TENTATIVE RULINGS

FOR: January 5, 2021

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

Remote appearances via Zoom are mandatory to prevent the spread of COVID-19. Please use Zoom at the links listed below. COURTCALL IS NO LONGER AVAILABLE.

If you have cases scheduled in both courtrooms at the same time, first log-in to the Zoom session for the department that has your quickest matter(s), and upon check-in, ask the clerk to email the clerk in the other department to advise that you will be late to the other Zoom session.

Dept. A Zoom
Join by Video (Preferred)
https://us02web.zoom.us/j/85897874559?pwd=Nk1VTnNQZmIzNXQwbVNiUk1iQTNCZz09
Join by Phone: 877 853 5247 or 888 788 0099 **Meeting ID:** 858 9787 4559 **Password:** 704959

Dept. B Zoom
Join by Video (Preferred)
https://us02web.zoom.us/j/89902611018?pwd=OXJRM2FFWHZ4YXJ4b2szZWs1UFJYZz09
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Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. Go to http://napacountybar.org/court-reporting-services/ for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

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

In the Matter of the Hale Family Trust **20PR000192**

PETITION TO DETERMINE EXISTENCE OF TRUST

APPEARANCE REQUIRED to discuss whether this petition should be stayed pending the outcome of the appeal in Case No. 20PR000060, which involves the same issue regarding existence of the trust.

(CONTINUED)

In the Matter of Yoselin Camilla Macias Jovel **20PR000218**

REVIEW HEARING

TENTATIVE RULING: By Minute Order of 12/01/2020, the Court ordered Petitioner to file a Receipt and Acknowledgement of Order for the Deposit of Money into Blocked Account (MC-356) (Receipt). None appears in the Court's file. The matter is therefore CONTINUED to February 4, 2021, 8:30 a.m. in Dept. A. The Clerk is directed to send Notice. If the Receipt is filed prior to the continued hearing, the matter will be taken off calendar. If the Receipt is not filed prior to the continued hearing, Petition should be prepared to appear and explain to the Court why the Receipt has not been filed.

In the Matter of Hugo Alejandro Macias Jovel **20PR000219**

REVIEW HEARING

TENTATIVE RULING: By Minute Order of 12/01/2020, the Court ordered Petitioner to file a Receipt and Acknowledgement of Order for the Deposit of Money into Blocked Account (MC-356) (Receipt). None appears in the Court's file. The matter is therefore CONTINUED to February 4, 2021, 8:30 a.m. in Dept. A. The Clerk is directed to send Notice. If the Receipt is filed prior to the continued hearing, the matter will be taken off calendar. If the Receipt is not filed prior to the continued hearing, Petition should be prepared to appear and explain to the Court why the Receipt has not been filed.

Conservatorship of Michael David Thomas **20PR000242**

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE PERSON AND ESTATE

TENTATIVE RULING: The matter is CONTINUED to January 14, 2021, 8:30 a.m. in Dept. B to permit Petitioner to address the following issues. There is neither proof of service of notice of hearing nor *Capacity Declaration – Conservatorship* (form GC-335) in the Court's file. The Clerk shall provide notice of the continued hearing. The Temporary Conservatorship is extended through, and the letters therefore shall not expire until, January 14, 2021.

Estate of David T Gottlieb **20PR000263**

SPOUSAL PROPERTY PETITION

TENTATIVE RULING: GRANT petition.

Conservatorship of Rachel Elizabeth Thomas **26-24593**

CONFIRM STATUS OF CONSERVATOR

TENTATIVE RULING: The matter is continued to January 14, 2021, at 8:30 a.m. in Dept. B. Any temporary orders are continued to that date.

** At 9:00 a.m. **

Conservatorship of Jesus Manuel Salcedo **20MH000126**

PETITION FOR APPOINTMENT OF LPS CONSERVATOR

APPEARANCE REQUIRED

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

Joanne Strickland v. Ingrid Guibert, *et al.* **19CV001552**

MOTION TO SET ASIDE REQUEST FOR ENTRY OF DEFAULT AS TO DEFENDANT TRENDLINE INTERNATIONAL, LLC, A BUSINESS ENTITY

TENTATIVE RULING: The motion is CONTINUED to February 4, 2021, at 8:30 a.m. in Dept. A. There is no proof of service of the present motion in the Court's file. Moreover, the Notice of Motion references a Memorandum of Points and Authorities. No such memorandum appears in the Court's file.

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Moving party/counsel is directed to contact the opposing party/ies forthwith and advise of Local Rule 2.9 and the Court's tentative ruling procedure. Notwithstanding the procedures set forth in Local Rule 2.9, the moving party/counsel shall appear at the hearing, by Zoom, unless it is confirmed that no party requests oral argument.

Murat Baspehlivan, et al. v. Kayla Nicole Kim Clark, et al. **19CV001788**

PETITION FOR ORDER AUTHORIZING COMPROMISE OF PENDING ACTION OF A PERSON WITH A DISABILITY

TENTATIVE RULING: GRANT petition. The matter is set for a status review hearing for February 2, 2021, at 8:30 a.m. in Dept. A to confirm filing of the deposit of the money into the special needs trust via an attorney's declaration.

Michael Venuta, *et al.* v. Barend Venter, *et al.* **20CV000707**

[1] DEFENDANTS DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

TENTATIVE RULING: The demurrer is SUSTAINED IN PART. The demurrer is sustained, with 10 days' leave to amend, as to Plaintiffs' causes of action for breach of contract, and for damages pursuant to Civil Code section 1102, *et seq*. The demurrer is OVERRULED in all other respects.

A. Procedural Background

Defendants Barend Venter and Susara M. Venter, individually and as Trustee of the Venter Family Revocable Trust demur, both generally and specially, and pursuant to Code of Civil Procedure section 430.10, subds. (d), (e), and (f), to Plaintiff's First Amended Complaint (FAC), and to each cause of action asserted therein, on grounds of uncertainty, failure to allege facts sufficient to state a cause of action, and misjoinder of parties.

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Moving party/counsel is directed to contact the opposing party/ies forthwith and advise of Local Rule 2.9 and the Court's tentative ruling procedure. Notwithstanding the procedures set forth in Local Rule 2.9, the moving party/counsel shall appear at the hearing, by Zoom, unless it is confirmed that no party requests oral argument.

B. Legal Analysis

A complaint must contain "facts constituting the cause of action." (Code Civ. Proc. § 425.10, subd. (a)(1).) A demurrer is treated as "admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The court may also consider as grounds for a demurrer any matter that is judicially noticeable under Evidence Code sections 451 or 452. (Code. Civ. Proc., § 430.30, subd. (a).) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Comm. on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 213-14.) In reviewing a demurrer, the court must "construe the allegations of a complaint liberally in favor of the pleader." (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 438.) A general demurrer will also lie "where the complaint has included allegations that clearly disclose some defense or bar to recovery." (*Cryolife, Inc. v. Super. Ct.* (2003) 110 Cal.App.4th 1145, 1152.)

Generally, it is an abuse of discretion for a court to deny leave to amend where there is any reasonable possibility that a plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiffs bear the burden of showing such reasonable possibility. (*Ibid*; see Opposition at 2:2-3.)

1. The FAC Contains Specific Factual Allegations Sufficient to State a Claim for Fraud

The first cause of action purports to state a claim for fraud and misrepresentation. (See FAC at 2:21-22.) The elements of actionable fraud which must be pleaded and proved are a false representation of a material fact, made with knowledge of its falsity and with intent to induce reliance thereon, on which plaintiff justifiably relies to his injuries. (See *Wishnick v. Frye* (1952) 111 Cal.App.2d 926, 930.) Claims based in fraud must be specifically pleaded, with facts constituting each element of the cause of action alleged. (*Hall v. Dept. of Adoptions* (1975) 47 Cal.App. 898, 904.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus, the policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered. [Citations omitted.]" (*Lazar v. Super. Ct.* (1996)12 Cal.4th 631, 645.)

The Court finds that paragraphs 10 – 18 of the FAC contain specific factual allegations sufficient to state a cause of action for fraud against defendants Barend Venter and Susara Venter under the heightened pleading standard articulated in *Lazar v. Super. Ct., supra,* 12 Cal.4th at 645. Those same paragraphs, together with the allegations of paragraphs five and seven are sufficient to state a cause of action against defendant Venter Family Revocable Trust.

For the foregoing reasons, the Demurer is OVERRULED as to the first cause of action.

2. The FAC Fails to State a Claim for Breach of Contract

The Court finds that specific language in the written agreement that is attached to the FAC negatives general allegations leaving the FAC, as a whole, deficient in stating a claim for breach of contract.

Plaintiffs allege that, "pursuant to a written Real Estate Purchase Agreement…a copy of which is attached hereto as Exhibit 1, [Plaintiffs] purchased the property from the Venter Family Revocable Trust." (See FAC at ¶ 21.) Plaintiffs further allege that their agreement was for the purchase of a home consisting of 1,967 square feet with "all new plumbing and electrical." (FAC at ¶ 22.) They further allege that the home they were sold, "consisted of 1,450 square feet of living area and neither the plumbing nor the electrical were new…." (*Id*. at ¶ 23.) Finally, they allege that they have suffered damages as a result of the alleged breach. (*Id*. at ¶ 27.)

Defendants counter by appealing to the written contract attached to the FAC. They first contend that the document contains no representations or terms relating to the square footage of the home on the property, or the condition of the electrical or plumbing systems. (See Opposition at 5:17-18.) They call out two additional terms contained in the writing. The first is the following statement in a section entitled "Warranties": "Buyer understand [*sic*] that the Seller never lived on the Real Property and agree to buy the Real Property As Is." (FAC at Exh. 1, "Warranties" subd. (f), emphasis in original.)[1] The second is a "Merger Clause" that provides, "[t]his

[1] Plaintiffs argue that an "as is" provision "does not extend to issues that are not readily observable, such as plumbing and electrical systems, whether permits were obtained, and the size in square feet of a building." (Opposition at 3:17-19.) As discussed herein below, the Court finds that, independent of this provision, the FAC

Agreement, when executed by both Buyer and Seller, shall contain the entire understanding and agreement between Buyer and Seller and Agent, if any, with respect to the matters ref()Ted [*sic*] to herein and shall supersede all prior or contemporaneous agreements, representations and understanding with respect to such matters." (See FAC at Exh. 1, "Miscellaneous Provisions", subd. (d).)

Where a pleading contains both general allegations and specific allegations, the specific allegations control and will support a demurrer where they negative an element of the cause of action. (*Shusett v. Home Savings & Loan Assn.* (1964) 231 Cal.App.2d 146, 150.) The Court finds that the inclusion of the "Merger Clause" provision in the written agreement, and the absence in the agreement of any provisions relating to the square footage of the home on the property and the condition of the electrical and plumbing systems therein, constitute specific allegations that serve to "negative" the more general allegations of paragraph 22 of the FAC. Without the allegations of paragraph 22, the FAC fails to state a claim for breach of contract.

Through their opposition, Plaintiffs effectively concede the point. They fail to direct the Court to any language in the written agreement on these conditions of the subject property. They similarly fail to address the issue of the merger clause.

The Court finds, in Plaintiffs' opposition, no request for leave to amend the second cause of action, and no suggestion of how Plaintiffs might amend the FAC to cure the foregoing defect in stating a cause of action for breach of contract. This silence stands in contrast with Plaintiffs' assertion that, if required, they could amend the FAC to allege additional facts relating to their fraud cause of action. (See Opposition at 2:22.) Despite this failure, the Court finds that a reasonable possibility exists that Plaintiff can state a good cause of action against defendants for breach of contract. For the foregoing reasons, the demurrer is sustained with 10 days' leave to amend as to the second cause of action.

3. The FAC Fails to Allege Facts Sufficient to State a Claim Pursuant to Civil Code Section 1102, *et seq*.

In addressing the demurrer, Plaintiffs offer that, "[t]he breach of contract cause of action includes the allegations that defendants violated the disclosure requirements of Civil Code §1102, *et seq.*" (Opposition at 3:25-26.) Plaintiffs fail to explain how such a violation, if true, would support a cause of action for breach of contract. This is not, however, necessarily fatal to a cause of action pursuant to the subject code section.

"Even though the plaintiffs labeled their causes of action, that does not mean they are bound by those labels. 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. (Citation omitted.)" (*Jaffe v. Carroll* (1973) 35 Cal.App.3d 53, 57.) "The courts of this state have, of course, long since departed from holding a plaintiff strictly to the 'form of action' he has pleaded and instead have adopted the

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contains allegations that negatives allegations essential to Plaintiff's cause of action for breach of contract. For this reason, Plaintiff's arguments regarding the "As-Is" provision are immaterial to the Court's analysis.

more flexible approach of examining the facts alleged to determine if a demurrer should be sustained." (*Ibid*.)

Through their opposition, Plaintiffs urge that, pursuant to Civil Code section 1102.13, "plaintiffs are entitled to recover their 'actual damages' suffered by virtue of the sellers' failure to provide the required disclosure statement…." Assuming, *arguendo*, that this is an accurate articulation of the provisions of Civil Code section 1102.13, the Court finds that the FAC fails to allege facts from which Defendants can determine what damages Plaintiffs suffered as a result of the alleged failure to provide the required disclosure statement. As such, Plaintiffs have failed to state a claim pursuant to Civil Code section 1102 *et seq.*

Again, the Court finds, in Plaintiffs' opposition, no request for leave to amend the second cause of action, and no suggestion of how Plaintiffs might amend the FAC to cure the foregoing defect in stating a cause of action pursuant to the statute. Despite this failure, the Court finds that a reasonable possibility exists that Plaintiff can state a good cause of action thereunder. For the foregoing reasons, the demurrer is sustained with 10 days' leave to amend as to the second cause of action.

4. The FAC Alleges Facts Sufficient to State a Claim for Usury

The Court finds that the FAC alleges facts sufficient to state a claim for usury.

Defendants first argue that, "a plaintiff is required to allege that the lender had a willful intent to enter into a usurious transaction." (Support Memo at 6:19-20.) In a claim for usury, "[t]he element of intent is narrow. '[T]he intent sufficient to support the judgment [of usury] does not require a conscious attempt, with knowledge of the law, to evade it. The conscious and voluntary taking of more than the legal rate of interest constitutes usury and the only intent necessary on the part of the lender is to take the amount of interest which he receives; if that amount is more than the law allows, the offense is complete.'" (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 798, quoting *Thomas v. Hunt Mfg. Co.* (1954) 42 Cal.2d 734, 740.) The Court finds the allegations in paragraph 29 of the FAC sufficient to allege the element of intent pursuant to this holding.

Defendants remaining arguments relating to this cause of action are based on assertions that Plaintiffs will be unable to prove their allegations. As noted above, however, "[a] demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Comm. on Children's Television, Inc. v. Gen. Foods Corp., supra*, 35 Cal.3d at 213-14.)

[2] DEFENDANTS' MOTION TO STRIKE PORTIONS OF PLAINTIFF'S FIRST AMENDED COMPLAINT

TENTATIVE RULING: The motion is DENIED.

A. Procedural Background

Defendants Barend Venter, Susara M. Venter, individually and as Trustee of the Venter Family Revocable Trust move, pursuant to Code of Civil Procedure section 435, to strike certain portions of Plaintiff's First Amended Complaint (FAC).

As an initial matter, Defendants' notice of motion fails to state the grounds on which the requested relief is sought. (See Code Civ. Proc. §1010 ["the notice of a motion, other than for a new trial, must state…the grounds upon which it will be made"]; see also Rules of Court, Rule 3.1110 ["[a] notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order"]; see also *People v. American Sur. Ins. Co.* (1999) 75 Cal.App.4th 719, 726.) The notice of motion states only that the motion is brought pursuant to Code of Civil Procedure section 435. That statute, however, governs the timing and form of a notice of motion to strike. No other explanation is provided in the Notice of Motion for the grounds on which the motion is brought.

Moreover, the notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Moving party/counsel is directed to contact the opposing party/ies forthwith and advise of Local Rule 2.9 and the Court's tentative ruling procedure. Notwithstanding the procedures set forth in Local Rule 2.9, the moving party/counsel shall appear at the hearing, by Zoom, unless it is confirmed that no party requests oral argument.

B. Legal Analysis

Putting aside the procedural deficiencies of Defendants' notice of motion, and regarding the motion as one brought pursuant to Code of Civil Procedure section 436, the Court does not find grounds for granting the motion. A party may move the Court to strike any irrelevant matter inserted into a complaint. (Code Civ. Proc. § 436, subd. (a).) Defendant fails to argue in what way the subject allegations of the FAC are irrelevant or otherwise subject to a motion to strike.

Moreover, it appears that the motion may be moot. The entirety of Defendants' argument is as follows. "Should the court agree that our demurrers should be sustained except as to any claim for damages relating to electrical/plumbing based upon alleged fraud in connection with a 'backyard' conversation, we request that, consistent with such a potential ruling, the [subject] paragraphs and/or language of the FAC be stricken…." (Support Memo. at 2:8-11.) The Court did not resolve Defendants' demurrers in the manner here asserted as a condition of Defendants' motion to strike. As a result, it appears that the motion is moot.

In the Matter of Alecia Yasnitska McMinn **20CV001182**

PETITION FOR CHANGE OF NAME

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

****At 9:30 ****

Nicole Riedel *et al.* v. Patrick Elliott-Smith, *et al.* **18CV000524**

PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT

TENTATIVE RULING: The motion is GRANTED, IN PART, as to Plaintiff's request for entry of an interlocutory judgment on the terms of the parties' purported settlement agreement. Plaintiff shall, pursuant to Rules of Court, rule 3.1591, subdivision (h) prepare and file a proposed judgment consistent with this order. The motion is DENIED in all other respects.

A. Procedural Background

Plaintiff Nicole Riedel moves, pursuant to Code of Civil Procedure sections 664.6 (Section 664.6), and 128, subd. (a)(4) (Section 128(a)(4)) for four specific forms of relief:

1. Entry of an interlocutory judgment on the terms of the parties' purported settlement agreement;
2. Appointment of a "third-party permitting expert" to take control over the regulatory entitlements process for a construction project to be undertaken by Defendants pursuant to the purported settlement agreement;
3. An order compelling Defendants to "take all other actions required by the Settlement Agreement in order to timely commence construction of [the project]"; and,
4. Awarding Plaintiff her costs and attorneys' fees incurred in bringing the present motion. (Motion at 1:26-2:13.)

Plaintiff argues that she is entitled to the foregoing relief on the grounds that Defendant "breached the Settlement Agreement by failing to perform under [its] terms…by…failing to 'immediately' seek to obtain permits for, and thereafter 'diligently perform' the construction project." (*Id*. at 2:14-18.)

B. Legal Analysis

1. Plaintiff is Entitled to Have Judgment Entered Pursuant to Code of Civil Procedure Section 664.6

The Court is empowered to enter judgment where parties to pending litigation stipulate to a settlement in a writing signed by the parties outside the court. (Section 664.6.)

Defendant's opposition is dedicated to arguing that the second and third requested forms of relief are not appropriate. Defendant concedes the existence of the settlement agreement, and further concedes that he is responsible, in at least some measure, for completing a "pond outfall improvement work" (POIW) project. (See Declaration of Patrick Elliott-Smith at ¶ 2.) Defendant presents no argument opposing Plaintiff's request for entry of an interlocutory judgment based on the terms of the settlement agreement.

For the foregoing reasons, Plaintiff's motion is GRANTED as to Plaintiff's prayer for an order entering the parties' settlement agreement as an interlocutory judgment. (See Section 664.6.)

2. Plaintiff's Remaining Requests Fall Outside of the Scope of a Motion Under Section 664.6

Plaintiff prays the Court appoint a third-party to take control over the process of obtaining permits for the POIW project. Plaintiff fails to provide authority by which the Court may provide the requested relief.

If requested by the parties, the Court may retain jurisdiction over the parties to enforce the settlement until performance in full of its terms. (Section 664.6.) In addition, Section 128 (a)(4) provides that the Court has the power to "compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein."

However, Plaintiff points the Court to no language in the settlement agreement that anticipates appointment of a "third-party permitting expert" in the event that Defendant fails to execute his obligations under that agreement. Similarly, Plaintiff fails to point to language in the settlement agreement that authorizes the Court to make such appointment if the parties are unable to do so.

"'The statutory procedure for enforcing settlement agreements under section 664.6 is not exclusive. It is merely an expeditious, valid alternative statutorily created.' [Citation.] 'Even though it is not exclusive, [section 664.6] is intended to provide a means for enforcing an agreement that requires nothing more than a single motion.' [Citation.] ' 'Although a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], nothing in section 664.6 authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon.' ' [Citation.] As such, '[t]he power of the trial court under Code of Civil Procedure section 664.6 … is extremely limited. [¶] … The court is powerless to impose on the parties more restrictive or less restrictive or different terms than those contained in their settlement agreement.' [Citation.]" (*Machado v. Myers* (2019) 39 Cal.App.5th 779, 790.)

Because appointment of a third-party permitting expert is not contemplated by the terms of the settlement agreement, the Court declines to grant the requested relief. (See *Machado v. Myers*, *supra*, 39 Cal.App.5th at 790.)

Plaintiff's third request is for an order compelling Defendants to "immediately take all other actions required by the Settlement Agreement in order to timely commence construction of the POIW, including but not limited to (i) obtaining construction drawings for the POIW, and (ii) entering into a written construction agreement with the contractor specified in the Settlement Agreement…." (Motion at 2:8-11.)

The Court first notes that sub-point (i) in Plaintiff's request suffers the same shortcoming as her second request: the settlement agreement does not appear to provide for the completion of construction drawings. Plaintiff points the Court to no such language, and the Court is unable to find any. The Court therefore declines to grant this requested relief. (See *Machado v. Myers*, *supra*, 39 Cal.App.5th at 790.)

Plaintiff's third request is thereby reduced to one for an order "[c]ompelling Defendants to immediately take all other actions required by the Settlement Agreement in order to timely commence construction of the POIW, including but not limited to…entering into a written construction agreement with the contractor specified in the settlement agreement…." (Motino at 2:8-11.) Plaintiff's fourth request is for an award of attorneys' fees incurred in bringing the motion. (*Id*. at 2:12-13.) Through her memorandum, Plaintiff argues that such fees are "permitted by Section 12 of the Settlement Agreement." (Support Memo at 2:12-13.)

The Court notes that these requests do appear to be reflections of specific terms of the parties' settlement agreement. (See Declaration of Paul Carey in Support of Motion (Carey Decl.) at Exh. A, ¶¶ 3(b) and 12.) This does not, however, make the prayed for relief available under a motion to enforce a settlement agreement pursuant to Section 664.6.

Plaintiff argues that such order is necessary because Defendant has, in the absence of such order, failed to undertake these actions of his own volition. However, on this point, the parties are in dispute. Defendant contends that he has made significant efforts aimed at securing permits to undertake the POIW project. Defendant submits his own declaration, and a declaration of attorney Tom Fama in support of his position. Plaintiff argues that, rather than being aimed at securing permits for the POIW project, Defendant's efforts have been exclusively dedicated to obtaining permits for the (allegedly) unpermitted pond that is the original source of the parties' dispute. Plaintiff submits two declarations by expert witness Erich Fischer, two declarations by attorney Paul G. Carey, and a declaration from Plaintiff in support of her position.

As a preliminary matter, this is not a case in which a party clearly refuses to take specific action that is expressly required pursuant to the terms of the settlement agreement. Plaintiff's appeal to the holding in *Blueberry Properties, LLC v. Chow* (2014) 230 Cal.App.4th 1017, is therefore misplaced. The settlement agreement in that case required plaintiff to execute a quitclaim deed which plaintiff thereafter refused to do. (*Id*. at 1021.) In the context of the plaintiff's refusal to undertake a straight-forward ministerial act, the trial court found that it had authority to appoint an "elisor" which it defined as a person appointed by the court "to sign documents on behalf of a recalcitrant party in order to effectuate its judgments or orders, where the party refuses to execute such documents." (*Id*. at 1020.)

Here, by contrast, Plaintiff seeks an order directing Defendant to undertake entire courses of action involving significant discretion. Moreover, Plaintiff seeks the Court's intervention in the context of Defendant's assertion that he *has* complied with the terms of the settlement agreement, and that Plaintiff's complaints are with the manner in which he has done so.

The question then is whether the Court is authorized, upon a noticed motion pursuant to Sections 664.6 and section 128 (a)(4), to determine whether Defendant's various activities amount to a breach of the settlement agreement. The Court finds that such a determination is beyond the scope of a Section 664.6 motion.

Plaintiff argues that the Court "has the power under CCP §664.6 to determine disputed factual issues that have arisen regarding the settlement agreement" citing *Fiore v. Alvord* (1985) 182 Cal.App.3d 561, 565-566. The court in *Fiore v. Alvord* held that upon a motion under that

statute, the court sits as a trier of fact in determining whether the parties entered into a binding settlement, and if so, the terms of such settlement. (*Ibid*.) The Court declines to read into this limited holding a broader authority to sit as a trier of fact in determining whether a breach of those terms has occurred, as Plaintiff here avers.

The Court is not empowered to retain jurisdiction pursuant to Section 664.6 to "summarily enforce the terms of a settlement agreement as applied to new disputes that arise after a final judgment is entered." (*Howeth v. Coffelt* (2017) 18 Cal.App.5th 126, 134.) "The retention of jurisdiction pursuant to section 664.6 is intended to allow the court to ensure all parties perform pursuant to a settlement agreement that results in a dismissal of a lawsuit." (*Ibid*.) Again, "the power of the trial court under Section 664.6 is 'extremely limited.' [Citation.]" (*Ibid*.) A motion pursuant to Section 664.6 is proper to "resolve the dispute at issue in the [original] complaint" but not "to litigate new issues that arose after the settlement and entry of the resulting judgment." (*Ibid*.) "To allow the trial court to consider these new issues summarily by way of a postjudgment motion would deprive [Defendant] of [his] full panoply of procedural protections normally available to a defendant before judgment, including discovery and the right to a jury trial." (*Id*. at 134-135.)

For the foregoing reasons, the Court finds that a determination of whether Defendant has – either through or in spite of his various activities described in the competing declarations – violated the terms of the settlement agreement is outside the scope of a motion to enforce a settlement agreement pursuant to Section 664.6. (*Howeth v. Coffelt, supra*, 18 Cal.App.5th at 135.)