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Superior Court of California,
County of Orange
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Clerk of the Superior Court
By Enrique Veloz, Deputy Clerk

Attorney for Defendant Janice Vance

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF ORANGE-CENTRAL JUSTICE CENTER**

11 NAHID BIRJANDI, an individual,

12 Plaintiff,

13 vs.

14 JANICE VANCE, an individual; SANDRA L.
15 MAYBERRY, an individual, and DOES 1 through
16 50, inclusive,

17 Defendants.

) Case No. 30-2012-00560949

) **DEFENDANT JANICE VANCE**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF HER**
) **MOTION FOR JUDGMENT ON THE**
) **PLEADINGS**

) Judge: Hon. John C. Gastelum

) Hearing Date: ~~xxxx~~ ~~xx~~ 2013
May 14,

) Time: 2:00 p.m.

) Dept: C-07

18 _____)
19
20 Defendant, Janice Vance (“Vance”) submits the following memorandum of points and
21 authorities in support of her Motion for Judgment on the Pleadings pursuant to California Code of
22 Civil Procedure section 438 on the grounds that Plaintiff’s claims are barred by the applicable
23 statute of limitations.

24 **I.**

25 **INTRODUCTION**

26 Plaintiff’s initial Complaint against Janice Vance and Sandra Mayberry was filed on April
27 11, 2012 based on a cause of action for Slander of Title. Defendant Sandra Mayberry’s Motion for
28 Judgment on the Pleadings was filed on October 5, 2012 and on November 8, 2012, this Court

1 granted Defendant Mayberry’s Motion for Judgment on the Pleadings in its entirety. The First
2 Amended Complaint (“FAC”) was filed against Janice Vance only on December 7, 2012 and
3 continues to allege Slander of Title. Plaintiff alleges that Defendant Vance improperly filed a *lis*
4 *pendens* against the Plaintiff’s real property in October of 2008, which prevented the Plaintiff from
5 refinancing the mortgage on that property at a lower interest rate and thus causing damages.

6 California Code of Civil Procedure section 338(g) explicitly provides a three year statute of
7 limitations for “[a]n action for slander of title to real property.” The sole question at issue in this
8 motion therefore, is *when* Plaintiff became aware of the *lis pendens*. If the Plaintiff was aware of
9 the *lis pendens* at any time in the year 2008, her current FAC—filed in April 2012—is barred by
10 the applicable three-year statute of limitations as a matter of law. The Plaintiff’s own allegations set
11 forth in the FAC establish that she became aware of the *lis pendens* in October, 2008; and the
12 judicially noticeable proofs of service submitted concurrently with this motion confirm this fact,
13 leaving no room for doubt. Accordingly, judgment on the pleadings must be entered in favor of
14 Defendant Vance as to the entirety of the FAC.

15 **II.**

16 **PERTINENT FACTUAL ALLEGATIONS IN THE FAC**

17 In her FAC, the Plaintiff alleges she began undertaking efforts to refinance her home at a
18 lower interest rate “in the fall of 2008”. On October 10, 2008, Defendant Vance filed and recorded
19 a Notice of Pending Action (*Lis Pendens*) against the Plaintiff’s real property in Laguna Niguel.
20 The Plaintiff attached a copy of the *Lis Pendens* document as Exhibit “A” to the FAC.

21 The Plaintiff alleges that “soon after” her efforts to refinance in the fall of 2008, she became
22 aware of the *Lis Pendens* filed by Defendant against her property, which “prevent[ed] her from
23 refinancing her existing mortgage.” Plaintiff contends that the filing and recording of the *lis*
24 *pendens* constituted Slander of Title and caused her resulting damages. The Plaintiff filed the
25 current action for Slander of Title on April 11, 2012.

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III.

AUTHORITY TO GRANT JUDGMENT ON THE PLEADINGS

Pursuant to California Code of Civil Procedure section 438, the Court has authority to grant a moving defendant Judgment on the Pleadings if the FAC “does not state facts sufficient to constitute a cause of action against that defendant.” (CCP § 438(c)(1)(B)(ii).) A motion for judgment on the pleadings is akin to a general demurrer; it tests the sufficiency of the FAC to state a cause of action. (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 989.) The court must assume the truth of all factual allegations in the FAC, along with matters subject to judicial notice. (*Wise v. Pacific Gas and Elec. Co.* (2005) 132 Cal.App.4th 725, 738; citing to: *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515–516.)

A pleading which on its face is barred by the statute of limitations does not state a viable cause of action and is subject to judgment on the pleadings. (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 440.) Leave to amend need not be granted if any possible amendment would inevitably be barred by the statute of limitations. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1011.)

IV.

**THE PLAINTIFF FAILED TO FILE HER CLAIMS WITHIN THE THREE-YEAR
STATUTE OF LIMITATIONS**

California Code of Civil Procedure (“CCP”) section 338, subsection (g), explicitly provides a three-year statute of limitations for an action for “Slander of Title”. (CCP § 338(g).) Plaintiff’s primary cause of action in the FAC is for “Slander of Title”.

A. THE FACTUAL ALLEGATIONS IN THE FAC CONFIRM PLAINTIFF BECAME AWARE OF THE LIS PENDENS IN 2008 AND SHE THEREFORE FAILED TO FILE HER CLAIM WITHIN THE APPLICABLE THREE-YEAR LIMITATIONS PERIOD

The factual allegations set forth in the body of the FAC confirm that Plaintiff discovered the *lis pendens* filed against her real property in the year 2008 when she was attempting to refinance her home. Accordingly, Plaintiff failed to bring the instant action within three years of that discovery and her FAC is barred by CCP Section 338(g).

1 It is settled law that a FAC's factual allegations "constitute judicial admissions binding on
2 the plaintiff." (*Gibbs v. American Airlines, Inc.* (1999) 71 Cal. App. 4th 1, 11; citing to *Foxborough*
3 *v. Van Atta* (1994) 26 Cal. App. 4th 217, 222.) Here, Plaintiff alleges that she attempted to refinance
4 her mortgage in "the fall of 2008" but was unable to do so as a result of the *lis pendens* filed by
5 Defendant Vance on October 10, 2008. (FAC) Based on these allegations, the statute of limitations
6 commenced upon her discovery "in the fall of 2008" and would have expired "in the fall of 2011."

7 Plaintiff did not file the FAC however, until April of 2012 and therefore missed the statute
8 of limitations by over 5 months. This alone provides dispositive grounds to grant Judgment on the
9 Pleadings in support of Defendant Vance.

10 **B. THE FACTS SET FORTH IN THE "ATTACHMENTS" TO THE FAC FURTHER**
11 **CONFIRM PLAINTIFF FAILED TO FILE HER CLAIM WITHIN THE**
12 **APPLICABLE THREE-YEAR LIMITATIONS PERIOD**

13 The facts provided in the "attachments" to the FAC further confirm the Plaintiff had
14 knowledge of the *lis pendens* in 2008 and therefore failed to file the instant matter within the three-
15 year limitations period.

16 The allegations in the FAC, which a court must accept as true when considering a motion
17 for judgment on the pleadings, "necessarily include the contents of any exhibits attached to the
18 FAC." Indeed, the contents of an incorporated document...will take precedence over and supercede
19 any inconsistent or contrary allegations set out in the pleading. In the case of such a conflict, we
20 will look solely to the attached exhibit. (*Building Permit Consultants, Inc. v. Mazur* (2004) 122
21 Cal.App.4th 1400, 1409.)

22 Here, the Plaintiff alleges in the body of the FAC that "soon after" her attempts to refinance
23 her mortgage in the fall of 2008, she became aware of the allegedly improper filing of the *lis*
24 *pendens*. (FAC, ¶¶ 19-21.) Plaintiff attaches the *lis pendens* document as Exhibit "A". Plaintiff then
25 attaches, as Exhibit "B", correspondence from her attorney to Defendant Vance, wherein Plaintiff's
26 attorney recites the facts of the situation and states: "Dr. Birjandi has been prevented from
27 refinancing her residence **since the latter part of 2008**, when rates began trending downward
28 significantly." (FAC Exhibit "B", p. 1, second paragraph.) Plaintiff explicitly incorporates the
substance of Exhibit B into the allegations in her FAC. (FAC, p. 6, line 17.)

1 Accordingly, even if there were some ambiguity as to what the Plaintiff may have meant by
2 her statement that “soon after undertaking her efforts to refinance...” as set forth in paragraph 21 of
3 her FAC, the incorporated facts she sets forth in Exhibit “B” to the FAC confirm that under any
4 circumstance, the Plaintiff discovered the allegedly improper conduct in “the latter part of 2008.”
5 (*Ibid.*) In fact, discovery of the facts which form the basis for her current FAC on *any date* in the
6 year 2008—even as late as December 31, 2008—is dispositive proof that her FAC is barred under
7 the applicable three-year limitations period in CCP §338(g).

8 **C. PLAINTIFF WAS FORMALLY SERVED WITH THE *LIS PENDENS* AT THE**
9 **TIME IT WAS FILED AND RECORDED IN OCTOBER, 2008; SHE THEREFORE**
10 **HAD “ACTUAL” NOTICE TRIGGERING THE THREE-YEAR STATUTE OF**
11 **LIMITATIONS**

11 Plaintiff attaches a copy of the “Notice of Pending Action (*Lis Pendens*) as Exhibit “A” to
12 the FAC, but does not include the proof of service. (FAC, Ex. “A”.) Defendant Vance requests the
13 Court take Judicial Notice of the same document, but as filed and recorded with the proof of
14 service. (*See*, Request for Judicial Notice, accompanying this memorandum).

15 **1.) The Court May Consider Judicially Noticeable Documents in a Motion for**
16 **Judgment on the Pleadings**

17 Code of Civil Procedure section 438, subsection (d) states as follows: “[t]he grounds for
18 motion provided for in this section shall appear on the face of the challenged pleading or from any
19 matter of which the court is required to take judicial notice. Where the motion is based on a matter
20 of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code,
21 the matter shall be specified in the notice of motion, or in the supporting points and authorities,
22 except as the court may otherwise permit.” (CCP § 438(d).)

23 Defendant Vance has properly identified and submitted the accompanying Request for
24 Judicial Notice, with Exhibits “A” through “D”, which are documents from the Dissolution of
25 Marriage of Roland Colton and Janice Vance. These documents were filed with the San Diego
26 Superior Court in the matter of *Colton v. Vance* (fka Colton) stemming back as early as October 7,
27 1992 with one of the filings as recent as March 6, 2013. The FAC, itself, alleges that Colton and
28 Vance began dissolution proceedings in 1991 in the San Diego Superior Court. (FAC ¶ 11).

1 **2.) The Proof of Service From Both the “Filed” Notice of Lis Pendens and the**
2 **“Recorded” Notice of Lis Pendens Confirm the Plaintiff Had Actual Notice in**
3 **October, 2008, of the Facts Supporting Her Current Claims**

4 Defendant Vance requests the Court take Judicial Notice of the proofs of service filed along
5 with the Notice of Pending Action (Lis Pendens) which demonstrate that Plaintiff’s representative
6 and counsel at the time, Ms. Elizabeth M. Lewis, was served with a copy of the lis pendens action
7 on October 7, 2008.

8 Thus, in addition to the factual allegations set forth in the FAC where Plaintiff admits that
9 (1) in the fall of 2008 she was attempting to refinance her mortgage but could not do so as a result
10 of the *lis pendens* and (2) Plaintiff’s other attorney’s statement—incorporated as fact into the
11 FAC—that Plaintiff was prevented from refinancing in “the latter part of 2008”; the proofs of
12 service demonstrate that Plaintiff, by and through her counsel of record, was directly served with a
13 copy of the *lis pendens* document on October 7, 2008.

14 It is undisputed, based on the judicially binding factual allegations in the FAC and the
15 judicially noticeable proofs of service provided herewith, that Plaintiff had actual notice of the *lis*
16 *pendens* in October of 2008 and that she failed to file her cause of action for slander of title until
17 well beyond the three-year statute of limitations set forth in CCP 338(g); waiting instead until April
18 11, 2012. Judgment on the Pleadings must be granted in favor of Defendant Vance.

19 **D. THE FIRST AMENDED COMPLAINT ALLEGES THAT THE STATUTE OF**
20 **LIMITATIONS IS TOLLED PURSUANT TO CCP §351 SINCE DEFENDANT VANCE**
21 **HAS LIVED OUT OF THE STATE FOR SEVERAL YEARS.**

22 Section 351 of the California Code of Civil Procedure appears on its face to toll limitations
23 on the time in which to file an action if the cause of action accrues against a person and that person
24 is out of the state. This argument must fail for two reasons. First, the case of *Filet Menu, Inc. v.*
25 *Cheng*, (App. 2 Dist. 1999) 84 Cal. Rptr. 2d 384, 71 Cal. App 4th 1276, held that this section is
26 unconstitutional as it violates the commerce clause. It appears that the purpose of the statute was to
27 provide added protection to California residents on a claim against a potential defendant not
28 residing in the state. Here however, the facts of this case are unique in that Plaintiff Birjandi has
been married to her attorney Roland Colton since June of 1991. (FAC, ¶14.) The **Exhibits** attached

1 hereto reveal that Colton and Vance have been involved in protracted dissolution proceedings in
2 San Diego Superior Court since 1991. See FAC ¶11 and **Exhibits A-D**. Also, *Exhibit "A"* reveals
3 that Mr. Colton and Ms. Vance have six children from their previous marriage. Based on these
4 facts, it is inconceivable that the legislature would have intended that CCP §351 would toll the
5 statute of limitations under these circumstances. Clearly Plaintiff, through her husband Colton, has
6 had continuous and systematic access to and has known the whereabouts of Ms. Vance through her
7 attorneys even as recently as March 6th of this year. (*Exhibit "D"*).

8 V.

9 **CONCLUSION**

10 Based on the foregoing points and authorities, Defendant Vance respectfully requests the
11 Court grant Judgment on the Pleadings in her favor and dismiss Plaintiff's case in its entirety.
12 Moreover, because there is no reasonable chance that the Plaintiff's failure to comply with the
13 statute of limitations could be cured by an amendment to the FAC; Defendant Vance requests her
14 motion be granted without leave to amend.

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17 Dated: March 14, 2013

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19 _____
20 Gary C. Wykidal
21 Attorney for Defendant Vance
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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 245 Fischer Ave., Suite A-1, Costa Mesa, California 92626.

On March 14, 2013, I served the foregoing document described as:

DEFENDANT JANICE VANCE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HER MOTION FOR JUDGMENT ON THE PLEADINGS

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

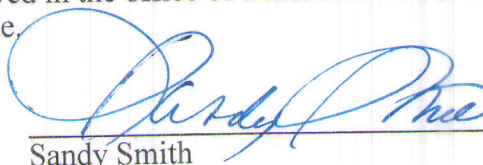
Roland C. Colton
Colton Law Group
28202 Cabot Road, Suite 300
Laguna Niguel, CA 92677

Robert W. Harrison, Esq.
Wilson, Elser, Moskowitz, Edelman &
Dicker LLP
655 West Broadway, Suite 900
San Diego, CA 92101

- (X) **(BY MAIL)** I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of 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.
- () **(BY OVERNIGHT NEXT DAY DELIVERY)** On the above-mentioned date, I placed a true copy of the above-mentioned document(s) in a sealed envelope or package designated by Federal Express with delivery fees paid or provided for, addressed to the person(s) as indicated above and deposited same in a box or other facility regularly maintained by Federal Express or delivered same to an authorized courier or driver authorized by Federal Express to received documents.
- () **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.
- () **(BY FACSIMILE)** From facsimile number (714) 751-5428, I caused each such document to be transmitted by facsimile machine, to the parties and numbers indicated above, pursuant to Rule 2008. The facsimile machine I used complied with California Rules of Court, Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2008(e)(4), I caused the machine to print a transaction record of the transmission, a copy of which is attached to the original of this declaration.

EXECUTED on March 14, 2013, at Costa Mesa, California.

- (X) **(STATE)** I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.
- () **(FEDERAL)** I declare I am employed in the office of a member of the Bar of this Court at whose direction service was made.


Sandy Smith