as evidence in a CEQA matter is to determine first whether the item is part of the administrative record pursuant to subdivision (e) of section 21167.6. If the item does not qualify for inclusion in the administrative record, then its admissibility can be determined under the rules applicable to extra-record evidence." (*Madera Oversight*, 199 Cal.App.4th at p. 62.)

Here, unlike *Western States*, there is no existing AR such that these documents would be extra-record evidence. Rather, the issue before the Court is the scope of the AR in the first instance.

The Court therefore does not apply the *Western States* analysis to these motions. The Court also rejects the City's contention that the documents cannot be part of the AR to the extent the City did not actually consider or review them. (See *San Francisco Tomorrow*, 229 Cal.App.4th at p. 533; *Golden Door Properties,* 53 Cal.App.5th at p. 768.)

On a final note, the Court acknowledges that the parties filed their briefs before AB 130 or SB 131 became effective. The Court will consider any arguments as to the impact of these new laws, if any, on the issues before the Court at the hearing on this matter.

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 July, 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: 07/15/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV0002212

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK:

PETITIONER: FRIENDS OF HAUKE PARK vs. DEFENDANT: CITY OF MILL VALLEY	

NATURE OF PROCEEDINGS: HEARING – OTHER: ON OBJECTIONS TO THE ADMINISTRATIVE RECORD

RULING

The administrative record for *Hauke Park II* will include documents proposed by Petitioner only to the extent the documents relate to the Hamilton Project or the 1 Hamilton site, the HEU as it pertains to the Hamilton Project or 1 Hamilton site, or the amendment to the General Plan as it pertains to the Hamilton Project or the 1 Hamilton site. Documents relating to The Housing Workshop's analysis of alternative sites are to be included, as the Petition in *Hauke Park II* contends that alternative sites were not reasonably considered. Documents relating to the housing element process generally, or amendment of the General Plan generally, or documents that pertain to other sites or other issues and not specifically the Hamilton Project or 1 Hamilton site, will not be included.

With respect to specific documents identified in the parties' papers: the June 21, 2021, City Council Meeting, Item 4, Staff Report (file name 21.6.21 CC Item 4 Staff Report.pdf) and the June 21, 2021, City Council Meeting, Item 4, Public Comment #1, are included in the *Hauke Park I* AR only. The December 2021 Emails, pages 92 and 93, and the agenda for a September 27, 2022 meeting regarding 1 Hamilton, are included in both the *Hauke Park I* and *Hauke Park II* ARs.

Discussion

The parties have each filed a motion, opposition, and reply relating to the scope of the administrative record in this action. With minor exceptions, the parties do not submit copies of documents in dispute but instead describe them in general terms as relating to the HEU.[1]

[1] There is some confusion over how many documents are in dispute, but it appears to be between 176-198.

The parties have filed similar motions in the related case of *Friends of Hauke Park v. City of Mill Valley*, Case No. CIV0000005 ("*Hauke Park I*"). The Court incorporates Sections I (Procedural Background), II (Request for Judicial Notice), III (Standard of Review), IV (Scope of An Administrative Record; Extra-Record Evidence), V(A) (Relevant Authority Regarding EIRs and Future Conduct), and the discussion of *Western States* in Section V(D) of the Order in *Hauke Park I* here as these discussions are relevant to the motions in both cases.

HEU Documents Generally

The City argues that Petitioner seeks to include in the *Hauke Park II* AR documents that do not relate to and/or pre-date even the initial stages of what would become the Hamilton Project. Petitioner argues that because the Hamilton Project EIR tiered from the HEU EIR, documents relating to the HEU are relevant to the Hamilton EIR as well.

The Court does not have copies of the disputed documents before it, so it is unclear how many HEU documents relate specifically to the City's consideration of the 1 Hamilton site or the Hamilton Project and how many relate to other sites or other issues not specifically tied or related to the 1 Hamilton site or Hamilton Project. These are the only documents that should be included in the *Hauke Park II* AR. These documents should include documents from The Housing Workshop's analysis of alternative sites as this issue is raised in the *Hauke Park II* Petition. The Court will not do the parties' work for them and list all specific documents that are to be included in the *Hauke Park II* AR based on the general indices provided by the parties. The Court encourages the parties to work through this issue with the direction provided herein.

As the Court stated in its *Hauke Park I* Order, this ruling is not a substantive ruling on the merits or any of the parties' arguments.

Three Documents Identified by Petitioner

Petitioner argues that three specific documents should be included in both ARs. These documents include: (1) June 21, 2021, City Council Meeting, Item 4, Staff Report (file name 21.6.21 CC Item 4 Staff Report.pdf), which is referenced in the administrative record indexes on page 3 for *Hauke Park I* and on page 2 for *Hauke Park II*; (2) June 21, 2021, City Council Meeting, Item 4, Public Comment #1 (file name 21.6.21 CC Item 4 Public Comment #1.pdf), which is referenced in the administrative record indexes on page 12 for *Hauke Park I* and on page 11 for *Hauke Park II*; and (3) December 2021 Emails, pages 92 and 93 (file name 2021.12 Emails.pdf), which is referenced in the administrative record indexes on page 14 for *Hauke Park I* and on page 12 for *Hauke Park II*. The documents themselves are not submitted to the Court; rather, Petitioner cites only to the parties' annotated indices of documents.

Petitioner argues that the staff report (1) should be included because it addresses The Housing Workshop analysis and the HEU, both of which Petitioner challenges, the public comment (2) should be included because it addresses The Housing Workshop's analysis of City-owned sites which Petitioner challenges, and the emails (3) address both 1 Hamilton and the HEU.

The City agrees that the emails (3) should be included in both ARs, so the Court does not address those emails further.

The City agrees that the staff report (1) and public comment (2) should be included in the *Hauke Park I* AR, but not the *Hauke Park II* AR.

The Court denies Petitioner's request to add the staff report (1) and public comment (2) to the *Hauke Park II* AR. The documents themselves are not submitted so the Court cannot discern if these documents pertain to the 1 Hamilton site or the Hamilton Project. For the staff report (1), the index entry states only: "6/21/2021 6/21/21 City Council Meeting Item 4 Staff Report 21.6.21 CC Item 4 Staff Report.pdf." For the public comment, the index entry states only: "6/21/21 CC Meeting Item 4 Public Comment #1 21.6.21 CC Item 4 Public Comment #1.pdf." Petitioner provides an insufficient basis for these documents to be added to the *Hauke Park II* AR.

Agenda for September 27, 2022 Meeting

Petitioner seeks to add to both ARs an agenda of a private meeting between the City and EAH for September 27, 2022 regarding the status of the Hamilton Project. The document states among other things that "EAH confirmed with the City that the land use designation for 1 Hamilton will be changed to multi-family residential via the Housing Element Process." Petitioner argues that it should be included in both records because it discusses both the City's proposed change to the Hamilton site's land use designation (within the scope of the HEI EIR) and the Hamilton Project (within the scope of the Hamilton EIR) and is relevant to its piecemealing claim.

The City agrees that this document should be included in the *Hauke Park II* AR, but states that it should not be included in the *Hauke Park I* AR.

The document in question is attached as Exhibit 13 to Mr. Soluri's declaration. This agenda discusses the status of work at 1 Hamilton as of September 27, 2022, before the Draft HEU EIR was released. For the reasons discussed in the Court's Order in *Hauke Park I*, this document should be included in the *Hauke Park I* AR.

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 July, 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: 07/15/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV0003301

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:	CLERK:
IN THE MATTER OF: MARENE SORGEN	

NATURE OF PROCEEDINGS: MOTION – PROTECTIVE ORDER

RULING

Respondents and Defendants Town of Fairfax and Town Council of The Town of Fairfax (collectively, "the Town" or "Respondents") Motion for a Protective Order quashing the deposition notice pursuant to Code of Civil Procedure section 2025.410 or for a Protective Order pursuant to Code of Civil Procedure section 2025.420, ordering that the deposition of Ms. Linda Neal, a Town Planner ("Ms. Neal"), currently scheduled for July 11, 2025 will not be taken, is **GRANTED, in part** as set forth below.

Background

Petitioners Verle and Marene Sorenson (collectively, "Petitioners") own a home in the Town of Fairfax located at 80 Crest Road ("Sorgen Home"), built in 1973 on a sloped hill. (1 AR 1-16, 97.) While Petitioners were preparing their estate plan, they reached out to the Town at some point in 2018 to determine whether their home complied with the Town's applicable building requirements. (Declaration of Zachary N. Scalzo ISO Motion ("Scalzo Decl."), Ex. L, [First Amended Verified Petition for Writ of Mandate and Complaint for Declaratory Relief, Injunctive Relief, and Damages ("FAP"), ¶¶ 3 4].) At that time, the Town determined that Petitioners would need to apply for a height variance because the Sorgen Home, which was approximately 50 feet tall, exceeded the maximum height permitted under the Town Code. (See 1 AR 96-105; 3 AR 667-671.)

Respondents contend that the Sorgen Home, as it exists today, has an enclosed lower level with multiple rooms, whereas the original plans permitted by the Town indicated that level as open space. (*Ibid.*) The Town therefore determined that the entire lowest level consisted of unpermitted construction added after the Sorgen Home was completed in 1973, and that the Sorgen Home exceeded the maximum height permitted for a residence under every permutation of the Town's Code in effect from 1973 to the present. (*Ibid.*)

Petitioners applied for a height variance in 2019. (1 AR 1-16.) In October 2019, the Town's Planning Commission held a hearing and ultimately denied Petitioners' application for a height variance. (1 AR 93-147.) Petitioners then appealed the Planning Commission's denial of the variance to the Town Council. (3 AR 701-703.) In April 2024, the Town Council held a hearing and denied Petitioners' appeal. (3 AR 663-829.)

On June 28, 2024, Petitioners filed the original Petition ("Petition") alleging a cause of action for a writ that purported to seek the issuance of a traditional writ under Code of Civil Procedure section 1085 ("section 1085") and administrative writ on Code of Civil Procedure section 1094.5 ("section 1094.5"). (Petition, ¶¶ 27-49.) Petitioners also alleged causes of action for inverse condemnation, injunctive, and declaratory relief. (Petition, ¶¶ 50-62.)

On June 18, 2025, Petitioners filed the FAP which separates Petitioners' writ claims as follows: (i) a claim for traditional mandate (section 1085) challenging the initial decision by the City in 2018 to require that the Sorgens apply for a height variance; (ii) an additional section 1085 writ claim alleging constitutional violations relating to that initial decision; and (iii) a claim for administrative mandate (section 1094.5) that argues the Town Council's decision to deny the Sorgens a height variance was not supported by substantial evidence. (FAP, ¶¶ 27-53.) The FAP maintains Petitioners' claims for inverse condemnation, injunctive, and declaratory relief. (FAP, ¶¶ 54-66.)
The parties entered into a stipulation, which was later entered as an order of this Court, agreeing that "the Town will prepare a proposed index of the contents of the administrative record, and the record shall then be compiled and certified following the circulation of the record index." (Stipulation and Order, 8/23/24, ¶ 1.)

A dispute has arisen about the contents of the Administrative Record ("AR"). Namely, Petitioners contend that Respondents have improperly left out documents which should be included in the AR. After numerous attempts at informal resolution failed, Petitioners issued a deposition notice for Ms. Neal, the Town Planner who certified the existing AR. The purpose of the deposition is to enquire regarding the adequacy of the AR. Respondents now seek a protective order or move to quash the deposition subpoena in its entirety.

Legal Standard

Upon motion, the Court may issue an order quashing a subpoena requiring the attendance of witnesses. (Code Civ. Proc., § 1987.1.) The Court's order may quash the subpoena entirely, modify it, or direct compliance upon terms or conditions as the Court shall declare, including protective orders. (*Ibid.*; see Code Civ. Proc., § 2025.410 ["a party may also move for an order staying the taking of the deposition and quashing the deposition notice].) In addition, the Court may make any other order as may be appropriate to protect any party, deponent, or other person from unreasonable demands, unwarranted annoyance or undue burden and expense. (*Ibid.*; see also Code Civ. Proc., § 2025.420.)

Discussion

Respondents contend that discovery in writ proceedings is only allowed where a party can show that the discovery is reasonably calculated to lead to the discovery of admissible extra-record evidence that could not have, with reasonable diligence, been presented at the time of hearing. Further, Respondents argue that questions regarding the preparation and review of the AR would seek to probe the thought processes of the decisionmakers—here, Ms. Neal (in the section 1085 cause of action) and the Town Council (the section 1094.5 cause of action)—and are precluded as a matter of law. Finally, Respondents conclude that the Town included in the AR all documents presented to the Town Council at the April 2024 hearing, which is the proper scope of the AR in this action.

Petitioners counter that Respondents are conflating the motion to strike/motion to augment process with this preliminary inquiry into what documents exist and argue that they do not need to make the showing relevant to extra record evidence, since they are merely seeking evidence which should be included in the AR. They cite Code of Civil Procedure section 1094.6, subdivision (c) which provides:

> "The complete record of the proceedings shall be prepared by the local agency or its commission, board, officer, or agent which made the decision and shall be delivered to the petitioner within 190 days after he has filed a written request therefor. The local agency may recover from the petitioner its actual costs for transcribing or otherwise preparing the record. Such record shall include the transcript of the proceedings, all pleadings, all notices and orders, any proposed decision by a hearing officer, the final decision, all admitted exhibits, all rejected exhibits in the possession of the local agency or its commission, board, officer, or agent, ***all written evidence, and any other papers in the case***."

(Code Civ. Proc., § 1094.6, subd. (c). Emphasis added.) Petitioners further cite to the section 18:26 of the Rutter Guide which provides:

> ***PRACTICE POINTER:*** What the agency did and did not rely upon in determining to take the challenged action will sometimes be a disputed issue. In requesting the agency to prepare the record, petitioner's counsel has an opportunity to require respondent to commit itself to what was and was not relied upon. For example, a board or council may be tempted to exclude from the record the input that some or all of the members received from staff, or may be tempted to exclude proffered evidence that was contrary to the ultimate decision. If the agency responds to the request for a record with a body of documents that is missing items petitioner knows or believes to have been before the decisionmakers, petitioner's counsel can initiate contact with the agency's lawyers and request addition of the missing items. ***Ultimately, it may be necessary for petitioner to seek discovery into the adequacy of the administrative record, which may lead to a motion to augment the record.***

(Asimow, Levy, Tuleja & Brehler, Cal. Practice Guide: Administrative Law (The Rutter Group 2024) § 18:26. Emphasis added.)

Respondents are correct that "[g]enerally, on a section 1094.5 review after an administrative hearing, the court is limited to the evidence presented in the administrative proceedings unless the evidence was unavailable at the time of the hearing or improperly excluded from the record." (*Manderson-Saleh v. Regents of University of California* (2021) 60 Cal.App.5th 674, 694.)

However, there are two issues the Court sees with Respondents' view of how this limits its obligations to produce documents for the AR. First, this case has been framed as both a 1085 and 1094.5 writ. Even if Respondents were correct and the 1094.5 AR is limited to what was presented at the hearing, the 1085 case is not. (*Ibid.*). Second, Respondents are conflating the identification of documents that will be relied upon in the Court's ultimate merits review, and the identification of documents that need to be produced as part of the AR.

There is a surprising scarcity of case law on the exact issue presented in this motion. However, the Court agrees with Petitioners that *Golden Door Props., LLC v. Superior Ct.* (2020) 53 Cal.App.5th 733, as modified on denial of reh'g (Aug. 25, 2020), provides a helpful overview of the correct analysis. In that case, the court noted that "the key was recognizing this distinction between (1) writings properly included in the record of proceedings under section 21167.6 and (2) those outside the record, which constitute extra-record evidence." (*Id.*, at p. 766.) Although that case involved a CEQA matter, so the type of documents required to be included in the AR are potentially different, the question before this Court is the same.

Ultimately in 1094.5 cases, the AR is required to contain "***all written evidence, and any other papers in the case***." (Code Civ. Proc., § 1094.6, subd. (c).) Respondents appear to admit they have failed to include written evidence and other papers in the case on the grounds that they were not produced at the administrative hearing. Petitioners should be permitted discovery so that they may determine which documents have been excluded by Respondents on this ground. However, the Court agrees that deposing Ms. Neal is a burdensome discovery procedure to accomplish this goal, and that a deposition is likely to invade additional areas not properly at issue such as the Town Planner's thought processes.

The Court therefore agrees to stay the deposition indefinitely but orders Respondents to produce "all written evidence and any other papers in the case" regardless of whether they were produced at the administrative hearing. Such production shall occur no later **than August 12, 2025**. If any documents are withheld on privilege grounds, Respondents shall so indicate in a concurrently produced privilege log, which shall accurately and fairly describe each withheld document so that Petitioners can understand its general nature.

None of the documents in this supplemental production shall automatically be deemed to be part of the AR. Petitioners may instead raise the issue of including any of the supplemental documents by way of motion to augment the record.

If Respondents fail to comply with their obligations in this Order, Petitioners may apply ex parte to have the stay on the deposition lifted.

At this time, the Court denies all requests for sanctions, finding that both parties acted with substantial justification and the imposition of sanctions would be unjust. However, the denial of

sanctions is without prejudice and either party may renew the request if it is necessary to return this matter to the Court for additional determination.

The Court also notes that Petitioners raised a service issue (Respondents' email containing the Motion was "bounced" by their email server and Petitioners did not receive the Motion papers on June 26, 2025). It appears that Petitioners have had a full opportunity to brief the merits in opposition to the Motion, but if Petitioners assert this delay in receipt prejudiced their ability to meaningfully respond, the Court will entertain requests to continue the hearing as needed.

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 July 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: 07/15/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV0005457

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:	CLERK:
PLAINTIFF: HECTOR TORRES vs. DEFENDANT: RESTORATION HARDWARE, INC.	

NATURE OF PROCEEDINGS: MOTION – COMPEL

RULING

The motion to compel arbitration by defendant Restoration Hardware, Inc. is **GRANTED**, and the matter is stayed pending completion of the arbitration. (Code Civ. Proc., §§ 1281.2 & 1281.4.) The Court strikes plaintiff Hector Torres's untimely opposition. (See Code Civ. Proc., § 1005, subd. (b) [opposition due nine court days prior to the hearing and here, no later than July 1, 2025]; see also MCR Civ 2.8 G. ["The Court may decline to consider any memorandum or other document not filed within the deadline set by the applicable statute"].)

Background and Summary of Allegations

Plaintiff Hector Torres ("Plaintiff") filed his complaint against defendant Restoration Hardware, Inc. ("Defendant") on February 20, 2025, alleging disability discrimination, age discrimination, harassment because of disability and age, a failure to reasonably accommodate, retaliation for complaining about discrimination and harassment, and a failure to engage in the interactive process. (Complaint, 2/20/25.)

Plaintiff was employed by Defendant at its Corte Madera location between January 21, 2019 and February 28, 2022. (Complaint, ¶¶ 5 & 29.) His duties included *inter alia* general custodial work. (Complaint, ¶ 6.) Plaintiff alleges that throughout his employment his performance was satisfactory. (Complaint, ¶ 7.) He contends he was discriminated against and wrongfully terminated for pretextual reasons based on his advanced age and for a disability he suffered during his employment. (Complaint, ¶¶ 8-30.)

When Plaintiff was initially employed by Defendant, as part of the onboarding process, Plaintiff was presented with an Arbitration Agreement which he electronically signed on January 28, 2019. (Declaration of Emmanuelle Tobola, ¶¶ 5-8, and Exh. A.)

The Arbitration Agreement sets forth the following:

> Claims Covered By This Arbitration Agreement. Employee and the Company agree to arbitrate any claim, dispute, and/or controversy that either Employee may have against the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) or the Company may have against Employee, arising from, related to, or having any relationship or connection whatsoever with Employee's seeking employment, Employee's employment, or Employee's other association with the Company. Included within the scope of this Arbitration Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise.

(Tobola Decl., Exh. A.)

Defendant now moves to compel arbitration pursuant to the agreement between the parties and asks the Court to dismiss the action or alternatively stay it pending the completion of arbitration.

Legal Standard

Under the Federal Arbitration Act (9 U.S.C. § 1 et seq. ("FAA")), "[a] written provision in ... a contract evidencing a transaction involving [interstate] commerce to settle by arbitration the controversy thereafter arising out of such contract or transaction, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) The FAA was intended to reverse centuries of judicial hostility to arbitration agreements by putting arbitration agreements upon the same footing as other contracts. (*Shearson/American Exp., Inc. v. McMahon* (1987) 482 U.S. 220, 225-226.) However, arbitration – whether under the California Arbitration Act ("CAA") or FAA – "is a matter of consent, not coercion ... a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (US), LLC (2012) 55 Cal.4th 223, 236 [internal quotations and citations omitted].)

The party seeking to arbitrate must prove the existence of the agreement. (*Pinnacle, supra,* 55 Cal.4th at 236.) If it does so, the burden shifts to the party opposing arbitration to "demonstrate that an arbitration provision cannot be interpreted to require arbitration of the dispute" or that the agreement is otherwise unenforceable. (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686-87.)

Both the FAA and CAA employ the same principles of contract interpretation. Thus, regardless of which act governs the interpretation of the Agreement, the result is the same." (*Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 157.) Where the interpretation of an arbitration provision

does not turn upon the credibility of extrinsic evidence, interpretation is solely a judicial function and the court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. (*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 771.)

Discussion

Here, moving party Defendant has met its initial burden to demonstrate the existence of an agreement to arbitrate (the "Agreement") which covers the causes of action raised in Plaintiff's complaint. (Complaint, 2/20/25; Tobola Decl., Exh. A.) All of Plaintiff's claims arise out of his employment with Defendant. (Complaint, 2/20/25; Tobola Decl., Exh. A [parties agree to arbitrate any claim or dispute "arising from, related to, or having any relationship or connection whatsoever with Employee's seeking employment, Employee's employment, or Employee's other association with the Company. Included within the scope of this Arbitration Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination and harassment"].) Accordingly, under the Agreement, they must be arbitrated unless Plaintiff can demonstrate that the Agreement is otherwise unenforceable.

The Court has stricken Plaintiff's late opposition and thus Plaintiff has failed to establish his burden that the Agreement is unenforceable. Even if the Court had considered Plaintiff's opposition, Plaintiff only discussed procedural unconscionability and failed to address substantive unconscionability, thus failing to meet his burden in any event. (*Vo v. Technology Credit Union* (2025) 108 Cal.App.5th 632, 641 ["The party opposing the enforcement of an arbitration agreement has the burden of establishing both procedural and substantive unconscionability"], internal citations omitted.)

Unconscionability

The unconscionability defense has been recognized by the United States Supreme Court as a general contract defense in California, and therefore a defense to an agreement to arbitrate. (*Fisher v. MoneyGram Int'l, Inc.* (2021) 66 Cal.App.5th 1084, 1093, internal citations omitted.) Applying the unconscionability defense to an arbitration agreement in California is not preempted by the FAA. (*Ibid.*) Unconscionability is commonly defined as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (*Ibid.*) Unconscionability, as the definition suggests, has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. (*Ibid.*) Procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, but they need not be present in equal parts. (*Ibid.*) Rather, California courts employ a sliding scale to determine unconscionability, the more substantively oppressive the contract terms, the less evidence of procedural unconscionability is required to conclude the terms are unenforceable, and vice versa. (*Ibid.*)

A. Procedural Unconscionability

"A procedural unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power on a take-it-or-leave-it basis." (*OTO, LLC v. Kho* (2019) 8 Cal.5th 111, 126, citations and internal quotations omitted.) "*Oppression* occurs where a contract involves lack of negotiation and meaningful choice, *surprise* where the allegedly unconscionable provision is hidden within a prolix printed form." (*Ibid.*, citations and internal quotations omitted, emphasis in original.) "[A]dhesion contracts in the employment context, that is, those contracts offered to employees on a take-it-or-leave-it basis, typically contain some aspects of procedural unconscionability." (*Serpa v. California Surety Investigations, Inc.* (1996) 215 Cal.App.4th 695, 704.) However, this adhesive aspect of an agreement is not dispositive. When . . . there is no other indication of oppression or surprise, 'the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high.'" (*Ibid.*, citations omitted.)

While the Court has not considered Plaintiff's opposition, in addressing the arguments set forth in Defendant's reply, the facts of this case are similar to those in *Caballero v. Premier Care Simi Valley LLC* (2021) 69 Cal.App.5th 512. In *Caballero*, the court found an arbitration agreement enforceable where the plaintiff signed the agreement notwithstanding his limited English skills and there was no evidence that the plaintiff either requested assistance in understanding the document or was prevented from obtaining such assistance. (*Id.* at p. 514.) The court explained:

> Generally, a party may not avoid enforcement of an arbitration provision because the party has limited proficiency in the English language. If a party does not speak or understand English sufficiently to comprehend a contract in English, it is incumbent upon the party to have it read or explained to him or her. An exception to the general rule applies when a party was fraudulently induced to sign the contract. This exception is inapplicable here, because Caballero does not contend Premier Care defrauded him or prevented him from learning the contract's terms. He simply states that, to the best of his recollection, he was not presented with an Arbitration Agreement in Spanish or an Arbitration Agreement in English that was explained to him. He cites no authority suggesting it was Premier Care's initial burden to ascertain whether he could understand the English version. All Caballero had to do was tell Elstein or one of Premier Care's Spanish-speaking employees that he cannot read English, and the burden would have shifted to Premier Care to explain the contents of the Arbitration Agreement. His decision to sign a document he could not read is not a basis for avoiding an arbitration agreement.

(*Id.* at pp. 518-519, citations omitted.) As in *Caballero*, here, Plaintiff signed the Agreement notwithstanding his limited English skills and there is no evidence before the Court that he requested assistance to understand the document or was prevented from obtaining assistance in any way.

B. Substantive Unconscionability

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they reallocate risks in an objectively unreasonable or unexpected manner. (*Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539.) "In assessing substantive unconscionability, the paramount consideration is mutuality." (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 241, internal citation and quotation marks omitted.) Arbitration agreements are substantively unconscionable where they lack a "modicum of bilaterality," "without at least some reasonable justification for such one-sidedness based on 'business realities.'" (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 117.)

"Substantive unconscionability examines the fairness of a contract's terms. This analysis ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided. All these formulations point to the central idea that the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party." (*OTO, supra*, 8 Cal.5th at pp. 129-130, internal citation and quotations omitted.)

Without an opposition, no challenge has been made to the substance of the Agreement. As stated previously, even if the Court had considered the opposition, Plaintiff failed to address the substance of the Agreement and thus failed to meet his burden establishing that the Agreement was unconscionable and therefore unenforceable.

Accordingly, the Court grants the motion to compel arbitration and stays the matter pending completion of the same.

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 July 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: 07/15/25 TIME: 1:30 P.M. DEPT: A CASE NO: CV0006202

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:	CLERK:
PLAINTIFF: SAEED GHAFOORI, ET AL vs. DEFENDANT: BANK OF AMERICA HOME LOANS, ET AL	

NATURE OF PROCEEDINGS: ORDER - SHOW CAUSE; PRELIMINARY INJUNCTION

RULING

Plaintiffs' Saeed Ghafoori and Gissou Beykpour Ghafoori ("Plaintiffs") Motion for Preliminary Injunction is **DENIED**.

Procedural Background

Plaintiffs are the owners of 11 Sky Road in Mill Valley ("Subject Property"). In November 2005, Plaintiffs refinanced their loan and thereafter defaulted resulting in a notice of default on December 5, 2016. They filed a lawsuit against Defendants in February 2017 in case number CIV1700544 ("first lawsuit"). Plaintiffs allege they were "forced" into a settlement agreement of the first lawsuit wherein the parties agreed to keep the terms thereof confidential. In the settlement agreement, Defendants agreed to rescind the December 5, 2016 notice of default and not take any action to pursue foreclosure until after August 1, 2019. In summer of 2019 Plaintiffs allege they engaged with potential buyers, but Defendants allegedly disclosed the confidential settlement terms to third party buyers, which Plaintiffs allege resulted in the buyers revoking an offer to purchase Plaintiffs' property. They also allege Defendants thereafter recorded another notice of default on September 5, 2019. Plaintiffs allege this interfered with their right to sell the property and Defendants failed to establish a single point of contact to stop the foreclosure proceedings. Plaintiffs allege they submitted loan modification packages, but Defendants failed to process or approve them. In January 2025, Defendants approved Plaintiffs for a trial three-month period, but the monthly payments were over 200% higher. Plaintiffs allege they appealed the proposed modification, but Defendants failed to provide any alternatives.

On April 12, 2023, Defendants provided Plaintiffs with a "Broker Property Opinion" which stated that the market valuation of the Property was $2,700,000. Plaintiffs subsequently tried to negotiate a purchase of the Note and Deed of Trust of the Property for $3,000,000, which

Defendants "dragged on for months without affirming or rejecting" Plaintiffs' offer. In September 2023, Plaintiffs' lender requested a "clear unencumbered transfer" of the Note and Deed of Trust of the Property, but Defendants were unable to verify that it would be able to satisfy the lender's request.

On May 12, 2024, Plaintiffs filed this action against Bank of America Home Loans, Bank of America NA successor by merger to Bank of American Home Loan Servicing, Bank of New York Mellon, Cwalt, Inc., and Mortgage Electronic Registration (MERS) ("Defendants") alleging claims for Violation of Code of Civil Procedure section 2924g; Violation of Civil Code sections 2923.55, 2924.12 & 2924.17 under Homeowner Bill of Rights; Violation of Business and Professions Code section 17200, et seq.; Negligent Misrepresentation; Intentional Misrepresentation; Improper Foreclosure Procedure; Declaratory Relief; and Injunctive Relief.

In May of 2025, Plaintiffs came before this Court to request an *ex parte* temporary restraining order ("TRO") to prevent foreclosure of the Subject Property. The Court granted the TRO and set a hearing for an OSC re Preliminary Injunction, which is currently before the Court.

Legal Standard

A preliminary injunction is an "extraordinary" form of relief because it is issued "prior to a full adjudication of the merits." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; *White v. Davis* (2003) 30 Cal.4th 528, 554 (*White*).) In deciding whether to award such relief, a trial court is to examine "two interrelated factors: (1) the likelihood that the [the party moving for the preliminary injunction,] will prevail on the merits [at trial], and (2) the relative balance of harms that is likely to result from the granting or denial of the interim injunctive relief." (*White*, at p. 554; *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70 (*IT Corp.*).) "These two [factors] operate on a sliding scale: '[T]he more likely it is that [the party seeking the injunction] will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue.' " (*Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1183 (*Integrated Dynamic*), quoting *King v. Meese* (1987) 43 Cal.3d 1217, 1227 (*King*); accord, *Fairrington v. Dyke Water Co.* (1958) 50 Cal.2d 198, 200 [applying this principle].)

"A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim." (*Ibid.*) Accordingly, the trial court must deny a motion for a preliminary injunction if there is no reasonable likelihood the moving party will prevail on the merits. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 447; *see Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 786–787 [order denying a motion for preliminary injunction should be affirmed if the trial court correctly found the moving party failed to satisfy either of the two factors].)

The burden is the party seeking injunctive relief, to show all elements necessary to support issuance of a preliminary injunction, presenting facts establishing the requisite reasonable probability of success on the merits. (*O'Connell v. Superior Ct.* (2006) 141 Cal.App.4th 1452, 1481; *Fleishman v. Superior Ct.* (2002) 102 Cal.App.4th 350, 356.) The drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing, by

someone having knowledge thereof, made under oath or by declaration under penalty of perjury. (*Ibid.*)

The trial court's order on a request for a preliminary injunction "reflects nothing more than the superior court's evaluation of the controversy on the record before it at the time of its ruling; it is not an adjudication of the ultimate merits of the dispute." (*People v. Uber Techs., Inc.* (2020) 56 Cal.App.5th 266, 283, as modified on denial of reh'g (Nov. 20, 2020); *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109; *Yee v. American National Ins. Co.* (2015) 235 Cal.App.4th 453, 457–458.) The preliminary injunction is intended to "preserv[e] ... the status quo until a final determination of the merits of the action." (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) The power to issue preliminary injunctions is an extraordinary one and should be exercised with great caution and only where it appears that sufficient cause for hasty action exists. (*West v Lind* (1960) 186 Cal.App.2d 563.)

If the court grants the preliminary injunction, the court *must* require an undertaking or allow a cash deposit in lieu thereof. (Code Civ. Proc., § 529.)

Request for Judicial Notice

Defendants Request for Judicial Notice is GRANTED, pursuant to Evidence Code section 452, subdivisions (d) and (h), with the limitation that the Court notices only the fact the identified documents were recorded and/or filed. The Court does not take judicial notice of the truth of any factual matters stated therein. (See *Poseidon Development, Inc. v. Woodland Lane States, LLC* (2007) 152 Cal.App.4th 1106, 1117 and *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.)

Discussion

Likelihood of Success on the Merits

Plaintiffs' application is based solely on a claim under Civil Code section 2923.6(c), and the assertion that Defendants are attempting to foreclose while in possession of a complete loan modification application. Plaintiffs do not allege a cause of action under section 2923.6 in their complaint. Moreover, Plaintiffs' allegations show that Defendants did indeed consider the application and presented Plaintiffs with a trial modification offer. Plaintiffs, however, refused to accept the offer and instead filed an appeal. Plaintiffs refused to accept the offer, and Defendants provided them with further notice that they are ineligible for any loss mitigation options. Defendants have not initiated any subsequent review for loss mitigation options and thus there is no violation of section 2923.6.

As for the allegations asserted in the complaint, Defendants rebut each in opposition. First, Defendants establish that Plaintiffs expressly waived any defense to the foreclosure – including, explicitly, through claims under the Homeowners Bill of Rights (HBOR) by way of the settlement agreement. As such, Defendants have a complete defense to Plaintiffs' claims under the HBR, and injunctive relief may not be granted thereunder. (See, e.g. *Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1026.)

Next, as to Civil Code section 2924g(c)(1), this provides that a notice of trustee's sale becomes stale if the sale does not proceed within 365 days of its recording. Plaintiffs allege that the notice of trustee's sale was recorded on December 23, 2022 and thus is stale. However, a new notice of sale was recorded on June 26, 2024. Plaintiffs have failed to show that they can prevail on this cause of action.

Plaintiffs allege Defendants failed to adequately consider the Net Present Value and possible principal reductions in violation of Civil Code sections 2923.6(c) and (f). However, neither subsection addresses these issues which Plaintiffs represent. As such, Plaintiffs have failed to show a likelihood that they will prevail on his claim for violations of section 2924c.

Plaintiffs' claim for Violation of Business and Professions Code section 17200, et seq. is based on the alleged violations of the Civil Code and negligent and intentional misrepresentations. Because Plaintiffs have failed to show how they can succeed on the other causes of action against Defendants, they also fail to show a likelihood of success on the merits for the Unfair Business Practices cause of action.

Plaintiffs also allege negligent and intentional misrepresentation claims based on the "Broker Property Opinion" in April 2023, which Plaintiffs interpreted to be an offer for them to make an offer to purchase the loan. The elements of fraud are (1) misrepresentation of a material fact (consisting of a false representation, concealment, or non-disclosure); (2) knowledge of the falsity (i.e., scienter); (3) intent to deceive and induce reliance; (4) justifiable and actual reliance on the misrepresentation; and (5) resulting damage. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445; *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 72-73.) Defendants establish that the opinion was conducted in conjunction with the modification review which Plaintiffs denied. Moreover, the opinion states it is "intended to be used solely by Bank of America, N.A. in connection with the evaluation of your request." Plaintiffs allege that they were induced to "intentionally forgo making his regularly schedule [sic] mortgage payments" on the purported promise to be granted a modification, but Plaintiffs have been in default since 2016 and were indeed offered a modification which they rejected. Plaintiffs have failed to show that they can prevail on these causes of action.

Plaintiffs allege a claim for "Improper Foreclosure Proceeding," and cite only to the language in the deed of trust designating MERS as the beneficiary and nominee of the lender and its successors and assigns. Plaintiffs do not make any attempt to link MERS' presence on the deed of trust to their purported conclusion that the foreclosure is improper. MERS has the power under California law to assign a deed of trust. (*Herrera v. Fed. Nat'l Mortg. Ass'n* (2012) 205 Cal.App.4th 1495, 1506.) Plaintiffs have failed to show that they can prevail on these causes of action.

Plaintiffs also seek declaratory relief. In cases of actual controversy relating to the legal rights and duties of the respective parties in relation to a contract or property, a person may bring an action for declaration of his or her rights and duties (Code of Civ. Pro., § 1060.) "A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the

court." (*Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 947.) Plaintiffs have not produced any evidence to support any of their claims.

Finally, Plaintiffs also allege a claim for injunctive relief. "[I]njunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted." (*Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168; accord *City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293 "Injunctive relief is a remedy, not a cause of action."], *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 734 [same].) As Plaintiffs have not demonstrated an underlying basis for relief, there is no basis for injunctive relief.

Interim Harm

Because Plaintiffs failed to satisfy the first factor (likelihood of success on the merits), the Court need not address the second factor (interim harm). (*Common Cause v. Board of Supervisors, supra,* 49 Cal.3d at p. 447; *see Yu v. University of La Verne, supra,* 196 Cal.App.4th at p. 786–787 [order denying a motion for preliminary injunction should be affirmed if the trial court correctly found the moving party failed to satisfy either of the two factors].)

For these reasons, the Motion for Preliminary Injunction is denied and the TRO entered by this Court on May 13, 2025 is dissolved.

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 July 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