

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 20, Honorable Socrates Peter Manoukian, Presiding

**Courtroom Clerk: Hientrang Tranthien
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2320**

**LAW AND MOTION TENTATIVE RULINGS
To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life." – Common Wisdom.

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DATE: Thursday, 17 September 2020 • TIME: 9:00 A.M.

In light of COVID-19-related health concerns and due to the order of the Public Health Department, Department 20 has resumed Law & Motion calendars but with safe-distancing protocols. Please check this tentative rulings page before making any appearance. Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom.

TROUBLESHOOTING TENTATIVE RULINGS

If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. If you fail to do either of these, your browser will pull up old information from old cookies even after the tentative rulings have been posted.

SOCIAL DISTANCING PROTOCOLS

Entry into the Courthouse.

As for matters which require personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced.

Individuals who wish to access the courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Virtual Access into the Courthouse.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted below.)

Join Zoom Meeting

<https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFpSjEam5xUT09>

Join by phone:

+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile

+16699006833,,961 4442 7712#

Meeting ID: 961 4442 7712

Password: 017350

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. It will help if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: **Line #/name/party**

If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "public."

The Santa Clara County Superior Court has established listen-only telephone Lines to allow remote access to public court proceedings. To listen to a public court proceeding in Department 20, you may dial 888-251-2909. When prompted, enter the access code number 4362730 when prompted, followed by the pound or hashtag (#) sign.

This session will not be recorded. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); **California Rules of Court**, rule 1.150.

Protocols during the Hearings.

Please notify this Court immediately if the matter will not be heard on the scheduled date. **California Rules of Court**, rule 3.1304(b).

If a party fails to appear at a law and motion hearing without having given notice, this court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. **California Rules of Court**, rule 3.1304(d).

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 7(E) and **California Rules of Court**, rule 3.1308. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This court will rule on the motion as if the party had appeared. **California Rules of Court**, rule 3.1304(c).

During any hearing, counsel and any litigant are requested to speak slowly and to not use any hands-free mode. Headsets with earbuds will be of great assistance to minimize feedback.

Do not hesitate to correct the Court or court staff concerning the pronunciation of any name. If your client is with you, please inform the Court how your client would prefer to be introduced.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with **California Rules of Court**, rule 3.1312.

Tentative Rulings Are Continued Below. Full Orders Are On The Following Pages.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV350 262	Equinix, Inc. v. Gaia Interactive, Inc.	SEE ATTACHED TENTATIVE RULING.
LINE 2	19CV347 731	El Camino Paving, Inc., et al. v. Dave Koehler, et al.	The demurrer to the first, fourth, fifth, seventh, eighth, ninth, and tenth causes of action in the FAC is OVERRULED in their entirety. The demurrer to the second, third, and sixth causes of action in the FAC is SUSTAINED WITH 10 DAYS' leave to amend for failure to state a claim.
LINE 3	19CV357 842	Tejinder Singh v. Chung Lee	This Court will CONTINUE the hearing on the matters set for 17 September 2020 and 15 October 2020 to 5 November 2020, after the hearing on the motion to compel arbitration.
LINE 4	19CV357 842	Tejinder Singh v. Chung Lee	SEE LINE 3.
LINE 5	18CV330894	Raad Rabieh vs. Paragon Systems, Inc., et al.	The Motion for Summary Judgment by Defendants Paragon Systems, Incorporated, Joseph Vegas, José Leuterio, and Mario Ayala is ordered OFF CALENDAR. The matter was ordered dismissed by Order of this Court signed and filed on for September 2020.
LINE 6	20CV361584	Richard Dickinson vs. Paragon Systems, Inc., et al.	The motion of plaintiffs to compel defendants to answer form and special interrogatories is GRANTED. Defendants are to serve code-compliant responses without objection within 30 days of the filing and service of this Order. The motion of plaintiffs to compel defendants to answer the request for production of documents GRANTED. Defendants are to serve code-compliant responses without objection within 30 days of the filing and service of this Order. The request of plaintiffs to compel defendants to pay monetary sanctions is DENIED.

LINE #	CASE #	CASE TITLE	RULING
LINE 7	20CV361584	Richard Dickinson vs. Paragon Systems, Inc., et al.	SEE LINE 6.
LINE 8	20CV361584	Richard Dickinson vs. Paragon Systems, Inc., et al.	SEE LINE 6.
LINE 9	19CV350075	Manu Pillai vs. WaterBit, Inc. et al.	The Order of Dismissal by this Court made by this Court on 13 February 2020 and filed on 13 March 2020 is VACATED. Defendants are given 30 days from the date of the filing and service of this order within which to RESPOND. The matter will be set for a Case Management Conference for Tuesday, 30 March 2021 at 10:00 AM in Department 20.
LINE 10	2012-1-CV-218724	Cavalry SPV I , LLC vs. Cathy Doan	The claim of exemption is DENIED.
LINE 11			
LINE 12			
LINE 13			
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LINE #	CASE #	CASE TITLE	RULING

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Calendar Line 1

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

DEPARTMENT 20

**161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
<http://www.scscourt.org>**

(For Clerk's Use Only)

**CASE NO.: 19CV350262
DATE: 17 September 2020**

TIME: 9:00 am

**Equinix, Inc. v. Gaia Interactive, Inc.
LINE NUMBER: 1**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 16 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER OF EXAMINATION.

I. Statement of Facts.

Plaintiff filed this complaint on 25 June 2019.¹

Plaintiff obtained judgment by default on 18 June 2020. On 24 June 2020, this Court set the matter for today's date for a hearing on an order of examination.

The file does not reflect a proof of service on any individual or entity.

Assuming that the Plaintiff can provide a proof of service, the Court will provide instruction as follows:

II. Conclusion and Order.

Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM. Social Distancing Protocols will be in effect, including the use of appropriate facial masks.

As an alternative to appearing in Department 20, the parties are strongly urged to appear virtually whereby the appropriate oath will be administered and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely (e.g., Zoom, conference call, etc.) on a different day. The Court will set a return date to make sure the OEX was completed.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

¹ This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (**Ca. St. Civil Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C)).

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Calendar Line 2

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20**

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 19CV347731
DATE: 17 September 2020

El Camino Paving, Inc., et al. v. Dave Koehler, et al.
TIME: 9:00 am
LINE NUMBER: 2

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 16 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

**DEMURRER TO THE FIRST AMENDED COMPLAINT BY
DEFENDANTS DAVE KOEHLER AND TONY BAYARD DE VOLO DBA LEGAL REALTY.**

I. Statement of Facts.

Plaintiffs filed this Complaint on 9 May 2019.²

This is an action for elder abuse and breach of fiduciary duty by plaintiffs El Camino Paving, Inc. ("El Camino Paving") and Stephanie Alva ("Stephanie").³ Stephanie brings this lawsuit as the successor trustee and/or personal representative of Marie Alva ("Marie"), the Alva Living Trust, Dated February 14, 1997 ("Alva Family Trust") and the successor in interest/personal representative of the Estate of Marie Alva ("Marie Estate"). (First Amended Complaint ["FAC"] at ¶ 2.) The parties are collectively referred to herein as "Plaintiffs."

Defendant Tony Bayard de Volo ("de Volo") is a lawyer and real estate broker licensed by the State of California. (FAC at ¶ 3.) Defendant Dave Koehler ("Koehler") is a certified public accountant licensed by the California Board of Accountancy and real estate salesperson. (Id. at ¶ 4.) Defendant Legal Realty ("Legal Realty") is a business operated by Koehler and/or de Volo in Santa Clara County. (Id. at ¶ 5.) Defendants Koehler, de Volo, and Legal Realty are collectively referred to herein as "Defendants."

According to the operative FAC, Marie and her husband, Estevan Alva ("Steve"), formed the Alva Family Trust. (FAC at ¶ 13.) In 1976, Steve co-founded El Camino Paving, a unionized construction company. (Id. at ¶ 12.) Steve was principally charged with its management and operations, and eventually bought out his business partner to be the sole owner. (Ibid.)

Steve successfully built the El Camino Paving business to enable him, among other things, to purchase two parcels of real property located in the City of Mountain View. (FAC at ¶ 14.) Steve purchased the first parcel, located at 924 San Rafael Avenue, and later put it into the Alva Family Trust. (Ibid.) El Camino Paving purchased

² This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (**Ca. St. Civil Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).

³ At times, the Court refers to the parties by their first names for purposes of clarity. No disrespect is intended. (See **Rubenstein v. Rubenstein** (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

the second parcel, located at 940 San Rafael Avenue. (Ibid.) The two parcels (collectively, “Properties”) were given a desirable location and became highly valuable. (Ibid.)

When Steve passed, Marie became president of El Camino Paving. (FAC at ¶ 17.) When she took over, the business was experiencing great financial distress resulting in a number of legal issues, including tax and civil liens and collection matters. (Id. at ¶ 18.) Starting in September 2009, Marie, with input from her daughter Stephanie, discussed plans to address these issues. (Id. at ¶ 19.) In doing so, they reached out to Defendants who agreed to help them with the lien and collection matters. (Id. at ¶¶ 20-21.) Defendants however never informed them of de Volo’s disciplinary problems with the California State Bar or the California DFE. (Id. at ¶ 23.) Nor did Defendants inform them they were inexperienced with significant real estate transactions like the one involved in this case. (Id. at ¶ 24.)

In December 2015, Marie suffered a heart attack, resulting in dementia and medically refractory seizures. (FAC at ¶ 25.) As a consequence, Marie’s mental capacity was diminished, thus rendering her susceptible to undue influence. (Ibid.)

On 13 March 2016, on behalf of El Camino Paving, Marie executed two Listing Agreements with defendants Koehler and Legal Realty. (FAC at ¶ 26.) The Listing Agreements related to the sale of the Properties. (Ibid.) Defendants however failed to properly market the Properties. (Id. at ¶ 28.) Instead, over objection, Defendants focused on only one potential purchaser of the Properties, Prometheus Real Estate Group, Inc. (“Prometheus”), so Defendants could receive a quick payout on their commission. (Ibid.) They did this despite paragraph 7 of the Listing Agreements which required Defendants to “exercise reasonable effort and diligence to achieve the purposes” of the Listing Agreements, i.e., to use reasonable and diligent efforts to obtain the best deal for Marie and Plaintiffs, and to obtain the best price for the Properties stated in the Listing Agreements which was approximated to be \$14,750,000. (Ibid.)

In August 2016, Prometheus issued a Letter of Intent to purchase the Properties. (FAC at ¶ 30.) Defendants presented Marie with a Real Estate Purchase Agreement (“Purchase Agreement”) between El Camino Paving and the Alva Family Trust, on the one hand, and Prometheus on the other, for purchase and sale of the Properties. (Id. at ¶ 31.) Under the Purchase Agreement, Prometheus would purchase the Properties for \$11,500,000, plus an additional bonus if the number of residential units approved to be developed exceeded 80, in which case Prometheus would pay an additional \$60,000 for each additional residential unit. (Ibid.) Plaintiffs allege the sales price was far below the actual value of the Properties and that Defendants did a poor job negotiating the deal. (Id. at ¶¶ 32-34.) Despite her illness and pressure from Defendants to sell the Properties, Marie signed the Purchase Agreement. (Id. at ¶¶ 35-36.)

Since Prometheus failed to meet deadlines set forth in the Purchase Agreement, it expired and the deal fell apart. (FAC at ¶ 40.) Defendants thereafter negotiated three amended purchase agreements which they persuaded Marie to sign despite terms that were not favorable to Plaintiffs and her declining health status. (Id. at ¶¶ 42-48.) Marie passed away on 28 July 2017. (Id. at ¶ 49.) Thereafter, Stephanie, as the successor trustee, stepped in on behalf of Plaintiffs. (Ibid.)

On 8 March 2018, due to extreme financial pressures, El Camino Paving and the Alva Family Trust accepted the Prometheus deal. (FAC at ¶ 50.) As a consequence, all of the creditors were paid from proceeds of the sale of the Properties. (Ibid.) Additional defendants were also paid nearly \$300,000 in “commissions” directly out of escrow. (Ibid.) Plaintiffs thereafter demanded that Defendants return all amounts paid in “commission” to Defendants by El Camino Paving and/or the Alva Family Trust, but they refused to do so. (Id. at ¶ 51.)

Plaintiffs filed the Operative FAC against Defendants alleging causes of action for:

- (1) Financial Elder Abuse;
- (2) Breach of Contract;
- (3) Undue Influence;
- (4) Breach of Fiduciary Duty;
- (5) Professional Negligence;
- (6) Fraud – Intentional Misrepresentation;
- (7) Fraudulent Concealment;

- (8) Intentional Infliction of Emotional Distress;
- (9) Negligent Infliction of Emotional Distress; and
- (10) Violation of Business and Professions Code, § 17200.

Currently before the Court is a demurrer by Defendants to each cause of action in the FAC. Plaintiffs filed written opposition and a request for judicial notice. Defendants filed reply papers.⁴

II. Analysis.

A. Request for Judicial Notice.

In opposition, Plaintiffs request judicial notice of Defendants' opposition to the application to continue the hearing set for the demurrer filed on 13 August 2020. (Sidebotham Decl. at Ex. A.) While the opposition constitutes a record of the superior court subject to judicial notice under Evidence Code section 452, subdivision (d), the document is not relevant to resolving issues raised by the demurrer. (See **Gbur v. Cohen** (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Accordingly, the request for judicial notice is DENIED.

B. Legal Standard.

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.'" (**Blank v. Kirwan** (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (**Committee on Children's Television, Inc. v. General Foods Corp.** (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. ... [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (**Gregory v. Albertson's, Inc.** (2002) 104 Cal.App.4th 845, 850.)

C. Demurrer.

Defendants demur to each cause of action in the FAC on various grounds addressed below.

1. First Cause of Action – Financial Elder Abuse.

Defendants demur to the first cause of action (financial elder abuse) on the following grounds: (1) misjoinder of parties; (2) failure to state a cause of action; (3) statute of limitations; (4) improper request for attorney's fees; and (5) uncertainty.

a. *Misjoinder of Parties.*

⁴Defendants filed reply papers in excess of 10 of pages in violation of the rules of court. (See **Cal. Rules of Court**, rule 3.113(d) [reply papers shall not exceed 10 pages].) Despite this violation, there is minimal prejudice and the Court will address the merits of the reply papers. The Court reminds defense counsel that all future filings must comply with the California Rules of Court.

Defendants argue that plaintiff El Camino Paving is improperly joined as a plaintiff to the first cause of action as no such claim lies against a corporation. As a preliminary matter, the case cited by Defendants does not support this proposition. And, even if El Camino Paving is not a proper plaintiff, the claim may be addressed by plaintiff Stephanie who is still a party to the case. Finally, with respect to misjoinder, one case has explained:

“Although the code seems to authorize the sustaining of a demurrer solely on such a technical objection [of misjoinder], the authorities indicate that the defendant is entitled to a favorable ruling only when he can show some prejudice suffered or some interests affected by the misjoinder. In practical effect, this means that such a demurrer can be successfully used only by the persons improperly joined. A proper defendant is seldom injured by the joinder of unnecessary or improper parties plaintiff or defendant, and his demurrer ought to be overruled.”

(Royal Surplus Lines Ins. Co. v. Ranger Ins. Co. (2002) 100 Cal.App.4th 193, 198.)

Defendants here do not demonstrate any prejudice suffered by the purported misjoinder. Accordingly, the demurrer on the ground of misjoinder is **OVERRULED**.

b. Failure to State a Cause of Action.

Defendants argue the first cause of action fails to allege the necessary “taking” to state a valid claim.

To state a cause of action for financial elder abuse, a plaintiff must allege with particularity that: (1) the victim was an “elder” at the relevant time; (2) the defendant took, secreted, appropriated or retained, or assisted another in taking, secreting, appropriating or retaining, real or personal property of the elder; and (3) wrongful use of the property or intent to defraud the elder. (**Welf. & Inst. Code**, § 15610.30; **Covenant Care, Inc. v. Super. Ct.** (2004) 32 Cal.4th 771, 790 [financial elder abuse claims must be pled with particularity].) “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.” (**Welf. & Inst. Code**, §15610.30, subd. (b); see also **Bonfigli v. Strachan** (2011) 192 Cal.App.4th 1302, 1315.)

Defendants contend there was no taking of Marie’s real or personal property to establish a claim for elder abuse. The real property here includes the two parcels of land, one owned by El Camino Paving and the other by the Alva Family Trust. Defendants argue the sales proceeds from the Properties did not originate from Marie, the elder, or her property. This contention lacks merit because, as the opposition points out, plaintiff Stephanie has standing to pursue the claim as Marie’s personal representative with respect to the parcel of land held by the trust. This is consistent with Welfare and Institutions Code section 15610.30, subdivision (c) which provides in pertinent part:

“[A] person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a **representative of an elder or dependent adult.**”

(Welf. & Inst. Code, § 15610.30, subd. (c), emphasis added.)

Alternatively, Defendants assert there are no facts supporting the allegations for “wrongful use or with intent to defraud.” As a preliminary matter, at least one California appellate court has determined that bad faith or intent to defraud is no longer required in elder or dependent adult abuse cases. (See **Stebly v. Litton Loan Servicing, LLP** (2011) 202 Cal.App.4th 522, 527.) Nevertheless, this argument is misplaced as Plaintiffs allege Defendants took, secreted, appropriated, or retained the \$300,000 in commissions for a wrongful use. (FAC at ¶

53.) Also, as stated above, the statute defines a wrongful use where “the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.” (**Welf. & Inst. Code**, §15610.30, subd. (b).) Indeed, Plaintiffs allege Defendants knew or should have known their conduct would likely harm Marie or Plaintiffs thus tracking the language of the statute. (See FAC at ¶ 55.)

Accordingly, the demurrer to the first cause of action on the ground that it fails to state a claim is OVERRULED.

c. *Statute of Limitations.*

Defendants also contend the first cause of action is barred by the statute of limitations.

“Statute of limitations is the collective term applied to acts or parts of acts that prescribe the periods beyond which a plaintiff may not bring a cause of action.” (**V.C. v. Los Angeles Unified School Dist.** (2006) 139 Cal.App.4th 499, 509.) “A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all of its elements.” (*Id.* at pp. 509-510, internal citations and quotation marks omitted.)

A court may sustain a demurrer on the ground of failure to state sufficient facts if “the complaint shows on its face the statute [of limitations] bars the action.” (**E-Fab, Inc. v. Accountants, Inc. Services** (2007) 153 Cal.App.4th 1308, 1315.) A demurrer is not sustainable if there is only a possibility the cause of action is time-barred; the statute of limitations defense must be clearly and affirmatively apparent from the allegations in the pleading. (*Id.* at pp. 1315-16.) When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*Id.* at p. 1316.)

“To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the ‘gravamen’ of the cause of action.” (**Hensler v. City of Glendale** (1994) 8 Cal.4th 1, 22.) “The nature of the cause of action and the primary right involved, not the form or label of the cause of action or the relief demanded, determine which statute of limitations applies.” (**Carter v. Prime Healthcare Paradise Valley LLC** (2011) 198 Cal.App.4th 396, 412.)

To the extent that Plaintiffs request damages for “pain and suffering,” Defendants argue the claim is time barred by the two-year statute of limitations under Code of Civil Procedure section 335.1. That section however is not applicable as it pertains to actions for assault, battery, injury or death caused by the wrongful or neglectful act of another. Nor have Defendants attempted to explain how this statute would apply to Plaintiffs’ claim for financial elder abuse which has a four year statute of limitations. (See **Welf. & Inst. Code**, §15657.7 [“An action for damages ... for financial abuse of an elder or dependent adult, as defined in Section 15610.30, shall be commenced within four years after the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse.”].)

Consequently, the demurrer to the first cause of action on the ground that the claim is barred by the statute of limitations is OVERRULED.

d. *Improper Request for Attorney’s Fees.*

Defendants contend the first cause of action is subject to demurrer as it improperly requests an award of attorney’s fees. (See FAC at ¶ 57.) However, the proper procedural vehicle for challenging an improper remedy is motion to strike, not demurrer. (See **Caliber Bodyworks, Inc. v. Super. Ct.** (2005) 134 Cal.App.4th 365, 385 (**Caliber Bodyworks, Inc.**) [“The appropriate procedural device for challenging a portion of a cause of action seeking an improper remedy is a motion to strike.”]; see also **Kong v. City of Hawaiian Gardens Redevelopment Agency** (2002) 108 Cal.App.4th 1028, 1047 (**Kong**) [“a demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy”].)

Accordingly, the demurrer to the first cause of action on the ground that Plaintiffs make an improper request for attorney's fees is OVERRULED.

e. *Uncertainty.*

Finally, Defendants assert the first cause of action is subject to demurrer for uncertainty. (**Code Civ. Proc.**, § 430.10, subd. (f).)

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616.) "[T]he failure to specify the uncertain aspects of a complaint will defeat a demurrer based on the grounds of uncertainty." (*Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 809, overruled on other grounds by *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 328, fn. 30.)

Here, Defendants make no attempt to explain how allegations in the first cause of action are ambiguous or unintelligible. Instead, they reiterate arguments as to whether Plaintiffs have alleged facts to state a cause of action which were rejected for reasons stated above. Furthermore, the law is settled that "[a] special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading but is directed at the uncertainty existing in the allegations actually made." (*Butler v. Sequeira* (1950) 100 Cal.App.2d 143, 145-146.)

Consequently, the demurrer to the first cause of action on the ground of uncertainty is OVERRULED.

2. Second Cause of Action – Breach of Contract.

Defendants demur to the second cause of action (breach of contract) on the following grounds: (1) failure to state a cause of action; (2) failure to allege the amount of damages; and (3) uncertainty.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

"If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) A plaintiff may also plead a contract by its legal effect. "In order to plead a contract by its legal effect, plaintiff must 'allege the substance of its relevant terms. This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions.' [Citation.]" (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489.)

The breach of contract claim here arises from Defendants' alleged breach of the Listing Agreements. (FAC at ¶ 61.) While not explicit on the face of the FAC, the Court can infer that the Listing Agreements were written contracts as Plaintiffs specifically refer to paragraph 7 of the agreements in their pleading. (Id. at ¶ 28.) Also, neither side disputes the subject agreements were in fact written contracts. Thus, Plaintiffs are required to attach the written agreements, allege the terms verbatim or plead the contracts according to their legal effect. Plaintiffs' second cause of action falls short in this regard and therefore the demurrer is sustained on that basis.

Accordingly, the demurrer to the second cause of action is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND for failure to state a claim. Having sustained the demurrer on this ground, the Court declines to address the remaining arguments.

3. Third Cause of Action – Undue Influence.

Defendants demur to the third cause of action (undue influence) on the following grounds: (1) failure to state a cause of action; (2) failure to allege the amount of damages; (3) uncertainty; and (4) statute of limitations.

Defendants argue there is no independent cause of action for undue influence as a matter of law. For example, Civil Code section 1575 describes acts that constitute undue influence in the context of a party's ability to consent to a contract. (See **Civ. Code**, § 1575 [providing that undue influence consists of: (1) the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) taking an unfair advantage of another's weakness of mind; or (3) taking a grossly oppressive and unfair advantage of another's necessities or distress].) It does not provide any private right of action against a person that exerts undue influence over another. Instead, undue influence, as defined by Civil Code section 1575, is a theory upon which a party may claim that a contract should be rescinded. (See **Das v. Bank of America, N.A.** (2010) 186 Cal.App.4th 727, 743; see also **Odorizzi v. Bloomfield School Dist.** (1966) 246 Cal.App.2d 123, 130-31; **Civ. Code**, § 1689, subd. (b)(1).) In other words, allegations of undue influence under Civil Code section 1575 may properly form the basis of a claim for rescission.

Nevertheless, undue influence, as defined by Welfare and Institutions Code section 15610.70, subdivision (a), is also a ground upon which a claim for financial elder abuse may be made. (See **Bounds v. Super. Ct.** (2014) 229 Cal.App.4th 468, 478-479; see also **Welf. & Inst. Code**, § 15610.30, subd. (a)(3).) In opposition, Plaintiffs argue they are alleging such a claim in the third cause of action. However, based on the pleaded facts, it is unclear whether Plaintiffs are alleging a claim for undue influence under the Welfare and Institutions Code. As a consequence, the demurrer will be sustained with an opportunity for Plaintiffs to amend and allege facts in support of this claim.

Accordingly, the demurrer to the third cause of action is SUSTAINED WITH 10 DAYS' leave to amend on the ground that it fails to state a claim. Having sustained the demurrer on this ground, the Court declines to address the remaining arguments.

4. Fourth Cause of Action - Breach of Fiduciary Duty.

Defendants demur to the fourth cause of action (breach of fiduciary duty) on the following grounds: (1) statute of limitations; (2) failure to allege the amount of damages; and (3) uncertainty.

a. *Statute of Limitations.*

Defendants argue the fourth cause of action is barred by the statute of limitations set forth in Code of Civil Procedure section 340.6 [one-year applicable to attorneys] and section 339 [two-years applicable to accountants for professional negligence]. In opposition, Plaintiffs argue the claim is timely as the four-year statute of limitations applies under Code of Civil Procedure section 343.

The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or non-fraudulent. (See **Fuller v. First Franklin Financial Corp.** (2013) 216 Cal.App.4th 955, 963 ["limitations period is three years ... for a cause of action for breach of fiduciary duty where the gravamen of the claim is deceit, rather than the catchall four-year limitations period that would otherwise apply"]; **Williams L. Lyon & Associates, Inc. v. Super. Ct.** (2012) 204 Cal.App.4th 1294, 1312 ["[b]reach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code of Civil Procedure section 343"]; **City of Vista v. Robert Thomas Securities, Inc.** (2000) 84 Cal.App.4th 882, 889 [four-year statute

of limitations applies to breach of fiduciary duty, unless the gravamen of the claim is actual or constructive fraud, in which case the statute of limitations is three years[.]

In some circumstances, the statute of limitations for a breach of fiduciary duty claim can be less than three years. For example, in *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, the appellate court held that because the claim of breach of fiduciary duty “amount[ed] to a claim of professional negligence,” the two-year statute of limitations for professional negligence applied, and the plaintiff could not “prolong the limitations period by invoking a fiduciary theory of liability.” (*Id.* at p. 1159.)

Also, “the test for determining whether a cause of action falls within the statute of limitations contained in [Code of Civil Procedure] section 340.6(a) is ‘whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation.’ [Citation.] Further, section 340.6(a) applies to any claims that meet this test, notwithstanding how they are styled: ‘[s]ection 340.6(a) applies as soon as discovery makes clear that the claim’s underlying basis consists of evidence that the attorney provided deficient professional services.’ [Citations.]” (*Nguyen v. Ford* (2020) 49 Cal.App.5th 1, 17 (*Nguyen*)). In *Nguyen*, the Sixth Appellate District determined the basis of plaintiff’s breach of fiduciary duty cause of action was that defendant, an attorney, provided deficient professional services and thus the claim fell within the one-year limitations period contained in Code of Civil Procedure section 340.6, subdivision (a). (*Id.* at pp. 17-18.)

Like *Nguyen*, Plaintiffs’ breach of fiduciary duty cause of action arises from Defendants’ deficient professional services acting as attorneys and accountants on behalf of Marie in connection with the sale of the Properties. (See FAC at ¶¶ 69-72.) Nor do Plaintiffs attempt to explain with supporting legal authority why the limitations periods proscribed by Defendants would not be applicable in this action. The Court therefore finds that the limitations set forth in Code of Civil Procedure section 340.6 and section 339 govern this cause of action.

Code of Civil Procedure section 340.6, subdivision (a) provides in relevant part:

“An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.”

“The two-year statute of limitations prescribed by [Code of Civil Procedure] section 339, subdivision (1) applies to actions for accounting malpractice.” (*Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 714.) “The two-year statute of limitations under [Code of Civil Procedure] section 339, subdivision (1) commences ‘when (1) the aggrieved party discover the negligent conduct causing the loss or damage and (2) the aggrieved party has suffered actual injury as a result of the negligent conduct.’ [Citations.]” (*Id.* at p. 715.)

Defendants’ statute of limitations argument is underdeveloped as they do not address whether the face of the pleading discloses a time when Plaintiffs discovered facts constituting the wrongful act, omission or negligent conduct. Nor is there any discussion as to the actual date of the wrongful act or omission or when Plaintiffs suffered actual injury as a result of the negligent conduct. Instead, Defendants refer only to paragraph 47 of the FAC, the date in which they presented Marie with the final amended purchase agreement. As the statute of limitations is not clearly and affirmatively apparent from the face of the pleading, the demurrer is not sustainable on this ground.

Accordingly, the demurrer to the fourth cause of action on the ground that it is barred by the statute of limitations is OVERRULED.

b. *Failure to Allege the Amount of Damages.*

Defendants also argue the fourth cause of action fails as Plaintiffs do not allege the amount of monetary damages in conjunction with the claim. Defendants rely on Code of Civil Procedure section 425.10, subdivision (a)(2) which provides that a complaint shall contain: "A demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages is demanded, the amount demanded shall be stated." Plaintiffs here request money damages in the amount of at least \$300,000 in wrongfully obtained commissions, property and profit losses and thus the demurrer is not sustainable on this ground. (See FAC at ¶ 73.)

Accordingly, the demurrer to the fourth cause of action on the ground that Plaintiffs fail to allege the amount of damages is OVERRULED.

c. Uncertainty.

Finally, Defendants argue the claim is uncertain as Plaintiffs have improperly lumped Defendants together who have different professional roles, fiduciary duties and limitations periods. This argument is not persuasive as the lawsuit is primarily about the business dealings of *two* defendants regarding the sale of real property. Nothing about this claim is ambiguous or uncertain. Nor do Defendants provide any legal authority to support this contention.

Consequently, the demurrer to the fourth cause of action on the ground of uncertainty is OVERRULED.

5. Fifth Cause of Action – Professional Negligence.

Defendants demur to the fifth cause of action (professional negligence) on the following grounds: (1) statute of limitations; (2) improper request for punitive damages; and (3) failure to allege the amount of damages.

a. Statute of Limitations.

The demurrer to the fifth cause of action on the ground that it is barred by the statute of limitations is OVERRULED for the reasons stated above regarding the fourth cause of action.

b. Improper Request for Punitive Damages.

Defendants argue the fifth cause of action is subject to demurrer as it improperly seeks an award of punitive damages. However, the proper procedural vehicle for challenging an improper remedy is motion to strike, not demurrer. (See **Caliber Bodyworks, Inc.**, *supra*, 134 Cal.App.4th at p. 385 ["The appropriate procedural device for challenging a portion of a cause of action seeking an improper remedy is a motion to strike."]; see also **Kong**, *supra*, 108 Cal.App.4th at p. 1047 ["a demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy"]; **Grieves v. Super. Ct.** (1984) 157 Cal.App.3d 159, 163 [petitioners' punitive damage allegations not subject to real parties' demurrers].)

Accordingly, the demurrer to the fifth cause of action on the ground that Plaintiffs make an improper request for punitive damages is OVERRULED.

c. Failure to Allege the Amount of Damages.

Defendants also argue the fifth cause of action fails as Plaintiffs do not allege the amount of monetary damages in conjunction with the claim. Plaintiffs here request money damages in the amount of at least \$300,000 in wrongfully obtained commissions, property and profit losses and thus the demurrer is not sustainable on this ground. (See FAC at ¶ 79.)

Consequently, the demurrer to the fifth cause of action on the ground that Plaintiffs fail to allege the amount of damages is OVERRULED.

6. Sixth Cause of Action – Fraud – Misrepresentation.

Defendants demur to the sixth cause of action (fraud - misrepresentation) on the following grounds: (1) failure to state a cause of action; (2) statute of limitations; (3) uncertainty; and (4) failure to allege the amount of damages.

“The elements of fraud are (1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance on the misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damages.” (**Cansino v. Bank of America** (2014) 224 Cal.App.4th 1462, 1469.)

Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made.” (**West v. JPMorgan Chase Bank, N.A.** (2013) 214 Cal.App.4th 780, 793 (**West**), citation and quotation marks omitted.)

Courts enforce the specificity requirement in consideration of its two purposes. (**West, supra**, 214 Cal.App.4th at p. 793.) The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them. (**Ibid.**) The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud. (**Ibid.**)

Defendants here persuasively argue that Plaintiffs fail to plead fraud with the required specificity as it is not clear which representations are being made in support of the claim. Plaintiffs refer to Defendants’ “aforesaid representations” to Marie regarding their competency, good intentions, and acting in the best interests of Plaintiffs. (See FAC at ¶ 82.) But, in examining prior allegations of the FAC, the Court cannot locate any specific misrepresentations made by Defendants to state a claim for fraud.

In opposition, Plaintiffs contend the specificity requirement can be overlooked in cases involving numerous misrepresentations. In support, Plaintiffs rely on **Morgan v. AT&T Wireless Services, Inc.** (2009) 177 Cal.App.4th 1235 (**Morgan**) where the appellate court stated:

“[W]here a fraud claim is based on numerous misrepresentations, such as an advertising campaign that is alleged to be misleading, plaintiffs need not allege the specific advertisements the individual plaintiffs relied upon; it is sufficient for the plaintiff to provide a representative selection of the advertisements or other statements to indicate the language upon which the implied misrepresentations are based.”

(**Id.** at p. 1262.)

Morgan however is distinguishable as it involved statements in advertisements and press releases which tend to be widely disseminated to the public. By contrast, Plaintiffs do not allege facts with respect to an advertising campaign as this case appears to be merely a business transaction involving private parties. Nor do

Plaintiffs explain how the flexible standard set forth in *Morgan* supports their fraud cause of action based on the pleaded facts of the FAC.

Accordingly, the demurrer to the sixth cause of action is SUSTAINED WITH 10 DAYS' leave to amend on the ground that it fails to state a claim. Having sustained the demurrer on this ground, the Court declines to address the remaining arguments.

7. Seventh Cause of Action – Fraudulent Concealment.

Defendants demur to the seventh cause of action (fraudulent concealment) on the following grounds: (1) failure to state a cause of action; (2) uncertainty; (3) statute of limitations; and (4) failure to allege the amount of damages.

a. *Failure to State a Cause of Action.*

Defendants argue there is no duty to disclose with respect to defendant de Volo to support the seventh cause of action.

“To maintain a cause of action for fraud through nondisclosure or concealment of facts, there must be allegations demonstrating that the defendant was under a legal duty to disclose those facts.” (*Los Angeles Memorial Coliseum Commission, et al. v. Insomniac, Inc., et al.* (2015) 233 Cal.App.4th 803, 831.)

“There are ‘four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. [Citation.]” (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336, quoting *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651.)

Here, Plaintiffs allege a claim for fraudulent concealment as to *all* defendants. The demurrer challenges *only* the duty to disclose element as to defendant de Volo’s multiple and serious legal and realty disciplinary matters. (FAC at ¶ 90.) Defendants however cannot demur to a portion of a cause of action. (*PH II, Inc. v. Super. Ct.* (1995) 33 Cal.App.4th 1680, 1681 (*PH II, Inc.*)) This is because Plaintiffs also allege that Defendants failed to disclose *they* were not competent or experienced in creditor, debt, and lien issues which plagued the Properties. (FAC at ¶ 90.) Instead, where a substantive defect appears on the face of the pleading, but involves only a portion of a cause of action, it may be subject to motion to strike. (*PH II, Inc., supra*, 33 Cal.App.4th at p. 1681.)

Accordingly, the demurrer to the seventh cause of action on the ground that it fails to state a claim is OVERRULED.

b. *Uncertainty.*

Defendants also argue the claim is subject to a demurrer for uncertainty based on the following allegation: “They further concealed the negative ramifications of the various amendments to the Purchase Agreement, as aforesaid.” (FAC at ¶ 90.) Again, this contention lacks merit as Defendants cannot demur to a portion of a cause of action. Furthermore, despite Defendants’ argument to the contrary, the Court finds nothing uncertain or ambiguous about this claim to support a demurrer for uncertainty.

Consequently, the demurrer to the seventh cause of action on the ground of uncertainty is OVERRULED.

c. *Statute of Limitations.*

Defendants contend the seventh cause of action is barred by the two-year statute of limitations under Code of Civil Procedure section 335.1. However, as stated above, that section pertains to actions for assault, battery, injury or death caused by the wrongful or neglectful act of another. Defendants do not explain how section 335.1 applies to this fraud claim which is subject to a three-year statute of limitations. (See **Code Civ. Proc.**, § 338, subd. (d); **Kline v. Turner** (2001) 87 Cal.App.4th 1369, 1373 [“An action for relief on the grounds of fraud or mistake must be commenced within three years”.].)

Accordingly, the demurrer to the seventh cause of action on the ground that it is barred by the statute of limitations is **OVERRULED**.

d. *Failure to Allege the Amount of Damages.*

Finally, Defendants argue the seventh cause of action fails as Plaintiffs do not allege the amount of monetary damages in conjunction with the claim. Plaintiffs here request money damages in the amount of at least \$300,000 in wrongfully obtained commissions, property and profit losses and thus the demurrer is not sustainable on this ground. (See FAC at ¶ 94.)

Consequently, the demurrer to the seventh cause of action on the ground that Plaintiffs fail to allege the amount of damages is **OVERRULED**.

8. Eighth Cause of Action – Intentional Infliction of Emotional Distress.

Defendants demur to the eighth cause of action (intentional infliction of emotional distress) on the following grounds: (1) misjoinder of parties; (2) statute of limitations; and (3) uncertainty.

a. *Misjoinder of Parties.*

The demurrer to the eighth cause of action on the ground of misjoinder of parties is **OVERRULED** for the reasons stated above regarding the first cause of action.

b. *Statute of Limitations.*

Defendants argue the eighth cause of action is barred by the statute of limitations. Both sides agree that such claims are governed by a two-year statute of limitations. (**Code Civ. Proc.**, § 335.1; **Wassmann v. South Orange County Community College District** (2018) 24 Cal.App.5th 825, 852-853.) “A cause of action for intentional infliction of emotional distress accrues, and the statute of limitations begins to run, once the plaintiff suffers severe emotional distress as a result of outrageous conduct on the part of the defendant.” (**Cantu v. Resolution Trust Corp.** (1992) 4 Cal.App.4th 857, 889.)

Again, this argument is underdeveloped as Defendants do not address *when* Plaintiffs suffered severe emotional distress so the statute of limitations begins to run. Instead, Defendants refer only to paragraph 47 of the FAC, the date in which they presented Marie with the final amended purchase agreement. As the statute of

limitations is not clearly and affirmatively apparent from the face of the pleading, the demurrer is not sustainable on this ground.

Accordingly, the demurrer to the eighth cause of action on the ground that it is barred by the statute of limitations is OVERRULED.

c. Uncertainty.

Finally, Defendants contend the claim is subject to a demurrer for uncertainty for lacking specificity regarding what conduct caused Marie to suffer emotional distress and what breaches of duty exist towards Marie and Plaintiffs. This argument seems better served as one based on failure to state a cause of action. But, no such argument is made here by Defendants. Nor is the Court inclined to make any such argument on behalf of Defendants. Beyond that, the alleged conduct and breach of duty are based on prior allegations incorporated into the eighth cause of action. (See FAC at ¶¶ 96-99.) Defendants' conclusory argument fails to address why prior facts in the FAC do not sufficiently fill in the gaps for allegations raised in the eighth cause of action.

Consequently, the demurrer to the eighth cause of action on the ground of uncertainty is OVERRULED.

9. Ninth Cause of Action – Negligent Infliction of Emotional Distress.

The demurrer to the ninth cause of action (negligent infliction of emotional distress) is OVERRULED for the same reasons stated above in the eighth cause of action.

10. Tenth Cause of Action – Violation of Business & Professions Code, § 17200.

Defendants demur to the tenth cause of action (violation of Business & Professions Code, § 17200) on the following grounds: (1) uncertainty; and (2) failure to allege the amount of damages.

a. Uncertainty.

Defendants argue the tenth cause of action is subject to a demurrer for uncertainty as Plaintiffs fail to identify conduct which constitutes unfair competition. This contention is not well-taken as the UCL claim is based on prior allegations incorporated into the tenth cause of action. (See FAC at ¶¶ 106-107.) Again, Defendants'

conclusory argument fails to address why prior facts in the FAC do not sufficiently identify acts to support unfair competition in the tenth cause of action.

Accordingly, the demurrer to the tenth cause of action on the ground of uncertainty is OVERRULED.

b. Failure to Allege the Amount of Damages.

Finally, Defendants argue the tenth cause of action fails as Plaintiffs do not allege the amount of monetary damages in conjunction with the claim. Plaintiffs here request money damages in the amount of at least \$300,000 in wrongfully obtained commissions, property and profit losses and thus the demurrer is not sustainable on this ground. (See FAC at ¶¶ 108.)

Consequently, the demurrer to the tenth cause of action on the ground that Plaintiffs fail to allege the amount of damages is OVERRULED.

III. Conclusion and Order.

The demurrer to the first, fourth, fifth, seventh, eighth, ninth, and tenth causes of action in the FAC is OVERRULED in their entirety.

The demurrer to the second, third, and sixth causes of action in the FAC is SUSTAINED WITH 10 DAYS' leave to amend for failure to state a claim.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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Calendar Line 3

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20**

**161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
*http://www.scscourt.org***

(For Clerk's Use Only)

**CASE NO.: 19CV357842
DATE: 17 September 2020**

TIME: 9:00 am

**Tejinder Singh v. Chung Lee
LINE NUMBER: 3, 4**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 16 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

**ORDERS ON DEMURRER AND MOTION TO STRIKE
OF CROSS-DEFENDANTS ANAND AND WDB REALTY AND FINANCE
TO THE CROSS-COMPLAINT OF FOROS FUND, LLC.**

In this case, plaintiff alleges fraud in connection with the sale of real property. Plaintiff has sued seller, seller's real estate agent, seller's real estate brokerage, and the brokerage's president.

Cross-complaints were separately filed by (1) seller and (2) agent/brokerage/brokerage's president against buyer's agent. Buyer's agent has filed demurrers/ motions to strike as to each of the cross-complaints. One such set of hearings is set to be heard on 17 September 2020 at 9:00 am in this Department.

Plaintiff has filed a motion to compel arbitration and stay court proceedings. This motion to compel is set to be heard on 15 October 2020 along with the other demurrer/motion to strike.

This Court will CONTINUE the hearing on the matters set for 17 September 2020 and 15 October 2020 to 5 November 2020, after the hearing on the motion to compel arbitration.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

Calendar Line 4

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Calendar Line 5

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20**

**161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
*http://www.scscourt.org***

(For Clerk's Use Only)

**CASE NO.: 18CV330894
DATE: 17 September 2020**

TIME: 9:00 am

**Raad Rabieh vs. Paragon Systems, Inc., et al.
LINE NUMBER: 5**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 16 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

**ORDER ON MOTION FOR SUMMARY JUDGMENT BY
DEFENDANTS PARAGON SYSTEMS, INC., JOSEPH VEGAS, JOSÉ LEUTERIO, AND MARIO AYALA.**

The Motion for Summary Judgment by Defendants Paragon Systems, Incorporated, Joseph Vegas, José Leuterio, and Mario Ayala is ordered OFF CALENDAR. The matter was ordered dismissed by Order of this Court signed and filed on for September 2020.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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Calendar Line 6

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 20 CV361584 Richard Dickinson, Christine Hutchinson vs Timothy Cunningham et al.
DATE: 17 September 2020 TIME: 9:00 am LINE NUMBER: 6, 7, 8

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 16 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON MOTION OF PLAINTIFFS TO COMPEL DEFENDANTS TO RESPOND TO FORM
INTERROGATORIES, SET 1; SPECIAL INTERROGATORIES, SET 1; AND
REQUEST FOR PRODUCTION OF DOCUMENTS, SET 1.

I. **Statement of Facts.**

Plaintiff filed this complaint on 9 January 2020.⁵

plaintiffs allege that they were mobile home owners and residential tenants at 21691 Loma Prieta Road in the town of Los Gatos from August 2016 to October 2019. The mobile home park in which plaintiffs resided is a seven space mobile home community. They lived in a mobile home they owned. Defendants provided utilities as part of the verbal lease agreement.

In October 2019 and in compliance with **Civil Code**, § 798.84, plaintiffs personally served defendants with a written 30 day notice commencement of legal action for failure to remedy certain habitability and nuisance issues such as dilapidated septic system, revoking after encouraging the plaintiffs to grow marijuana in the park (even though other residents were allowed to grow marijuana) illegally shutting off the water on more than 60 occasions, making unauthorized entry into the unit without prior written notice, threatening plaintiffs to call the police, serving an illegal 60-day notice of termination of tenancy without cause, and driving their vehicle into plaintiff Hutchinson's car and then refusing to provide insurance information, and threatening plaintiffs with a firearm.

The complaint states causes of action for:

1. negligence;
2. breach of contract;
3. constructive eviction;
4. violation of **Civil Code**, § 1942.5;

⁵ This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (**Ca. St. Civil Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C)).

5. nuisance;
6. trespass;
7. unfair business practices;
8. violations of the Mobile Home Residency Law (*Civil Code*, § 798 et seq.);
9. bad-faith retention of security deposit;
10. intentional infliction of emotional distress; and
11. declaratory and injunctive relief.

On 3 March 2020, Defendants Timothy S. Cunningham and Mary Johanna Walsh answered the complaint individually and as trustees of the Cunningham-Walsh Family Trust in propria persona.

Defendants claim in their answer that they rented a vacant piece of land to the plaintiffs to allow them to park their fifth wheel travel trailer. Defendants claim that plaintiffs were responsible for their own water and electricity and for emptying their own septic tank in the travel trailer. They do not own a mobile home park and never have. The only structure on the property is a barn owned by defendants in which the plaintiffs did not have access.

As for the marijuana plants, defendants contend that the plaintiffs maintained a field of not less than 500 illegal marijuana plants. Defendants contacted the Sheriff's Department after seeing a helicopter flying around the field. The Sheriff informed the defendants that the field was illegal and must be removed immediately. Plaintiffs refused to do so and threatened defendants with harm, throwing softball-sized rocks at defendants.

II. Discovery Dispute.

On 13 April 2020, plaintiffs served their first sets of discovery. Responses were due by 18 May 2020 but were not forthcoming.

On 29 May 2020, then-counsel for plaintiff mailed a "Meet & Confer" letter to the address of records granting an extension of time within which to respond to 8 June 2020.

Counsel followed up with a telephone call on 10 June 2020, calling a number with which counsel used to discuss the matter with Timothy S. Cunningham on a prior occasion.⁶

On 16 June 2020, counsel for plaintiffs mailed a second meet and confer letter extending the time within which to respond to 23 June 2020. The mail has not been returned and, to date, defendants have not served written responses to the discovery requests.

III. Analysis.

A. Form and Special Interrogatories.

The rules and procedures governing interrogatories is set forth in *Code of Civil Procedure*, § 2030.010 et seq. Interrogatories may be served without leave of court any time during the action, with a few exceptions which include: (1) during the first 10 days after service of summons or defendant's appearance in the action (whichever is first); and (2) cutoff on discovery before trial (*Code of Civil Procedure*, § 2030.20). Interrogatories may be sent to any other party to the action (*Code of Civil Procedure*, § 2030.010(a).) The party to whom interrogatories are directed may promptly move for a protective order (*Code of Civil Procedure*, § 2030.090(a).)

Unless excused by protective order, the party to whom the interrogatories are directed is under a duty to respond to each question separately, under oath, and within the time limits. (*Code of Civil Procedure*, §

⁶ On the prior occasion, Mr. Cunningham apparently indicated that they are innocent and will not be subjected to trial.

2030.210(a).) The response may be: (1) an answer; (2) an objection; or (3) an election to allow inspection and copying of records. (*Id.*) A response that indicates an inability to respond is insufficient. If the responding party lacks personal knowledge sufficient to respond, he or she may state such only after making a reasonable good faith effort to obtain the information through other persons or organizations (***Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants*** (2007) 148 Cal App 4th 390, 406.) The response to the interrogatories is due within 30 days from the date the interrogatories were served. (***Code of Civil Procedure***, § 2030.260(a).) The court may shorten or extend time for response by motion from one of the parties *Id.* Similarly, the parties may stipulate to an extension of time for responding, which must be in writing. (***Code of Civil Procedure***, § 2030.270).

Failing to respond within the time limit described above waives most objections to the interrogatories, which includes claims of privilege and work product. (***Code of Civil Procedure***, § 2030.290(a); (see ***Leach v. Superior Court (Markum)*** (1980) 111 Cal App 3d 902, 905-906).) The delay in responding also waives the option to produce writings in under ***Code of Civil Procedure***, § 2030.230 in lieu of the information contained within them (***Code of Civil Procedure***, § 2030.290(a).)

Plaintiffs served code-compliant discovery requests and defendants failed to respond. The motion of plaintiffs to compel defendants to answer form and special interrogatories is GRANTED. Defendants are to serve code-compliant responses without objection within 30 days of the filing and service of this Order.

B. Requests for Production of Documents.

The rules and procedures governing requests for production (also referred to as inspection demands) are governed by ***Code of Civil Procedure***, § 2031.010 et. seq. A demand may be served on any other party to the action (***Code of Civil Procedure***, § 2031.010). A demand may be used to obtain inspection, copying, testing or sampling of: (1) documents, (2) tangible things, (3) land, and (4) electronically stored information in the possession, custody or control of another party. (*Id.*) These demands are limited to matters within the permissible scope of discovery. (*Id.*)

A demand may be served at any time during the lawsuit with a few exceptions including: (1) the first 10 days after service of summons or defendant's appearance in the action (whichever is first); and (2) cutoff on discovery before trial (***Code of Civil Procedure***, § 2031.020). The party seeking discovery serves a demand for inspection on the party believed to be in possession, custody or control of the documents or property to be inspected (***Code of Civil Procedure***, § 2031.040.) Unlike interrogatories and RFAs, there is no limit on the number of demands that can be served. Instead of responding to the demand, the party to whom it is directed, or a third party whose privacy would be infringed by disclosure of the documents, may seek a protective order (***Code of Civil Procedure***, § 2031.060).

The party to whom a demand is served must respond within 30 days after service, unless excused by protective order. (***Code of Civil Procedure***, § 2031.260). The court has the power to extend or shorten the time allowed for response. *Id.* Additionally, the parties may agree to extend the time allowed to respond, but it must be confirmed in writing. (***Code of Civil Procedure***, § 2031.270).

Failure to timely respond to a demand results in a waiver of all objections to the requests, including claims of privilege or work product protection (***Code of Civil Procedure***, § 2031.300(a).) The court has the authority to grant relief from such waiver if (1) the party belatedly served a response that is in substantial compliance; and (2) the party filed a noticed motion supported by declaration showing that the delay resulted from mistake, inadvertence or excusable neglect. (***Code of Civil Procedure***, § 2031.300(a).)

A motion to compel may be made if: (1) there is no response at all; (2) the responses have been made but they are not satisfactory to the demanding party; or (3) where an agreement to comply has been, but compliance is not forthcoming. (CCP § 2031.300-2031.320). In ruling on a motion to compel, the court may require the party who objects to a request, on the ground of privilege, to prepare and serve a privilege log. (***Best Products, Inc. v. Superior Court (Granatelli Motorsports, Inc.)*** (2004) 119 Cal.App.4th 1181, 1188-1189).)

Plaintiffs served code-compliant discovery requests and defendants failed to respond. The motion of plaintiffs to compel defendants to answer the request for production of documents GRANTED. Defendants are to serve code-compliant responses without objection within 30 days of the filing and service of this Order.

C. Sanctions.

If the motion to compel responses to proper discovery requests is granted, the court shall order the party to whom the discovery was directed to pay the propounding party's reasonable expenses, including attorney fees, in enforcing discovery "unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (*Code of Civil Procedure*, § 2030.300(d); 2031.300(c); 2023.010(d); 2023.030(a).)

"A request for a sanction shall, in the notice of the motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought." (*Code of Civil Procedure*, § 2023.040.)

While the plaintiffs made a reasonable request for monetary sanctions, the request is not code-compliant because the notices of the various motions did not indicate that plaintiffs were seeking any sanctions at all.

The request of plaintiffs to compel defendants to pay monetary sanctions is DENIED.

III. Conclusion and Order.

The motion of plaintiffs to compel defendants to answer form and special interrogatories is GRANTED. Defendants are to serve code-compliant responses without objection within 30 days of the filing and service of this Order.

The motion of plaintiffs to compel defendants to answer the request for production of documents GRANTED. Defendants are to serve code-compliant responses without objection within 30 days of the filing and service of this Order.

The request of plaintiffs to compel defendants to pay monetary sanctions is DENIED.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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**COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20**

**161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
<http://www.scscourt.org>**

(For Clerk's Use Only)

**CASE NO.: 19CV350075
DATE: 17 September 2020**

TIME: 9:00 am

**Manu Pillai vs. Waterbit, Inc.
LINE NUMBER: 9**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 16 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON PLAINTIFF MANUHAR PILLAI'S MOTION TO SET ASIDE DISMISSAL.

I. Statement of Facts.

Plaintiff filed this complaint on June 19, 2019 regarding fraud.

In the moving papers, counsel for plaintiff state:

"The matter was filed and served in June of 2019, and, on March 13, 2020, the matter came onto calendar for a Case Management Conference. The matter was thereafter dismissed for failure of the parties to serve. However, Plaintiff's attorneys appeared in court that day to find the matter had been called and dismissed with no option of recalling the case and no option to show that service had been effected." (Memorandum of Points and Authorities, page 1, line 26-page 2, line 2.)

Contrary to the statement that the matter was "filed *and served* in June 2019," the papers in the file contained a slightly different version of events.

First, 13 March 2020 was a Friday and there was no Case Management Conference/Dismissal Review Calendar on a Friday.

Second, there are no proofs of service in the file other than Exhibit "A" to the instant motion. That document shows that defendant Lief Chastaine was personally served as an individual defendant and that WaterBit Inc. was served pursuant to Code of Civil Procedure, § 416.10 (corporation) on 27 January 2020 at 11:48 AM.⁷

Third, at the first Case Management Conference which was held on 1 October 2019, counsel for plaintiff (Christine Kelly, Esq.) appeared via Court Call. Since the matter was not served, Commissioner Mikkelson issued an Order to Show Cause for failure to serve and set the matter for 13 February 2020 at 9:00 AM in Department 19.

Fourth, at the Case Management Conference of 13 February 2020, there was no appearance and this Department⁸ ordered the matter dismissed without prejudice. The formal Order of Dismissal was entered on March

⁷ There does not appear to be a proof of service on defendant Andrew Wright.

⁸ This Department assumed coverage for the Department 19 calendar in mid-January 2020.

13, 2020 due to a failure to serve on the parties and the plaintiff's counsel's failure to appear at the Case Management Conference of 13 February 2020.

On 21 February 2020, the defendants⁹ paid an appearance fee and filed a declaration advising of their intent to file a Demurrer and sought an extension of time of 60 days within which to file the demurrer.¹⁰

After the case was dismissed, the involved parties continued to negotiate on the matter. Plaintiff filed the Motion to Set Aside the Dismissal of the case on July 20, 2020, almost four and a half months later.

II. Analysis.

The plaintiff's counsel argues that the dismissal should be set aside because the counsel's actions caused the dismissal on March 13, 2020.

According to **Code of Civil Procedure**, § 473(b), the motion for relief “. . . shall be made within a reasonable time, in no case exceeding six months, after the judgement, dismissal, order or proceeding was taken.” The motion is timely. A motion is deemed to have been brought before the court upon due service and filing of a notice of motion. (**Code of Civil Procedure**, § 1005.5; see **Cromwell v. Cummings** (1998) 65 Cal.App.4th Supp. 10, 13.)

Here, while the plaintiff's motion was not past due, counsel waited almost four and a half months to submit to motion. Plaintiff's counsel did not inform the Court as to why there was a delay in filing the motion. With that in mind, the motion was filed within the six-month time period, with insufficient time to account for complications.¹¹

As this Court is fond of saying, “Leave Time for Trouble.”

Even negligence on the part of the attorney will, under some circumstances, justify the trial court in granting relief. (**Vartanian v. Croll** (1953) 117 Cal.App.2d 639, 645; **Stephens v. Baker & Baker Roofing Co.** (1955) 130 Cal.App.2d 765, 772.)

Counsel for plaintiff has filed a declaration of fault.

Code of Civil Procedure, § 473(c) states” (1) Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of this section, the court may do any of the following:

(A) Impose a penalty of no greater than one thousand dollars (\$1,000) upon an offending attorney or party.

(B) Direct that an offending attorney pay an amount no greater than one thousand dollars (\$1,000) to the State Bar Client Security Fund.

(C) Grant other relief as is appropriate.

(2) However, where the court grants relief from a default or default judgment pursuant to this section based upon the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional upon the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or upon compliance with other sanctions ordered by the court.

This Court had given some thought to imposing a penalty pursuant to the foregoing. This Court now declines to do so because of a vague recollection around that time that several counsel had appeared in the wrong

⁹ This document was presented on behalf of all three defendants.

¹⁰ This Court notes that it would be unusual for the court to accept a filing fee from a defendant after the matter had been dismissed. This Court assumes that there was just a lag in the paperwork. Because of the outcome of this motion, this observation is of no moment.

department or wrong building and came to this Department after the clerk's paperwork had been submitted and entered into the Court's computers.

III. Conclusion and Order.

The Order of Dismissal by this Court made by this Court on 13 February 2020 and filed on 13 March 2020 is VACATED. Defendants are given 30 days from the date of the filing and service of this order within which to RESPOND. The matter will be set for a Case Management Conference for Tuesday, 30 March 2021 at 10:00 AM in Department 20.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20**

**161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
<http://www.scscourt.org>**

(For Clerk's Use Only)

CASE NO.: 2012-1-CV-218724

Cavalry SPV I, LLC vs Cathy Doan

DATE: 17 September 2020

TIME: 9:00 am

LINE NUMBER: 10

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 16 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON JUDGMENT DEBTOR'S CLAIM OF EXEMPTION.

I. Statement of Facts.

Plaintiff filed this complaint on 14 February 2012.¹²

On 6 June 2012, Judgment Creditor obtained a default judgment against Judgment Debtor in the amount of \$8,809.26. The file shows that various writs of execution have been filed and partial sums collected.

On 27 August 2020 Judgment Debtor filed the present claim of exemption. She lists her income and expenses and notes that she is subject to a 25% earnings withholding order now in effect.

She shows that she is making payments of \$961.00 a month to three other creditors which apparently are not reduced to judgments..

II. Conclusion and Order.

The claim of exemption is DENIED.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

¹² This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (**Ca. St. Civil Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C)).

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