SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/01/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2203564

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: DANIEL BISSMEYER vs. DEFENDANT: KONIKU, INC	

NATURE OF PROCEEDINGS: MOTION – SUMMARY JUDGMENT

RULING

Plaintiff/Cross-Defendant Daniel Bissmeyer's ("Plaintiff" or "Bissmeyer") Motion for Summary Judgment on the First Amended Cross-Complaint ("FAXC") is DENIED. The alternative Motion for Summary Adjudication of Issues 1-8 is GRANTED in part, as to the 1st and 8th Issues only. The Motion is DENIED as to all remaining Issues.

BACKGROUND

Plaintiff brought a wrongful termination action against his former employer Koniku, Inc. ("Koniku") and its founder/CEO Oshiorenoya Agabi (Koniku and Agabi are referred to collectively as "Defendants"), alleging causes of action for: 1) Retaliation in violation of Labor Code sections 1102.5, 1102.6; 2) Wrongful Termination in Violation of Public Policy; 3) Failure to Pay Wages in violation of Labor Code sections 201, 1194; 4) Failure to Reimburse for Necessary Business Expenses (Labor Code, § 2802); 5) Waiting Time Penalties (Labor Code, §§ 201-203) ; 6) Failure to Permit Inspection of Personnel and Payroll Records (Labor Code, §§ 226, 1198.5); and 7) Unfair Competition (Bus. & Prof. Code, § 17200). The Unfair Competition cause of action is based on alleged violations of the Labor Code.

Plaintiff alleges that he worked as Vice President of Sales for Defendants beginning January 25, 2022 until he was terminated on July 26, 2022. (Compl., ¶ 24)

Plaintiff alleges that when he complained to Mr. Agabi that Defendants had falsely told investors, customers, and board members that the product would be completed in the fall, Mr. Agabi nevertheless expected Plaintiff to promote and sell an untested and unfinished product to customers. (Compl., ¶ 19) Plaintiff also protested to Mr. Agabi that he (Agabi) was making false representations to government agencies concerning the sensitive technologies used in the product in order to obtain a less strict export classification (*Id.,* ¶ 20); that Agabi was not complying with even these less onerous export requirements; and the company had not received the certifications

of Koniku's laboratories from the Departments of Homeland Security and the Alcohol, Tobacco and Firearms for handling explosives. (*Id.,* ¶ 21) Plaintiff also brought these concerns to the Board of Directors. (*Id.,* ¶ 22) In response to his complaints, Plaintiff alleges that he was terminated. (*Id.,* ¶ 23)

Plaintiff claims he was not paid the first $15,000 installment of his Retention Bonus, he was not paid his accrued and unused paid time off, and he was not reimbursed for business expenses in the amount of $1,647.30. (*Id.,* ¶ 24)

Koniku filed a Cross-Complaint on April 10, 2024 and on August 5, 2024, Koniku filed the operative FAXC. In that FAXC, Koniku alleges that Bissmeyer worked for Koniku as VP of Sales for approximately six months from February through July, 2022. (FAXC, ¶¶ 1-2.) That, during his employment, he was paid at a $175,000 salary level instead of his $140,000 contracted salary, that this arrangement had been worked out in part to compensate Bissmeyer for an early retention bonus, and that he solicited and obtained advances from Koniku against future commissions that he never earned, having made no sales. (*Id.,* at ¶¶ 3, 8, 10, & 11.) On July 26, 2022, Koniku terminated Bissmeyer for cause. (*Id.,* at ¶¶ 3, 14, 16.) Bissmeyer is obligated to, but has not, repaid the advanced bonus and commission payments. (*Id.,* at ¶¶ 3, 16.) Koniku further alleges that after Bissmeyer was terminated, he made disparaging remarks regarding Koniku including to Bruce Coole, an executive at Airbus. (*Id*., at ¶¶ 17, 19.) Koniku further alleges that Bissmeyer made misrepresentations to Coole regarding the quality of Koniku's products, the reliability of Koniku as a business partner, and of the moral character of Koniku's founder, Mr. Agabi. (*Id*., at ¶¶ 19, 34, 42, & 52.)

OBJECTIONS TO EVIDENCE

Plaintiff's Objection to Defendants' Request for Judicial Notice No. 1 is OVERRULED. Defendants have provided a signed copy of the declaration. The declaration has been filed with this Court and the filed copy is signed. Accordingly, Judicial Notice is proper under Evidence Code section 452, subdivision d. However, as stated below, the Court takes Judicial Notice of the existence of the document in the Court's file and not the truth of the statements contained therein. (*Ramsden v. W. Union* (1977) 71 Cal.App.3d 873, 879.)

Plaintiff's Objection to the Declaration of Mr. Agabi No. 3 is SUSTAINED (hearsay). All other Objections to the Declaration of Mr. Agabi are OVERRULED.

Plaintiff's Objections to the Supplemental Declaration of Mr. Agabi are OVERRULED.

REQUESTS FOR JUDICIAL NOTICE

Defendants' Request for Judicial Notice No. 1 is GRANTED. (Evid Code, § 452, subd. (d).) However, the Court merely takes Judicial Notice of the existence of the document in the Court's file and not the truth of the statements contained therein. (*South Lake Tahoe Property Owners Group v. City of South Lake Tahoe* (2023) 92 Cal.App.5th 735, 752; *Ramsden v. W. Union, supra,* 71 Cal.App.3d at p. 879.)

LEGAL STANDARD

A party may move for summary judgment "if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a)(1).) "[I]f all the evidence submitted, and all inferences reasonably deducible from the evidence and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law," the moving party will be entitled to summary judgment. (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

The moving party bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact, and if the party does so, the burden shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; accord Code Civ. Proc., § 437c, subd. (p)(2).) "Once the defendant ... has met that burden, the burden shifts to the plaintiff... to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid*.) "If the plaintiff cannot do so, summary judgment should be granted." (*Avivi v. Centro Medico Urgente Med. Ctr.* (2008) 159 Cal.App.4th 463, 467.)

"When deciding whether to grant summary judgment, the court must consider all of the evidence set forth in the papers (except evidence to which the court has sustained an objection), as well as all reasonable inferences that may be drawn from that evidence, in the light most favorable to the party opposing summary judgment." (*Avivi, supra*, at p. 467; see also Code Civ. Proc., § 437c, subd. (c).)

DISCUSSION

Plaintiff moves for Summary Judgment pursuant to Code of Civil Procedure section 437c, subdivision (a), on the grounds that the FAXC has no merit and there is no triable issue of fact as to the legal issues raised therein.

Alternatively, pursuant to Code of Civil Procedure section 437c, subdivision (f), Plaintiff moves for Summary Adjudication on the following issues:

> Issue No. 1: Koniku's first cause of its FAXC for breach of contract fails because Defendant cannot establish an enforceable contract capable of breach;
>
> Issue No. 2: Koniku's second cause of its FAXC for intentional interference with contractual relations fails because Bissmeyer did not engage in intentional acts designed to induce a breach or disruption;
>
> Issue No. 3: Koniku's third cause of its FAXC for intentional interference with prospective economic relations fails because Bissmeyer did not engage in intentional acts designed to induce a breach or disruption;
>
> Issue No. 4: Koniku's third cause of its FAXC for intentional interference with prospective economic relations fails because Bissmeyer's alleged conduct was not independently wrongful;

> Issue No. 5: Koniku's fourth cause of its FAXC for negligent interference with prospective economic relations fails because Bissmeyer did not owe Defendant a duty;
>
> Issue No. 6: Koniku's fourth cause of its FAXC for negligent interference with prospective economic relations fails because Bissmeyer did not breach any alleged duty to Defendant;
>
> Issue No. 7: Koniku's fourth cause of its FAXC for negligent interference with prospective economic relations fails because Bissmeyer did not make any untruthful disparaging comments; and
>
> Issue No. 8: Koniku's claim for punitive damages against Bissmeyer fails because Defendant cannot establish malice, fraud or oppression by Bissmeyer to support such remedy.

Issue 1

Plaintiff's motion argues that Koniku fails to state a claim for breach of contract because Koniku cannot establish the existence of a contract enforceable by Koniku capable of Plaintiff's breach. Determination whether a contract is void and unenforceable because of illegality is a question of law. (*McIntosh v. Mills* (2004) 121 Cal.App.4th 333, 343.)

Specifically, Plaintiff argues that the Agreement is unlawful and unenforceable pursuant to Government Code section 12964.5 (as revised effective January 1, 2022), which provides, in pertinent part, as follows:

> (a)(1) It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either of the following: … (B)(i) For an employer to require an employee to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace. (ii) A nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace shall include, in substantial form, the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful." (2) Any agreement or document in violation of this subdivision is contrary to public policy and shall be unenforceable.

(Govt. Code, § 12964.5.)

Plaintiff asserts the non-disparagement provision does not include the requisite carveout permitting disclosure about unlawful acts such as harassment or discrimination in the workplace. (FAXC, ¶ 18; Exh. 1, at p. 12, ¶ 8.)

Paragraph 8 of the Agreement provides:

> 8. Non-Disparagement. I agree and covenant that I will not at any time, either during the Relationship or thereafter, (i) make, publish or communicate any written or oral statements which I know or reasonably should know to be disparaging or negative concerning the Company, its business or any of its employees and officers, or (ii) urge or influence any person to make any such statement. I acknowledge this Section 8 does not, in any way, restrict or impede me from exercising protected rights to the extent that such rights cannot be waived by agreement or from complying with any applicable law or regulation or a valid order of a court of competent jurisdiction or an authorized government agency, provided that such compliance does not exceed that required by the law, regulation, or order.

(*Ibid*; Material Fact ("MF") Nos. 1-2.)

In Opposition, Koniku argues that the carveout the Agreement does contain - "Section 8 does not, in any way, restrict or impede me from exercising protected rights to the extent that such rights cannot be waived by agreement or from complying with any applicable law or regulation or a valid order of a court" - is a sufficient carveout even though it does not include the statutorily required language ("Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful").

The statute requires the language to be "in substantial form" and the statutorily provided language. The Court finds the carveout in the agreement not to be in substantial form or substantially similar to the statutorily provided language. While it may ultimately have a similar effect, the Court will not second guess the wisdom of the legislature by assuming the specific examples given in the language provided are superfluous. Common sense suggests that they were not, and the purpose of the specific mention is to avoid amorphous reference to "rights" whose definition may not be readily apparent to the average person.

Koniku further argues that the Agreement is negotiated and is therefore exempt from the purview of section 12964.5. (Response Fact "RF") No. 11) However, while negotiated settlement agreements to "resolve an underlying claim… that has been filed by an employee…" are excepted, Koniku provides no evidence that this was the case. (Gov't Code, § 12964.5, subd. (d)(1).) Rather, the evidence provided demonstrates that this was a proactively negotiated employment contract, not a settlement agreement. (MF No. 1) The Court concludes the Agreement is not exempt under the plain language of the statute.

Next Koniku argues that even if the provision violates section 12964.5, the Court need only sever the provision to address it, not invalidate the entire agreement. However, this is directly contradicted by the language of the statute itself which states "[a]ny *agreement or document in violation* of this subdivision is contrary to public policy and shall be unenforceable." (Govt. Code, § 12964.5, emphasis added.) This language renders the entire agreement/document unenforceable.

For these reasons, none of Koniku's arguments are sufficient to meet the burden (which shifted back after moving party made a prima facie showing that no enforceable contract exists) to demonstrate a triable issue to the contrary. Therefore Summary Adjudication of Issue No. 1 is GRANTED.

Issue 2

The elements of a cause of action for intentional interference with contractual relations are: "(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. … To establish the claim, the plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his or her action." (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148, quoting *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 56.)

Koniku alleges that Plaintiff's interfered with the Airbus contract "by calling Bruce Coole and making disparaging remarks regarding Koniku." (FAXC, at ¶ 33; MF No. 4.) Plaintiff argues that Koniku cannot prevail on this claim because Plaintiff's evidence (his own declaration) shows he did not make the alleged remarks nor engage in intentional acts designed to induce a breach or disruption. (MF Nos. 5-7.) However, Koniku counters with circumstantial evidence that if credited by the finder of fact, could allow it to find the disputed fact in favor of Koniku. (RF No. 5.)

For these reasons Summary Adjudication of Issues No. 2 is DENIED, as is the Motion for Summary Judgment as a whole.

Issues 3 and 4

Issues 3 and 4 address the third cause of action for intentional interference with prospective economic advantage.

A cause of action for intentional interference with prospective economic advantage contains five elements: " (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of defendant." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) "[A] plaintiff ... must plead and prove as part of its case-in-chief that the defendant's conduct was 'wrongful by some legal measure other than the fact of interference itself." (*Id*., at p. 1153.) "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Id*., at p. 1159, fn. omitted.)

Plaintiff argues that Koniku cannot prevail on this cause of action because (1) he did not engage in intentional acts designed to induce a breach or disruption of the contractual relationship; and (2) he did not engage in an independently wrongful act.

For the reasons discussed under Issue 2 above, (1) is the subject of disputed material facts not suitable for resolution at this stage.

As to Plaintiff's claims that he did not engage in an independently wrongful act, Plaintiff has shifted the burden back to Koniku to show a triable issue on this element. (MF No. 6.) Material Fact No. 6 states that Bissmeyer has not made any false statements about Koniku or Agabi to Mr. Coole. (MF No. 6; See Bissmeyer Decl., ¶ 3.) A person cannot incur liability for interfering with a prospective economic advantage by giving truthful information to a third party. (*Savage v. Pac. Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 449–50).)

In return, Koniku has established a dispute of material fact exists as to what was said to Mr. Coole and whether those statements were truthful. (RF No. 5.) A reasonable finder of fact could find Koniku's account most compelling.

For these reasons, Summary Adjudication of the Third Cause of Action (Issues 3 and 4) is DENIED.

Issues 5-7

Issues Nos. 5-7 all address the fourth cause of action for negligent interference with prospective economic relations. Plaintiff argues the fourth cause of action fails because Plaintiff 1) did not owe Defendant a duty; 2) did not breach any alleged duty to Defendant; 3) did not make any untruthful disparaging comments.

"The tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1078.)

Negligence requires the existence of a legal duty and the breach thereof. (*Thomas v. Stenberg* (2012) 206 Cal App.4th 654, 662.) Plaintiff argues that the fourth cause of action in the FAXC must fail because Defendant cannot establish either.

The existence of a legal duty is a question of law while the breach thereof is a question of fact. Neither party has provided explicit caselaw stating whether the duty of loyalty owed by an employee to an employer carries over after the termination of the employment relationship. The Court therefore considers the following multipart inquiry to determine whether a duty existed.

(*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804.) Those criteria are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm. (*Ibid.)*

On motion for summary judgment or adjudication, the moving party's evidence must be strictly construed, while the opposing party's evidence must be liberally construed. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.) Any evidentiary doubts are resolved in favor of the opposing party (*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1176.)

The Court finds, for the purpose of this motion only and with no ultimate determination of the merits, Koniku has established that a duty between it and Plaintiff existed. (See RF No. 5.) For the reasons discussed above, there are disputed material facts with respect to whether Plaintiff breached that duty and made untrue disparaging remarks.

For these reasons, Summary Adjudication of the Fourth Cause of Action (Issues 5-7) is DENIED.

Issue 8

Plaintiff seeks Summary Adjudication on the issue of punitive damages.

Punitive damages may be imposed where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. (Civ. Code, § 3294, subd. (a).) "Malice" is conduct intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on with a willful and conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subd. (c)(1).) An award of punitive damages requires "despicable conduct," meaning behavior that is "vile," "base," or contemptible" and that would be "looked down upon and despised by ordinary decent people," in addition to willful and conscious disregard for the rights and safety of others. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "'Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.' [Citation.]" (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210.)

Plaintiff argues that the FACX does not allege of malice, oppression, or fraud and argues that there is no evidence of in the record sufficient to support a punitive damages award.

The burden of a party moving for summary judgment only requires that he or she negate the theories of liability *as alleged in the complaint. (Hutton v. Fid. Nat'l Title Co.* (2013) 213 Cal.App.4th 486, 49), *as modified on denial of reh'g* (Feb. 22, 2013). Emphasis in original) Here, although the FAXC prays for punitive damages, it does not contain allegations of malice, oppression, or fraud.

Even if it had, under the clear and convincing standard, the evidence supporting a claim for punitive damages must be so clear as to leave no substantial doubt and sufficiently strong to

command the unhesitating assent of every reasonable mind. (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1158, as modified on denial of reh'g (July 26, 2018). Internal citations omitted.) Although the clear and convincing evidentiary standard is a stringent one, "it does not impose on a plaintiff the obligation to 'prove' a case for punitive damages at summary judgment [or summary adjudication]. (*Ibid*.)

However, on summary adjudication, the evidence and all inferences that reasonably can be drawn from it must meet the higher standard. (*Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1119. Internal citations omitted.) Summary adjudication should be granted "unless it appears that actual malice may be proved at trial by clear and convincing evidence...." (*Ibid.*)

Here, even viewing the evidence in the light most favorable to opposing party, it cannot be said the evidence would "command the asset of every reasonable mind." No reasonable jury could find the Koniku's evidence to be clear and convincing proof of malice, fraud, or oppression.

For these reasons, Summary Adjudication of the claim for Punitive Damages is GRANTED.

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 August, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3Q7qPFgFZa.1
Meeting ID: 161 516 2449
Passcode: 073961

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 07/25/25 TIME: 1:30 P.M. DEPT: E CASE NO: PRO2200974

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

IN RE TRUST OF: KIISK 1996 REVOCABLE TRUST DATED MAY10, 1996	

NATURE OF PROCEEDINGS: 1) MOTION – SUMMARY ADJUDICATION – OTHER
2) MOTION FOR SUMMARY JUDGMENT

RULING

Defendant Edwin Davidian's ("Davidian") Motion for Summary Judgment or, in the alternative, Summary Adjudication is DENIED.

Respondent Payam Behradnia's ("Behradnia") Motion for Summary Adjudication is DENIED.

BACKGROUND

Petitioner Mat Kiisk ("Kiisk") owned and operated a dental practice operating under the name Kiisk D.D.S. Inc. ("Dental Practice"). The Dental Practice was in a building owned by Kiisk as Trustee of the Kiisk 1996 Revocable Trust ("Trust"), located at 3100 19th Avenue, San Francisco, CA ("Property"). Kiisk was approaching retirement age and wanted to eliminate his debt on the Property and Dental Practice. In 2018 Kiisk entered into an agreement with broker ProMed Financial, Inc. ("ProMed") wherein ProMed agreed to offer the Dental Practice for sale at a listing price of $1,100,000. The sale was to include the equipment, furniture, custodial rights to patient files, goodwill, etc. Kiisk alleges that the listing price did not include the value of the Property.

In 2019, Kiisk began working with Dental Recovery Solutions 360, LLC to market both the Dental Practice and Property.

In late 2019, Behradnia and Kiisk met to discuss the sale of the Property and Dental Practice to Payam Behradnia DMD Dental Group Inc. ("DMD Dental Group Inc.") and EZ Smile Family Dental Group ("EZ Smile"). Kiisk alleges that Behradnia represented that Kiisk would become debt free and would receive $20,000 per month through the sale agreement.

Kiisk alleges that Behradnia and Davidian (collectively known as "Respondents") intentionally misled Kiisk to believe that he would be relieved on all loans, liens and judgments related to the

Property. In reliance on these representations, and Respondents' written promises that they would get rid of all loans, liens, and judgments on the Property, Kiisk agreed to sell the Property to Respondents. Kiisk alleges that he agreed to the below-market sale price of $1,100,000 based on representations that this would eliminate all loans, liens, and judgments on the Property (approximate total value of $1,475,000).

Kiisk also agreed to sell his Dental Practice for $25,000 as part of a package deal with Behradnia, substantially below the ProMed listing price of $1,100,000. Kiisk believed that this was necessary as part of the deal to eliminate Kiisk's debt. Prior to closing, Kiisk contributed an additional $40,000 to close the transaction, at Respondents' behest.

After the sale of the Property and the Dental Practice, Respondents failed to pay off Kiisk's debts. Kiisk then filed this Petition on April 7, 2022.

Legal Standard

The purpose of a motion for summary judgment "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal. App. 4th 1110, 1119.)

"When deciding whether to grant summary judgment, the court must consider all of the evidence set forth in the papers (except evidence to which the court has sustained an objection), as well as all reasonable inferences that may be drawn from that evidence, in the light most favorable to the party opposing summary judgment." (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th at 467; Code of Civ. Proc. §437c.) The moving party's evidence must be strictly construed, while the opposing party's evidence must be liberally construed. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.) Any evidentiary doubts are resolved in favor of the opposing party. (*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1176.)

A party may more for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims of damages, or one or more issues of duty. (Code Civ. Proc., § 437c(f).) A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion. (*Lomes v. Hartford Financial Service Group, Inc.* (2001) 88 Cal.App.4th 127, 131.)

DAVIDIAN'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

EVIDENTIARY OBJECTIONS

The Court does not rule on the parties' evidentiary objections as the challenged evidence is not material to the Court's ruling. (Code Civ. Proc., § 437c(q).)

MOTION TO STRIKE

The separate statement of undisputed material facts must be served on all parties at least 81 days before the hearing (Code Civ. Proc., § 437c(1)(3)). Davidian's *Amended* Separate Statement of Undisputed Facts was filed on April 1, 2025; fewer than 81 days prior to the June 20, 2025 hearing when taking into consideration the Cesar Chavez holiday on March 31, 2025.

The Court finds that Davidian's Amended Separate Statement of Undisputed Facts was not timely filed and grants Kiisk's Motion to Strike.

DISCUSSION

First Cause of Action/Recover Property – Prob. Code § 850 (Issue No. 1)

In the First Cause of Action, Kiisk alleges that he is entitled to recover the Property from Respondents based on their misconduct; namely financial elder abuse, wrongful and bad faith taking, and/or undue influence in bad faith. (First Amended Petition ("FAP"), ¶¶40-42.)

Davidian argues that Kiisk is not entitled to recover the Property pursuant to Prob. Code Sec. 850 because Kiisk has no right to recover the property. The requirements of Sec. 850 are extremely broad; the petitioning party must: (1) fall within one of the categories of persons who may file a Sec. 850 petition; and (2) state facts upon which the claim is based.

Here, Kiisk is a trustee who seeks to recover the Property from Respondents, satisfying the first prong of the requirements. (Prob. C. § 850(a)(3)(B).) Kiisk also states facts upon which this claim is based.

Davidian presents the following facts, which are undisputed. Kiisk is Trustee of the Kiisk 1996 Revocable Trust. (UMF No. 2.) The February 2020 Contract for the purchase of the Property states that: (1) time is of the essence; (2) all understandings between the parties were incorporated in the agreement; (3) it was intended to be a final, complete, and exclusive agreement; and (4) no portion of the agreement may be modified except in writing. (UMF Nos. 7 and 8.) Prior to the sale of the Property, there were at least $1,471,533.62 in liens on the property. (UMF No. 9.) When Kiisk entered into the February 2020 contract, he was in default on the first deed of trust on the Property. (UMF No. 10.) A Notice of Trustee's Sale of the Property was recorded on February 21, 2020 and advised that the Property was scheduled to be sold at public auction on March 27, 2020. (UMF Nos. 11 and 12.) A judgment of over $500,000 was entered against Kiisk in favor of East West Bank on April 25, 2019 and as of February 24, 2020, East West Bank had a judgment lien on the Property in excess of $500,000. (UMF Nos. 13 and 14.) The parties initialed a Short Sale Advisory dated March 2, 2020 that stated that: (1)

some lenders will release the lien but not forgive the underlying debt; (2) some lenders may or may not agree to reduce the amount owed to satisfy the debt and may continue to pursue the borrower for payment; and (3) the seller should obtain a written agreement from the lender addressing whether they would be released from any liability and have that agreement reviewed by a professional. (UMF Nos. 15-18.) $82,466.38 of the proceeds from the sale of the Property were paid to East West Bank and escrow closed on March 31, 2020. (UMF Nos. 19-20.)

Davidian's first purported undisputed material fact states that Kiisk entered into the listing agreement for the sale of the real property at issue in November 2019. (UMF No. 1.) Kiisk disputes this, arguing that this statement is incomplete and misleading. Kiisk provides additional triable issues of fact to support his allegation that the listing agreement was part of a package deal to eliminate Kiisk's debt and that Davidian obtained the Property: (1) through financial elder abuse, and/or (2) wrongfully and in bad faith, and/or (3) through undue influence in bad faith. (See Petitioner's Response to Respondent/Defendant Edwin Davidian's Separate Statement of Undisputed Material Facts ("Resp. to UMF") No. 1.)

Davidian's motion for summary adjudication of Issue No. 1/the First Cause of Action is therefore denied.

Second Cause of Action/Double Damages – Prob. Code § 859 (Issues No. 2 and 3)

Probate Code section 859 states in pertinent part:

> If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part….

Davidian argues that the Second Cause of Action necessarily fails with the First Cause of Action and simply incorporates the facts and supporting evidence for Issue No. 1. (UMF Nos. 1-20.) Davidian also argues that the Second Cause of Action fails because there was no wrongful conduct and again incorporates the same facts and supporting evidence. (UMF Nos. 1-20.)

Because the Court finds triable issues of fact with regard to UMF No. 1, Davidian's motion for summary adjudication of Issues No. 2 and 3/the Second Cause of Action is denied.

Tenth Cause of Action/Breach of Contract (Issues No. 4 - 7)

In the Tenth Cause of Action, Kiisk alleges that Respondents breached the written agreement entered into on November 20, 2019 in that they have failed and refused to: (1) pay off all loans, liens, and judgments related to the Property; (2) pay Kiisk 10% of the profits of EZ Smile. (FAP, ¶¶92-95.) Alternatively, Kiisk argues that if he is not found to be the employee of Respondents,

then DMD breached the Independent Contractor Agreement by failing to pay the agreed-upon wages and percentage of EZ Smile's profits. (FAP, ¶¶96-102.)

The elements of a breach of contract cause of action are: (1) the existence of a contract; (2) the plaintiff's performance or excuse for nonperformance of the contract; (3) defendant's breach; and (4) damage to plaintiff resulting from the breach. (*State Compensation Ins. Fund v. ReadyLink Healthcare, Inc.* (2020) 50 Cal.App.5th 422, 449 ("*ReadyLink*").)

Issue No. 4. Davidian argues that the alleged contract sued upon is not an enforceable contract and in any event was superseded by one or more subsequent integrated contracts. Davidian again incorporates the facts and supporting evidence for Issue No. 1. (UMF Nos. 1-20.)

Because the Court finds triable issues of fact with regard to UMF No. 1, Davidian's motion for summary adjudication of Issue No. 4 is denied.

Issue No. 5. Davidian argues that the alleged letter sued upon is too uncertain to be an enforceable contract.

With regard to UMF No. 45, Kiisk does not dispute the fact that the 2019 Letter ("2019 LOI") does not state an agreed upon purchase price for the Property. However, Kiisk argues that the 2019 LOI was part of broader negotiations in a package deal involving the sale of the Property and the Dental Practice, along with satisfaction of debt, and removal of liens. (Resp. to UMF No. 45.)

With regard to UMF No. 46, Kiisk disputes it stating that the fact that the 2019 LOI does not specify which persons or entities are taking on obligations with respect to any dental practice, taken in isolation, is incomplete and misleading. (Resp. to UMF No. 46.) Kiisk reiterates the argument regarding broader negotiations and a package deal.

The Court finds that Kiisk provided additional triable issues of fact with regard to UMF Nos. 45 and 46. Accordingly, Davidian's motion for summary adjudication of Issue No. 5 is denied.

Issue No. 6. Davidian argues that he did not breach the purchase agreement.

The following facts are undisputed. The terms of the February 24, 2020 Purchase Contract provided that: (1) the offer to purchase was contingent upon final approval from all creditors and seller's ability to provide a title free and clear of any liens and judgments; and the remainder of balance from Buyer's funds to be allocated to East West Bank as their final payout and if accepted, the judgment case No CGC-10-573857 to be removed and cleared from the property. (UMF No. 47 and 48.) The amount of funds from Buyer's Property purchase after senior lienholders were paid was $82,466.38; East West Bank credited $82,466.38 against the balance of its judgment lien against Kiisk; and the Byers paid a total of $1,100,000 for the Property. (UMF No. 49, 50, and 52.)

The purported material fact that the February 2020 Purchase Contract did not require Buyers to pay off all loans, liens, and judgments related to the Property is disputed. (UMF No. 51.) Kiisk disputes this fact arguing that this fact is incomplete, mischaracterizes the evidence, and is

misleading because the contract was part of broader negotiations for a package deal. (Resp. to UMF No. 51.)

Kiisk further disputes the fact that the March 12, 2020 BPA superseded all previous agreements between Mat Kiisk, D.D.S., Inc. and Payam Behradnia DMD Dental Group, Inc. with respect to the purchase of the assets sold by Mat Kiisk, D.D.S., Inc. to Payam Behradnia DMD Dental Group, Inc. (UMF No. 53.) Kiisk alleges that this mischaracterizes evidence and that the statement "superseded all previous agreements" is a legal conclusion. Kiisk disputes this fact by providing further evidence that that the contract is part of broader negotiations for a package deal. (Resp. to UMF No. 53.)

Davidian fails to provide supporting evidence for the purported material fact that Davidian was not a party to the sale of the practice assets by Mat Kiisk, D.D.S., Inc. and Payam Behradnia DMD Dental Group, Inc. (UMF No. 54.) Kiisk requests that this UMF be stricken; or in the alternative, disputes this UMF. (Resp. to UMF No. 54.)

While Davidian fails to meet his burden to support this undisputed fact with admissible evidence, Kiisk has provided additional triable issues of fact with respect to UMF No. 54 and further provides additional facts supported by evidence to show that the contract was part of broader negotiations for a package deal (Additional Undisputed Material Fact. ("AUMF") 106, 107.) Accordingly, Davidian's motion for summary adjudication of Issue No. 6 is denied.

Issue No. 7. Davidian argues that even if the alleged 2019 Letter had been an enforceable contract,
Davidian would not have been in breach.

The purported material facts presented are duplicative of material facts presented in Issue No. 5; UMF No. 55 is the same as UMF No. 45; UMF No. 56 is the same as UMF No. 46.

This Court has already found that Kiisk provided additional triable issues of fact with regard to UMF No. 45 and 46; Davidian's motion for summary adjudication of Issue No. 7 is therefore denied.

Because the Court found triable issues of material fact with respect to Issues No. 4 – 7, the motion for summary adjudication of the Tenth Cause of Action is likewise denied.

Fourth Cause of Action/Fraud Against Respondents Behradnia and Davidian (Issues No. 8 - 11)

In the Fourth Cause of Action, Kiisk alleges that Davidian committed fraud by making knowingly false representations to Kiisk in connection with the sale of the Property and Dental Practice, resulting in harm in an amount of more than $1,075,000. (FAP, ¶¶54-60.)

The elements of fraud are (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (Geraghty v. Shalizi (2017) 8 Cal.App.5th 593, 597.)

Issue No. 8. Davidian argues that there is no fraud because there was no misrepresentation.

All facts presented with regard to this issue are disputed.

Kiisk disputes the facts regarding what the parties were willing to pay as incomplete and misleading because the contract was part of broader negotiations for a package deal, involving sale of the Property and Dental Practice, and negotiations with third party creditors and lienholders for them to accept partial payments from the proceeds of the sales as satisfaction in full. (Resp. to UMF Nos. 57 – 59.)

Kiisk also disputes the fact that Davidian is not and never has been an owner of EZ Smile or any dental practice. (UMF No. 60.) Kiisk incorporates his additional undisputed material facts that demonstrate Davidian was a beneficial owner or interest holder because of his expectation that he was entitled to a revenue stream equal to a percentage of the Dental Practice's net profits. (AUMF Nos. 107 and 108.)

Accordingly, because there are triable issues of material fact, the Court denies the motion for summary adjudication of Issue No. 8.

Issue No. 9. Davidian argues that there is no fraud because there was no knowledge of falsity or intent to defraud.

Kiisk does not dispute the fact that Kiisk told Davidian that Kiisk was in contact with East West Bank's attorney regarding his debt. (UMF No. 62.)

Kiisk disputes the fact that Davidian never communicated with East West Bank regarding either of the Petitioners[1] or their debts. (UMF No. 61.) Kiisk argues that Davidian communicated with East West Bank about these matters via his agent, Ali Rismanchi of Vanguard. Kiisk incorporates his additional undisputed material facts in support of this. (AUMF Nos. 90, 92 and 93.)

Kiisk disputes the fact that Kiisk represented to Davidian that he was negotiating his debts with his creditors; arguing that the evidence cited by Davidian does not support that purported fact. (Resp. to UMF No. 63.)

Accordingly, because the Court finds triable issues of material fact, the motion for summary adjudication of Issue No. 9 is denied.

Issue No. 10. Davidian argues that there is no fraud because there was no justifiable reliance by Kiisk.

The following facts are undisputed. Kiisk was represented by Vanguard for the sale of the Property. (UMF No. 66). Kiisk testified that he has never spoken to Davidian; Kiisk qualifies

[1] The Court has previously noted that Kiisk petitions both as an individual and as trustee of the Kiisk 1996 Revocable Trust, Dated May 10, 1996; and

this as undisputed assuming that "spoken" refers strictly to oral communications. (UMF No. 67; Resp. to UMF No. 67.) Kiisk was represented by an attorney before the Corporation closed escrow on the sale of its corporate assets. (UMF No. 68.)

Kiisk argues that the evidence cited does not support Davidian's purported facts that: (1) Kiisk told Davidian that he was in contact with East West Bank's attorney regarding his debt; and (2) Kiisk represented to Davidian that he was negotiating his debts with his creditors. (Resp. to UMF Nos. 64 and 65.)

Accordingly, because the Court finds triable issues of material fact, the motion for summary adjudication of Issue No. 10 is denied.

Issue No. 11. Davidian argues that there is no fraud because Davidian was not the cause of damage to Kiisk, if any.

The following facts are undisputed. A Notice of Trustee's Sale of the Property was recorded on February 21, 2020, advising that the Property was scheduled to be sold at public auction on March 27, 2020 and providing the address of the Property and the location of the sale. (UMF No. 72.) The Buyers and Kiisk signed an addendum to the Purchase Agreement agreeing to release $100,000 from escrow as a nonrefundable deposit to James Vernon in exchange for his agreement to delay the foreclosure sale of the Building and to allow the sale to proceed so long as it occurs on or before April 3, 2020. (UMF No. 74.) East West Bank received payment of $82,466.38 toward the amount owed by Kiisk from the proceeds from the sale of the Property. (UMF No. 76.) Kiisk negotiated a settlement with East West Bank and East West Bank accepted a discounted amount in satisfaction of the judgment lien it had against Kiisk. (UMF No. 77.)

Kiisk disputes the fact that the Buyers agreed to release $100,000 from escrow as a nonrefundable deposit to the attorney for Kiisk's first and second lienholders on the Property to delay the Trustee's Sale scheduled for March 27, 2020 and allow Kiisk to avoid foreclosure. (UMF No. 73.) Kiisk disputes this as misleading and incomplete because the contract was part of broader negotiations for a package deal. (Resp. to UMF No. 73.)

Accordingly, because the Court finds triable issues of material fact with respect to the contract as being part of broader negotiations for a package deal, the motion for summary adjudication of Issue No. 11 is denied.

Because the Court found triable issues of material fact with respect to Issues No. 8 – 11, the motion for summary adjudication of the Fourth Cause of Action is likewise denied.

Third Cause of Action/Financial Elder Abuse Against All Respondents (Issues No. 12 and 13)

In the Third Cause of Action, Kiisk alleges that Davidian committed financial elder abuse against him by obtaining Kiisk's Property and Dental Practice by undue influence and/or with the intent to defraud Kiisk, who was older than 65 at the time of Respondents' misconduct. Kiisk alleges that he was harmed by Davidian's misconduct and that such misconduct was a substantial factor in causing Kiisk's harm. (FAP, ¶¶46 – 53.)

California Welfare and Institutions Code § 15610.30(a) provides that "financial abuse" of an elder occurs when an entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both" or "[a]ssists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." Section 15610.30(b) provides that "[a] person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult."

Davidian argues that the Third Cause of Action fails because there was no fraud or undue influence in Respondents' purchase of the property. Davidian incorporates by reference all the asserted undisputed material facts and supporting evidence for Issues No. 1 through 11. (UMF Nos. 1 – 76.) Davidian also argues that the Third Cause of Action fails because Davidian did not obtain any of the assets of Mat Kiisk, D.D.S., Inc. and, in any event, assets belonging to the corporation cannot be the basis of a financial elder abuse claim. (UMF Nos. 1 – 76.)

Because the Court finds triable issues of fact with regard to UMF No. 1, Davidian's motion for summary adjudication of Issues No. 12 and 13/the Third Cause of Action is denied.

BEHRADNIA'S MOTION FOR SUMMARY ADJUDICATION

EVIDENTIARY OBJECTIONS

The Court does not rule on the parties' evidentiary objections as the challenged evidence is not material to the Court's ruling. (Code Civ. Proc., § 437c(q).)

MOTION TO STRIKE

Absent court order, the Motion for Summary Adjudication must be heard no later than 30 days before trial. (Code Civ. Proc., § 437c(a)(3).) When the Motion for Summary Adjudication was filed, the court assigned a hearing date of June 27, 2025 and the trial was set for July 22, 2025. The hearing date for this Motion was fewer than 30 days before the trial.

Kiisk requests that the Court strike Behradnia's Motion for Summary Adjudication as untimely or in the alternative outright deny the motion as untimely (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 657.)

The trial date has since been moved to December 2, 2025, which cures this timing issue. Kiisk's Motion to Strike is denied.

DISCUSSION

First Cause of Action/Recover Property – Prob. Code § 850 (Issue No. 1)

In the First Cause of Action, Kiisk alleges that he is entitled to recover the Property from Respondents based on their misconduct; namely financial elder abuse, wrongful and bad faith taking, and/or undue influence in bad faith. (First Amended Petition ("FAP"), ¶¶40-42.)

Behradnia argues that Kiisk is not entitled to recover the Property pursuant to Prob. Code Sec. 850 because Kiisk has no right to recover the property. The requirements of Sec. 850 are extremely broad; the petitioning party must: (1) fall within one of the categories of persons who may file a Sec. 850 petition; and (2) state facts upon which the claim is based.

Here, Kiisk is a trustee who seeks to recover the Property from Respondents, satisfying the first prong of the requirements. (Prob. C. § 850(a)(3)(B).) Kiisk also states facts upon which this claim is based.

Behradnia presents the following facts, which are undisputed. Kiisk is Trustee of the Kiisk 1996 Revocable Trust. (UMF No. 2.) The February 2020 Contract for the purchase of the Property states that: (1) time is of the essence; (2) all understandings between the parties were incorporated in the agreement; (3) it was intended to be a final, complete, and exclusive agreement; and (4) no portion of the agreement may be modified except in writing. (UMF Nos. 7 and 8.) Prior to the sale of the Property, there were at least $1,471,533.62 in liens on the property. (UMF No. 9.) When Kiisk entered into the February 2020 contract, he was in default on the first deed of trust on the Property. (UMF No. 10.) A Notice of Trustee's Sale of the Property was recorded on February 21, 2020 and advised that the Property was scheduled to be sold at public auction on March 27, 2020. (UMF Nos. 11 and 12.) A judgment of over $500,000 was entered against Kiisk in favor of East West Bank on April 25, 2019 and as of February 24, 2020, East West Bank had a judgment lien on the Property in excess of $500,000. (UMF Nos. 13 and 14.) The parties initialed a Short Sale Advisory dated March 2, 2020 that stated that: (1) some lenders will release the lien but not forgive the underlying debt; (2) some lenders may or may not agree to reduce the amount owed to satisfy the debt and may continue to pursue the borrower for payment; and (3) the seller should obtain a written agreement from the lender addressing whether they would be released from any liability and have that agreement reviewed by a professional. (UMF Nos. 15-18.) $82,466.38 of the proceeds from the sale of the Property were paid to East West Bank and escrow closed on March 31, 2020. (UMF Nos. 19-20.)

Behradnia's first purported undisputed material fact states that Kiisk entered into the listing agreement for the sale of the real property at issue in November 2019. (UMF No. 1.) Kiisk disputes this, arguing that this statement is incomplete and misleading. Kiisk provides additional triable issues of fact to support his allegation that the listing agreement was part of a package deal to eliminate Kiisk's debt and that Behradnia obtained the Property: (1) through financial elder abuse, and/or (2) wrongfully and in bad faith, and/or (3) through undue influence in bad faith. (See Petitioner's Response to Respondent/Defendant Payam Behradnia's Separate Statement of Undisputed Material Facts ("Resp. to UMF") No. 1.)

Behradnia's motion for summary adjudication of Issue No. 1/the First Cause of Action is therefore denied.

Second Cause of Action/Double Damages – Prob. Code § 859 (Issues No. 2 and 3)

Probate Code section 859 states in pertinent part:

> If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part….

Behradnia argues that the Second Cause of Action necessarily fails with the First Cause of Action and simply incorporates the facts and supporting evidence for Issue No. 1. (UMF Nos. 1-20.) Behradnia also argues that the Second Cause of Action fails because there was no wrongful conduct and again incorporates the same facts and supporting evidence. (UMF Nos. 1-20.)

Because the Court finds triable issues of fact with regard to UMF No. 1, Behradnia's motion for summary adjudication of Issues No. 2 and 3/the Second Cause of Action 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 August, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3Q7qPFgFZa.1
Meeting ID: 161 516 2449
Passcode: 073961

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/01/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0006278

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: CORNELL L. TONEY vs. DEFENDANT: SELECT PORTFOLIO SERVICING AND DOES 1-100, 2025	

NATURE OF PROCEEDINGS: ORDER TO SHOW CAUSE – PRELIMINARY INJUNCTION

RULING

Plaintiff's request for preliminary injunction is denied. The temporary restraining order issued on May 23, 2025 is dissolved.

Procedural Background

Plaintiff Cornell Toney "et al" filed his Complaint against Select Portfolio Servicing ("SPS") on May 21, 2025, alleging violations of the Homeowner Bill of Rights ("HOBR") and Civil Code Section 2923.5 and also asserting claims for declaratory relief, injunctive relief, and an accounting. Plaintiff's claims arise from SPS's conduct as Trustee for a deed of trust on Plaintiff's residence in Novato. Plaintiff alleges that among other things, SPS violated the HOBR by recording a notice of default without fully informing Plaintiff of his opportunity to apply for a loan modification and even though Plaintiff had submitted a complete application for a loan modification which was still being considered, by failing to appoint a single point of contact, and failing to provide Plaintiff with certain information regarding foreclosure prevention alternatives. Plaintiff also alleges that SPS violated Section 2923.5 by recording a notice of default without having first contacted Plaintiff first to assess his financial situation and explore options to avoid forfeiture.

On the same day he filed his Complaint, Plaintiff filed an ex parte application seeking a temporary restraining order ("TRO") and order to show cause ("OSC") as to why a preliminary injunction should not be issued. The Court granted Plaintiff's request and issued a TRO and OSC with a hearing date of June 27, 2025. At the hearing on June 27, 2025, the Court noted that SPS's opposition papers were just filed that day and continued the OSC hearing to July 18, 2025.

The Court stated that SPS's response was required to be electronically served that day and that any reply by Plaintiff was due by July 11, 2025. Plaintiff did not file a reply by July 11, 2025.

Prior to the hearing on July 18th, the Court posted its tentative ruling denying Plaintiff's request for a preliminary injunction because SPS had presented evidence that Plaintiff's claims may be barred by res judicata and Plaintiff did not present any evidence that this doctrine did not apply. The Court also noted that Plaintiff bears the burden of showing a likelihood of prevailing on the merits, and that the evidence submitted with his TRO papers did not satisfy that burden. Specifically, Plaintiff made no showing whatsoever of any violation of the HBOR or Civil Code Section 2923.5 sufficient to support the relief he seeks in his Complaint.

At the July 18th hearing, the Court granted Plaintiff's request to file a late reply and continued the hearing to August 1, 2025. The Court ordered that Plaintiff's reply was due on July 28, 2025 by 5:00 p.m., and that the reply must be filed and served with a courtesy copy emailed to the Court.

Plaintiff did not file a reply until after noon on July 30, 2025.

Standard

A preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint or the affidavits show satisfactorily that sufficient grounds exist therefore. (Code Civ. Proc. § 527(a).) The purpose of a preliminary injunction is to preserve the status quo until a final determination on the merits. (*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, 565.) The determination of whether to grant a preliminary injunction rests in the sound discretion of the trial court. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1470.)

Trial courts evaluate two interrelated factors when deciding whether to issue a preliminary injunction. The first is the likelihood that the moving party will prevail at trial. The second is the interim harm that the plaintiff will likely sustain if the injunction were denied as compared to the harm that the defendant will likely suffer if the injunction were issued. (*Pro-Family Advocates v. Gomez* (1996) 46 Cal.App.4th 1674, 1681-82.) "[T]he greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Jamison v. Department of Transp.* (2016) 4 Cal.App.5th 356, 361-62.) The burden of proof is on the plaintiff as the moving party "to show all elements necessary to support issuance of a preliminary injunction." (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.)

Request for Judicial Notice

The Court grants SPS's request for judicial notice of the Assignment of Deed of Trust (Exhibit 1), Notice of Default (Exhibit 2), the Complaint in Case No. SV0002310 (Exhibit 3), and the dismissal in Case No. SV0002310 (Exhibit 4). (Evid. Code §§ 452, 453.)

Discussion

SPS's Response shows that on March 20, 2024, Plaintiff initiated a lawsuit against SPS in this court, Case No. CV0002310, alleging violations of the HOBR and Civil Code Section 2923.5, and seeking declaratory relief, injunctive relief, and an accounting, relating to the same property. (Declaration of Paula B. Hernandez ("Hernandez Decl."), ¶3; RJN Exh. 3.) The court in Case No. CV0002310 issued a TRO and OSC but the OSC hearing did not occur because Plaintiff and SPS entered into a confidential settlement and release of all claims. (Hernandez Decl., ¶¶4, 5.) Pursuant to that settlement agreement, Plaintiff dismissed that case with prejudice. (*Id*., ¶7; RJN Exh. 4.)

In his late reply, Plaintiff submits the declaration of Ayanna Jenkins Toney, his attorney of record. Ms. Toney states that she is also an owner of the property and that "[t]he confidential settlement agreement that was improperly placed in issue by the defendant was based on a different set of facts relating to prior violations of the HOBR by SPS in 2024." Ms. Toney then states that "SPS did not even bother to explain why the Default Notice was not mailed to the Plaintiffs. Plaintiff was actively working with SPS on a loan modification as evidenced by the letter from SPS dated February 4, 2025. See Exhibit A attached hereto and incorporated herein. Plaintiffs gathered the necessary documents as evidenced by the letter from SPS dated February 24, 2025. See Exhibit B attached here and incorporated herein. These letters prove that the Plaintiffs were unaware that the default had been issued on January 15, 2025, according to the Exhibit submitted by the defendants. The presence of these two letters amongst other evidence that the Plaintiffs intend to introduce at trial provides evidence of dual tracking which as stated above violates the HOBR." Ms. Toney also states that they will suffer irreparable harm without a preliminary injunction.

Plaintiff's request for preliminary injunction is denied. SPS has raised the possibility that Plaintiff's claims are barred by res judicata, but Plaintiff argues that the Court cannot rule on that defense given the confidential nature of the parties' settlement agreement. In any event, Plaintiff fails to show a likelihood of prevailing at trial. As noted above, the burden is on Plaintiff to make this showing. (See *O'Connell*, 141 Cal.App.4th at p. 1481.) In connection with Plaintiff's ex parte application for a TRO, Plaintiff only submitted the deed of trust and notices of trustee's sale, and a short declaration regarding irreparable harm. In its previous tentative ruling, the Court noted that this was insufficient to show a probability of prevailing on the merits as Plaintiff made no showing of any violation of the HBOR or Civil Code Section 2923.5 sufficient to support the relief he seeks in his Complaint.

The late reply filed with the court is also insufficient to satisfy Plaintiff's burden. The reply does not actually attach any exhibits as Ms. Toney states. According to SPS's sur-reply, Plaintiff has not provided these exhibits to SPS either despite requests from SPS's counsel. SPS also argues that these exhibits appear to relate to new allegations in any event rather than the allegations actually made in the Complaint and/or arguments made in connection with Plaintiff's TRO application.

The evidentiary record does not support the issuance of a preliminary injunction. The record consists of the deed of trust and notices of trustee's sale, statements from Ms. Toney that she and Plaintiff will suffer irreparable harm without a preliminary injunction, and Ms. Toney's

declaration that references exhibits that are not submitted to the Court and fails to establish a likelihood that Plaintiff can establish a violation of the HBOR or Civil Code Section 2923.5.

The Court recognizes that Ms. Toney states she and Mr. Toney will suffer irreparable harm without a preliminary injunction. However, an injunction should not issue where there is no showing of a possibility of success on the merits even though its issuance might prevent irreparable harm. (*Choice-in-Education League v. Los Angeles Unified School Dist*. (1993) 17 Cal.App.4th 415, 422.) After balancing the factors, the court concludes that the request for a preliminary injunction should be denied.

The TRO is dissolved as of the date of 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 August 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3Q7qPFgFZa.1
Meeting ID: 161 516 2449
Passcode: 073961

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/01/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV1502647

PRESIDING: HON. ANDREW E. SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL vs. DEFENDANT: DAVID L. HOFFMAN, ET AL	

NATURE OF PROCEEDINGS: MOTION –MODIFY

RULING

This matter involves property located at 2 Alta and 230 East Cintura in Lagunitas (the "Properties"). Eric P. Beatty (the "Receiver") was appointed as a receiver over the Properties in October 2015.

On May 21, 2021, Judge Haakenson issued an Order which stated in part:

> 2. The Receiver is instruction [sic] to retain a real estate broker to assess, value, list and market the Properties and to secure sales of them for approval and confirmation by the Court.
>
> 3. Respondent DAVID L. HOFFMAN is ordered to vacate the Properties, and to cause all other persons occupying the Properties, to vacate within 90 days of entry of this order.

(May 21, 2021 Order (the "Order").)

Defendant Hoffman requests that the Court modify the Order by deleting these two paragraphs or, alternatively, to stay these two paragraphs while the Receiver pursues negotiations with Buckminster Fuller Institute ("BFI"). Hoffman states that BFI has expressed an interest in acquiring the Properties. The proposed transaction with BFI would include the Properties being transferred to BFI with BFI funding and effecting compliance with code and administrative orders, and having the payment of receiver and other expenses "appropriately accommodated". Hoffman also asks that he be allowed to remain at the Properties while the Receiver pursues this proposed transaction, and that the Court provide further instructions directing the Receiver to apply the California Historic Building Code to resolve compliance with administrative orders and code violations.

The County states that it does not take a position as to whether the Order should be modified to allow Hoffman to remain at the Properties or whether the Properties should be sold. However, it argues that Hoffman's request should be denied because the Court already determined that selling the Properties was the only feasible option to bring them into compliance, and Hoffman's motion does not demonstrate that the situation has changed. The Court had previously granted the Receiver an opportunity to file a motion to amend the Order based on the Receiver's discussions with BFI to determine whether an alternative was available, but the Receiver has not filed such a motion and has not requested that the Order be modified. The County further points out that the Receiver and Judge Haakenson spent years evaluating the feasibility of rehabilitating the Properties under the historic building codes and nevertheless concluded that it was not possible without hundreds of thousands of dollars spent doing so. The County argues that the Receiver is in the best position to determine whether the Order should be modified. Because the Receiver has not indicated that circumstances have changed, the County argues, Hoffman's motion should be denied.

The Court agrees that the Receiver's input is necessary before the Court will consider modifying or staying the Order. As of the date of this ruling, the Receiver has not submitted his position on the matter. The Court therefore issues an Order to Show Cause to the Receiver to provide his input and recommendation with respect to the proposed BFI transaction. The hearing for the Order to Show Cause is August 29, 2025, at 1:30 p.m. in Department E. The Receiver shall submit his position and recommendation by August 22, 2025.

Counsel for Defendant is to provide notice to the Receiver.

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 August, 2025 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3O7qPFgFZa.1
Meeting ID: 161 516 2449
Passcode: 073961

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 8/01/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2204259

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: JENNIFER SWIFT vs. DEFENDANT: UNITED PARCEL SERVICE, INC., ET AL	

NATURE OF PROCEEDINGS: MOTION – COMPEL; DISCOVERY FACILITATOR PROGRAM

RULING

The Court thanks the parties and Discovery Facilitator Kreft for their work resolving most of the issues presented in Jennifer Swift's ("Plaintiff") Motion to Compel Further Responses to Plaintiff's Requests for Production of Documents, Sets 4 and 5 from Defendant United Parcel Service, Inc. and Request for Monetary Sanctions.

Remaining for the Court's determination is whether United Parcel Service, Inc. ("Defendant") can withhold as protected by the attorney-client privilege a document related to Plaintiff's complaint that her co-workers drugged her at a workplace event in early 2020, that would otherwise be responsive to RFP No. 89 and Plaintiff's request for monetary sanctions.

RFP 89

The attorney-client privilege is contained in Evidence Code section 950 et seq., and in general allows the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer...." (Evid. Code, § 954.) The attorney-client privilege covers all forms of communication, including the transmission of specific documents (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600.) At the same time, documents prepared independently by a party, including witness statements, do not become privileged communications merely because they are turned over to counsel. (See *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214.)

The attorney-client privilege applies to confidential communications within the scope of the attorney-client relationship even if the communication does not relate to pending litigation; the privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened. [Citations.]' (*Roberts v. City of Palmdale* (1993) 5

Cal.4th 363, 371.) For the communication to be privileged where a corporate entity is the client, 'the dominant purpose must be for transmittal to an attorney 'in the course of professional employment.' [Citations.]' (*Holm v. Superior Court* (1954) 42 Cal.2d 500, 507, disapproved on another point in *Suezaki v. Superior Court* (1962) 58 Cal.2d 166.)

Even where an attorney is hired to investigate employee complaints about employment discrimination, that attorney may be acting as a fact-finder, and the information is not protected by attorney/client privilege. The documents produced during an attorney's investigation for his/her client must be examined to determine if the dominant purpose of the particular communication was to secure or render legal service or advice. (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 121-122.)

The outstanding emails are protected by the attorney-client privilege. After in camera review of the document in question, the court concludes that the so-called Harris report is also protected by the attorney-client privilege. An employer's HR report not prepared by an attorney and communications are not protected by the attorney-client privilege unless the communications are with attorneys for the purpose of receiving legal advice. (City of Petaluma v. Superior Court (21016) 248 Cal.App.4th 1023, 1032-1035.) Here, there is no question that the dominant purpose of the investigation was to secure legal advice.

In addition, after reviewing the Harris report in camera, there is no basis to conclude that Defendant's privilege objection is waived. (See *Wellpoint Health Networks, supra.* 59 Cal.App.4th at p. 128; *Kaiser Foundation Hospitals v. Superior Court* (1998) 66 Cal.App.4th 1217, 1126-1127.)

Sanctions

Plaintiff's sanctions request is respectfully denied.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/01/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0005398

PRESIDING: HON. ANDREW E. SWEET

REPORTER: CLERK: G. STRATFORD

PETITIONER: ANDREW HUTCHESON, ET AL vs. DEFENDANT: UBS FINANCIAL SERVICES, INC.	

NATURE OF PROCEEDINGS: MOTION – OTHER: FINAL APPROVAL OF CLASS AND PAGA SETTLMENT FILED 02/19/2025

RULING

Plaintiff's unopposed an unobjected-to Motion for Final Approval of Class and PAGA Settlement and Motion for Fees, Costs and Service Awards is granted.

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 August, 2025 is as follows:
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