TENTATIVE RULINGS

DEPARTMENT C33

Judge Sandy N. Leal

December 4, 2025 at 10:00 AM

Civil Court Reporters: The Court does not provide court reporters for law and motion hearings. Please see the Court's website for rules and procedures for court reporters obtained by the Parties.

Tentative rulings: The Court endeavors to post tentative rulings on the Court's website in the morning, prior to the hearing. However, ongoing proceedings such as jury trials may prevent posting by that time. Tentative rulings may not be posted in every case. Please do not call the Department for tentative rulings if tentative rulings have not been posted. The Court will not entertain a request to continue a hearing or the filing of further documents once a tentative ruling has been posted.

Submitting on tentative rulings: If all counsel intend to submit on the tentative ruling and do not desire oral argument, please advise the Courtroom Clerk or Courtroom Attendant by calling (657) 622-5233. Please do not call the Department unless all parties submit on the tentative ruling. If all sides submit on the tentative ruling and so advise the Court, the tentative ruling shall become the Court's final ruling and the prevailing party shall give notice of the ruling and prepare an order for the Court's signature if appropriate under Cal. R. Ct. 3.1312.

Non-appearances: If nobody appears for the hearing and the Court has not been notified that all parties submit on the tentative ruling, the Court shall determine whether the matter is taken off calendar or the tentative ruling becomes the final ruling. The Court also might make a different order at the hearing. (*Lewis v. Fletcher Jones Motor Cars, Inc.*, 205 Cal.App.4th 436, 442, fn. 1 (2012.))

Appearances: Department C33 conducts non-evidentiary proceedings, such as law and motion hearings, remotely by Zoom videoconference pursuant to Code of Civil Procedure section 367.75 and Orange County Local Rule 375. Any party or attorney, however, may appear in person by coming to Department C33 at the Central Justice Center, located at 700 Civic Center Drive West in Santa Ana, California.

All counsel and self-represented parties appearing in-person must check in with the courtroom clerk or courtroom attendant before the designated hearing time. All counsel and self-represented parties appearing remotely must check-in online through the court's civil video appearance website at https://www.occourts.org/media-relations/civil.html before the designated hearing time. Once the online check-in is completed, participants will be prompted to join the courtroom's Zoom hearing session. Participants will initially be directed to a virtual waiting room pending the start of their specific video hearing. Check-in instructions and instructional video are available at https://www.occourts.org/media-relations/aci.html. The Court's "Appearance Procedures and Information--Civil Unlimited and Complex" and "Guidelines for Remote Appearances" also are available at https://www.occourts.org/media-relations.aci.html. Those procedures and guidelines will be strictly enforced.

Public Access: The courtroom remains open for all evidentiary and non-evidentiary proceedings. Members of the media or public may obtain access to law and motion hearings in this Department by either coming to the Department at the designated hearing time or contacting the Courtroom Clerk at (657) 622-5233 to obtain login information. For remote appearances by the media or public, please contact the Courtroom Clerk 24 hours in advance so as not to interrupt the hearings.

No filming, broadcasting, photography, or electronic recording is permitted of the video session pursuant to California Rules of Court, rule 1.150 and Orange County Superior Court rule 180.

#	Case Name	Tentative
2	***2023-01370885*** ***Boroumand vs. Auto Pros***	**Motion to Compel Deposition (Oral or Written)** **OFF CALENDAR**
4	***2024-01376047*** ***Curran vs. Rivian Automotive, Inc.***	**Motion for Summary Judgment and/or Adjudication** Defendants Rivian Automotive Inc., Jeff Hammoud, and Rivian Automotive, LLC's Motion for Summary Judgment is GRANTED. <u>Objections</u> Defendants improperly interposed objections in their responsive separate statement and, thus, they are not considered. (Cal. Rules of Court, rule 3.1354, subd. (b)(c).) <u>Judicial Notice</u> Plaintiff's requests for judicial notice are granted. (Evid. Code, § 452.) <u>Merits</u> **Defendant Rivian Inc.** "Corporate entities are presumed to have separate existences, and the corporate form will be disregarded only when the ends of justice require this result." (*Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737.) "Two corporations may be treated as a single employer for purposes of liability under Title VII of the federal 1964 Civil Rights Act. [Citation.] Because California's Fair Employment and Housing Act (FEHA) has the same nature and purpose as the federal law, California courts frequently look to federal case law for guidance in interpreting the FEHA." (*Ibid*.) The integrated enterprise test "has four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control." (*Ibid*.) "Under this test, common ownership or control alone is never enough to establish parent liability. [Citation.] Although courts consider the four factors together, they often deem centralized control of labor relations the most important." (*Id*. at 738.) Defendant Rivian Automotive, Inc. (Rivian Inc.) has demonstrated Plaintiff was hired by Defendant Rivian Automotive, LLC (Rivian LLC), Plaintiff's direct supervisor, Defendant Jeff Hammoud, is a Rivian LLC employee, Hammoud made the decision to terminate Plaintiff, and Plaintiff's salary was paid by Rivian LLC. (UMF 8-24.) Plaintiff only contests Rivian Inc. provided a raise and equity bonus once in March 2023 and provides Rivian Inc. and Rivian LLC share an address, agent of service, CEO, and name. Plaintiff presents no evidence regarding interrelation of operations and common ownership or financial control. Plaintiff's only evidence of centralized control of labor relations is the single reference in a stock bonus letter. Here, similar to *Laird*, Plaintiff has failed to demonstrate Rivian Inc. actually exercised any control over Rivian LLC's employment decisions. (*Laird, supra*, 68

		Cal.App.4th 727, 739.) Thus, Plaintiff has only demonstrated common management, which is insufficient alone. Therefore, Defendant Rivian Inc.'s Motion for Summary Judgment should be granted. **Administrative Remedies** Plaintiff has adequately exhausted her administrative remedies. "[A]s long as the DFEH complaint identifies the complainant's employer as having discriminated against complainant, we see no basis for precluding the complainant from bringing a lawsuit against that employer even if the employer is not referred to by its proper legal name in the DFEH complaint." (*Clark v. Superior Court* (2021) 62 Cal.App.5th 289, 307.) **1st Cause of Action – Sex Discrimination** California's FEHA makes it an unlawful employment practice to discharge or discriminate against employees in the "terms, conditions, or privileges of employment" because of a disability. (Gov. Code, § 12940, subd. (a).) " 'California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination....' [Citation.] [¶] 'This so-called McDonnell Douglas test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially.' " (*Wills v. Superior Ct.* (2011) 195 Cal.App.4th 143, 159 (Wills).) "In the first stage, the plaintiff bears the burden to establish a prima face case of discrimination. [Citation.] The burden in this stage is ' "not onerous" ' [citation], and the evidence necessary to satisfy it is minimal [citation].... If the plaintiff meets this burden, ' " 'the burden shifts to the defendant to [articulate a] legitimate nondiscriminatory reason for its employment decision....' ..." ' [Citation.] This likewise is not an onerous burden [citation], and is generally met by presenting admissible evidence showing the defendant's reason for its employment decision [citation]. [¶] Finally, if the defendant presents evidence showing a legitimate, nondiscriminatory reason, the burden again shifts to the plaintiff to establish the defendant intentionally discriminated against him or her. [Citation.] The plaintiff may satisfy this burden by proving the legitimate reasons offered by the defendant were false, creating an inference that those reasons served as a pretext for discrimination." (*Wills, supra*, 195 Cal.App.4th 143, 159–160.) "A defendant's summary judgment motion ' "slightly modifies the order of these [McDonnell Douglas] showings." ' [Citation.] [The defendant has] the initial burden to either (1) negate an essential element of [the plaintiff's] prima face case [citation] or (2) establish a legitimate, nondiscriminatory reason for [the challenged adverse action] [citation]." (*Wills, supra*, 195 Cal.App.4th 143, 160.) " '[T]o avoid summary judgment [once the employer makes the foregoing showing], an employee claiming discrimination must offer

		substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*Wills, supra*, 195 Cal.App.4th 143, 160.) The elements of a discrimination claim are: "(1) [the plaintiff] was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355.) It is not disputed Plaintiff is a member of a protected class and suffered an adverse employment action. Defendants present evidence Plaintiff was not performing competently in her position as Director of CMF. Sohpia Park, a CMF designer, was considering leaving Rivian due to Plaintiff's management. (Park Decl., ¶ 9-11.) Specifically, Plaintiff assigned a project to design the interior of a new model to a single CMF designer, instead of Rivian's usual practice of allowing all designers to collaborate on sketches which resulted in a design that differed substantially from Rivian's brand. (Park Decl., ¶ 6; Hammoud Decl., ¶ 13.) Plaintiff failed to take initiative to collaborate and communicate with the engineering team after Hammoud instructed her to do so. (Hammoud Decl., ¶ 15.) In March 2023, Hammoud rated Plaintiff as a 1 out of 9 on a talent assessment program. (Hammoud Decl., ¶ 18.) Plaintiff failed to ensure a laptop with a presentation for executives of an investor was functioning and accessible at two separate meetings in early 2023 which was Plaintiff's responsibility. (Hammoud Decl., ¶¶ 19-22.) Hammoud placed Plaintiff on a reset plan in August 2023 to improve Plaintiff's job performance or terminate the employment. (Hammoud Decl., ¶¶ 18, 25.) Hammoud met with Plaintiff during the reset plan to discuss areas of improvement and evaluate her progress. (Hammoud Decl., ¶ 27.) On one occasion, Hammoud informed Plaintiff the design team did not find her approachable and stated "just a smile can go a long way" to seeming more approachable to improve the work environment. (Hammoud Decl., ¶ 28.) Plaintiff made some improvement during the reset plan, however, Hammoud believed she was "not delivering on the development of color mastering," "had not fixed or built relationships with engineering partners," "was frequently out of the office," and he did not observe an improvement in the morale of the CMF team. (Hammoud Decl., ¶ 31.) Plaintiff has failed to demonstrate a triable issue of fact as Defendants' nondiscriminatory reason. She only offers the evidence of a slight raise and a stock bonus. However, Defendants have demonstrated the bonus was provided based on company success and not Plaintiff's individual

		contributions as argued by her. (Chereton Decl., 86:14-87:2.) Plaintiff claims the raise she received was "very rare" and Hammoud was "very happy" with Plaintiff's performance, however, she has not attached the portion of her deposition where she claims to have testified to these statements. Thus, the Court cannot consider them. "The employee must do more than raise an issue whether the employer's action was unfair, unsound, wrong or mistaken, because the overriding issue is whether discriminatory animus motivated the employer. The employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons. In other words, plaintiff must produce substantial responsive evidence to show that the employer's ostensible motive was pretextual; that is, that a discriminatory reason more likely motivated the employer or that the employer's explanation is unworthy of credence. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties* (2009) 173 Cal.App.4th 740, 755 (cleaned up).) " 'Where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive.' " (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 809.) "One is quickly drawn to the realization that claims that employer animus exists in termination but not in hiring seem irrational. From the standpoint of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes thereby incurring the psychological costs of associating with them, only to fire them once they are on the job." (*Ibid*.) Plaintiff has presented little evidence to show Defendants' stated reason of Plaintiff's failure to meet her job requirements was pretextual. Plaintiff points to several comments made by Hammoud which Plaintiff claims demonstrate his sexist animus. The comments include one instance where Hammoud made a comment to an employee that his wife was a prostitute because she worked nights; another instance where he complained Plaintiff was "being too wordy," "talking too much," needed to "get to the point," and "why are we talking about this"; another instance where Hammoud suggested Plaintiff smile more; and finally, one instance where he asked if she was going to an interview because her hair was different. Plaintiff has failed to rebut the strong inference there was no discriminatory animus because Hammoud both hired her and terminated her in just over a year. Further, Plaintiff presents no evidence to connect the comments to his evaluation of Plaintiff's job performance. Thus, summary adjudication should be granted as to the 1st cause of action. Plaintiff's other claims are derivative of her discrimination claim. Thus, they fail because they are derivative of the sex discrimination cause of action. Therefore, summary judgment is proper.

5	***2024-01388988*** ***De La Cruz vs. Southern California Edison Company***	**Motion to Compel Production** Plaintiff Jose Israel Gonzalez De La Cruz's (Plaintiff) Motion to Compel Defendant Southern California Edison to Provide Further Responses to Plaintiff's First Request for Production of Documents is GRANTED. On 1/23/25, the court granted the motion, in part, and continued the motion in part for an in-camera review of documents purportedly protected by qualified attorney-work product doctrine. (ROA 124.) More specifically, at the 1/23/25 hearing, the court noted the motion was moot as to Nos. 4, 9, 10, 13, 14, 29, and 42–83 and only No. 25 remained in dispute. No. 25 sought "Any and all DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED INFORMATION that evidences the distance from the roof of 244 Santo Tomas Avenue to the primary conductor." Defendant's supplemental response consisted of several objections, including work product doctrine protection and a substantive response: "An investigation was conducted at the direction of Responding Party's counsel and therefore the information obtained is privileged." The court granted the motion, in part, as to pre-incident documents containing measurements and ordered Defendant to produce all pre-incident documents containing measurements created within five years before the incident within 20 days. The court advised the parties that it intended to review all post-incident documents for which Defendant was claiming qualified attorney-work product protection and ordered Defendant to electronically file unredacted versions of said documents for in camera review by 2/7/25. The hearing was continued to 02/27/2025. (ROA 124.) After a long delay and technical issues, on 10/30/25, the court conducted the in-camera review. Defense counsel appeared via Zoom. Christopher Jones, Land Surveyor, was also present via Zoom to assist with the software images. (ROA 214.) Code of Civil Procedure, Section 2018.030 restates the attorney "work product" doctrine, including the qualified attorney-work product protection: "The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Code Civ. Proc., § 2018.030, subd. (b).) The attorney work product doctrine protects "[w]ork produced by an attorney's agents and consultants, as well as the attorney's own work product." (*Citizens for Ceres v. Superior Court* (2013) 217 Cal. App. 4th 889, 911.) Work product protection applies whether an attorney is acting in a litigation or "nonlitigation legal capacity." (*Rumac, Inc. v. Bottomley (*1983) 143 Cal. App. 3d 810, 815-16.)

		Generally, work product protection covers "derivative" material, i.e., material created by or derived from an attorney's work on behalf of a client that reflects the attorney's evaluation or interpretation of the law or the facts involved. Examples include charts and diagrams prepared for trial; audit reports or compilations of entries in documents and records; and appraisals, opinions and reports of experts employed by consultants (and not yet designated as trial witnesses) developed as a result of the counsel's initiative in preparing for trial. (*Coito v. Superior Court* (2012) 54 Cal. 4th 480, 489; *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834–835; *Mack v. Superior Court In and For Sacramento County* (1968) 259 Cal.App.2d 7, 10.) "Nonderivative" material, i.e., material that is only evidentiary in nature, is not protected even if attorney work went into obtaining the materials or by simply transmitting the material to the attorney. (*Coito, supra,* 54 Cal.4th at 489; *Mack, supra,* 259 Cal.App.2d at 10.) Examples include the identity and location of physical evidence and witnesses. (*Coito, supra,* 54 Cal.4th at 489; *Mack, supra,* 259 Cal.App.2d at 10.) The material Defendant produced for review were computer-generated 3D images of the incident scene that were created using the post-incident measurements of the scene. After reviewing the images and questioning Defense counsel about the images and Defendant's claim of qualified attorney-work product protection, the court finds the qualified attorney-work product doctrine does not apply. Thus, Defendant's objection based on qualified attorney-work product doctrine is OVERRULED. The remainder of the motion is GRANTED as to post-incident documents containing measurements. Defendant is ordered to produce the computer-generated 3D images at the in-camera review within 20 days.
6	***2021-01183151*** ***LoanCare LLC vs. DataMortgage, Inc.***	**Motion to Exclude Experts** Defendant Data Mortgage, Inc.'s Motion to Exclude Karen Bell's expert testimony is DENIED. "A party must identify its expert witnesses before trial in response to a demand for exchange of expert witness information under Code of Civil Procedure section 2034.210. This requirement applies to both retained and nonretained experts." (*Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 139; see §§ 2034.210, subd. (a), 2034.260, subd. (b)(1).) For an expert witness who "has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action," the " 'exchange shall also include or be accompanied by an expert witness declaration.' " (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 34; see §§ 2034.210, subd. (b), 2034.260, subd. (c); *Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 638.) Failure "to submit an expert witness declaration that fully complies with the content requirements of" section 2034.260, subdivision (c), may result in exclusion of the expert opinion. (*Bonds v. Roy* (1999) 20 Cal.4th 140, 149; see § 2034.300; *Staub v. Kiley* (2014) 226 Cal.App.4th 1437, 1445.)

		Code of Civil Procedure section 2034.210 provides that any party may demand an exchange of information regarding expert witnesses. Code of Civil Procedure section 2034.300 codifies the trial court's authority to exclude the "expert opinion of any witness that is offered by any party who has unreasonably failed" to comply with expert designation rules. Non-compliance with these rules "may be found to be 'unreasonable' when a party's conduct gives the appearance of gamesmanship, such as undue rigidity in responding to expert scheduling issues. [Citation.] The operative inquiry is whether the conduct being evaluated will compromise these evident purposes of the discovery statutes: ' "to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise." ' " (*Staub*, *supra*, 226 Cal.App.4th at p. 1447.) Here, it is apparent Plaintiff's failure to include Bell in its expert designation is not a result of gamesmanship. Bell's declaration was used in opposition to Defendant's summary judgment motion earlier this year and Bell testified in phase 1 of the trial. Additionally, Defendant noticed Bell's deposition for November 17, then canceled it after filing this motion and receiving the amended designation with Bell included. (Edwards Decl., ¶ 4.) Thus, Plaintiff's failure to include Bell in its expert designation was not unreasonable and the Court may not exclude her testimony.
8	***2024-01422198*** ***Rinker vs. Rinker***	**Motion to Compel Arbitration** The Motion of Defendants Bart Rinker ("B. Rinker"), individually, as Trustee of the 2020 Harry S. Rinker Separate Property Trust, and as Executor of the Estate of Harry S. Rinker, Deceased, and Gail L. Reiter ("G. Reiter"), individually and as Trustee of The Gail Lavern Reiter Trust (collectively, "Defendants") to arbitrate the issues in controversy involved in this action and to stay the action pending arbitration is GRANTED. Defendants' unopposed Request for Judicial Notice ("RJN") is GRANTED. Defendants' objections to the Declaration of Diane J. Rinker ("Plaintiff") are SUSTAINED. Defendants move to compel arbitration pursuant to Code of Civil Procedure section 1281.2. Under section 1281.2, a party to an arbitration agreement may move to compel arbitration if another party to the agreement refuses to arbitrate, and the court shall order the parties to arbitrate if it determines an agreement to arbitrate exists, "unless it determines that: (a) The right to compel arbitration has been waived by the petitioner;

(b) Grounds exist for the revocation of the agreement; or

(c) A party to the arbitration agreement is also a party to pending court action or special proceeding with third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on common issue of law or fact . . . ."

"When presented with a motion or petition to compel arbitration, a trial court must determine whether an 'agreement to arbitrate the controversy exists.' (Code Civ. Proc., § 1281.2; [Citation.]) The court makes this determination in a 'summary proceeding' (Code Civ. Proc., § 1290.2), sitting 'as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination.' [Citation.] [¶] The party seeking arbitration has the burden of proving the existence of an arbitration agreement by a preponderance of the evidence. [Citation.] The agreement must be in writing to be valid and enforceable. (Code Civ. Proc., § 1281.) The party opposing arbitration bears the burden of proving by a preponderance of the evidence any defense to the agreement's enforcement. [Citation.] Whether the arbitration agreement is a legally enforceable contract is determined by applying general principles of California contract law. [Citation.]" (*Ramirez v. Golden Queen Mining Co., LLC* (2024) 102 Cal.App.5th 821, 829–30.)

Written agreement to arbitrate the controversy:
Defendants move to compel arbitration pursuant to an Arbitration Agreement with an effective date of 12-7-23. (Rudolph Decl. ¶14, Ex. 2.) The Arbitration Agreement was the result of three civil actions filed by Plaintiff. (Rudolph Decl., ¶¶ 5, 8-14.) The individual parties involved in the three civil actions engaged in mediation which resulted in the parties entering into a First Amended Agreement Relating to Mediation Procedure ("Mediation Agreement"). (Rudolph Decl., ¶¶ 8, 12; Ex. 1.)

The parties' mediation was unsuccessful, and the arbitration was commenced pursuant to the terms of the Arbitration Agreement on August 6, 2024. (Rudolph Decl., ¶ 24.) Despite commencement of the arbitration, Plaintiff filed this action on August 27, 2024, seeking a declaratory judgment that "the Arbitration Agreement is … unenforceable, as no contract was created." (Complaint [ROA #2], ¶ 23 and Prayer ¶ 1.) On September 17, 2024, Plaintiff filed a motion at JAMS seeking to dismiss the arbitration, which was denied on November 8, 2024; however, the arbitrator stayed arbitration pending "further determination by the Superior Court and direction it may give to the Arbitrator." (Rudolph Decl. ¶ 28.)

The Mediation Agreement expresses the parties' intention to arbitrate all issues that are not resolved through mediation. (Rudolph Decl., ¶ 13.) Specifically, the Arbitration Agreement provides in subdivision H of the Recital:

		"As is reflected in the Mediation Agreement, the Parties intend and desire for Mediation to encompass all issues, disputes, controversies, claims, causes of action, and defenses (collectively Issues) necessary to achieve a complete and global resolution among all of the Parties. Among other things included in the Issues is the value and disposition of Bart and Diane's respective interests in Cucamonga Business Park." (Rudolph Decl. ¶ 14, Ex. 2, Recital H.) Further, Section 2 of the Arbitration Agreement provides the parties agreement to arbitrate all issues as provided in Recital H: **"SUBMISSION TO BINDING ARBITRATION.** The Parties each agree to submit all Issues to neutral, binding arbitration at JAMS, in Irvine, California, pursuant to the JAMS Comprehensive Arbitration Rules & Procedures (the Rules), excepting only as the Rules are modified by this Agreement. The Parties each agree to waive and relinquish, and do hereby waive and relinquish, any rights they might possess to have any of the Issues litigated in a court or jury trial." (Rudolph Decl. ¶ 14, Ex. 2, Section 2.) Therefore, Defendants have established the existence of an Arbitration Agreement. <u>Enforceability of Arbitration Agreement</u>: Plaintiff does not dispute that she entered into the Arbitration Agreement. Instead, she argues it is unenforceable due to a mutual mistake that prevented contract formation. Plaintiff contends her consent to the Arbitration Agreement was based on a mistake in that August Henry Reiter III ("A. Reiter"), a co-owner of the Cucamonga Business Park ("CBP"), is an indispensable party to the Arbitration Agreement, the parties having agreed to arbitrate all issues necessary for a complete and global resolution among the parties, including specifically, the value and disposition of B. Rinker and Plaintiff's respective interests in the CBP; however, a complete and global resolution is not possible without resolution of the CBP, which is not possible without A. Reiter. According to Plaintiff, any disposition of Plaintiff and B. Rinker respective interests in CBP is governed by a written Tenancy-In-Common Agreement ("TIC Agreement"), dated December 30, 2020, and entered into by and between Plaintiff and B. Rinker, as Trustees of the Harry S. Rinker and Diane J. Rinker Revocable Trust dated May 10, 1966, as Amended and Restated, and the other co-owners of the CBP, A. Reiter and G. Reiter as Trustees of the Reiter Family Trust. Plaintiff makes the same contentions in the complaint in this action seeking a declaration that the Arbitration Agreement is unenforceable. (See Compl., ¶¶ 21-23.) Plaintiff has not established that the Arbitration Agreement was executed based on a mutual mistake. Notably, Plaintiff does not allege in the

		complaint that the mistake was mutual, nor does she allege that Defendants were aware of Plaintiff's mistake. A mistake is either one of fact (Civ. Code, § 1577) or one of law (Civ. Code, § 1578). A party's unilateral mistake of fact will not vitiate formation of the contract unless the complaining party has acted reasonably in her own behalf. (Civ. Code, 1577. See *Estate of Eskra* (2022) 78 Cal.App.5th 209, 215, 225 [where a party fails to act reasonably on her own behalf, she will be held to have assumed the risk of unilateral mistake, as a matter of law].) In the case of a mistake of law, a party's unilateral mistake will not vitiate formation of the contract unless the other party to the contract was aware of and failed to rectify the complaining party's mistake. (Civ. Code, § 1578, subd. (2); *Dowling v. Farmers Ins. Exchange* (2012) 208 Cal.App.4th 685, 699.) Here, the evidence establishes that any mistake that may have existed was unilateral on Plaintiff's part. During her deposition, Plaintiff authenticated her signature on the Arbitration Agreement and confirmed that she was represented by counsel; she also admitted her understanding that the value and disposition of her and B. Rinker's respective interests in CBP were part of the Mediation Agreement and the Arbitration Agreement, that she was not induced by any other party to enter into the Arbitration Agreement, that she executed the TIC Agreement, that she was represented by counsel in connection with the negotiation of the TIC Agreement, and that she had access to the TIC Agreement at all times since December 30, 2020. (Rudolph Decl., ¶¶ 31, 33-34, Exs. 8-10.) Based on these facts, Plaintiff failed to act reasonably on her own behalf and therefore she assumed the risk of her unilateral mistake. The evidence also establishes that the mistake was not material to the issues to be determined in arbitration. Pursuant to the terms of the Arbitration Agreement, Plaintiff and B. Rinker sought to resolve *their* respective interests in the CBP. The Arbitration Agreement provides: "Among other things included in the Issues is the value and disposition of *Bart and Diane's* respective interests in Cucamonga Business Park." (Rudolph Decl. ¶ 14, Ex. 2, Recital H [emphasis added].) The Arbitration Agreement does not contain any provisions involving A. Reiter's interests in the CBP. It also does not make the arbitrator's ultimate valuation and disposition of Plaintiff and B. Rinker's respective interests in the CBP subject to the TIC Agreement. <u>Waiver of Right to Compel Arbitration:</u> Plaintiff argues Defendants waived their right to arbitration by engaging in conduct wholly inconsistent with a right to arbitration, including filing an answer, participating in case management, serving written discovery, serving a notice of Plaintiff's deposition, filing a motion to compel Plaintiff's deposition, and thereafter taking Plaintiff's deposition. Plaintiff also argues Defendants waived their right to arbitration by unreasonably delaying the filing of the instant motion.

		"To establish waiver under generally applicable contract law, the party opposing enforcement of a contractual agreement must prove by clear and convincing evidence that the waiving party knew of the contractual right and intentionally relinquished or abandoned it. The waiving party's knowledge of the right may be 'actual or constructive.' Its intentional relinquishment or abandonment of the right may be proved by evidence of words expressing an intent to relinquish the right or of conduct that is so inconsistent with an intent to enforce the contractual right as to lead a reasonable factfinder to conclude that the party had abandoned it." (*Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, 584 [cleaned up].) "To establish waiver, there is no requirement that the party opposing enforcement of the contractual right demonstrate prejudice or otherwise show harm resulting from the waiving party's conduct." (*Id.* at 585.) Here, there is no dispute that Defendants have always been aware their right to compel arbitration. Regarding Defendants' actions, they do not establish Defendants intentionally relinquished or abandoned their right to arbitration. On September 24, 2024, before Defendants filed their answer, B. Rinker filed an opposition to Plaintiff's *ex parte* application, which sought to stay the arbitration that commenced a few weeks before this action was filed. (Rudolph Decl., ¶¶ 24, 27; ROA # 23.) In addition, on October 4, 2024, Defendants filed an answer where three of the six affirmative defenses concern their right to arbitration. (Higuchi Decl., ¶ 5; ROA #32, ¶¶ 3-11.) While Defendants served one set of form interrogatories and demand for production of documents, and took Plaintiff's deposition (see Higuchi Decl., ¶¶ 6-7, 13), Defendants pursued this limited discovery to establish the Arbitration Agreement applied to the matters alleged in the complaint, namely, that the Arbitration Agreement is unenforceable. Notably, Defendants relied in part on Plaintiff's deposition testimony to support the instant motion. Further, although Defendants filed a CMC statement in this case that requested a court trial and left the box for indicating it was "willing to participate" in arbitration blank, B. Rinker filed motions to compel arbitration in each of the three other actions Plaintiff filed after arbitration was commenced. (See RJN, Ex. 11, 12, 14.) This conduct establishes Defendants at all times acted in a manner consistent with their stated intention to enforce their rights under the Arbitration Agreement. With respect to delay, at least five months of it was caused by Plaintiff's failure to appear for her deposition which necessitated the motion to compel. (See ROA # 72.) Specifically, Defendants served the notice of deposition on January 7, 2025, scheduling the deposition on February 19, 2025, the motion was heard on May 15, 2025, and Plaintiff's deposition was taken on June 10, 2025. (Higuchi Decl., ¶¶ 6, 13; ROA ## 72, 84.) The motion is GRANTED. The action is stayed pending the completion of arbitration. Defendants to give notice.

10	***2022-01241813*** ***Shady Bird Lending, LLC vs. The Source At Beach, LLC***	**Motion for Leave to File Amended Cross-Complaint** Defendant/Cross-Complainant The Source At Beach, LLC's Motion for Leave to File First Amended Cross-Complaint is GRANTED. Defendant/Cross-Complainant The Source At Beach, LLC ("TSB") seeks leave to file a First Amended Cross-Complaint pursuant to Code of Civil Procedure sections 473, subdivision (a)(1), and 576 to add a cause of action for trespass against Plaintiff/Cross-Defendant Shady Bird Lending, LLC ("Shady Bird"), along with additional facts supporting the new cause of action which arose after the original Cross-Complaint was filed on February 3, 2023. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading[.]" (Code Civ. Proc. § 473(a)(1).) "Any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading." (Code Civ. Proc., § 576.) Policy favors liberally granting leave to amend so that all disputed matters between the parties may be resolved. (See *Hirsa v. Sup.Ct. (Vickers)* (1981) 118 Cal.App.3d 486, 488-489; *Mesler v. Bragg Mgmt. Co.* (1985) 39 Cal.3d 290, 296 ["There is a strong policy in favor of liberal allowances of amendments."].) Denial is rarely justified. (*Morgan v. Sup.Ct.* (1959) 172 Cal.App.2d 527, 530.) However, denial is appropriate if the party seeking the amendment has been dilatory and the delay has prejudiced the opposing party. (*See Hirsa, supra,* 118 Cal.App.3d at p. 490; *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488 [denial proper where leave sought on eve of trial when a jury was about to be impaneled, without explanation for nearly two-year delay, and the only way to avoid prejudice to the opposing party was to continue trial to allow further discovery to defend against the new allegations]; *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345 [denial not abuse of discretion where plaintiff sought leave to amend after trial readiness conference without explanation for delay and amendment would require additional discovery and perhaps result in a demurrer or other pretrial motion].) As an initial matter, as Shady Bird correctly points out, TSB should have sought leave to file a supplemental pleading pursuant to Code of Civil Procedure section 464 since TSB seeks to allege facts that occurred after the original Cross-Complaint was filed in February 2023. (See Code Civ. Proc., § 464, subd. (a); *Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 287, disapproved on other grounds, *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 219 ["Matters which occur after the date of the complaint (or in this case cross-complaint) must be brought into the pending action, if at all, by means of a supplemental complaint."].) Nevertheless, the court has the discretion to consider this motion as one for leave to file a supplemental cross-complaint. (See *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193

		["The nature of a motion is determined by the nature of the relief sought, not by the label attached to it."].) The procedures for filing a motion for leave to file a supplemental pleading are the same as when seeking leave to file an amended pleading. (See Weil & Brown, Cal. Prac. Guide Civ. Pro. Before Trial (The Rutter Group June 2025 update) ¶ 6:812 [stating that the procedures for both motions are the same].) A motion for leave to amend must state with particularity what allegations are to be amended. Namely, it must state what allegations in the previous pleading are proposed to be deleted and/or added, if any, and where, by page, paragraph, and line number. (California Rules of Court (CRC), Rule 3.1324(a)(2)-(3).) The motion must be accompanied by a declaration specifying: (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier. (CRC, Rule 3.1324(b).) The motion must also be accompanied by the proposed amended pleading, numbered to differentiate it from the prior pleadings or amendments. (CRC, Rule 3.1324(a)(1).) It is within the court's discretion to require compliance with Rule 3.1324 before granting leave. (*Hataishi v. First American Home Buyers Protection Corp.* (2014) 223 Cal.App.4th 1454, 1469.) Here, TSB has complied with Rule 3.1324 except that it fails to explain the reasons why the request for amendment was not made earlier. TSB only explains the delay relating to its current counsel. TSB fails however to explain why its prior counsel did not seek leave to amend/supplement the cross-complaint between February 2024 (the last date alleged in the PFACC) and August 2025 when its prior counsel substituted out of the case. TSB explains only that after its current counsel substituted into this case on August 14, 2025, counsel took action to verify the trespass and whether adequate discovery had been conducted and then sought a stipulation from Shady Bird's counsel on October 17, 2025, to file the PFACC. (Lee Decl., ¶¶ 4-5, 12-13.) Shady Bird's counsel would only stipulate if TSB agreed to a trial continuance and reopening of discovery. (Id., ¶ 5.) TSB's counsel did not believe either were necessary (*ibid*.) and filed the instant motion on October 24, 2025. Thus, TSB unreasonably delayed seeking leave for well over a year without explanation. TSB contends Shady Bird will not suffer prejudice because the new cause of action will not require additional discovery or a trial continuance. According to TSB, the additional facts concerning the trespass claim have been adequately covered in depositions and/or written discovery so no additional costs of preparation will be incurred by the parties. However, as Shady Bird correctly points out, since the Cross-Complaint did not allege trespass, the depositions and written discovery did not cover the facts that may support Shady Bird's defenses to trespass or disprove TSB's trespass allegations or test the veracity of TSB's version of the facts concerning the trespass. Further, without the appropriate discovery into the trespass cause of action, Shady Bird was

		deprived of the value that such discovery would have in the designation of expert witnesses on this new cause of action. In addition, the PFACC may result in a demurrer, motion to strike or other pretrial motion practice. The court notes that prior to filing the instant motion, Shady Bird agreed to stipulate to TSB filing the PFACC if TSB agreed to reopen discovery and continue trial. These conditions would alleviate the prejudice identified by Shady Bird. Therefore, given the liberal policy of granting leave to amend to resolve all disputes between the parties, the motion is GRANTED. The trial is continued to . Discovery is reopened as to the new cause of action for trespass only. All deadlines and completion dates for discovery concerning the new cause of action, motions and other procedural matters are continued based on the new trial date according to Code of Civil Procedure.
11	***2021-01226723*** ***Software Freedom Conservancy, Inc. vs. Vizio, Inc.***	**Motion for Summary Judgment and/or Adjudication** Plaintiff Software Freedom Conservancy, Inc.'s Second Motion for Summary Adjudication (ROA 496) is GRANTED as to issue no. 1 and DENIED as to issues no. 2 and 3. Plaintiff's request for judicial notice (ROA 488) is granted as to items 1-7 and 10 and denied as to items 8-9 and 11. Defendant's objections (ROA 563) are sustained as to objection 18 (Wikipedia article) and overruled as to the remaining objections. <u>Legal Standard:</u> Code of Civil Procedure section 437c states in part: "(f)(1) A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. (2) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion."

		"(p) For purposes of motions for summary judgment and summary adjudication: (1) A plaintiff or cross-complainant has met that party's burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." Issue No. 1: Whether VIZIO has a contractual duty to provide SFC with the complete corresponding machine-readable source code (as that term is defined in Section 3 of the GNU General Public License, version 2 (the GPLv2")) for any software on its Smart TV Model No. D32h-J09 that is licensed under the GPLv2 and the complete corresponding machine-readable source code (as that term is defined in Section 0 of the GNU Lesser General Public License version 2.1 (the "LGPLv2.1")) for any library that is licensed under the LGPLv2.1. Plaintiff argues the subject smart TV included a statement in the "License List" menu that it "may contain executable codes and libraries that are subject to the terms of the GNU General Public License (GPL), GNU Lesser General License (LGPL) … and other open source licenses. VIZIO offers to provide applicable source code upon request for a processing fee covering the cost of fulfilling the distribution…." (Motion, p. 8.) Plaintiff contends its representative accepted such offer by requesting the applicable source code in a live chat with a Vizio representative. (p. 9; UMFs 8-11.) Defendant contends (1) Plaintiff failed to allege in the complaint that it had a direct contract with Vizio, (2) Plaintiff failed to assert such a claim in its discovery responses, (3) Plaintiff should not be allowed to belatedly amend its complaint to state such an allegation, and (4) the alleged acceptance was by non-party Paul Visscher who was not an clearly acting as an employee or agent of Plaintiff. (Opp. at pp. 4-8.) The pleadings define the issues on a motion for summary judgment. (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) Here, Plaintiff's operative FAC alleges claims for breach of contract and declaratory relief. Paragraphs 100-101 of the FAC allege that Defendant "purports to include a written offer for source code via the SmartCast streaming platform…" in the License List, consistent with Plaintiff's allegations of an offer in the motion. Paragraph 107 references the "source code recently provided by" Defendant, which Plaintiff asserts was the result of Ms. Visscher's acceptance of the offer in April 2023. (Reply, p. 2.)

		However, Plaintiff alleges the responsive code provided was incomplete and insufficient. Plaintiff also alleges at paragraph 128 that Defendant "did not accompany the Subject TVs with either the source code corresponding to the executable of the SmartCast Works at Issue residing on those devices, or with a valid written offer to provide such source code on demand." Plaintiff alleges Defendant's failure to provide the source code is a breach of the subject agreements. (¶¶ 128-138.) "It is well established that a party may plead in the alternative and may make inconsistent allegations." (*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311, 1323 [cleaned up].) Here, Plaintiff alleged both that Defendant failed to make an offer or provide the source code, and in the alternative that Defendant made a purported offer via the License List but failed to adequately comply with Plaintiff's request for code. (FAC, ¶¶ 100, 101, 107, 128-138.) Plaintiff is permitted to plead in the alternative. Here, Plaintiff adequately pled facts in the FAC that could support its claim that a direct contract existed between the parties consistent with its motion. Next, Defendant argues Plaintiff's discovery responses contradict its contract assertions in the motion. Defendant states, "These allegations were consistent with SFC's interrogatory responses in discovery that explained why, in SFC's view, VIZIO's written offers were invalid. (CITE.) [sic]" (Opp. at 5:20-22.) Defendant apparently neglected to insert a citation in support of this argument. Defendant's responses to Plaintiff's undisputed facts also fail to cite their evidence in support of this argument. (See Responses to UMFs 8-11.) However, in reply Plaintiff states its discovery responses merely contended that Defendant's offer was invalid because it was too difficult for ordinary users to find and exercise. Again, Plaintiff is entitled to allege in the alternative that the offer was binding on Defendant, but at the same time that it was too difficult for a typical user to access the offer. Therefore, Plaintiff adequately stated a basis for its contract argument in its FAC and discovery responses. Substantively, Defendant does not contend there is insufficient evidence it made an offer or that Mr. Visscher accepted it. Rather, Defendant contends in a footnote that the alleged acceptance was by a third-party Mr. Visscher who did not disclose he was Plaintiff's agent. (Opp. at p. 6, fn. 2.) Plaintiff cites legal authority holding that an "undisclosed principal" may accept the benefits of a contract made by an agent. (Reply at p. 5.) Here, Visscher declares he has been the Systems Administrator for Plaintiff since February 2023 and that in April 2023, he requested the source code "on behalf of" Plaintiff. This is sufficient to demonstrate that Visscher was Plaintiff's agent, and Defendant does not present evidence or legal authority showing that Visscher was not Plaintiff's agent.

Therefore, the motion is granted as to issue no. 1.

Issue No. 2: Whether, under the GPLv2, VIZIO has a contractual duty to provide to the purchasers of any VIZIO Smart TVs, including SFC: (a) the complete corresponding machine-readable source code (as defined in Section 3 of the GPLv2) for any software on its Smart TVs that is licensed under the GPLv2; or (b) a written offer, valid for at least three years, to give any third party, for a charge no more than the cost of physically performing source distribution, a complete machine-readable copy of the corresponding source code.

Plaintiff alleges the plain language of the GPLs provides that Plaintiff and other purchase of Defendant's smart TVs are intended third-party beneficiaries of the GPLs.

Defendant contends Plaintiff is improperly attempting to relitigate an issue the Court already decided in denying Plaintiff's prior motion for summary adjudication. (3/26/24 Minute Order.) In that order, the Court found Defendant had presented evidence that FSF "did not intend for third parties [including Plaintiff] to enforce the rights under the license agreement," creating a triable issue as to the parties' intent. (pp. 4-5.)

Moreover, the Court found that Plaintiff had improperly narrowed the issue to only assert Defendant failed to provide the source code, without addressing the alternative duty to provide a written offer. Now, Plaintiff has expanded the issue of duty to include either alternative.

Code of Civil Procedure section 437c(a)(4) provides, "A party shall not bring more than one motion for summary judgment against an adverse party to the action or proceeding. This limitation does not apply to motions for summary adjudication." Section 437c(f)(2) states in part, "A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion."

Bagley v. TRW, Inc. (1999) 73 Cal.App.4th 1092, 1096, footnote 3 (*Bagley*), states:

"[T]he prohibition against repeated summary judgment motions was added to make the summary judgment process more efficient and to reduce the opportunities for abuses of the procedure (Sen. Rules Com., Off. of Sen. Floor Analyses, rev. of Sen. Bill No. 2594 (Aug. 23, 1990)) which the addition of subdivision (f)(2) accomplished by overruling the cases that had held that an order denying a motion for summary judgment did not preclude a renewal of the same motion at any time before trial."

Code of Civil Procedure section 437c(f)(2) does not expressly require reasonable diligence in discovering and presenting new facts, although

		relief based on new facts or evidence requires a showing a reasonable diligence in other contexts. (See *Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1509 [motion for new trial]; *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1467 [motion for reconsideration].) Defendant contends Plaintiff's motion is essentially an improper motion for reconsideration which does not comply with the requirements of Code of Civil Procedures section 1008. Defendant argues there are no material new facts or law supporting reconsideration or renewal of the prior motion. Plaintiff responds that the language of section 437c(f)(2) only prohibits a motion for summary judgment based which raises the same issues as a prior motion for summary adjudication. At least one court has agreed with Plaintiff's interpretation of the statute. (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 72 ["Blue Shield's motion for summary judgment falls outside the scope of Code of Civil Procedure section 437c, subdivision (f)(2), as the prior motion was one for summary judgment rather than summary adjudication"].) Plaintiff further argues it may make a "subsequent application for the same order upon new or different facts, circumstances, or law" under section 1008 and that the present motion defines the issue of duty differently – the new motion asks the Court to determine Defendant's duty as to all smart TVs (rather than a limited number of models) and includes the question of whether that duty includes an offer of source code. Plaintiff also points to new facts, including the deposition and declaration of FSF Executive Director Zoe Kooyman, in which Kooyman stated third parties should be able to enforce the GPLs even if they are not the copyright holders. The Court has discretion to decide whether to consider a renewed or subsequent motion based on similar issues. (See *Nieto v. Blue Shield of California Life & Health Ins. Co.*, *supra*, 181 Cal.App.4th 60, 72 [we review a trial court's decision to allow a party to file a renewed or subsequent motion for summary judgment for an abuse of discretion].) The Court construes the summary judgment statute to give the Court discretion to decline to consider a subsequent motion under the statute based on the same issues, in order to give effect to the drafter's intent of reducing duplicative or repetitive motions. Here, Plaintiff had the opportunity to litigate issues no. 2 and 3 in its prior motion. Issues no. 2 and 3 effectively ask the Court to reconsider its 3/26/24 ruling based on evidence which could have, with reasonable diligence, been presented before the hearing on the prior motion. Although the issues in the present motion are defined more broadly, Plaintiff's assertion of these issues is an improper attempt to obtain summary adjudication as to issues which the Court's prior order found were disputed.

		Moreover, even if the Court reaches the merits of issues nos. 2 and 3, Plaintiff has not demonstrated that the new evidence disposes of the factual disputes which caused the Court to deny its prior motion. Even if the Court considers the new evidence, including declarations of Ms. Kooyman and Mr. Kuhn, the new evidence does not negate the triable issues created by conflicting prior statements by the FSF which the Court previously found were sufficient to demonstrate a triable issue. Issue No. 3: Whether, under the GNU Lesser General Public License, version 2.1 (the LGPLv.2.1), VIZIO has a contractual duty to provide to the purchasers of any VIZIO Smart TVs, including SFC: (a) the complete corresponding machine-readable source code (as defined in Section 0 of the LGPLv2.1) for any library (as defined in Section 0 of the LGPLv2.1) on its Smart TVs that is licensed under the LGPLv2.1; or (b) otherwise comply with Section 6 of the LGPLv2.1. The motion is denied for the same reasons set out under issue no. 2.
12	***2025-01473353*** ***Trujillo vs. Newrez, LLC***	**Demurrer to Complaint** Defendant Newrez LLC dba Shellpoint Mortgage Servicing's demurrer to plaintiff Jose A. Trujillo is SUSTAINED in part with leave to amend. **Defendant's request for judicial notice** In connection with its demurrer, Defendant requests judicial notice of the following documents: - Exhibit 1 - Grant Deed recorded on February 9, 2009 as Instrument Number 2009000056864 in the Official Records of the County of Orange, State of California - Exhibit 2 - Deed of Trust recorded on May 27, 2014 as Instrument Number 2014000204066 in the Official Records of the County of Orange, State of California - Exhibit 3 - Corporate Assignment of Deed of Trust recorded on July 25, 2023 in the Official Records of the County of Orange, State of California as Instrument 2023000178548 - Exhibit 4 - Notice of Default and Election to Sell Under Deed of Trust recorded on October 25, 2022 as Instrument Number 2022000344760 in the Official Records of the County of Orange, State of California - Exhibit 5 - Notice of Trustee's Sale recorded on September 13, 2024 as Instrument Number 2023000025670 in the Official Records of the County of Orange, State of California - Exhibit 6 – Trustee's Deed Upon Sale recorded on April 23, 2025 as Instrument Number 2025000118485 in the Official Records of the County of Orange, State of California.

Evidence Code section 452, subdivisions (c) and (h) permit a court to take judicial notice of "[o]fficial acts . . . of any state of the United States" and "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy," respectively.

"[C]ourts have taken judicial notice of the existence and recordation of real property records, including deeds of trust, when the authenticity of the documents is not challenged. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, citations omitted.)

Accordingly, the Court GRANTS Defendant's request for judicial notice.

First cause of action for violation of Civil Code section 2923.5

Civil Code section 2923.5 governs notices of default and provides: "A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default pursuant to section 2924 until" thirty (30) days after attempting with due diligence to "contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." (Civ. Code, § 2923.5, subds. (a)(1); (2)(A).)

Section 2923.5 applies only to mortgages pursuant to section 2924.15. (Civ. Code, § 2923.5, subd. (f)).

Section 2924.15, subdivision (a) provides section 2923.5 applies "only to a first lien mortgage or deed of trust that is secured by owner-occupied residential real property containing no more than four dwelling units." Subdivision (b) defines "owner-occupied" as property that "is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes."

Defendant contends Plaintiff fails to allege the loan "was made for personal, family, or household purposes, that the Subject Property contains no more than four dwellings, or that it is Plaintiff's principal residence" and that "Defendant is a loan servicer subject to section 2923.5." (Dem. at 8:5-9.) Defendant further contends Plaintiff does not plead sufficient facts alleging noncompliance and Plaintiff has no available remedy as the foreclosure sale has already occurred.

Plaintiff alleges:

- The subject property located at 1506 South Lowell Street, Santa Ana, California 92707 is Plaintiff's residence. (Compl. ¶ 1.)

- Defendant "is the purported current loan servicer and beneficiary of the mortgage loan that is the subject of the allegations complained of herein." (Compl. ¶ 2.)

- "On November 1, 2023, SHELLPOINT DEFENDANT recorded a Notice of Default on the Subject Property. PLAINTIFF owned the property and has lived within Subject Property years prior to foreclosure and when the Notice of Default was issued. Plaintiff received no mail or messages from SHELLPOINT Defendant." (Compl. ¶ 21.)

- "PLAINTIFF was surprised when he received the Notice of Default as he was not contacted by SHELLPOINT DEFENDANT at any time prior to the recordation of the Notice of Default regarding alternatives to foreclosure . . ." (Compl. ¶ 13.)

As such, Plaintiff has alleged sufficient facts to state a claim for a violation of Civil Code 2923.5.

Defendant further contends the only remedy for violation of 2923.5 is the postponement of the foreclosure sale, which has already occurred. (Dem. at 9:14-15.) Civil Code section 2924.19 subdivision (b) provides, however, that mortgage servicers may be liable "to a borrower for actual economic damages pursuant to Section 3281, resulting from a material violation of Section 2923.5 . . . where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale."

Accordingly, the Court OVERRULES the demurrer as to the first cause of action.

Second cause of action for violation of Civil Code section 2924.9

Pursuant to Civil Code section 2924.9, a mortgage servicer must send the borrower a written communication concerning foreclosure prevention alternatives within five business days after recording notice of default. (Civ. Code, § 2924.9, subd. (a).)

As with section 2923.5 discussed above, section 2924.9 applies only to owner occupied residential property that "is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes."

Again, Defendant contends Plaintiff fails to allege the loan "was made for personal, family, or household purposes, that the Subject Property contains no more than four dwellings, or that it is Plaintiff's principal residence" and that "Defendant is a loan servicer subject to section 2923.5." (Dem. at 10:12-16.) Defendant further contends Plaintiff does not plead sufficient facts alleging noncompliance, specifically as Plaintiff's allegations pertain to occurrences prior to the recording of the Notice of Default rather than after.

Plaintiff alleges:

- The subject property located at 1506 South Lowell Street, Santa Ana, California 92707 is Plaintiff's residence. (Compl. ¶ 1.)

- Defendant "is the purported current loan servicer and beneficiary of the mortgage loan that is the subject of the allegations complained of herein." (Compl. ¶ 2.)
- Plaintiff "owned the property and has lived within Subject Property years prior to foreclosure and when the Notice of Default was issued." (Compl. ¶ 21.)

- Defendant "failed to notify PLAINTIFF of all foreclosure prevention alternatives within 5 business days after Notice of Default recorded, as required by Civ. Code § 2924.9." (Compl. ¶ 26.)

As such, Plaintiff has alleged sufficient facts to state a claim for a violation of Civil Code section 2924.9.

Accordingly, the Court OVERRULES the demurrer as to the second cause of action.

Third cause of action for wrongful foreclosure

"The elements of wrongful foreclosure cause of action are: '(1) [T]he trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.'" (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525, citations omitted.)

Plaintiff alleges:

- Defendant wrongfully foreclosed on the Subject Property based upon violations of Civ. Code §§ 2923.5, 2924.9. (Compl. ¶ 29.)
- Defendant caused an illegal, fraudulent, or willfully oppressive sale of the Subject Property pursuant to a power of sale in a mortgage or deed of trust. (Compl. ¶ 30)

- Plaintiff suffered prejudice or harm as a result of the wrongful foreclosure trustee sale. (Compl. ¶ 31.)

- Plaintiff advised Defendant that "he had filed bankruptcy that afternoon and had a feasible Chapter 13 plan that he could pay back the arrears which were approximately $40,000 to be spread out in 60 months in a chapter 13. However, the sale still went forward and Plaintiff was told the sale took place earlier that day." (Compl. ¶ 32.)

- Plaintiff is excused from the tender requirement because of Defendant's violations of Civ. Code §§ 2923.5, 2924.9 (Compl. ¶ 33.)

As such, Plaintiff has alleged sufficient facts to state a claim for wrongful foreclosure.

Accordingly, the Court OVERRULES the demurrer as to the third cause of action

Fourth cause of action for violation of Business & Professions Code sections 17200, et seq.

The Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq., prohibits unfair competition, including unlawful, unfair or fraudulent business acts. (*Cel-Tech Comm., Inc. v. Los Angeles Cellular Tele. Co.* (1999) 20 Cal.4th 163, 180.) "By proscribing 'any unlawful' business practice, 'section 17200 'borrows' violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." (*Ibid*., citations omitted.) Virtually any law or regulation can serve as predicate for a section 17200 "unlawful" violation. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 681, citation omitted.)

Defendant contends Plaintiff's UCL claim fails as Plaintiff other causes of action fail. As discussed above, however, Plaintiffs have sufficiently alleged a violation of Civil Code sections 2923.5 and 2924.9.

Relying on *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, Defendant further contends Plaintiff lacks standing to bring a UCL claim as any alleged damage caused by the foreclosure sale was the result of Plaintiff's own default under the loan. (Dem. at 15:25-16:3.)

In *Jenkins*, the court found the plaintiff lacked standing for a UCL claim stating: "Jenkins's home was subject to nonjudicial foreclosure because of Jenkins's default on her loan, which occurred before Defendants' alleged wrongful acts, Jenkins cannot assert the impending foreclosure of her home (i.e., her alleged economic injury) was caused by Defendants' wrongful actions." 216 Cal.App.4th 497, 523.

Similarly, Defendant contends Plaintiff "does not deny his default under the Loan and fails to allege that he would have avoided the foreclosure or afforded a modified a loan." (Dem. at 16:3-5.)

Here, while Plaintiff does allege unlawful/unfair acts that occurred after her default such as violations of Civil Code sections 2923.5 and 2924.9, Plaintiff also includes allegations of Defendant's acts prior to her default such as "offer[ing] modifications, but not actual assistance with such actions" (Compl. ¶ 41), lengthy delays so that loss mitigation and loan modification will not be timely provided causing Plaintiff "to incur

		continuing interest charges that would otherwise be mitigated, late fees, and ultimately foreclosure costs" (Compl. ¶ 44), and providing information that was "certainly misleading and not consistent as to the status of the loan modification and what [Plaintiff] was supposed to do to satisfy the lender's demands (Compl. ¶ 51). As such, Plaintiff has alleged sufficient facts to state a claim under Business & Professions Code sections 17200, et seq. Accordingly, the Court OVERRULES the demurrer as to the fourth cause of action. **Fifth cause of action for cancellation of written instruments, Civil Code section 3412** Civil Code section 3412 provides: "A written instrument, in respect to which there is reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." Defendant contends Plaintiff's cause of action fails because the Notice of Default and Notice of Trustee's Sale are no longer outstanding as the property has already sold at foreclosure to a third party. (Dem. at 16:14-18.) Defendant further contends Plaintiff fails to sufficiently allege the instruments are void. (Dem. at 17:15-17.) "To state a cause of action to remove a cloud [under Civil Code section 3412], instead of pleading in general terms that the defendant claims an adverse interest, the plaintiff must allege, inter alia, facts showing actual invalidity of the apparently valid instrument or piece of evidence." (*Wolfe v. Lipsy* (1985) 163 Cal.App.3d 633, 638, disapproved on other grounds, *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 35-36.) Plaintiff alleges only that he "had a reasonable belief" that the Notice of Default and Notice of Trustee's Sale are voidable or void ab initio. (Compl. ¶ 56.) As such, Plaintiff fails to plead sufficient facts to state a claim under Civil Code section 3412. Accordingly, the Court SUSTAINS the demurrer as to the fifth cause of action with leave to amend.