July 26, 2024
Dept. 9
Tentative Rulings

1.	22CV1327	CLUTTER v. SERRANO EL DORADO OWNERS' ASSOC.
Motion for Leave to File First Amended Cross-Complaint		

Defendant/Cross-Complainant Serrano El Dorado Owners' Association ("Cross-Complainant") brings this motion for an order granting leave to file a First-Amended Cross-Complaint to add Cross-Defendant, Universal Protection Services, LP, and Roes 2 through 50. The motion states that the [Proposed] First Amended Cross-Complaint is attached as Exhibit 1; in the Court's filing system, it is attached to Mr. Sullivan's declaration and not the motion.

The proof of service in the court's file declares that on June 7, 2024, notice of the hearing and copies of the moving papers were served by mail on counsel for Plaintiff, and counsel for proposed added Cross-Defendant.

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code." (*Code of Civil Procedure,* § 473(a)(1).)

There is a general policy in this state of great liberality in allowing amendment of pleadings at any stage of the litigation to allow cases to be decided on their merits. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1047.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (Citations omitted.)" (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) "…absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564, 176 Cal.Rptr. 704.)" (*Board of Trustees of Leland Stanford Jr. University v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163.)

There is no opposition to the motion in the court's file.

TENTATIVE RULING #1:

THE MOTION IS GRANTED.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL.

RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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2.	**23CV0982**	**GIACOMINI v. RECEK**
Motion to be Relieved		

Counsel for the Defendant has filed a motion to be relieved as counsel pursuant to Code of Civil Procedure § 284(2) and California Rules of Court, Rule 3.1362.

A declaration on Judicial Council Form MC-052 accompanies the motion, as required by California Rules of Court, Rule 3.1362, stating that counsel has been unable to locate and contact client, even with the help of an investigator. New counsel has been retained by Association of Counsel filed with the court but client fails to execute a Substitution of Counsel relieving prior counsel.

Code of Civil Procedure § 284(2) and California Rules of Court, Rule 3.1362 allow an attorney to withdraw after notice to the client. Proof of service of the motion on the Defendants at their last known address and on counsel for Plaintiff was filed on June 4, 2024.

A Settlement Conference is currently scheduled on December 4, 2024, Trial Conference and Motions in Limine on January 3, 2025, and Trial on January 14, 2025, and the dates are listed in the proposed Order as required by California Rules of Court, Rule 3.1362(e).

TENTATIVE RULING #2:

ABSENT OBJECTION, THE MOTION IS GRANTED. COUNSEL IS DIRECTED TO SERVE A COPY OF THE SIGNED ORDER (FORM MC-053) ON THE CLIENT AND ALL PARTIES THAT HAVE APPEARED IN THE CASE IN ACCORDANCE WITH CALIFORNIA RULES OF COURT, RULE 3.1362(e).

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3.	**24CV1225**	**MATTER OF J.G. WENTWORTH**
Transfer of Payment Rights		

Prior to approving a petition for the transfer of payment rights, this court is required to make a number of express written findings pursuant to Cal. Insurance Code § 10139.5, including the following:

1. That the transfer is in the best interests of the Payee, taking into account the welfare and support of Payee's dependents.
2. That the Payee has been advised in writing by the Petitioner to seek independent professional advice) and has either received that advice or knowingly waived in writing the opportunity to receive that advice. This finding is supported by Exhibit E to the Petition. *See also,* Petition at p. 4.
3. That the transferee has complied with the notification requirements and does not contravene any applicable statute or the order of any court or government authority. In this case, it is not clear that the required disclosure statement was provided at least ten days prior to the execution of the transfer agreement, as required by Cal. Ins. Code § 10136, because both documents were executed on June 5, 2024. See Exhibits A and B. The First Amended Petition does not cure this.
4. That the transfer does not contravene any applicable statute or the order of any court or government authority. In this case, the Petition (which is verified by a Vice President of J.G. Wentworth) at page 8 represents that Payee has no court-ordered child support obligations.

In addition to the express written findings required by the applicable statutes, Cal. Ins. Code § 10139.5(b) requires the court to determine whether, based on the totality of the circumstances and considering the payee's age, mental capacity, legal knowledge, and apparent maturity level, the proposed transfer is fair and reasonable, and in the payee's best interests. The court may deny or defer ruling on the petition if the court believes that the payee does not fully understand the proposed transaction, and/or that the payee should obtain independent legal or financial advice regarding the transaction.

The Petition submitted generally contains the information required by the Insurance Code for court approval of this transaction, however, its representations are verified by the Petitioner, not by the payee. The Petition asserts that certain information, such as employment information for the payee that would establish that the payee needs the money now to help with funeral expenses and medical bills, will be submitted in an accompanying declaration, but no such declaration was filed.

Some information required by the statutes was included in the Petition through a verified statement of the Petitioner, but without any representation by the payee himself/herself, such as:

1. Whether there are any court orders for child or spousal support;
2. The purpose of the proposed transfer;
3. The payee's financial/economic situation;
4. Whether the payments to be transferred are required for future medical care or necessary living expenses;
5. Whether the payee was satisfied with the terms of prior payment transfer agreements that she had entered into;
6. Whether, within the past five years, the payee has attempted to enter into any such agreement with this Petitioner or any other entity that were denied by a court, or that were withdrawn or dismissed prior to a determination on the merits;
7. Whether the payee or her family are facing a hardship situation.

This court cannot grant this Petition in compliance with the applicable statutes, without more information as described above, either through submittal of a declaration of the Payee, or by appearance and testimony. The First Amended Petition does not cure these defects.

TENTATIVE RULING #3:

APPEARANCES REQUIRED ON FRIDAY, JULY 26, 2024, AT 8:30 A.M. IN DEPARTMENT NINE.

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4.	**PC20200643**	**WOOD ET AL v. CANDLELIGHTER LIMITED**
Further Responses & Imposition of Monetary Sanctions		

- **Motion to Compel Further Responses and Imposition of Monetary Sanctions Regarding Demand for Production of Documents, Set One Served on Marcelino Gonzales 01/26/24**
- **Motion to Compel Further Responses and Imposition of Monetary Sanctions Regarding Demand for Production of Documents, Set One Served on Lewis Wood 01/26/24**

The Motions to Compel were withdrawn.

TENTATIVE RULING #4:

THIS HEARING IS DROPPED FROM THE CALENDAR.

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5.	**23CV1500**	**KUVAKOS v. ROSS**
Lis Pendens and Attorney's Fees		

Defendant Julie A. Ross ("Defendant") moves for an Order against Plaintiffs James and Josephine Kuvaos (the "Plaintiffs")—(1) expunging the Lis Pendens recorded on September 7, 2024, in the office of the Recorder of El Dorado County, with instrument number 2023-0025222, attached the Edens Declaration in Support of the Motion to Expunge as Exhibit 5 (the "Lis Pendens"), and (2) for a reasonable award of attorney fees and costs in the amount of no less than $4,610.00 against the Plaintiffs—on the grounds that (a) the Lis Pendens is void and invalid due to improper service, (b) the Second Amended Complaint does not contain a cause of action that would, if meritorious, affect title or possession of the real property identified in the Second Amended Complaint, and (c) the Plaintiffs have not established by a preponderance of the evidence the probable validity of the real property claim or claims contained in the Second Amended Complaint, pursuant to Code of Civil Procedure sections 405.23, 405.30, 405.31, 405.32, and 405.38.

In Defendant's motion, counsel argues that the Lis Pendens remains, despite an agreement from opposing counsel that it would be pulled. (Motion, p. 1, ¶1) Counsel for Defendant states he has never received a recorded copy of the withdrawal, only a notarized copy. (*Decl. Edens)* The Court's expungement of an improper lis pendens is mandatory, not discretionary. (CCP §§ 405.31, 405.32; *Weil & Brown, et al.,* CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Guide 2018 Update) § 9:437 ("Rutter").) Unless Plaintiffs can provide a recorded copy of the withdrawal, the Court expunges the lis pendens.

On July 19, 2024, Plaintiff filed an opposition. On July 22, 2024, Defendant filed a motin to strike the opposition due to it being untimely. The court needs to inquire of the parties to gather further information and is mindful that the parties will already be in court for Defendant's Order To Show Cause. As such, the court orders the parties to appear.

TENTATIVE RULING #5:

PARTIES ARE ORDERED TO APPEAR.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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COUNTY LOCAL RULE 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

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6.	**24CV0532**	**VILT v. POLSTON**
Motion to Deem Matters Admitted		

Plaintiff brings this Motion based on Defendant's alleged failure to respond to discovery. The Motion notes that on May 2, 2024, Plaintiff served First Set of Form Interrogatories, First Set of Special Interrogatories, First Set of Requests for Admission, and First Set of Requests for Production of Documents. (Luu Decl. ¶5) As of June 7, 2024, Defendant has not responded, requested an extension of time, or contacted Plaintiff and/or Plaintiff's counsel.

When there is a total failure to respond to discovery, "[a]ll that need be shown in the moving papers is that a set of interrogatories was properly served on the opposing party, that the time to respond has expired, and that no response of any kind has been served." (*Leach v. Superior Court* (Markum) (1980) 111 Cal.App.3d 902, 905-906 (*Leach); Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 411 (*Sinaiko*); CCP § 2030.290(b); CRC 3.1345; Rutter §§ 8:1137, 8:1140.)

Moreover, the moving party is not required to show a "reasonable and good-faith attempt" to resolve the matter informally before filing the motion. (CCP § 2030.290; *Sinaiko*, 148 Cal.App.4th at 411; *St. Mary v. Superior Court* (*Schellenberg*) (2014) 223 Cal.App.4th 762, 777-778 [Requests for Admission] (*St. Mary*); Rutter § 8:1141.) When a party fails to timely serve responses to requests for admission, monetary sanctions are mandatory. (CCP § 2033.280(c).)

Under Code of Civil Procedure sections 2030.260, 2031.260, and 2033.250, a party has thirty (30) days to respond to interrogatories, requests for admission, and requests for production of documents.

If a party to whom a discovery request has been directed fails to comply with the request, then the party who propounded the request may seek a motion to compel responses. (CCP §§ 2030.290(b), 2013.300(b).) Similarly, when a party to whom requests for admission are directed fails to serve a timely response, then the requesting party may move for an order that the truth of any matters specified in the requests be deemed admitted. (CCP § 2033.280(b).)

Under Code of Civil Procedure section 1010, the time to respond to discovery is increased by two (2) court days when served via overnight mail. Here, the Plaintiff's counsel served the discovery via overnight mail on May 2, 2024, and the Defendant never responded or offered any justification for his refusal to respond (Luu Dec., ¶ 5.). Thirty days from May 2, 2024, is June 1, 2024. Two court days from June 1, 2024, is June 4, 2024. As of June 7, 2024, the Plaintiff still has not received the Defendant's responses. (Id., at ¶ 6.) Defendant has not responded to the motion.

Plaintiff claims attorney's fees and costs in the amount of $3,560.00 to bring this Motion, as noted in counsel's declaration. Counsel claims the filing fee was $240, although the motion

fee upon review of the file is $60. The attorney claims 1 hour for preparing discovery, 2.3 hours preparing the Motion and supporting documents, 1 hour to review any Opposition, 3 hours to prepare a Reply, and 1 hour for appearance. Counsel bills an hourly rate of $400.

Upon review of the pleadings, the court finds that the reasonable amount of attorney time to prepare the motion is 1 hour, given the limited issues involved. The court declines to find the time actually conducting discovery to be valid claimed expenses for sanctions, as these expenses would have been incurred even if Defendant filed a response. The court notes that no time needed to be reasonably incurred to review an opposition or file a reply since no opposition was filed. Subject to augmentation if additional time is required due to possible oral argument at the hearing, the court orders Defendant to pay Plaintiff $460 as a sanction for the filing fee and one hour of attorney time.

TENTATIVE RULING #6:

1. **MOTION TO DEEM MATTERS ADMITTED IS GRANTED.**
2. **SANCTIONS ORDERED IN THE AMOUNT OF $460 AGAINST DEFENDANT.**

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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7.	**PC20190309**	**CITY OF ROCKLIN v. LEGACY FAMILY ADVENTURES**
Plaintiff / Cross-Defendant City of Rocklin's Motion for Summary Judgment		
Defendant Legacy's and Busch's Motion for Summary Adjudication		

Plaintiff / Cross-Defendant City's Motion for Summary Judgment

Before the court is plaintiff City of Rocklin's (the "City") motion for summary judgment as to: (1) the Ninth Cause of Action ("C/A") in the City's Second-Amended Complaint ("SAC") for anticipatory repudiation; (2) the First C/A in defendant Legacy Family Adventures-Rocklin, LLC's ("Legacy") First-Amended Cross-Complaint ("FACC") for breach of contract; (3) the Second C/A in Legacy's FACC for breach of implied covenant of good faith and fair dealing; and (4) the Third C/A in Legacy's FACC for rescission.

1. Factual Background

On January 24, 2017, the City and Legacy entered into the "Rocklin Adventure Park Master Agreement." (UMF, ¶ 1.) On April 24, 2018, the parties entered into the "Amended and Re-Stated Adventure Park Operating Agreement."[1] (UMF, ¶ 2.)

The contracts required Legacy to make annual debt service payments to the City. (UMF, ¶¶ 3, 4.) In October 2018, Legacy provided the City a pro forma ("October 2018 pro forma"), which reflected lower revenues than originally planned. (See Busch Decl., Apr. 5, 2024, ¶ 20.)

2. Evidentiary Objections

The court rules on the City's objections to Legacy's evidence as follows: the court sustains Objection Numbers 1, 2, 3, 4, and 7; and overrules Objection Numbers 5, 6, 8, and 9.

3. Request for Judicial Notice

Pursuant to Evidence Code section 452, subdivision (d), the court grants the City's unopposed request for judicial notice of Exhibit D (the City's notice of its 2023 MSJ), Exhibit E (the City's separate statement of undisputed material facts for its 2023 MSJ), and Exhibit J (the court's November 29, 2023, Order regarding the 2023 MSJ).

[1] Legacy disputes the legal validity of the Amended Operating Agreement. (Legacy's Resp. to City's UMF, ¶ 2.)

4. Preliminary Matters

4.1. Rule Against Repeat Summary Judgment Motions

Legacy contends that, with the exception of the Ninth C/A in the City's SAC, the instant motion is barred by Code of Civil Procedure sections 437c, subdivision (f)(2)[1] and 1008, subdivision (b),[2] which limit the parties' ability to file repetitive motions for summary judgment. A trial court's decision to allow a party to file a renewed or subsequent motion for summary judgment is reviewed for abuse of discretion. (See *Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1812.)

In this case, the court denied the City's 2023 MSJ as to: (1) Paragraphs 87(b), 87(c), 87(d), and 87(f), alleged under the First C/A of Legacy's FACC for breach of contract; (2) Paragraphs 100(g), 100(h), and 100(j), alleged under the Second C/A of Legacy's FACC for breach of the implied covenant of good faith and fair dealing; and (3) the Third C/A of Legacy's FACC for rescission of the Amended Operating Agreement.

The court concludes that the issues argued in the instant motion are sufficiently different than those raised and determined in the City's 2023 MSJ. In the City's 2023 MSJ, the relevant issues were: (1) with respect to the First C/A in Legacy's FACC for breach of contract, whether the City breached certain contract provisions; (2) with respect to the Second C/A in Legacy's FACC for breach of the implied covenant of good faith and fair dealing, whether the City's alleged conduct breached the implied covenant; and (3) with respect to the Third C/A in Legacy's FACC for rescission of the Amended Operating Agreement, whether alleged negligent misrepresentation or financial coercion can serve as the basis for rescission.

By contrast, the issue raised in the instant motion with respect to the First, Second, and Third C/A in Legacy's FACC is whether Legacy performed or was excused from performing under the contract. The City claims Legacy cannot establish the required element of performance where Legacy anticipatorily repudiated the contract.

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[1] Code of Civil Procedure section 437c, subdivision (f)(2) provides in relevant 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."

[2] Code of Civil Procedure section 1008, subdivision (b) provides in relevant part, "[a] party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

Because the 2023 MSJ was denied on different grounds, the court finds it is not improper to consider the instant motion. (See *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 72 [holding that the rule against repeat summary judgment motions did not bar a second motion that was based on "an issue not raised by the first motion"].)

4.2. Length of Opposition and Reply Papers

The City points out that Legacy's opposition brief, which is 26 pages, exceeds the 20-page limit provided in California Rules of Court, rule 3.1113, subdivision (d). The City, in turn, filed a reply brief that is oversized. The court exercises its discretion to consider both parties' oversized briefs.

5. Standard of Review

5.1. The City's MSJ on its SAC

A party is entitled to summary judgment only if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "[A] plaintiff [moving for summary judgment] bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, quoting Code Civ. Proc., § 437c, subd. (o)(1).) "Once the plaintiff … has met that burden, the burden shifts to the 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 … 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." (Code Civ. Proc., § 437c, subd. (p)(1).)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417.)

5.2. The City's MSJ Against Legacy's FACC

A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action at issue cannot be established, or that there is a complete defense to the cause of action. (*Aguilar*, *supra*, 25 Cal.4th at p. 850, citing Code Civ. Proc., § 437c, subd. (o)(2).) "Once the defendant … has met that burden, the burden shifts to the

plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant 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." (Code Civ. Proc., § 437, subd. (p)(2).)

6. Discussion

6.1. Ninth C/A in the City's SAC for Anticipatory Repudiation

The Ninth C/A in the City's SAC is for anticipatory repudiation. In general, the law recognizes a party's repudiation of a contract as a form of anticipatory breach. "[A]n anticipatory repudiation of the contract, or anticipatory breach, occurs before performance is due under the contract and results in a total breach. [Citation.] … A promisor's anticipatory repudiation permits the promise to recover damages immediately for a total breach of contract without performing or offering to perform any conditions precedent under the contract." (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1275–1276.)

Anticipatory breach can be express or implied: "An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.)

The City contends Legacy expressly[1] repudiated the contract by "conveying to the City in the October 2018 pro forma that [Legacy] would not meet its financial obligations to the City to pay the annual debt service." (Mtn. at 8:10–12.) At deposition, Legacy's Chief Financial Officer, Mark Wagner answered "yes" to the question, "Does this [2018 pro forma] unequivocally reflect that [Legacy] would not meet its obligations to the City of Rocklin to repay the City's debt and fund that capital account at least in the first ten years of its operation?" (Filippini Decl., Jan. 26, 2024, Ex. C at 399:23–400:8.)

However, "repudiation is ordinarily a question of fact and intent, and [whether a contract has been repudiated] must be determined by the facts in the particular case. [Citation.]" (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 28.)

The court concludes there is a triable issue of material fact as to whether Legacy unequivocally refused to perform. The October 2018 pro forma states *projected* financial returns based on specific assumptions, such as the number of operating days and annual attendance. On the one hand, the October 2018 pro forma appears to show that Legacy would not gross enough

[1] The City proceeds on a theory of express repudiation only; the City does not claim implied repudiation. (See Reply at 15:6–16.)

money to pay the annual debt service. On the other hand, the October 2018 pro forma is merely a projection of financial returns. (Legacy's Opp. at 18:23–25.) At deposition, Busch was asked, "But at bottom, this October 4, 2018, pro forma reflected that [Legacy] would not meet its obligation–its financial obligations to the City of Rocklin, beginning in Year 1 and going through the term of the agreement; correct?" Busch answered, "All things normal, that's correct." (Filippini Decl., Jan. 26, 2024, Ex. E at 42:11-16.) A reasonable juror could find that Busch's response was equivocal because he used the phrase, "all things normal."

Moreover, at deposition in response to why Busch painted (what the City's counsel deemed to be) a "misleading picture of park performance," Busch responded that "we wanted to have [the City] fulfill their written and verbal commitment to us to come to the table and work out an agreement that's beneficial to both parties to make the park work…[t]his is worst case scenario. Now let's work from here." (Evidence in Opposition, Ex. 18 at 178:9-23.)

Importantly, as part of Legacy's response to the City's November 21, 2018 letter which cites what the City characterizes as Legacy's anticipated failure to make its debt payments, Legacy responds with the following interlineated in red on the letter: "LFA does not anticipate defaulting and cannot default because the City has not complied with the Agreement. LFA believes that it is in the best interest of the City Council and the citizens of Rocklin to know the potential financial ramifications should the park construction site not be completed as promised." (Evidence in Opposition, Ex. 14.)

Rather than the court being able to find as a matter of law that Legacy anticipatorily repudiated the contract, the court finds that a reasonable juror could conclude that the October 2018 pro forma and the meetings that followed were an attempt by Legacy to alert the City to the financial problems *both parties* would encounter if the City continued to proceed with their current plans for construction, a plan which the court previously found was entirely within the discretion of the City and could be modified by them as the City saws fit. This is a fact-based analysis that cannot be resolved on a motion for summary adjudication.

Because there is a triable issue of material fact, the court denies the City's motion as to the Ninth C/A for anticipatory repudiation.

Of note, the City additionally argues that Legacy failed to properly identify material facts at issue in a separate statement, thereby violating the Golden Rule of Summary Adjudication – that is, if the fact is not in the separate statement, the fact does not exist. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22.) However, the court in *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 315-316 rejected "the absolute prohibition against consideration of non-referenced evidence, which seems to be the substance of the 'Golden Rule' of *United Community Church*." The court continues:

> In spite of this unquestioned acceptance [by a large number of courts] of the "Golden Rule," we respectfully submit the statute demands a rule composed of a

> baser metal. The "Golden Rule" fails to note that the statute speaks in terms of the trial court's discretion: "The failure to comply with this requirement of a separate statement may *in the court's discretion* constitute a sufficient ground for denial of the motion." (§ 437c, subd. (b), italics added.) Therefore, we may not mechanically conclude, as the "Golden Rule" would have us do, that the court should never consider evidence not referenced in the separate statement. The statute is permissive, not mandatory: "[f]acts stated elsewhere [than in the separate statement] need not be considered by the court [citation]...." [Citations.] Whether to consider evidence not referenced in the moving party's separate statement rests with the sound discretion of the trial court, and we review the decision to consider or not consider this evidence for an abuse of that discretion.
>
> (*Id.*)

The court exercises its discretion to consider the evidence referenced by Legacy in its response, even if such evidence was not specifically referenced in the separate statement. The court finds that such consideration still respects the City's due process rights, who the court finds clearly were made aware of the evidence upon which Legacy's opposition relies through its reference in the pleadings. As such, to the extent that Legacy committed a technical defect, the court declines to alter its analysis on this basis.

6.2. <u>First C/A in Legacy's FACC for Breach of Contract</u>

The elements of a breach of contract claim are: (1) the existence of a contract; (2) plaintiff's performance or excuse for non-performance; (3) defendant's breach; and (4) the resulting damages to plaintiff. (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 439.)

The City contends that, assuming Legacy anticipatorily repudiated the parties' agreement, Legacy cannot establish the required element of performance for its breach of contract claim. However, as previously discussed, the City has not established anticipatory repudiation. Therefore, the motion for summary judgment is denied as to the First C/A in Legacy's FACC for breach of contract.

6.3. <u>Second C/A in Legacy's FACC for Breach of Implied Covenant</u>

" ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' " (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371.) To establish a claim of breach of the implied covenant of good faith and fair dealing, the plaintiff (or here, cross-complainant) must prove all of the following: (1) that plaintiff and defendant entered into a contract; (2) that plaintiff did all, or substantially all of the significant things that the contract required it to do or that it was excused from having to do those things; (3) that all conditions required for defendant's performance had

occurred or were excused; (4) that defendant prevented plaintiff from receiving the benefits under the contract; (5) that by doing so, defendant did not act fairly and in good faith; and (6) that plaintiff was harmed by defendant's conduct. (See CACI No. 325, Breach of Implied Covenant of Good Faith and Faith Dealing–Essential Factual Elements.)

The City argues that Legacy cannot establish its breach of implied covenant claim where Legacy repudiated the parties' agreement. Again, however, the City has not established anticipatory repudiation. Therefore, the City's motion for summary judgment must be denied on this ground.

The City also argues that summary judgment is appropriate for the following reasons: (1) the City has not improperly alleged that Legacy anticipatorily repudiated the Agreement; (2) any such contention that the City improperly alleged an anticipatory repudiation in its complaint would be litigation privileged; and (3) the court has already held that Legacy was not entitled to the Park "contemplated by the Master Agreement," and therefore, no breach claim can be premised on a park purportedly "contemplated by the Master Agreement." (Mtn. at 9:17–10:1.) The court rejects City's arguments because none of them show that Legacy is unable to establish a required element in its cause of action for breach of the implied covenant. Therefore, the City's motion is also denied on these grounds.

6.4. Third C/A in Legacy's FACC for Rescission

Legacy labeled its Third C/A in its FACC "Rescission." "Rescission," however, "is not a cause of action; it is a remedy." (*Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 70.) To determine the nature of Legacy's C/A, the court looks at the facts alleged, not its label. (See, e.g., *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908; *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387.) It is "an elementary principle of modern pleading that the nature and character of a pleading is to be determined from its allegations, regardless of what it may be called, and that the subject matter of an action and issues involved are determined from the facts alleged rather than from the title of the pleadings or the character of the damage recovery suggested in connection with the prayer for relief." (*McDonald v. Filice* (1967) 252 Cal.App.2d 613, 622; accord, *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1281; *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 98.) The allegations in Legacy's Third C/A for "rescission" establish causes of action for fraud and/or negligent

misrepresentation[1] and breach of the implied covenant of good faith and fair dealing,[2] regardless of its label or remedies it sought.

The City's argument that Legacy was, itself, in breach of the contract (by allegedly repudiating the contract) is inapplicable to the fraud or negligent misrepresentation claim because it is not a required element. Therefore, the City's motion is denied on this ground.

As for the breach of implied covenant of good faith and fair dealing, the City has not established anticipatory repudiation as a matter of law. Therefore, the City's motion is also denied on this ground.

Defendants Legacy's and Busch's Motion for Summary Adjudication

Before the court is defendant Legacy's and David Busch's (collectively referred to as "defendants") May 10, 2024, motion for summary adjudication against the following causes of action in the City's SAC: (1) First C/A for fraud; (2) Third C/A for negligent misrepresentation; and (3) Ninth C/A for anticipatory breach.

1. Evidentiary Objections

The court sustains the City's Objection Number 9 [sic][3] (regarding Exhibit 14, Complaint filed February 13, 2019) and Number 10 [sic] (regarding Exhibit 16, First-Amended Complaint filed December 19, 2019). The court overrules the City's Objection Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 [sic], 12 [sic], and 13 [sic].

2. Request for Judicial Notice

Pursuant to Evidence Code section 452, the court denies defendants' request for judicial notice of Exhibit 13 (City Council Report dated January 24, 2017); and grants defendants' request of Exhibit 14 (the City's original Complaint filed February 13, 2019), Exhibit 15 (Declaration of Rick Horst dated September 10, 2019, in support of the City's Opposition to defendants' special motion to strike SLAPP claims), Exhibit 16 (the City's First-Amended Complaint filed December

[1] The FACC alleges the City represented to Legacy that the Amended Operating Agreement was necessary to use bond funds for construction of the Park; but Legacy subsequently learned that, despite entering the Amended Operating Agreement, the City did not use any bond funds for construction. (FACC, ¶ 106.)

[2] The FACC alleges that the City Manager threatened to terminate the Master Agreement if Legacy refused to execute the Amended Operating Agreement. (FACC, ¶ 107.)

[3] It appears that the City inadvertently included Objection Number 9 twice in its objections. The second Objection Number 9 is actually Objection Number 10. Objection Number 10 is actually Objection Number 11, and so on.

19, 2019), Exhibit 17 (the City's SAC filed August 25, 2023), and Exhibit 18 (the court's November 29, 2023, Order regarding the City's 2023 MSJ).

3. Standard of Review

A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action at issue cannot be established, or that there is a complete defense to the cause of action. (*Aguilar*, *supra*, 25 Cal.4th at p. 850, citing Code Civ. Proc., § 437c, subd. (o)(2).) "Once the defendant … has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant 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." (Code Civ. Proc., § 437, subd. (p)(2).)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417.)

4. Discussion

4.1. First C/A in the City's SAC for Fraud

"The elements of fraud that will give rise to a tort action for deceit are: '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974, internal quotation marks omitted.)

Defendants claim the City cannot establish it reasonably relied on the following alleged misrepresentations made by Busch because the City failed to sufficiently investigate the statements: (1) that Busch's parks in Pflugerville, Texas and White Settlement, Texas were successful and viable in January 2017 (SAC, ¶ 76); (2) that Busch only sold the parks in Pflugerville and White Settlement because he was "ready to come home" to the Sacramento area (SAC, ¶ 76); (3) that if the City were to contact the people Busch had dealt with over the years, the City would receive "glowing, glowing remarks" (SAC, ¶ 76); and (4) Busch's failure to fully disclose his business experience and prior business failings (SAC, ¶ 78).

"Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact. [Citation.]" (*Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1475.) In this case, the court finds that reasonable minds could come to more than one conclusion as to whether the City's reliance on the alleged misrepresentations was reasonable. Therefore, the motion for summary judgment must be denied.

4.2. Third C/A in the City's SAC for Negligent Misrepresentation

Negligent misrepresentation consists of the assertion, as a fact, of something that is not true by one who lacks reasonable grounds for believing it to be true. (Civ. Code, § 1710, subd. (2); *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407.) The elements of a claim for negligent misrepresentation are a misrepresentation of fact, lack of reasonable grounds, a duty to plaintiff, intent to induce reliance, reliance, causation, and harm. (*Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1307.)

Similar to the First C/A in the City's SAC for fraud, defendants claim the City cannot establish that it reasonably relied on the alleged misrepresentations made by defendants because the City failed to sufficiently investigate Busch's statements. Again, however, the issue of reasonable reliance is a question of fact. (*Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1475.) Therefore, the motion for summary judgment must be denied.

4.3. Ninth C/A in the City's SAC for Anticipatory Repudiation

Defendants contend the City cannot establish that Legacy expressly repudiated the parties' agreement where: (1) the October 2018 pro forma is not a clear and unequivocal statement of Legacy's refusal to perform; (2) Legacy's annual reimbursement obligation had not been set; and (3) the City's failure to provide a breakdown of construction costs was a breach of its contractual obligation.

As previously discussed, the court finds there is a triable issue of material fact regarding whether Legacy unequivocally refused to perform. In addition to the 2018 pro forma, the City has also produced evidence that in November and December 2018, Legacy unequivocally acknowledged it would not meet its financial obligations to the City. (See City's Sep. Statement of Undisputed Material Facts, ¶¶ 137, 139.)

Additionally, Legacy has not demonstrated that City's failure to provide a breakdown of construction costs was a breach of its contractual obligation.

Based on the above, Legacy's motion is denied as to the Ninth C/A for anticipatory repudiation.

TENTATIVE RULING #7:

BOTH MOTIONS ARE DENIED. PARTIES ARE ORDERED TO APPEAR REGARDING THE COURT'S RULING ON THE PENDING MOTIONS IN LIMINE.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; EL DORADO COUNTY LOCAL RULE 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

8.	**24CV0417**	**RUDAS ET AL v. THD AT-HOME SERVICES DBA HOME DEPOT**
Demurrer & Motion to Strike		

Plaintiffs Consuelo Rudas and Robert Rudas ("Plaintiffs") filed a Complaint on March 4, 2024, alleging: (1) breach of contract/warranty; (2) negligence; (3) fraud and misrepresentation; and, (4) unfair and deceptive business acts and practices. This action involves installation of a roof and gutters onto Plaintiffs' home. Defendant filed a Demurrer and Motion to Strike.

Pursuant to CCP §472, a party may amend its pleading once without leave of the court after a demurrer or motion to strike is filed, within certain time constraints. In this case, Plaintiffs filed their First Amended Complaint prior to the Demurrer and Motion to Strike being heard, and within the time for filing an opposition, which satisfies CCP §472. The filing of the first amended complaint renders Defendant's Demurrer and Motion to Strike moot. *State Compensation Insurance Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131, See *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054.

Defendant withdrew its Demurrer and Motion to Strike.

TENTATIVE RULING #8:

THIS HEARING IS DROPPED FROM THE CALENDAR.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; EL DORADO COUNTY LOCAL RULE 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.