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CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles
JUN 16 2016
Sherri R. Carter, Executive Officer/Clerk
By Sandra Mixon, Deputy

Attorneys for Defendant, PACIFICA FIRST NATIONAL, INC.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
WEST DISTRICT – SANTA MONICA COURTHOUSE

RONNIE POTEL, an individual, Plaintiff, vs. PACIFIC FIRST NATIONAL INC. a/k/a PACIFICA FIRST NATIONAL INC., a California Corporation; and DOES 1 to 20, inclusive, Defendants	Case No.: SC124183 *[Assigned to the Honorable Judge C. Karlan, presiding in Department N, for all purposes]* **OPPOSITION TO DEMURRER TO FIRST AMENDED CROSS-COMPLAINT AND REQUEST FOR SANCTIONS PURSUANT TO CCP§128.5 FOR FILING FRIVOLOUS AND MERITLESS DEMURRER**
PACIFICA FIRST NATIONAL, INC., a California corporation, Cross-Complainant, vs. RONNIE POTEL, an individual; ARIE ABEKASIS, an individual; BRENT MICHAEL SILVER, an individual; BRENT MICHAEL SILVER doing business as BRENT SILVER CONSTRUCTION; BRENT SILVER CONSTRUCTION INC., a California corporation; and AMERICAN CONTRACTORS INDEMNITY COMPANY, a California corporation; and ROES 1 to 100, inclusive, Cross-Defendants	DATE: June 29, 2016 TIME: 8:30 a.m. DEPT: N

Cross-Complainant PACIFICA FIRST NATIONAL, INC. (hereinafter "CROSS-COMPLAINANT" and/or "Pacifica") opposes the demurrer of Cross-Defendants BRENT MICHAEL SILVER, BRENT SILVER CONSTRUCTION INC., ARIE ABEKASIS and AMERICAN CONTRACTORS INDEMNITY COMPANY.

Furthermore, Pacifica hereby provides notice that on June 29, 2016, at 8:30 a.m., in Department N, Cross-Complainant, and opposing party to the Demurrer, shall move and hereby does move for an Order granting sanctions in favor of PACIFICA FIRST NATIONAL, INC, and against Cross-Defendants BRENT MICHAEL SILVER, BRENT SILVER CONSTRUCTION INC., ARIE ABEKASIS and AMERICAN CONTRACTORS INDEMNITY COMPANY and counsel Leslie Richards, in the amount of $3,115.00, pursuant to *Code of Civil Procedure* section 128.5 for filing a frivolous motion/demurrer.

Said Motion is based upon the fact that the Demurrer was totally devoid of merit, was filed without complying with the statutory meet and confer requirement, and any reasonable attorney would agree that such motion is totally devoid of merit and is untimely. This request is based upon this notice, and the Declaration of Milene C. Apanian, and upon such arguments as may be heard at the hearing on the merits.

I.

INTRODUCTION

Cross-Defendants BRENT MICHAEL SILVER, BRENT SILVER CONSTRUCTION INC., ARIE ABEKASIS and AMERICAN CONTRACTORS INDEMNITY COMPANY ("Cross-Defendants") filed the instant demurrer on May 23, 2016.

The Demurrer filed by Cross-Defendants attacking the First Amended Cross Complaint ("Cross-Complaint") is untimely and procedurally defective for multiple reasons and fails to provide any legal authority or any facts justifying the attack on the Cross-Complaint or the filing of the meritless motion. For that reason, it appears that the motion is a frivolous motion and filed for improper purpose. Therefore, Pacifica requests that Cross-Defendants be sanctioned and Pacifica be reimbursed for the attorney's fees incurred in opposing the frivolous motion.

Additionally, the Points and Authorities is a page and a half, and only includes an

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"Introduction," some cases on the "Standard on Demurrer" which ironically support this opposition, and a "Conclusion." The Points and Authorities do not provide any legal analysis or argument regarding the alleged pleading deficiencies. Nevertheless, in this opposition Cross-Complainant addresses the improper statements and arguments included in the Notice of the Demurrer, and treats them as if stated in the Points and Authorities.

As set forth herein, each demurrer should be overruled because each cause of action alleged against Cross-Defendants is properly plead and states facts sufficient to constitute each cause of action.

II.

THE DEMURRER IS PROCEDURALLY DEFECTIVE AND MUST BE OVERRULED

The Demurrer ignores and disregards procedural and statutory requirements. It is a rudimentary motion without the applicable law or facts and it was filed **after** the Cross-Defendants filed an answer.

A. The Demurrer Does Not Comply With *Code Of Civil Procedure* Section 430.41

The Cross-Defendants filed their demurrer on May 23, 2016, which is after California *Code of Civil Procedure* ("CCP") section 430.41 became effective. Under CCP section 430.41, a demurring party **shall** file and serve with the demurrer a declaration stating either of the following: "A) The means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer. B) That the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith." CCP §430.41 was recently enacted in an effort to reduce the court congestion and to allow the parties to economically resolve differences prior to engaging in motion practice.

Cross-Defendants' counsel did not meet and confer prior to filing the demurrer to the First Amended Cross-Complaint. A review of the demurrer reveals that it does not include the required declaration. Further, the declaration of Milene C. Apanian, states that the Cross-Defendants' counsel did not make any attempt to meet and confer before filing the demurrer.

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(See Apanian Declaration, ¶6) A meet and confer by Cross-Defendants counsel would have allowed the opportunity to discuss the deficiencies in the demurrer, and the sufficiency of the Cross-Complaint. Instead, Cross-Defendants have forced Pacifica to incur unnecessary attorney's fees in opposing the demurrer. (See Apanian Declaration, ¶7, 9, 10.)

B. The Demurrer Must Be Stricken As Untimely

CCP states that "(a) A person against whom a complaint or cross-complaint has been filed may, within **30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint**." CCP §430.40(a), emphasis added. Furthermore, Section 432.10. entitled, "Motion, demurrer or other plea; time" states very clearly – "A party served with a cross-complaint may within **30 days after service** move, demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint." CCP§432.10, emphasis added. Also, Section 430.80 (Failure to object by demurrer or answer; waiver; exceptions), states:

> (a) If the party against whom a complaint or cross-complaint has been filed fails to object to the pleading, either by demurrer or answer, that party is **deemed to have waived the objection** unless it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action. (emphasis added)

Here, AMERICAN CONTRACTORS INDEMNITY COMPANY filed its answer on March 10, 2016. The court's website shows that BRENT MICHAEL SILVER and BRENT SILVER CONSTRUCTION INC. filed an answer on April 13, 2016. (See Apanian Declaration, ¶2, 3) The demurrer was filed by the Cross-Defendants on May 23, 2016, 9 and 6 weeks after they filed their answers.

C. The Attempted Addition Of Exhibits Is Inappropriate

Cross-Defendants' motion, in the Notice section, at page 2, lines 23 through 25, and at page 4, lines 8 through 11 attempts to attach Exhibit "1." As a seasoned litigator, Cross-Defendants' counsel should know that exhibits cannot simply be attached to a demurrer; but instead, procedural requirements must be followed before the Court can consider additional documents/exhibits. Not only are the added exhibits improper, they are not even competent evidence before the Court.

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Moreover, the copy of the demurrer served on Cross-Complainants is missing Exhibit "1." (See Apanian Declaration, ¶11.)

D. The Demurer Is An Improper "Speaking Demurrer"

This Demurrer, in the Notice section, attempts to introduce "facts" not found on the face of the Cross-Complaint[1]. A demurrer cannot allege or deny facts. Cook v. de la Guerra (1864) 24 Cal. 237, 239; *Hayward v. Henderson* (1979) 88 Cal. App. 3d 64, 71. A demurrer is an objection to a pleading, the grounds for which are **apparent from either the face of the complaint or a matter of which the court may take judicial notice**. (CCP § 430.30, subd. (a); see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. (*Picton v. Anderson Union High Sch. Dist.* (1996) 50 Cal. App. 4th 726, 732.) The court must treat as true all of the complaint's material factual allegations, but not contentions, deductions or conclusions of fact or law. (*Id.* at 732–33.) The complaint is to be construed liberally to determine whether a cause of action has been stated. (*Id.* at 733.)

Notwithstanding this long standing rule, Cross-Defendants, at page 2, lines 20-26, at page 3, lines7-14, and at page 4, lines 8-10, of their Demurrer, set forth facts not in the Cross-Complaint. These factual statements, and arguments, render this demurrer a "speaking demurrer." The Court cannot consider any other facts set forth in the demurrer that are not found on the face of the Cross-Complaint itself because a demurrer may only be used to challenge defects that appear on the face of the pleading. *Blank vs. Kerwin* (1985) 39 Cal 3d 311, 318. Therefore, none of the factual statements and/or exhibits (if in fact attached to the filed copy) should be considered for purposes of a demurrer as each is irrelevant for purposes of this demurrer.

E. The Demurer Is Procedurally Defective; the Points And Authorities Lack Arguments And/Or Facts

The Cross-Defendants' Points and Authorities is a page and a half, and only includes an "Introduction," some cases on the "Standard on Demurrer" which ironically support this opposition, and a "Conclusion." The Points and Authorities do not provide any legal analysis or argument

[1] The added facts are contained in the Notice of Demurrer. They are not part of the Points and Authorities.

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regarding the alleged pleading deficiencies. Cross-Complainant is left to "guess" as to why the Cross-Defendants think that the Cross-Complaint is allegedly "uncertain, ambiguous and unintelligible" or why it "does not state facts sufficient to constitute" the various causes of action.

III

THE DEMURRER TO THE FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT MUST BE OVERRULED

The Breach of Contract cause of action is sufficiently stated in the Cross-Complaint. "The statement of a cause of action for breach of contract requires a pleading of the following: (1) The contract, (2) Cross-Complainant's performance or excuse for nonperformance, (3) Cross-Defendant's breach; (4) Damage to Cross-Complainant." [Citations deleted]" 4 *Witkin, Cal. Proc. 5th* (2008) Plead, § 515, p. 648.

The Cross Complaint sets forth each necessary element for a cause of action for breach of contract: a written contract which is attached as an Exhibit (Cross-Complaint ¶¶ 41) performance or excuse of performance by Cross-Complainant (Cross-Complaint ¶¶ 42) detailed statement of the breaches by Cross-Defendants (Cross-Complaint ¶¶ 43) and damages (Cross-Complaint ¶¶ 44). Moreover, while the Notice of the demurrer attempts to add facts and exhibits, those facts and documents cannot be considered by the Court, as they are not part of the Points and Authorities, or via competent evidence. For the foregoing reasons, the demurrer to the breach of contract cause of action should be overruled because it is properly pleaded and states facts sufficient to constitute this cause of action.

IV

THE DEMURRER TO VARIOUS INDEMNITY ALLEGATIONS MUST BE OVERRULED

The Cross-Complaint alleges the Fifth Cause of Action for Implied Equitable Indemnity; the Sixth Cause of Action for Express Indemnity; and the Seventh Cause of Action for Comparative Indemnity. All three indemnity causes of action are demurred to by Cross-Defendants on the grounds that the allegations are "uncertain, ambiguous and unintelligible." None of the attacks provides any legal or factual support; or states **HOW** or **WHY** the allegations are insufficient. The

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entire demurrer is based on the boilerplate and repetitive conclusion that the pleadings are "uncertain, ambiguous and unintelligible." Nothing More!

Additionally, the added facts, and improper arguments on page 3, lines 6 through 14 must be disregarded because the Cross-Defendants are improperly attempt to litigate the merits of the case in the pleadings stage and in the demurrer. For the foregoing reasons, the demurrer to the Sixth, Seventh and Eight causes of actions related to the indemnity allegations should be overruled because each is properly pleaded and states facts sufficient to constitute the indemnity cause of action.

V

THE DEMURRER TO THE NINTH CAUSE OF ACTION FOR MISREPRESENTATION MUST BE OVERRULED

The Misrepresentation cause of action is sufficiently stated in the Cross-Complaint. While Cross-Defendants claim the allegation is "uncertain, ambiguous and unintelligible," they provide no facts (such as how or why) or arguments to support this challenge or to identify the alleged deficiencies.

VI

THE DEMURRER TO THE TENTH CAUSE OF ACTION FOR ENFORCEMENT OF LICENSE BOND MUST BE OVERRULED

The license bond cause of action is sufficiently stated in the Cross-Complaint. While Cross-Defendants claim the allegation is "uncertain, ambiguous and unintelligible," they provide no facts (such as how or why) or arguments to support this challenge or to identify the alleged deficiencies.

VII

THE DEMURRER IS FRIVOLOUS AND FILED IN BAD-FAITH; SANCTIONS PURSUANT TO CODE OF CIVIL PROCEDURE §128.5 ARE JUSTIFIED

Under CCP section 128.5, a trial court is authorized to order a party, the party's attorney, or both to pay any reasonable expenses, including attorney fees, incurred by another party as a result of "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." A bad faith action or tactic is considered "frivolous" if it is "totally and completely without merit." To be entitled to sanctions the moving party must show the action or tactic was in

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bad faith *and* frivolous or brought solely to cause unnecessary delay. *Harris v. Rudin, Richman & Appel* (2002) 95 Cal.App.4th 1332, 1343.

A determination of frivolousness requires a finding the motion is "totally and completely without merit" (§128.5, subd. (b)(2)), that is, "any reasonable attorney would agree such motion is totally devoid of merit." *Karwasky v. Zachay* (1983) 146 Cal.App.3d 679, 681." *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1391-1392.

Here, there is no reasonable attorney who would (a) ignore and disregard the statutory requirements prior to filing the demurrer, or (b) would believe that the Cross-Complaint is deficiently plead, or (c) would file the demurrer herein as drafted, **without legal authority or arguments** or (d) would file a demurrer 9 and 6 weeks after the parties answered. It should be obvious from the reading of the demurrer that little effort, if any, was put into researching the procedural requirements or drafting the demurrer. The demurrer is a rudimentary motion without the applicable law or facts. None of the attacks provides any legal or factual support; or states **HOW** or **WHY** the allegations are insufficient. None of the attacks evaluate the elements of the causes of actions, or identify any necessary missing allegations. The entire demurrer is based on the boilerplate and repetitive conclusion that the pleadings are "uncertain, ambiguous and unintelligible."

Pacifica has incurred legal expenses in excess of $3,115.00 to oppose this demurrer. Sanctions are merited. (See Apanian Declaration, ¶9, 10)

It is anticipated that after seeing this opposition and the deficiencies in the demurrer, Cross-Defendants may withdraw the demurrer, or take the hearing off calendar. Pacifica respectfully requests that in the case Cross-Defendants have a change of heart regarding the demurrer, that Pacifica's request for sanctions not be taken off calendar and that the sanctions be granted because Pacifica has already incurred attorney's fees filing this opposition.

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VII.
CONCLUSION

For the foregoing reasons, Pacifica respectfully requests that each of the demurrers be overruled and sanctions in the amount of $3,115.00 be granted to Pacifica to reimburse it for the unnecessary attorney's fees incurred in opposing the meritless demurrer.

In the event the Court sustains any demurrer, Pacifica respectfully requests it be given 30 days leave to amend the Cross-Complaint.

DATED: June 13, 2016

ABDULAZIZ, GROSSBART & RUDMAN

By: MILENE C. APANIAN
Attorney for PACIFICA FIRST NATIONAL, INC., a California corporation

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DECLARATION OF MILENE C. APANIAN IN SUPPORT OF OPPOSITION TO DEMURRER

I, MILENE C. APANIAN, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and am a partner with the law firm of Abdulaziz, Grossbart & Rudman, attorneys for PACIFICA FIRST NATIONAL, INC. a California corporation ("Pacifica") in this action. I am one of the attorneys for my firm which manages this file and as such, I have personal knowledge of following facts stated herein, and if called as a witness to testify, I could and would competently so testify.

2. AMERICAN CONTRACTORS INDEMNITY COMPANY filed its answer on March 10, 2016.

3. Based on the review of the court's online docket, I am informed and believe that Cross-Defendants BRENT MICHAEL SILVER and BRENT SILVER CONSTRUCTION INC. filed an answer on April 13, 2016.

4. Based on the review of the court's online docket, I am informed and believe that Cross-Defendants BRENT MICHAEL SILVER, BRENT SILVER CONSTRUCTION INC. and ARIE ABEKASIS ("Cross-Defendants") filed the instant demurrer on May 23, 2016.

5. Ms. Richards knows and has known for weeks that our office represents Pacifica.

6. Neither I, nor Ken Grossbart who also oversees this file, have received any communications from anyone from the Law Offices of Leslie Richards attempting to meet and confer prior to the filing the demurrer to the First Amended Cross-Complaint.

7. A meet and confer by Cross-Defendants' counsel would have allowed us the opportunity to discuss the deficiencies in the demurrer, and the sufficiency of the Cross-Complaint. Instead, Cross-Defendants have forced Pacifica to incur unnecessary attorney's fees in opposing the demurrer.

8. It appears from the Demurrer, and the lack of legal authority and arguments therein, that the demurrer was filed for improper purpose.

9. I have spent 6.9 hours preparing this opposition, including reviewing the court's docket, identifying various pleadings served/filed by opposing counsel, and conducting the research for the opposition. We will spend an additional 2 hours driving to and appearing at the

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demurrer hearing. My hourly billing rate is $350 and is reasonable based on my experience and years in practice. As a result Pacifica has incurred $3,115.00 in unnecessary attorney's fees.

10. All Cross-Defendants and counsel have done is waste this Court's time, as well as the resources of Pacifica in opposing the Motion. They should be sanctioned accordingly in the amount of $3,115.00.

11. The copy of the Cross-Defendants' demurrer that was served on our office is missing Exhibit "1."

I declare under penalty of perjury under the laws of the State of California, and of the United States, that the foregoing is true and correct.

Executed this 13th day of June 2016, at North Hollywood, California.

MILENE C. APANIAN
Declarant

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles in the State of California. I am over the age of 18 and not a party to the within action; my business address is 6454 Coldwater Canyon Avenue, North Hollywood, California 91606-1187.

On June 15, 2016, I served the foregoing documents(s):

OPPOSITION TO DEMURRER TO FIRST AMENDED CROSS-COMPLAINT AND REQUEST FOR SANCTIONS PURSUANT TO CCP§128.5 FOR FILING FRIVOLOUS AND MERITLESS DEMURRER

on the interested parties in this action by placing a true copy thereon enclosed in a sealed envelope addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

STATE

[X] (BY MAIL) I deposited such envelope with postage thereon fully prepaid in the United States mail at a facility regularly maintained by the United States Postal Service at North Hollywood, California.

[X] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at North Hollywood, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (VIA FAX) I transmitted a copy of said document by Facsimile machine, pursuant to C.C.P □1013(e) and Rule 2005. The facsimile machine used complied with Rule 2003(3) and no error was reported by said machine. Said FAX transmission(s) occurred on the below written date. Said Fax transmission(s) were directed as follows: PUT FAX NUMBER(S) HERE

[ ] (VIA FEDERAL EXPRESS PRIORITY OVERNIGHT NEXT BUSINESS MORNING) Delivered to an authorized courier or driver authorized by the express service carrier to receive documents in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served. FED EX TRACKING# _____

[ ] (BY ELECTRONIC SERVICE) Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be set to the persons at the electronic notification addresses listed on attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and was executed on June 15, 2016.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on June 15, 2016, at North Hollywood, California.

GABRIELA GOMEZ

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