

TENTATIVE RULINGS

FOR: October 16, 2020

If you do not see a tentative ruling for a scheduled matter, then attendance at the hearing is required.

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Dept. A Zoom

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PROBATE CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

Conservatorship of Corinne T. Rau

18PR000156

MOTION TO BE RELIEVED AS COUNSEL

TENTATIVE RULING: The motion is granted, including fees as prayed.

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PETITION FOR ORDER AUTHORIZING COMPROMISE OF MINOR’S CLAIM (Pr.C. 3500 et seq.)

TENTATIVE RULING: The matter is CONTINUED to November 18, 2020, 8:30 a.m. in Dept. A to provide Petitioner the opportunity to address the following issues. No notice of hearing or proof of service appear in the Court’s file. The Petition is incomplete in that the following attachments thereto do not appear in the Court’s file: 9, 13(b)(5), 14(a), 18(a), and 19a(2). The amount listed in paragraph 17(b) does not match the amount listed in paragraph 13(a)(2). Finally, the Court is concerned about certain attorneys’ expenses and costs asserted, through paragraph 14(b) of the Petition, to have been “incurred or paid.” The Court cannot deduce what type of expense or fee the terms “Minors Comp,” “Fracturacion,” and “Court Appearance” refer to. The Petition claims \$20 has been incurred for “Courthouse Parking” when there has been no hearing or other appearance in the matter, all appearances are currently being conducted via Zoom, and there is no paid parking in the vicinity of the Superior Court of California, County of Napa. Finally, the Court is concerned about the size of the claims for postage (\$177.28) and Office Supplies (\$110.17).

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Conservatorship of Janice Johnson

26-66918

REVIEW HEARING

TENTATIVE RULING: Based on the report of the court investigator, the Court determines by clear and convincing evidence that the conservatee cannot communicate, with or without reasonable accommodation, a desire to participate in the voting process, and therefore orders the conservatee disqualified from voting pursuant to Elections Code section 2208.

After a review of the matter, the Court finds the conservator is acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on October 18, 2022, at 8:30 a.m. in Dept. A. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

Stacee Cootes v. Wyman Property Management, et al.

16CV001108

DEMURRER TO THE FIRST AMENDED COMPLAINT

TENTATIVE RULING: On September 29, 2020, the Court continued the matter after posting a tentative ruling that the demurrer to the first amended complaint was untimely because it was filed after expiration of the 30-day period set forth in Code of Civil Procedure section 430.40, subdivision (a). The Court exercises its discretion to consider the untimely demurrer.

(*Jackson v. Doe* (2011) 192 Cal.App.4th 742, 749; *McAllister v. Cnty. of Monterey* (2007) 147 Cal.App.4th 253, 280.)

Defendant Mindy Wyman's demurrer to the entire first amended complaint is SUSTAINED WITHOUT LEAVE TO AMEND. Plaintiff Stacey Cootes indicates she does not oppose the demurrer as to this individual defendant. (Opp. at p. 7:28; n.2.)

Defendant Wyman Property Management's (WPM) demurrer to the first cause of action for negligence on the ground of failure to state sufficient facts is OVERRULED. "The elements of a cause of action for negligence are well established. They are (a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." (*Ladd v. Cnty. of San Mateo* (1996) 12 Cal.4th 913, 917.) WPM argues it does not owe plaintiff a duty of care as it only has a duty to the homeowner's association (HOA). As a result, WPM maintains imposing a separate duty would create an impermissible conflict of interest. WPM's hostile interest argument, based on *Ratcliff Architects v. Vanir Constr. Mgmt., Inc.* (2001) 88 Cal.App.4th 595, 606, is misplaced. The underlying premise in *Ratcliff* was based on the fact the contract "specifically excluded third party beneficiaries from having any rights under the contract." (*Ratcliff, supra*, 88 Cal.App.4th at p. 605.) The agreement here does not contain such a provision and the pleading alleges plaintiff was a third-party beneficiary of the contract, which was intended to benefit her. (First Amended Compl., ¶¶ 12, 46.)

WPM's demurrer to the second cause of action for gross negligence on the ground of failure to state sufficient facts is OVERRULED. "California does not recognize a distinct common law cause of action for gross negligence apart from negligence." (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 552 n.3; *Ordway v. Super. Ct.* (1988) 198 Cal.App.3d 98, 108 ["[G]ross' negligence is merely the same thing as ordinary negligence"], disapproved on other grounds in *Knight v. Jewett* (1992) 3 Cal.4th 296, 329.) Although the cause of action is labeled as "gross negligence," this is not determinative as the test on demurrer is whether the pleading states *any* valid claim entitling plaintiff to relief. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38 ["If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer."]) Plaintiff may be mistaken as to the nature of the claim or the legal theory, but if she has pled a cause of action for negligence, the demurrer must be overruled. In that regard, to the extent WPM relies on its previous argument regarding lack of duty under *Ratcliff*, it fails here for the same reason.

WPM's demurrer to the third cause of action for breach of contract on the ground of failure to state sufficient facts is OVERRULED. WPM's reliance on *Ratcliff* fails as noted. WPM also contends plaintiff is not, and cannot be, a third-party beneficiary of the contract between the HOA and WPM under *Berryman v. Merit Prop. Mgmt., Inc.* (2007) 152 Cal.App.4th 1544, 1553. *Berryman* is distinguishable as it only mentions a third party being unable to "sue on a contract to which she is merely an incidental beneficiary." The authority does not mention third-party beneficiaries, or apply to them, which is what is alleged in the case at bar. (See *H.N. and Frances C. Berger Foundation v. Perez* (2013) 218 Cal.App.4th 37, 46 [plaintiff does not need to be named in the agreements in order to be a third-party beneficiary, but there must be language, or extrinsic evidence, of the intent to benefit plaintiff, or a class of individuals

including plaintiff].) Plaintiff alleges WPM’s contract with the HOA to act as a property manager at the condominium complex created rights in plaintiff as a third-party beneficiary of the contract because the agreement was meant to benefit condominium owners at the complex. (First Amended Compl., ¶ 59.) Plaintiff goes on to allege that the purpose of the contract was to provide certain rights and obligations flowing to and from WPM and the individual owners of condominiums as HOA members. (*Id.*, ¶ 63.) Essentially, WPM contracted with plaintiff’s HOA to act as a property manager at a property within which plaintiff owns a unit. (*Id.*, ¶ 64.) WPM breached the agreement by ignoring plaintiff’s requests to have her condominium inspected and/or repaired in violation of paragraphs 1.3, 2.1, 3.1, and 3.3. of the contract. (*Id.*, ¶ 65.)

WPM’s demurrer to the fifth cause of action for premises liability on the ground of failure to state sufficient facts is SUSTAINED WITHOUT LEAVE TO AMEND. The claim is incorrectly labeled as the fourth cause of action in the amended pleading. WPM maintains it does not own or control the premises. (See *Hamilton v. Gage Bowl* (1992) 6 Cal.App.4th 1706, 1711 [“[A] defendant cannot be held liable for a defective or dangerous condition of property which defendant did not own, possess, or control.”].) Plaintiff did not address this argument in her opposition thereby conceding its merits.

WPM’s demurrer to the sixth cause of action for fraud and eighth cause of action for breach of fiduciary duty is SUSTAINED WITHOUT LEAVE TO AMEND. Both claims are incorrectly labeled as the fifth and seventh causes of action in the amended complaint. Plaintiff notes she does not oppose the demurrer as to these two causes of action. (*Id.* at p. 4:28, n.1.)

WPM’s demurrer to the seventh cause of action for injunction on the ground of failure to state sufficient facts is OVERRULED.¹ WPM is correct that “[i]njunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted.” (*Shell Oil v. Richter* (1942) 52 Cal.App.2d 164, 168.) Accordingly, the right to injunctive relief is attendant to an underlying cause of action. (See *City of Oakland v. Super. Ct.* (1982) 136 Cal.App.3d 565, 569 [stating that “[a] preliminary injunction . . . is but an adjunct to the action and its fate is hinged to the main action”]; see also *Cnty. of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973 [stating that “[a] permanent injunction is an equitable remedy, not a cause of action, and thus it is attendant to an underlying cause of action”].) Here, as discussed above, plaintiff has sufficiently stated an underlying cause of action to support a request for injunctive relief.

WPM shall file its answer within 10 calendar days of service of notice of entry of order. The October 16, 2020 case management conference shall remain on calendar.



¹ It is unclear from the opposition whether the seventh cause of action for injunction should remain or if plaintiff concedes to dropping the claim. (Compare Opp. at p. 10:23 [providing a section as to why plaintiff has sufficiently pled a basis for injunction] with *id.* at p. 11:20-23 [“Plaintiff requests the Court to allow Plaintiff leave to amend. If granted, Plaintiff will drop Mindy Wyman as a Defendant, and will drop her causes of action for fraud, injunction and fiduciary duty against Defendant WPM.”].) The parties are encouraged to meet and confer to resolve the matter.

DEFENDANT BANK OF AMERICA, N.A.'S MOTION FOR JUDGMENT ON THE PLEADINGS

TENTATIVE RULING: Defendants' Motion for judgment on the pleadings is GRANTED IN PART. The motion is GRANTED without leave to amend, as to both Plaintiffs on the first and second causes of action. The motion is GRANTED without leave to amend, as to Plaintiff Mohammad Khan on the third and fourth cause of action, and as to Plaintiff Bruce Chadbourne on the fifth cause of action. The motion is GRANTED with 30 days' leave to amend as to Plaintiff Chadbourne on the third cause of action. The Court STRIKES the allegations of the seventh and tenth causes of action, rendering the motion moot as to these. Finally, the motion is DENIED as to the Plaintiff Chadbourne on the fourth cause of action, and as to both Plaintiffs on the eighth cause of action.

A. Request for Judicial Notice

Defendants' Request for Judicial Notice is GRANTED. The Court takes judicial notice of the documents attached as Exhibits A through I thereto.

B. Procedural Background

BANA moves for judgment on the pleadings as to Plaintiffs' Third Amended Complaint (TAC), and to each cause of action asserted therein. Plaintiffs assert claims under the Homeowner's Bill of Rights, and related causes of action, relating to certain real property located at 1810 Mora Avenue in Calistoga, California (Property).

The TAC was filed after the Court sustained, in part, the Demurrer of defendants Fay Servicing, LLC and Wilmington Trust, National Association (Fay Defendants) to the Second Amended Complaint. (See Order re: Defendants' Demurrer to Second Amended Complaint, filed November 18, 2019 in this matter.) Thereafter, Fay Defendants demurred to the TAC. The Court sustained that demurrer, in part, through its Order re: Defendants' Demurrer to Third Amended Complaint, filed March 3, 2020 (TAC Demurrer Order).

The TAC contains allegations that Plaintiff Bruce Chadbourne purchased the Property in 2007, subject to a mortgage loan and related Deed of Trust (DOT) in favor of BANA. (TAC at ¶43.) Plaintiffs have admitted to having missed payments on the mortgage loan secured by the Property (Mortgage) as far back as 2008. (First Amended Complaint (FAC) at 5:10-11.) The causes of action purportedly set forth in the TAC all relate to the actions by BANA, and its successors in interest to the mortgage note and DOT, seeking to foreclose on the DOT.

Defendant Bank of America, N.A. (BANA) now moves, pursuant to Code of Civil Procedure section 438, subd. (c)(1)(B)(ii) for judgment on the pleadings as to each cause of action asserted against BANA in the Third Amended Complaint (TAC) filed by Plaintiffs Bruce Chadbourne and Mohammed Khan.

On August 25, 2020, Plaintiffs Bruce Chadbourne and Mohammad Khan filed an "Opposition / Plaintiffs' Response to Motion for Summary Judgment on the Pleadings." That

filing, however, presented no substantive opposition on any issue raised by the present motion. Rather, it requested that the Court remove the matter from its calendar due to a purported bankruptcy stay. The motion came on for hearing August 26, 2020. By Minute Order of that date, the Court advised Plaintiff Chadbourne, “that there is not an automatic stay of proceedings when Plaintiffs file bankruptcy.” The Court advised the Parties that it would continue the present motion to September 23, 2020, and permit Plaintiffs to file any additional opposition by September 10, 2020. Plaintiff filed no such opposition.

C. Legal Background

A complaint must contain “facts constituting the cause of action.” (Code Civ. Proc. §425.10, subd. (a)(1).) A defendant may move for judgment on the pleadings where “[t]he complaint does not state facts sufficient to constitute a cause of action against the defendant.” (Code Civ. Proc. §438, subd. (c)(1)(B)(ii).) “The grounds for motion provided for in this section shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice.” (*Id.* at subd. (d).) “The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law.” (*Schabarum v. Cal. Legislature* (1998) 60 Cal.App.4th 1205, 1216.) “Because a motion for judgment on the pleadings by the defendant is equivalent to a demurrer, we treat all properly pleaded facts in the operative complaint as true.” (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 676 at fn.1.) “In the case of either a demurrer or a motion for judgment on the pleadings, leave to amend should be granted if there is any reasonable possibility that the plaintiff can state a good cause of action.” (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.)

D. Legal Analysis

1. *Plaintiffs’ First and Second Causes of Action are Time Barred*

BANA argues that Plaintiffs’ first cause of action for intentional misrepresentation, and second cause of action for negligent misrepresentation are time barred.

The issues relevant to this argument were fully litigated in the context of Fay Defendants’ demurrer to the TAC. The Complaint clearly identifies a single representation, allegedly made by an employee of BANA on March 16, 2015, as the ground for its first and second causes of action. (See TAC at ¶¶ 83, 83 subds. (a), (b), and (d), and 88.) The original complaint in this action was filed significantly more than three years later, on January 8, 2019.” (TAC Demurrer Order at p.4.)

Following hearing on that demurrer, the Court found that Plaintiffs causes of action for intentional and negligent misrepresentation are time-barred. (See TAC Demurrer Order at p.5.) Based on the foregoing, BANA’s motion for judgment on the pleadings is GRANTED without leave to amend as to the first cause of action for intentional misrepresentation, and the second cause of action for negligent misrepresentation.

2. *Plaintiffs Fail to Allege Facts Sufficient to Establish that Plaintiff Mohammad Khan Has Standing to Assert Either the Third or Fourth Cause of Action*

This Court previously found that Plaintiff Mohammad Khan lacks standing to assert either the third cause of action for breach of contract or the fourth cause of action for promissory estoppel. (See TAC Demurrer Order at pp. 6-7.) For this reason, BANA's motion for judgment on the pleadings is GRANTED without leave to amend as to Plaintiff Mohammad Khan on these causes of action.

3. *Plaintiff Chadbourne Fails to Allege Facts Sufficient to State a Claim for Breach of Contract*

BANA argues that Plaintiff Chadbourne's cause of action for breach of contract fails to state a claim because Plaintiff fails to allege, with sufficient specificity, that he satisfied a condition precedent to the formation of the contract that he alleges BANA breached. (See Support Memo. at 17:2-25.)

The third cause of action asserts claims for breach of the "TPP Agreement," which is alleged to be "a written agreement" entered into by "Plaintiff Chadbourne and Defendant BANA...by which Plaintiff Chadbourne would make three (3) payments...of \$6075 each." (See TAC at ¶ 95; see also ¶¶ 52, 54.) Chadbourne alleges that by letter dated March 16, 2015, BANA offered to refinance the mortgage, "[i]f you complete this Trial Period Plan by making all payments as outlined below." (TAC at ¶52.) The TAC defines this March 16, 2015 letter as the "TPP Offer." (*Ibid.*) This TPP Offer is attached as Exhibit 1 to the Complaint. (See TAC at p.1, fn.1; Exh. 1.)

As BANA points out, the TPP Offer explicitly conditions refinancing of the mortgage not only upon Chadbourne making the identified payments, but upon Chadbourne making the payments by respective due dates that are explicitly set forth in the TPP Offer. (See Support Memo at 17:9-25; TAC at Exh. 1.) BANA argues that the TAC fails to state a cause of action for breach of contract, because it fails to affirmatively allege that Chadbourne *timely* made the payments; the condition precedent to contract formation.

"Where contractual liability depends upon the satisfaction or performance of one or more conditions precedent, the allegation of such satisfaction or performance is an essential part of the cause of action." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1389 (*Careau*)). "This requirement can be satisfied by allegations in general terms. It is sufficient for a plaintiff to simply allege that he has 'duly performed all the conditions on his part.'" (*Ibid.*)

The TAC contains allegations that the amounts were paid, but no allegations that they were timely paid. (See TAC at ¶¶ 55, 95.) Nor does the TAC contain, so far as the Court is able to find, any general allegation that Chadbourne has "duly performed all conditions on his part." (See *Careau, supra*, 222 Cal.App.3d at 1389.) For this reason, Chadbourne fails to state a cause of action for breach of contract against BANA. (*Ibid.*)

The Court concludes, however, that there is a reasonable possibility that Chadbourne can state a good cause of action, and on that basis, BANA's motion for judgment on the pleadings as

to Chadbourne's third cause of action for breach of contract is SUSTAINED with 30 days' leave to amend. (*Virginia G. v. ABC Unified School Dist.*, *supra*, 15 Cal.App.4th at 1852; Code Civ. Proc. §438, subd. (h)(2) ["[w]here a motion is granted...with leave to file an amended complaint...then the court shall grant 30 days to the party against whom the motion was granted to file an amended complaint..."].)

4. *Chadbourne Alleges Facts Sufficient to State a Claim Against BANA for Promissory Estoppel*

"The elements of a promissory estoppel claim are (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance. [Citation.]" (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1672.)

BANA first argues that the allegations of promise are not definite, and the allegations of reliance are not specifically or substantially alleged. (Support Memo. at 18:13-23.) The Court disagrees. The Court finds that the TAC adequately alleges facts sufficient to state a cause of action for promissory estoppel. (See TAC at ¶¶ 52, 56, 59-64, 80, 101-107.)

BANA next argues, in essence, that because Chadbourne's promissory estoppel claim is based on the same March 16, 2015, "TPP Offer" letter that forms the basis of his breach of contract claim, the former fails because "[i]f actual consideration was given by the promise, promissory estoppel does not apply." (Support Memo at 19:1-5, citing *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249 (*Youngman*)). The *Youngman* Court held that, "[i]f the promisee's performance was requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable." (*Ibid.*) The Court explained that, "[u]nder such circumstances, the only reliance which can make the promisor's failure to perform actionable is the promisee's doing what was requested." (*Ibid.*)

If Chadbourne's only allegations of reliance were the three payments requested under the March 16, 2015 "TPP Offer" letter, then the Court would agree. However, Chadbourne specifically alleges that, in addition to making these "trial payments," he also "relied to [his] detriment on the promises of [BANA] by spending countless hours and resources applying for loan modifications and by foregoing other remedies in [his] reliance on BANA's promises...[and]...by becoming delinquent in [his] monthly mortgage payments." (TAC at ¶105.) None of these acts were requested by BANA. As such, the rule articulated in *Youngman* does not apply to these allegations in the TAC.

For the foregoing reasons, BANA's motion for judgment on the pleadings is DENIED as to Chadbourne's cause of action for promissory estoppel.

5. *Plaintiffs' Complaint Clearly Discloses that the Fifth Cause of Action for Negligence is Barred by the Economic Loss Doctrine.*

A general demurrer, and therefore a motion for judgment on the pleadings, will lie "where the complaint has included allegations that clearly disclose some defense or bar to recovery." (*Cryolife, Inc. v. Super. Ct.* (2003) 110 Cal.App.4th 1145, 1152.)

BANA argues that the fifth cause of action for negligence is time barred.² (See Support Memo. at 19:8-9.) Through their fifth cause of action, Plaintiffs explicitly allege that Defendant BANA owed to Plaintiffs a duty of care “per the factors identified in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.” (TAC at ¶109.) BANA asserts that the statute of limitations on such claim is two-years. (Support Memo. at 19:10-11.) Assuming, *arguendo*, that this is the correct limitations period, BANA’s argument fails.

Plaintiffs’ allegations of breach are set out in paragraph 110 of the TAC. That paragraph asserts that BANA breached its duty to Plaintiffs in its processing of Plaintiffs’ submissions and requests to refinance or restructure the mortgage on the Property. (See TAC at ¶110.) Plaintiffs also allege that Plaintiffs’ efforts in this regard continued through and including September 23, 2017. (See TAC at ¶¶60-65.) Plaintiff filed its original Complaint in this action on January 8, 2019. Based on the foregoing, the Court cannot conclude that the allegations of the TAC “clearly disclose” that the Plaintiffs’ claim for negligence asserted against BANA is barred by a two-year statute of limitations. (*Cryolife Inc. v. Super. Ct.*, *supra*, 110 Cal.App.4th at 1152.)

The Court finds that BANA’s next two arguments involve a somewhat interrelated analysis. First, BANA argues that the fifth cause of action is barred by the Economic Loss Doctrine. Under the doctrine, plaintiffs may recover in tort for physical injury to person or property, but not for purely economic losses that may be recovered in a contract action. (*Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18-19.)

Second, BANA argues that Plaintiff Chadbourne’s negligence cause of action fails to state a claim because Chadbourne has not alleged facts sufficient to establish that BANA owed Chadbourne a duty of care. “The existence and scope of a defendant’s duty is a question of law for the court’s resolution.” (*Salinas v. Martin*, *supra* at 412.) On this issue, Plaintiffs allege as follows. “Defendant BANA owed Plaintiff Chadbourne a duty of care, per the factors identified in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650....” The Court finds that the holding in *Biakanja v. Irving* is inapposite to the facts presented.

In 1895 the California Supreme Court held that there could be no recovery for mere negligence in the performance of professional services, unless there was privity by contract or otherwise between the defendant and the person injured. (See *Lucas v. Hamm* (1961) 56 Cal.2d 583, 588, discussing *Buckley v. Gray* (1895) 110 Cal. 339.) The holding was overturned some 63 years later in *Biakanja v. Irving*, *supra*, 56 Cal.2d at 648-650. There our Supreme Court held that “[t]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.” (*Id.* at 650.)

² The Court agrees that the TAC alleges that BANA owed a duty only to plaintiff Chadbourne and does not allege that it owed any such duty to plaintiff Khan. (See TAC at ¶109.)

Here, Plaintiffs allege that Plaintiff Chadbourne and BANA were in contractual privity. They allege that Bana and Chadbourne were parties to the original 2007 loan. (See TAC at ¶43.) In addition, Plaintiffs allege that BANA and Chadbourne entered into a second contract in or around 2015. (See TAC at ¶95.) Again, the analysis articulated in *Biakanja v. Irving* is appropriate to determining whether a duty exists in the absence of such privity. *Biakanja v. Irving*, *supra*, 56 Cal.2d at 650.

The Court acknowledges that Plaintiffs allege an ongoing series of actions by BANA that were not necessarily, pursuant to the allegations of the TAC, related to the *performance* of either of those contracts. (See, *e.g.*, TAC at ¶¶55-65.) However, each of the actions related directly to the parties' contractual relationship, and most, if not all, constituted actions taken during negotiations towards altering (amending or novating) the parties' contract. Having failed to substantively oppose the present motion, Plaintiffs fail to present the Court with authority by which it might apply the *Biakanja v. Irving* analysis to the facts of this case. The Court is aware of no such authority and declines on its own authority to extend the scope of that cases' holding.

Turning back to BANA's first argument, in this context, the Court agrees that the economic loss rule otherwise bars Chadbourne from recovering under a negligence theory based on the allegations in the TAC. (*Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18-19.) Plaintiff alleges no physical injury or property damage. His economic losses are, pursuant to the doctrine, properly prayed for under a contract theory of recovery, and are not available under a negligence theory. (*Ibid.*)

For the foregoing reasons, BANA's motion for judgment on the pleadings is GRANTED as to Plaintiff Chadbourne's fifth cause of action for negligence. Over four complaints, Plaintiffs have alleged exclusively economic damages. In this context, and in light of the nature of the allegations, the Court finds no reasonable possibility that Chadbourne can amend to state a good cause of action for negligence, and on that basis, BANA's motion for judgment on the pleadings as to Chadbourne's fifth cause of action for negligence is GRANTED without leave to amend. (*Virginia G. v. ABC Unified School Dist.*, *supra*, 15 Cal.App.4th at 1852.)

6. *Plaintiffs Failed to Obtain Leave of Court to Add the Seventh Cause of Action for Fraudulent Transfer and/or the Tenth Cause of Action for Civil Conspiracy*

Neither the original Complaint nor the Second Amended Complaint asserted claims for fraudulent transfer or civil conspiracy. In the TAC Demurrer Order the Court found as follows. For the first time in this litigation, Plaintiffs assert, through the TAC, claims for fraudulent transfer (seventh cause of action), equitable accounting (ninth cause of action), and civil conspiracy (tenth cause of action). Fay Defendants object that Plaintiffs did so without proper leave of Court.

Following an order sustaining a demurrer...with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the

scope of the order granting leave to amend.” (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456.)

The Court's Order re: SAC Demurrer did not grant Plaintiffs permission to add additional causes of action... While leave to amend is not granted as to these causes of action, the Court's order is made without prejudice to Plaintiffs seeking permission under Code of Civil Procedure section 473 for leave to file an additional amendment. If Plaintiffs elect to so move, then, in addition to satisfying any requirements pursuant to that section and authority relating thereto, they will also need to satisfy the requirements of Code of Civil Procedure section 430.41, subdivision (e)(1).

Plaintiffs have not subsequently moved the Court for leave to amend. In follow up to the TAC Demurrer Order and to clarify the Court's finding therein, the Court strikes out the allegations of paragraphs 129-139 (constituting Plaintiffs' purported seventh cause of action for fraudulent transfer), 151-155 (constituting Plaintiffs' purported ninth cause of action for equitable accounting), and 156-163 (constituting Plaintiffs' purported tenth cause of action for civil conspiracy) on the grounds that they were not drawn or filed in conformity with the laws of this state. (See Code Civ. Proc. §436, subd. (b).)

In light of the foregoing, the Court finds BANA's demurrer, as to the seventh cause of action for fraudulent transfer, and to the tenth cause of action for civil conspiracy, moot.

7. *Plaintiffs Have Stated a Claim for Unfair Business Practices*

What constitutes “unfair competition” or an “unfair or fraudulent business practice” under Business and Professions Code section 17200, *et seq.*, under any given set of circumstances is a question of fact, the essential test being whether the public is likely to be deceived. (*People v. Toomey* (1984) 157 Cal.App.3d 1, 16.)

BANA first argues that because plaintiff Khan has no standing to bring claims for breach of contract and promissory estoppel, and does not assert a claim for negligence, therefore his derivative claim under this cause of action necessarily fails. BANA next argues that Plaintiffs do not adequately allege that BANA engaged in wrongful conduct that violated any prong of the UCL. The Court disagrees with both arguments, on the same grounds.

The TAC Demurrer Order states, “Plaintiffs' eighth cause of action asserts a claim for unfair business practices in violation of Business & Professions Code section 17200, *et seq.* Plaintiffs' claim is derivative of the allegations of breach of contract and promissory estoppel alleged by Chadbourne against Wilmington, and negligence alleged by both Plaintiffs against both Fay Defendants.” BANA attempts, here, to argue that the foregoing indicates that these are the only grounds on which Plaintiffs base their eighth cause of action. Not so. Plaintiffs also allege that, “Defendants have violated [Civil Code section 2924, *et seq.*] the Homeowners Bill of Rights.... (TAC at ¶143.)

The Court finds that, taking as true all of the allegations in the TAC and reasonable inferences therefrom, Plaintiffs have stated a claim for unfair competition based on violations of the cited provisions of the Civil Code. By way of example, the allegations of paragraphs 43-65 of the TAC appear to be sufficient to state violations of Civil Code sections 2924.11. Because of the strong policy in favor of trying claims on their merits, in reviewing a motion to strike, as with a demurrer, the court must “construe the allegations of a complaint liberally in favor of the pleader.” (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 438.) Doing so here, the Court finds that the TAC states a claim for unlawful business practices in violation of business and professions code section 17200.

For the foregoing reasons, BANA’s motion to strike is DENIED as to the eight cause of action.

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At 2:00 p.m.

Amalgamated Bank v. Napa Creek Village, LLC

20CV000904

(1) OSC RE: CONFIRMATION OF APPOINTMENT OF THE RECEIVER AND APPLICATION FOR A PRELIMINARY INJUNCTION

(2) MOTION TO STRIKE

(3) EX PARTE APPLICATION

APPEARANCE REQUIRED

PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Conservatorship of Aric Jonathan Dupree King

20PR000131

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE PERSON AND ESTATE – LIMITED CONSERVATORSHIP

TENTATIVE RULING: The matter is CONTINUED to November 17, 2020, 8:30 a.m. in Dept. B. On September 3, 2020, Petitioner filed an Amended Petition. On September 11, 2020, counsel for Petitioner filed a declaration by which she sought to replace an attachment to the Amended Petition. Petitioner is directed to file a complete Second Amended Petition with updated attachments. Petitioner is further directed to provide notice of the new hearing date to all interested parties, including the proposed Conservatee, and file a proof of service of same.

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Conservatorship of John Christ Chocalas

19PR000125

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE ESTATE ACCOUNT AND REPORT OF CONSERVATOR AND PETITION FOR ITS SETTLEMENT AND FOR FEES

TENTATIVE RULING: There is no accounting or report on file. The matter is continued to December 18, 2020, at 8:30 a.m. in Dept. B to allow the co-conservators to file an accounting/report and the Notice of Conservatee’s Rights (Judicial Council form GC-341) mailed to relatives of the proposed conservatee within the second degree. The clerk is directed to send notice to the parties.

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Estate of Jerome James Sorich

20PR000127

AMENDED PETITION FOR PROBATE OF LOST WILL AND FOR LETTERS OF ADMINISTRATION WITH WILL ANNEXED AND AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT

TENTATIVE RULING: On September 15, 2020, petitioner informed the Court that the original will was lodged that morning. On September 23, 2020, the Court continued the matter to allow time for the document to appear in the court file or for petitioner to file a proof of lodging. The original will is not in the court file and petitioner has not filed a proof of lodging. On October 2, 2020, the Court continued the matter to allow petitioner to file a written statement of substance evidencing decedent did not intend to revoke the copy of the will attached to the amended petition. (See Prob. Code, §§ 6124, 8223.)

On October 14, 2020, petitioner filed a second amended petition, and two declarations “in proof of will.” On October 15, 2020, petitioner filed a Proof of Service indicating that the second amended petition, and declarations had been served, by mail, on October 14, 2020.

The Court concludes that this does not provide adequate notice to interested parties of the matters set forth in the amended petition and declarations. Therefore, the matter is CONTINUED to November 6, 2020, at 8:30 a.m. in Dept. B. Petitioner shall provide notice of the continued hearing date.

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In the Matter of the Barbara M. Reising Trust

20PR000187

PETITION TO CONFIRM TITLE OF TRUST PROPERTY

TENTATIVE RULING: The Court discloses that Corbin O’Donnell is the son of a court employee. The Court can be fair and impartial. GRANT petition.

**CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B
(Historic Courthouse) at 8:30 a.m.**

**Romspen California Mortgage Limited Partnership
v. Robert Radovan, et al.**

19CV000989

MOTION FOR ATTORNEY’S FEES AND COSTS

TENTATIVE RULING: Plaintiff’s unopposed motion for attorney’s fees and costs is GRANTED in the amount of \$133,886.30

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In the Matter of Christine Marie Marc-Aurele

20CV000757

PETITION FOR CHANGE OF NAME

TENTATIVE RULING: Notice has been properly published and no written objections have been filed. The petition is GRANTED without need for appearance.

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Oak Creek East Homeowners Association v. Terence Redmond, et al. 20CV000879

ORDER TO SHOW CAUSE RE ISSUANCE OF A PRELIMINARY INJUNCTION

TENTATIVE RULING: Plaintiff Oak Creek East Homeowners Association motion for a preliminary injunction against defendants Terence Redmond and Melissa Redmond (individually and as trustees of the Redmond Family Revocable Trust) (collectively, the Redmonds) is GRANTED. The reflection pool shall be drained of all water and remain drained pending final judgment in this action. Plaintiff is required to obtain an undertaking. The preliminary injunction is conditioned on plaintiff obtaining an undertaking in the amount of \$500.

“[A]s a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief.” (*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 443, quoting *White v. Davis* (2003) 30 Cal.4th 528, 554; see *IT Corp. v. Cnty. of Imperial* (1983) 35 Cal.3d 63, 72.)

Plaintiff has presented evidence to demonstrate it is likely to prevail on the merits of the first cause of action for breach of CC&Rs, second cause of action for breach of contract, and third cause of action for private nuisance. (See *Wall Street Network, Ltd. v. N. Y. Times Co.* (2008) 164 Cal.App.4th 1171, 1178 [breach of contract elements]; *San Diego Gas & Elec. Co. v. Super. Ct.* (1996) 13 Cal.4th 893, 938 [private nuisance elements].) The evidence indicates the Redmonds deviated from the approved February 2019 Architectural Application and constructed unapproved improvements on Common Area and Exclusive Use Common Area. The Redmonds

exceeded the approved dimensions in the architectural application for their reflection pool. The Redmonds, for example, constructed a 19'3" long reflection pool, which exceeds the 16' length approved for the reflection pool. The reflection pool includes waterfalls, an electrical pump, and a concrete enclosure to house the electrical pump and related equipment. The architectural application did not show, and defendant did not approve these elements. This evidence supports the breach of contract claims in defendant's favor. The Redmonds additionally constructed a wrap-around patio exceeding the width and length of the Exclusive Use Common Area, which supports the private nuisance cause of action in defendant's favor.

Plaintiff also shows the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief weighs in its favor. There is evidence to support plaintiff's assertion that the water in the reflection pool could attract members of the public, and in particular children, who could injure themselves (or worse) if the water is not drained pending the resolution of this action. The Redmonds' contention they will lose money from the short-term rental of the property does not outweigh the safety risk posed by the reflection pool. The existence of the indemnity agreement does not change this outcome.

The Redmonds proffer numerous opposition arguments. These arguments fail. First, the February 2019 architectural application does not allow for substantial compliance as it states any deviation from the approved plans will nullify permission for the improvements. Second, the Court is not convinced unclean hands applies due to the safety risk. Third, although there may be circumstantial evidence of non-compliance with certain restrictions as applied to other owners (for umbrellas, etc.), there is no evidence other owners deviated from an approved architectural application. Fourth, the Court does not believe an equitable easement issue is relevant for purposes of whether to issue a preliminary injunction. Fifth, the purported "personal vendetta" against the Redmonds does not alter the fact that the evidence demonstrates they deviated from the approved architectural application and constructed unapproved improvements.

Plaintiff's request for judicial notice is GRANTED as to the complaint [Exhibit 1], but not for the truth of the matters asserted therein, the condominium subdivision map [Exhibit 2], the grant deed [Exhibit 3], and the trust transfer deed [Exhibit 4].