Tentative Rulings for April 19, 2023
Department S302

To request oral argument, you must notify Judicial Secretary Tiffany Uhls at (760) 904-5722 and inform all other counsel no later than 4:30 p.m.

This court follows California Rules of Court, Rule 3.1308 (a) (1) for tentative rulings (see Riverside Superior Court Local Rule 3316). Tentative Rulings for each law & motion matter are posted on the Internet by 3:00 p.m. on the court day immediately before the hearing at http://www.riverside.courts.ca.gov/tentativerulings.shtml. If you do not have Internet access, you may obtain the tentative ruling by telephone at (760) 904-5722.

To request oral argument, no later than 4:30 p.m. on the court day before the hearing you must (1) notify the judicial secretary for Department S302 at (760) 904-5722 and (2) inform all other parties of the request and of their need to appear telephonically, as stated below. If no request for oral argument is made by 4:30 p.m., the tentative ruling **will become the final ruling** on the matter effective the date of the hearing. **UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.**

IN LIGHT OF THE CORONAVIRUS PANDEMIC; AND UNTIL FURTHER NOTICE, COUNSEL AND SELF-REPRESENTED PARTIES ARE ENCOURAGED TO APPEAR AT ANY LAW AND MOTION DEPARTMENT REMOTELY WHEN REQUESTING ORAL ARGUMENTS.

REMOTE APPEARANCES: The court uses Zoom for remote appearances. Parties can log into Zoom on their device or opt to call into the scheduled hearing by using one of the following Zoom telephone numbers and the meeting ID for this department:

- Call-in Numbers: 1 (833) 568-8864 (TOLL FREE); 1 (669) 254-5252; 1 (669) 216-1590; 1 (551) 285-1373 or 1 (646) 828-7666
- Zoom Meeting ID: 161 954 8695

Please **MUTE** your phone until your case is called and it is your turn to speak. It is important to note that you must call fifteen (15) minutes prior to the scheduled hearing time to check in or there may be a delay in your case being heard.

For additional information and instructions on telephonic appearances, visit the court's website at: https://www.riverside.courts.ca.gov/PublicNotices/remote-appearances.php .

Riverside Superior Court provides official court reporters for hearings on law and motion matters only for litigants who have been granted fee waivers and only upon their timely request. (See General Administrative Order No. 2021-19-1) Other parties desiring a record of the hearing must retain a reporter pro tempore.

1.

CVSW2105046	HERNANDEZ VS AMERICAN HONDA MOTOR CO. INC	MOTION FOR ATTORNEY'S FEES BY JOSEPH HERNANDEZ

Tentative Ruling:

Summary: GRANT the motion and award Plaintiff $78,161.25 in attorney's fees. DENY the request for costs as those are automatically awarded pursuant to the Memorandum of Costs, which Defendant did not move to strike or tax.

Fees:

This is a Song-Beverly lemon law case. The parties settled the case and agreed that Plaintiff would recover his counsel's fees, costs, and expenses via this noticed Motion, and the parties agree that Plaintiff is the prevailing party. Plaintiff now move the court for an order awarding attorney's fees under the lodestar method.

In support of his motion, Plaintiff submitted the declarations of Attorney Richard Wirtz and Attorney Amy Rotman. In support of their opposition, Defendant submitted the declaration of Attorney Adjoa Anim-Appiah. With his reply, Plaintiff submitted evidentiary objections to the declaration of Attorney Adjoa Anim-Appiah. The court overrules all objections.

Civil Code §1794(d) provides that "[i]f the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." "Civil Code section 1794 " ' " 'requires the trial court to make an initial determination of the actual time expended; and then to ascertain whether under all the circumstances of the case the amount of actual time expended and the monetary charge being made for the time expended are reasonable. These circumstances may include, but are not limited to, factors such as the complexity of the case and procedural demands, the skill exhibited and the results achieved. If the time expended or the monetary charge being made for the time expended are not reasonable under all the circumstances, then the court must take this into account and award attorney fees in a lesser amount. A prevailing buyer has the burden of "showing that the fees incurred were 'allowable,' were 'reasonably necessary to the conduct of the litigation,' and were 'reasonable in amount. [Citations.]" (*Morris v. Hyundai Motor America* (2019) 41 Cal.App.5th 24, 34.)

A verified fee bill is *prima facie* evidence the costs, expenses, and services listed were necessarily incurred. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682.) Furthermore, a declaration attesting to the accuracy of the fee bill is presumed credible. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 396.)

While the verified fee bill is prima facie evidence of the hours and costs incurred, the trial court may make its own determination of the value of the services provided. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.) "In particular, 'the lodestar method vests the trial court with the discretion to decide which of the hours expended by the attorneys were 'reasonably spent' on the litigation' [Citation.], and to determine the hourly rates that should be used in the lodestar calculus. [Citation.]" (*Morris v. Hyundai Motor America* (2019) 41 Cal.App.5th 24, 35.)

The proposed rates for attorneys Underwood, Inscore, Chavez, Henry and Rotman are high for the Riverside legal community. Therefore, the court reduces the allowable rates as follows: Kelsey Henry: $250, Ommar Chavez: $250, Daniel Inscore: $350, Jessica Underwood:

$350, and Amy Rotman: $450. The requested fees for the paralegal/non-attorney staff are also too high, and will be reduced by half to bring them within reasonable range of $100 (for less experienced paralegal) to $150 (for more experienced paralegal). This reduces the attorney fee calculation from $58,467.50 to $44,377.50, and the paralegal calculation from $15,460.00 to $7,730.00.

Other than the rates charged a review of the billing statement, and reviewing those items identified by Defendant as problematic, the court finds that there are no other adjustments needed to the lodestar figure. Accordingly, the court finds that the lodestar figure is **$52,107.50**.

Once the court determines the lodestar figure, it can determine whether that figure should be adjusted up or down. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 997.) Plaintiff requested a multiplier of 1.5. Based on the facts in this case, the court is prepared to adjust the lodestar by the requested multiplier. Therefore, the court will award Plaintiffs attorney's fees of $78,161.25.

Memorandum of Costs:

In lieu of moving for costs as part of an attorney's fees motion, Plaintiff filed a Memorandum of Costs seeking $9,095.50 in fees as the prevailing party, pursuant to CCP §685.070. Defendant did not move to tax or strike costs within 10 days of the filing of the Memorandum of Costs, such costs automatically became part of Plaintiff's judgment in this case. Therefore, ruling on the award of costs as part of this motion is moot as the costs are already deemed a judgment.

2.

CVSW2206944	PHOENIX CAPITAL GROUP HOLDINGS, LLC VS KEITH CANDEE	GENERAL DEMURRER TO 1ST AMENDED CROSS-COMPLAINT BY PHOENIX CAPITAL GROUP HOLDINGS, LLC

Tentative Ruling:

Summary: This general demurrer will be sustained with leave to amend as to the second, third, and fourth causes of action of the FACC for breach of fiduciary duty, constructive fraud, and unlicensed activity, respectively. The demurrer will be overruled as to the first and the fifth causes of action for elder abuse and rescission, respectively.

Requests for Judicial Notice:

The Requests for Judicial Notice by Plaintiff Phoenix Capital Group Holdings ("Phoenix Capital"), and the Request for Judicial Notice by Cross-Complainant, Keith Candee ("Candee") will both be denied.

The matters contained in Phoenix Capital's RFJN are immaterial for purposes of a General Demurrer. The court does not decide a demurrer by factual inferences like the ones raised by Phoenix Capital. Candee's RFJN is also immaterial due to the court's ruling on the general demurrer.

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General Demurrer to FACC:

This action arises out of an agreement to sell mineral rights under the Purchase Sale Agreement ("PSA") entered into by Phoenix and Candee from land owned by Candee. The parties are in dispute as to the rights to $300,000 in royalty payments generated from the mineral interests. The PSA contained language providing for the following:

> All revenue payments, bonus, payments, delay payments, shut-in payments, production royalties or any other payments attributable to the herein acquired Mineral Interest received by KHC prior to the effective date of this [Agreement] are the property of KHC. With respect to this [Agreement], received is defined as having payment in hand. All such payments described above occurring after the effective date of the [Agreement] are the property of PHOENIX. (Complaint, ¶ 14, Ex. A [PSA, § 3.1].)

A general demurrer lies where the pleading does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., §430.10(e).) In evaluating a demurrer, the court gives the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Moore v. Regents of University of California* (1990) 51 Cal. 3d 120,125.) The court assumes the truth of all material which have been properly pleaded, of which may be inferred from those expressly pleaded, and of any material of which judicial notice has been requested and may be taken (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.) However, a demurrer does not admit contentions, deductions or conclusions of fact or law (*Daar v. Yellow Cab Company* (1967) 67 Cal. 2d 695, 713.) If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318.)

First and fifth causes of action for elder abuse and rescission:

Welfare and Institutions Code section 15610.30 defines financial abuse as occurring when someone (1) "**takes, secretes, appropriates**, obtains, or retains" real or personal property of an elder or dependent adult for (2) a wrongful use or with intent to defraud or **by undue influence**. Section 15610.30(c) clarifies the words, "takes, secretes, appropriates, obtains, or retains" when the elder or dependent adult is "**deprived**" of any property right.

The FACC sufficiently alleges a claim for elder abuse based on undue influence, which under section 15610.70 may be determined by factors such as the vulnerability of the victim and the influencer's apparent authority. (Welf. & Inst. Code, § 15610.70(a)(1)&(2).) Here, Candee alleges that he is over the age of 65 years, had a long history of health problems and was of diminished capacity and judgment, whereas Phoenix was in the position of greater expertise and knowledge in the oil and gas industry, who was in a "strong position," in the transaction relative to Candee. (FACC, ¶ 22.) Phoenix Capital's RFJN sought to have the court infer that Candee was not in a vulnerable position and was not of an unsound mind. The court cannot do that when addressing a demurrer.

For that reason, Candee has also sufficiently alleged a basis for seeking the remedy of rescission on grounds of undue influence. The recission remedy exists when the consent to the agreement was give "by mistake, or obtained through duress, menace, fraud, or **undue influence**, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." (Civ. Code, § 1689(b)(1).)

Second and third causes of action for breach of fiduciary duty and constructive fraud:

Candee's claim for breach of fiduciary duty fails for reason no facts are alleged to demonstrate that a fiduciary relationship was created between Candee and Phoenix. Here, Candee alleges that by sending the July 2021 letter to Candee, he was led to believe that he was Phoenix's client and that they were looking after his best interests. (FACC, ¶ 22.) Based on that representation, Candee alleges that he "reposed trust and confidence in Cross-defendants and Cross-defendants accepted and encouraged such trust and confidence." (FACC, ¶ 17.) However, other than the fact Phoenix solicited his business and the parties entered a contract for the purchase of mineral rights, Candee fails to allege either a contractual or statutory basis for creating a fiduciary relationship. Also, other than conclusory statements, Candee fails to allege facts demonstrating that Phoenix knowingly undertook the position to act as a fiduciary on behalf of Candee.

Having failed to sufficient plead a fiduciary relationship or any other legal or equitable duty imposed on Phoenix, Candee has failed to plead a cause of action for constructive fraud

Fourth cause of action unlicensed activity (Bus. & Prof. Code, § 10500 et seq.):

Candee asserts a claim for unlicensed activity under section 10500, which makes it unlawful for any person without a license to buy for solicit prospective purchasers of mineral, oil, or gas property. (Bus. & Prof. Code, § 10500(a).) However, as Phoenix points out, no statutory private right of action exists for Candee to assert a claim for violation of this section in civil suit. Rather "[i]t is the duty of the district attorney of the county in which a violation of Section 10500 or 10550.5 occurs to prosecute the violation." (Bus. & Prof. Code, § 10501(b).)

Conclusion:

For these reasons, the general demurrer should be sustained with leave to amend as to the second, third, and fourth causes of action of the FACC. The demurrer should be overruled as to the first and the fifth causes of action. Cross-Complainant Candee is ordered to file an amended complaint within 14 days of the court's ruling.

3.

MCC2000788	BEAR CREEK MASTER ASSOCIATION VS ATCHISON	MOTION FOR SUMMARY JUDGMENT AND FOR SUMMARY ADJUDICATION BY GISELLE ATCHISON ON HER 2D AMENDED CROSS COMPLAINT AND ON AFFIRMATIVRE DEFENSES RAISED BY HER ANSWER

Tentative Ruling:

Summary:

GRANT Cross-Complainant's request for judicial notice.

GRANT Cross-Defendant's request for judicial notice as to Exhibits 2-4; Decline to rule on Exhibit 1, which was not considered by the Court based on Cross-Complainant's failure to meet her initial burden.

SUSTAIN Cross-Defendant's evidentiary objections as to nos. 1-14, 16-23, 78-73; OVERRULE as to no. 15. Decline to rule on nos. 24-67 and 74 because the evidence objected to is moot and thus, was not material to the court's analysis.

DENY the motion. The motion for summary adjudication is procedurally defective, and Cross-Complainant failed to meet her initial burden on summary judgment that no triable issues of material fact exist.

Analysis:

This is an HOA dispute. In November 2019, Defendants Marvin and Gisele Atchison (the "Atchisons") purchased property located at 22780 Dear Run Court in Murrieta, which is within the Bear Creek common interest development ("Bear Creek"). On June 3, 2020, the Association filed the complaint alleging 1) breach of CC&Rs; and (2) nuisance. Default was entered against the Atchisons. The Court set aside the default against Giselle Atchison but denied Marvin Atchison's motion to set aside the default. The SAXC contains seven causes of action: 1) breach of CC&Rs; 2) breach of fiduciary duty; 3) failure to allow inspection; 4) nuisance; 5) negligence; 6) trespass; and 7) declaratory relief.

On March 30, 2023, the Court granted the Association's motion for summary judgment on its claims for breach of the CC&Rs and nuisance against Giselle.

Giselle's motion for summary judgment attacking the Association's complaint is moot based on the Court's recent ruling granting summary judgment in favor of the Association on March 30, 2023. Thus, only the claims asserted in the SAXC are at issue by this motion.

Preliminarily, the Association's arguments that the motion was untimely filed and served are not persuasive. The Association contends that the Court continued the initial trial date of January 13, 2023 to May 19, 2023, but did not extend any other deadlines, making the motion untimely. CCP § 437c provides that the motion cannot be heard later than "30 days before the date of trial, unless the court for good cause shown orders otherwise." (CCP § 437c(a)(3).) The 30-day "cut-off" under CCP § 437c is measured from the trial date in effect when the summary judgment motion is made; thus, a continuance of the initial trial date "reopens" the time for such

motions. (*Green v. Bristol Myers* (1988) 206 Cal.App.3d 604, 609; *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1765, fn. 4.) This motion will be heard exactly 30 days before the new trial date, and is thus timely. Further, although the Association argues that it did not receive the 75 days' mandatory notice requirement under CCP § 437c, the Association will be deemed to have waived any defect in service by filing a substantive opposition addressing the merits of the motion. (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697.)

Motion for Summary Adjudication:

The motion for summary adjudication fails due to procedural defects. Where summary adjudication of a cause of action is sought, the notice must identify the "specific cause of action" sought to be adjudicated. (CRC rule 3.1350(b).) Further, the separate statement of undisputed material facts must separately identify each cause of action and each supporting material fact claimed to be without dispute with respect to that cause of action. (CRC rule 3.1350(d).) "[T]he specific cause of action . . . must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (CRC rule 3.1350(b); *Truong v. Glasser* (2010) 181 Cal.App.4th 102, 118 (separately identified issues not required on motion for summary judgment).) When multiple causes of action are presented for summary adjudication in one motion, each cause of action to which the motion is directed must have a separate section heading indicating the issue number and specifying the issue. (CRC rule 3.1350(d).) Failure to comply with the separate statement requirement constitutes grounds for denial of the motion, in the court's discretion. (CCP § 437c(b)(1); *Tesselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 160.)

Here, the notice of motion fails to specify each of the causes of action that are the subject of the motion for summary adjudication, and the separate statement does not separately identify each cause of action by a separate section heading and does not tie each undisputed material fact to the particular cause of action. Rather, in the separate statement, Cross-Complainant lumps the Association's claims for breach of CC&Rs and nuisance (rendered moot by the Court's recent ruling) with her own cross-claim for breach of CC&Rs: "ISSUE 1: Atchison Submits Undisputed Material Facts that Provide a Complete Defense to BCMA's Causes of Action for Breach of CC&R's and Nuisance and Conclusively Proves Atchison's Cause of action for Breach of CC&R's Against BCMA." Cross-Complainant also lumps all of her other cross-claims together: "ISSUE 2: Atchison is Entitled to Summary Judgment on the Causes of Action for Breach of Fiduciary Duty; Failure to Allow Inspection; Nuisance; Negligence; Trespass; and Declaratory Relief." This is a significant issue because the elements for each cause of action are different. Cross-Complainant also failed to identify "Issue 1" and "Issue 2" in the notice of motion as required by CRC rule 3.1350(b) and (d). For these reasons, summary adjudication is denied.

Request for Judicial Notice:

Moving party seeks judicial notice of the CC&Rs recorded in the Riverside County's Recorder's OfficeJudicial notice of court records is proper under Evid. Code § 452(d). The court can also take judicial notice of the existence of recorded documents and their legal effect. (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-1118; *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754-755.). Grant as to these documents. Complaint and the SAXC – the court will take Judicial Notice of the existence and contents of these documents, but the truth of the contents.

The Association seeks judicial notice of this Court's prior orders and the article titled "Recycled Water: How Safe is It?" available on the website for the California State Assembly,

Committee on Water, Parks and Wildlife. Judicial notice of court records is proper under Evid. Code § 452(d); GRANT as to Exs. 2-4. The article was not material to the court's because Cross-Complainant did not meet her initial burden. DENY as to Ex. 1.

Evidentiary Objections:

The Association objects to statements made in Giselle Atchison's declaration based on improper legal conclusion, best evidence rule, unqualified expert opinion, speculation, hearsay, lack of foundation/personal knowledge, etc. The Association is correct that declarant's opinions regarding the scope of the landscape easement, water regulations, the purpose of a "mow curb" and the harmful effects of reclaimed water lack foundation and thus constitutes impermissible expert opinion. She fails to identify any special knowledge, training or experience that would provide the foundation for her opinions on easements, mow curbs and reclaimed water – she merely claims she owns her home. (Declaration of Giselle Atchison, ¶ 2.) Declarant also makes statements without adequate foundation or personal knowledge, attaches exhibits without stating where she obtained the document, and/or points to photos without stating where she took the photos or where the photos are from. SUSTAIN as to nos. 1-14, 16-23, 78-73. OVERRULE as to no. 15 which comes within a hearsay exception. The evidence to which the Association objects in nos. 24-67 and 74 is moot and was not considered in the court's analysis.

The Association also objects to statements made in the declaration of Andrew R. Zimbaldi, Cross-Complainant's purported expert on architectural applications. This evidence is moot and was not considered in the court's analysis.

Cross-Complainant filed a "Reply to Plaintiff Bear Creek Master Association's Respone to Separate Statement of Undisputed Material Facts," which contains evidentiary objections. The evidentiary objection were not filed as a separate document as required by CRC rule 3.1354(b), and in any case, the evidence to which she objects was not considered because Cross-Complainant failed to meet her initial burden.

Motion for Summary Judgment:

To the extent the motion is based on the Association's alleged failure to submit a denial or approval within 60 days of the Atchisons' submission of the architectural plans (Cross-Complainant's Separate Statement of Undisputed Material Facts ("UMF") Issue #1: 1-19), the motion fails because the Court already determined the evidence proved otherwise upon ruling on the Association's motion for summary judgment. This is reason alone is reason to deny the motion for summary judgment.

The motion is also based on Cross-Complainant's allegations that the Association unlawfully installed a concrete barrier aka a "mow curb" that encroached on their property without their knowledge or consent, and that the Association's irrigation system sprays harmful reclaimed water and sewage effluent onto their property. (UMF Issue #2: 1-22.) These facts support her causes of action for breach of CC&Rs, breach of fiduciary duty, nuisance, negligence, trespass and declaratory relief. (See SAXC, ¶¶ 114-128, 151-180.) As noted above, the presence of any one triable issue requires denial of the motion.

Cross-Complainant contends that the Association interfered with the Atchisons' use and enjoyment of the subject property by unlawfully installing the mow curb and spraying harmful reclaimed water on their property. (UMF Issue #2: 1-22.) The problem for Cross-Complainant, however, is that she relies upon her own declaration in support of these "undisputed" material facts. (UMF Issue #2, no. 5 ("The mow curb installed by BCMA on the Property is not located within any landscape easement in favor of BCMA"), no. 7 ("Applicable water regulations

required BCMA to obtain permission from the Atchisons prior to installing a reclaimed water system and mow curb on the Property").) As discussed above, Giselle's opinions lack foundation and are not admissible. Cross-Complainant also relies on the testimony of her husband Marvin Atchison, but his statements on the location of the landscape easement and water regulations also lack foundation and are inadmissible. Moreover, Cross-Complainant concedes that the "the exact location of the Landscape Easement is in dispute because the Individual Grant Deed that pertains to it has illegible characters." (Declaration of Giselle Atchison, ¶ 3.) Thus, Cross-Complainant essentially concedes there are triable issues of fact as to the location of the landscape easement and whether the mow curb encroaches on the subject property. Cross-Complainant failed to meet her initial burden that no triable issues of material fact exist.