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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIMOTHY P. DEMARTINI, et al.,
Plaintiffs,
v.
MICHAEL J. DEMARTINI, et al.,
Defendants.

No. 2:14-cv-2722 JAM CKD PS

FINDINGS AND RECOMMENDATIONS

Before the court is plaintiffs’ (Timothy and Margie’s) motion for summary judgment against defendants’ (Michael and Renate’s) counterclaims. (ECF No. 202.) At a May 31, 2017 hearing on the motion, plaintiffs were represented by counsel Kirk Rimmer and Christian Kemos, and defendants proceeded pro se. After their arguments, the court took the matter under submission. Upon review of the record and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

This case is predicated on diversity jurisdiction. As set forth in their Second Amended Answer and Counterclaims (ECF No. 104), Michael and Renate assert three causes of action: (1) declaratory relief establishing that, since 1974, the parties have been in a partnership to pool resources and operate various businesses; (2) breach of the partnership by plaintiffs in 2014; and (3) defamation by plaintiffs in 2014. Timothy and Margie assert defendants have not raised a genuine dispute of material fact as to any claim.

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1 I. Summary Judgment Standard Under Rule 56

2 Summary judgment is appropriate when it is demonstrated that there “is no genuine
3 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
4 Civ. P. 56(a). A party asserting that a fact cannot be disputed must support the assertion by
5 “citing to particular parts of materials in the record, including depositions, documents,
6 electronically stored information, affidavits or declarations, stipulations (including those made for
7 purposes of the motion only), admissions, interrogatory answers, or other materials. . .” Fed. R.
8 Civ. P. 56(c)(1)(A).

9 Summary judgment should be entered, after adequate time for discovery and upon motion,
10 against a party who fails to make a showing sufficient to establish the existence of an element
11 essential to that party’s case, and on which that party will bear the burden of proof at trial. See
12 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “[A] complete failure of proof concerning an
13 essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”
14 Id.

15 If the moving party meets its initial responsibility, the burden then shifts to the opposing
16 party to establish that a genuine issue as to any material fact actually does exist. See Matsushita
17 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the
18 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
19 of their pleadings but is required to tender evidence of specific facts in the form of affidavits,
20 and/or admissible discovery material, in support of its contention that the dispute exists or show
21 that the materials cited by the movant do not establish the absence of a genuine dispute. See Fed.
22 R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the
23 fact in contention is material, i.e., a fact that might affect the outcome of the suit under the
24 governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv.,
25 Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is
26 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving
27 party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

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1 In the endeavor to establish the existence of a factual dispute, the opposing party need not
2 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
3 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
4 trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce
5 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”
6 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee’s note on 1963
7 amendments).

8 In resolving the summary judgment motion, the evidence of the opposing party is to be
9 believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the
10 facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475
11 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s
12 obligation to produce a factual predicate from which the inference may be drawn. See Richards
13 v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902
14 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than
15 simply show that there is some metaphysical doubt as to the material facts Where the record
16 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
17 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

18 II. Declaratory Relief

19 Michael and Renate allege that, circa 1974, plaintiff Timothy and defendant Michael
20 entered into an oral partnership agreement to pool resources and operate a variety of businesses,
21 including land development, building, automobile repair, and sales. In 1977, Timothy and
22 Michael’s father James allegedly joined the partnership. Michael and Renate allege that, every
23 year, Timothy and Michael would discuss the operations of the partnership businesses and make
24 decisions relating to them. After James passed away in 1983, Timothy and Michael allegedly
25 agreed to continue the oral partnership. From 1974 to the present, the partnership agreement was
26 that Michael, Timothy, and other partners agreed to share in the profits and losses of the
27 businesses. Michael and Renate allege that the partnership includes the following assets:

- 28 • The Coan Ranch properties;

- 1 • The Maltman Drive property;
- 2 • The Dorsey East Main Street property;
- 3 • The 625 Idaho Maryland Road property;
- 4 • The property at 12731 Loma Rica Drive;
- 5 • The properties at 12757, 12759 and 12761 Loma Rica
6 Drive¹
- 7 • and the expansion of the various businesses that have
8 developed over the many years between the partners,
9 including purchasing and development of the Coan Ranch
10 and other businesses including the Auto and Recreational
11 Vehicle Sales and Service business.

12 California Corporations Code § 16101, subd. (9) defines a partnership as “an association
13 of two or more persons to carry on as co-owners a business for profit[.]” “Generally, a
14 partnership connotes co-ownership in partnership property, with a sharing in the profits and losses
15 of a continuing business.” Chambers v. Kay, 29 Cal. 4th 142, 150-151 (2002). “An essential
16 element of a partnership or joint venture is the right of joint participation in the management and
17 control of the business. [Citation.] Absent such right, the mere fact that one party is to receive
18 benefits in consideration of services rendered or for capital contribution does not, as a matter of
19 law, make him a partner or joint venturer.” Bank of California v. Connolly, 36 Cal. App. 3d 350,
20 364 (1973).

21 California Corporations Code § 16202 sets forth the rules for determining whether a
22 partnership is formed. Under § 16202, subd. (a), except as otherwise provided, “the association
23 of two or more persons to carry on as co-owners a business for profit forms a partnership,
24 whether or not the persons intended to form a partnership.” “A person who receives a share of
25 the profits of a business is presumed to be a partner in the business, unless the profits were
26 received” as payment of a debt, for services, as rent, or other types of payment. Corp. Code, §
27 16202, subd. (c)(3); see Chambers, 29 Cal. 4th at 151, n.3. “Whether a partnership or joint
28

¹ The Loma Rica Drive properties are acknowledged to be co-owned by the parties, and plaintiffs’
claim for dissolution of this partnership has been remanded to state court. (ECF No. 224.)

1 venture exists is primarily a factual question to be determined by the trier of fact from the
2 evidence and inferences to be drawn therefrom.” Bank of California, 36 Cal. App. at 364; see
3 also Weiner v. Fleischman, 54 Cal. 3d 476 (1991) (existence of an oral joint venture or
4 partnership agreement must be established by a preponderance of the evidence, rather than clear
5 and convincing evidence).

6 California Corporations Code § 16204 concerns the acquisition of partnership
7 property:

8 (a) Property is partnership property if acquired in the name of either
9 of the following:

10 (1) The partnership.

11 (2) One or more partners with an indication in the instrument
12 transferring title to the property of the person's capacity as a partner
13 or of the existence of a partnership but without an indication of the
14 name of the partnership.

15 (b) Property is acquired in the name of the partnership by a transfer
16 to either of the following:

17 (1) The partnership in its name.

18 (2) One or more partners in their capacity as partners in the
19 partnership, if the name of the partnership is indicated in the
20 instrument transferring title to the property.

21 (c) Property is presumed to be partnership property if purchased
22 with partnership assets, even if not acquired in the name of the
23 partnership or of one or more partners with an indication in the
24 instrument transferring title to the property of the person's capacity
25 as a partner or of the existence of a partnership.

26 (d) Property acquired in the name of one or more of the partners,
27 without an indication in the instrument transferring title to the
28 property of the person's capacity as a partner or of the existence of
a partnership and without use of partnership assets, is presumed to
be separate property, even if used for partnership purposes.

California Evidence Code § 662 provides: “The owner of the legal title to the property is
presumed to be the owner of the full beneficial title. This presumption may be rebutted only by
clear and convincing proof.” Section 662 applies to allegations that a party has beneficial rights
to property pursuant to an oral agreement, even if title is not in their name. See Murray v.
Murray, 26 Cal. App. 4th 1062, 1067 (1994), citing Tannehill v. Finch, 188 Cal. App. 3d 224,

1 227-228 (1986). “The clear-and-convincing standard requires that the evidence be so clear as to
2 leave no substantial doubt in the mind of the trier of fact; it must be sufficiently strong to
3 command the unhesitating assent of every reasonable mind.” 31 Cal. Jur. 3d Evidence § 96,
4 citing In re Angelia P., 28 Cal. 3d 908 (1981) (other citations omitted).

5 Michael and Renate’s claim for declaratory relief “is based on a partnership relationship
6 between the parties existing as an ongoing business . . . [,] a partnership existing beyond joint
7 properties or property lines.”² (ECF No. 216-4, Second Affidavit of Michael DeMartini, ¶ 20.)
8 Timothy and Margie argue that no such partnership existed. As to specific assets, plaintiffs assert
9 there is no genuine dispute of fact as to whether any of these were part of the claimed partnership.

10 A. Partnership formation. Michael declares that, when the parties formed an oral
11 agreement in 1975, “[t]here were no special terms, waivers or other complexities in the
12 agreement. It was merely an agreement to do business together with understood loyalty and
13 things that go along with it.”³ (Second Affidavit of Michael DeMartini, ¶ 3.) “The oral
14 agreement was renewed when plaintiffs moved to Nevada and on a yearly basis thereafter.” (Id.,
15 ¶ 5.) In 1977, “the oral agreement was modified such that Michael would provide more funding
16 and educational expertise into the partnership and Timothy would provide more work and spend
17 more time, but contribute less capital.” (Id., ¶ 7.) “From time to time the oral partnership
18 agreement with Timothy was adjusted as [need be] for different businesses, conditions and
19 participation arrangements and even compensation for extraordinary services by partners.” (Id., ¶
20 10.)

21 Defendants’ evidence of the alleged partnership includes the following: A 1975 check
22 from “Tim” (Timothy) to Michael for \$450 (Second Affidavit of Michael DeMartini, Ex. A);
23 1977 and 1978 DeMartini Company income tax returns listing James, Timothy and Michael as

24 _____
25 ² Defendants maintain that Michael’s own businesses (Meridian Company, formed in 1995, and
26 American Environmental, formed in 1998) are not part of the global partnership. (See Plaintiff’s
MSJ at 8.)

27 ³ At the hearing on the motion, Michael DeMartini explained that, within the family, it was
28 “considered offensive” to ask for a written agreement, as good faith was assumed.

1 partners (id., Exs. B & C); and 1978 checks for \$5,000 and \$560 from Michael to DeMartini Co.
2 (id., Ex. D). Michael also submits a map he prepared in 1973 for the East Main Street property
3 that would be used for the first DeMartini auto sales business (id., Ex. J.); a 1985 lease agreement
4 between Michael and Timothy (“a general partnership”) and a third party (id., Ex. E); and phone
5 records showing frequent calls between the brothers in 1986 (id., Ex. I). As recent evidence of
6 the partnership, defendants cite the 2006 publication of a fictitious business name for Michael and
7 Timothy doing business as DeMartini Brothers Construction and DeMartini & Sons (id., Ex. F);
8 and a 2013 bank document listing an account for DeMartini & Sons and signed by Timothy,
9 Margie, Michael, and Renate (id., Ex. G).

10 Plaintiffs contend that any documents indicating a partnership on their face “relate to the
11 DeMartini and Sons Partnership at Loma Rica Drive,” an issue which has been removed to state
12 court. (ECF No. 218, Plff’s Reply, at 8.)

13 B. DeMartini Auto Sales, DeMartini RV Sales, DeMartini Sunshine Body Shop (“the RV
14 businesses”). Timothy asserts that these are solely-held businesses of his and Margie, owned and
15 operated by them for forty years and built from their sole risk and contributions. Per his
16 declaration, Timothy started the DeMartini Sunshine Body Shop in Reno in 1974, Margie began
17 working with him in 1975, and it closed in 1977. In 1979, Timothy obtained a California
18 Dealer’s license and started DeMartini Auto Sales. He began by restoring and selling old cars,
19 then progressed to buying and selling RVs, developing a popular website in 1995 and employing
20 up to 40 people. In 2004, the business expanded from 1305 Dorsey East Main Street in Grass
21 Valley to a state-of-the-art facility at 625 Idaho Maryland Road, built with Timothy and Margie’s
22 own funds, including a down payment on the property from Timothy and Margie’s personal bank
23 credit line in their names only. Timothy hired an architect and engineers to design the new
24 facility, built with the help of his sons and employees. Margie worked on bookkeeping and
25 financials. Timothy asserts that Michael and Renate have never been involved with the
26 management or operation of these businesses, nor shared in the profits or been privy to financial
27 information about them. (ECF No. 202-5, Decl. of Timothy DeMartini.) Timothy cites
28 Michael’s deposition testimony to establish that Michael has never received a California Schedule

1 K-1 or partnership distribution from the RV businesses in forty years; there is no RV business
2 license in Michael’s name; Michael never wrote a check to the IRS for the RV businesses, never
3 sold or purchased any RV for DeMartini RV Sales, and never paid any bills on behalf of the RV
4 businesses. (UMF 7.)

5 Defendants counter that Michael paid bills on behalf the RV businesses indirectly, by
6 “doing 100 percent of the work on some of the other partnership properties and creating money
7 up into the hundreds of thousands of dollars . . . that was equally divided and provided to
8 Timothy, so he could pay off the loans of” the RV businesses. (Defs.’ Response to UMF 7, citing
9 Michael DeMartini Deposition, 12/8/16 99:18-100:9). As evidence for this proposition, he cites
10 Renate’s December 2016 declaration, where she interprets an attached income sheet for
11 DeMartini Brothers Construction between 2002 and 2014. (Defs.’ Response to UMF 9, citing
12 ECF No. 169-1, Decl. of Renate DeMartini, Ex. A.) Renate declares that this income report “for
13 a portion of the partnership businesses and properties at 12757, 12759, and 12761 Loma Rica
14 Drive in Grass Valley” shows that “the tenants that Michael and Renate DeMartini secured on
15 behalf of the partnership brought in \$774,519.44 to benefit the partnership. For that same period
16 ... Timothy DeMartini secured tenants supposedly in the name of the partnership and brought in
17 total income of \$70,600.” (*Id.*, ¶ 3.) Thus, she concludes, Michael and Renate were responsible
18 for nearly 92% of the income on these partnership properties over twelve years, which she
19 declares was split fifty-fifty with Timothy and Margie. (*Id.*, ¶¶ 3-4.)

20 This report appears to be the main piece of evidence for defendants’ claim that they were
21 bringing in money for the partnership, which Timothy was spending on the RV businesses, so
22 that the development and RV enterprises functioned as two halves of a partnership. Assuming the
23 report is admissible, however, it shows little except the parties’ joint management of the Loma
24 Rica properties, not at issue here.⁴ The report states that certain tenants were “managed” by
25 Michael or Timothy, but does not indicate who “secured” the tenants. While it lists deposits into

26 ⁴ Similarly, at the hearing, Michael DeMartini cited his design of five units of major buildings,
27 worth “hundreds of thousands of dollars,” and his generation of “millions” in shared income.
28 These statements also concerned the Loma Rica buildings, the subject of a partnership remanded
to state court.

1 an unnamed WestAmerica Bank account, the report makes no mention of how the income was
2 distributed between plaintiffs and defendants and/or plowed back into the partnership. And the
3 report makes no mention of the RV businesses or the disputed real properties.

4 Michael further declares that he worked with DeMartini’s Sunshine Body Shop in Reno in
5 the 1970s, rebuilding salvaged vehicles for resale. (ECF No. 216-3, First Affidavit of Michael
6 DeMartini, ¶¶ 3-4.) A few years later, a car lot was constructed at 1305 Dorsey East Main Street
7 in Grass Valley, using the survey plot plan prepared by Michael in the early 1970s. (*Id.*, ¶ 11.)
8 This property was initially rented, then purchased by Timothy after their father passed away in
9 1983. (*Id.*) In the 1980s, the brothers “talked about the various business co-adventures such as
10 automobile sales, land development, the industrial development at the airport, and home
11 building.” (Second Affidavit of Michael DeMartini, ¶ 21.) In the early 1990s, Timothy and
12 Michael agreed that Timothy would focus more on auto sales and RVs and be paid for the work
13 he did in this business, while Michael would pursue “land development opportunities” and be
14 paid for this work. (First Affidavit of Michael DeMartini, ¶ 14.) In 2002, Timothy “encouraged
15 [Michael] to continue doing all the work on the other businesses to bring in more money” while
16 Timothy devoted his time to the RV business. (*Id.*, ¶ 17.) Except for the tenant income sheet
17 described above, Michael points to no evidence showing that, for decades, he was funneling
18 money into the partnership or the RV businesses.

19 Michael and Timothy had numerous meetings about business strategies for the RV
20 businesses, and since the 1970s Michael corresponded with Timothy about the RV businesses,
21 “being a sounding board . . . and providing engineering expertise,” all without pay. (Second
22 Affidavit of Michael DeMartini, ¶¶ 27, 29.) In 2014, Timothy began taking actions to “squeeze”
23 Michael out of the partnership, and in September 2014, he filed suit for partition of one jointly-
24 owned property. (First Affidavit of Michael DeMartini, ¶ 23.)

25 C. Real Property at 625 Idaho Maryland Road. It is undisputed that this property was
26 purchased in 2004 by Timothy and Margie, with a down payment from their personal bank
27 account, and that the title is in their names. (UMF 9.) Michael did not sign any loan documents
28 for the property, make payments to any lender, or “sign[] anything relating to 625 Idaho

1 Maryland Road.” (UMF 12.) Since its purchase, this property has been exclusively managed and
2 operated by Timothy and Margie in conjunction with the RV businesses, and no Schedule K-1
3 distributions were issued in relation to it. (UMF 10.)

4 Michael declares that he “did some research on the property and gave some
5 recommendations regarding the possible purchase.” (First Affidavit of Michael DeMartini, ¶ 17.)
6 He also worked with Timothy on grading, drainage, and other engineering issues for the new
7 facility, without pay, although the facility was designed and built by others. (Id., ¶¶ 18-19;
8 Second Affidavit of Michael DeMartini, ¶ 22.); UMF 10.) Michael further asserts that he and
9 Renate were working on other partnership properties and bringing hundreds of thousands of
10 dollars into the partnership to help with the purchase of the property at 625 Idaho Road. (Defs’
11 Response to UMF 9.) As evidence, he cites Renate’s declaration about tenant income from the
12 Loma Rica Drive properties, discussed above.

13 D. Real Property at Dorsey East Main Street. This property was acquired by Timothy
14 and Margie when they purchased a half-ownership in 1990 from Timothy’s mother, and another
15 half-ownership in 1992 from Timothy’s uncle’s estate. Plaintiffs made these purchases with cash
16 and personal loans or mortgages. (UMF 14.) The property title is in Timothy and Margie’s
17 name. (Id.) Since the 1990s, it has been managed and operated by Timothy and Margie in
18 relation to the RV businesses. (UMF 16.) Timothy declares that Michael and Renate have never
19 been involved in managing this property, shared in the profits from any of the businesses on this
20 property, never received financial information about them, and never received a partnership
21 distribution from them. (UMF 16.) Michael has never had an office at that location and has not
22 been involved in bill paying, payroll, taxes, or loans involving the property. (UMF 18.)

23 In response, Michael cites his deposition testimony stating he believed there was an
24 agreement that he would work on the development business while Timothy worked in the RV
25 businesses, all as part of the partnership. (Defs’ response to UMF 16.) He also cites his unpaid
26 work conducting a preliminary survey and map of the property in 1973. (Second Affidavit of
27 Michael DeMartini, ¶ 28.)

28 ////

1 E. Real Property at Maltman Drive. Per Timothy's declaration, he and Margie bought the
2 property at 720 Maltman Drive for cash in 1994. (UMF 20.) They built a 5,000 square foot
3 building and a parking lot and used the property for their auto/RV shop until they bought the
4 property at 625 Idaho Maryland Road. (Id.) The property has been exclusively managed by
5 Timothy and Margie, and the title is in their names. (UMF 20-22.) Timothy declares that Michael
6 and Renate have never been involved with the management or operations of businesses on the
7 Maltman property, never shared in the gross returns or profits of these businesses, and never
8 received a tax return for the Maltman property. (UMF 21, 25.) It is undisputed that defendants
9 never received a K-1 distribution for this property. (Id.)

10 Michael declares that he was "involved in the pre-planning engineering feasibility" for the
11 Maltman property, which he did without pay. (Second Affidavit of Michael DeMartini, ¶ 32.)
12 He "believes" the property was part of the partnership between plaintiffs and defendants,
13 "otherwise the leasing of it that started around 2008 would have been competing with the
14 partnership." (Id., ¶ 33.) Michael also contends that he "indirectly" managed the Maltman
15 property, stating in deposition that "when the property was being developed and purchased,
16 Timothy and I consulted with each other regarding the viability of purchasing that property and
17 developing it." He cites phone bills of calls between him and Timothy as evidence supporting
18 this statement. (Michael DeMartini Depo. of 1/21/17, pp. 357:18-358:9.)

19 F. Conclusion. Overall, defendants' evidence for an oral agreement encompassing forty
20 years' of business and real property acquisitions is both sparse and vague. Much of it amounts to
21 Michael acting as a consultant or advisor, lacking real responsibility or stake in the claimed
22 partnership endeavors. Michael concedes that the partnership had "no special terms," was orally
23 adjusted over the years "as need be," and existed "beyond joint properties or property lines."
24 While the parties were in an acknowledged partnership concerning the Loma Rica Drive
25 properties, the scope, terms, and duration of any further partnership seem to be drawn from
26 Michael's own assumptions and little else. See F.T.C. v. Publ'g Clearing House, Inc., 104 F.3d
27 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any
28 supporting evidence, is insufficient to create a genuine issue of material fact.").

1 As to the real properties at 625 Idaho Maryland Road, Dorsey East Main Street, and
2 Maltman Drive, Timothy and Margie hold title to all three properties, making them the
3 presumptive owners of the “full beneficial title” absent clear and convincing proof to the contrary.
4 See Cal. Evid. Code § 662. There is no evidence that Michael participated in the management
5 and control of these properties (aside from occasional advice or assistance), nor that he received a
6 share of the profits of any businesses associated with the properties. Michael claims there was an
7 oral agreement that he would generate income from the Loma Rica properties and deposit them in
8 a partnership account, split 50/50, such that Timothy’s purchase of the 625 Idaho Road Property
9 in 2004 was done in part with partnership assets. See Corporations Code § 16204(c) (property is
10 “presumed to be partnership property if purchased with partnership assets”). However, there is
11 not enough evidence of this arrangement to potentially meet the “clear and convincing” standard
12 as to real property held in plaintiffs’ names.

13 As to the RV businesses, defendants have made no showing that, apart from the Loma
14 Rica properties, they were in a long-term profit-sharing arrangement, with money earned by
15 defendants used to grow plaintiffs’ RV businesses. Overwhelmingly, the evidence shows that
16 Timothy and Margie invested in, managed, operated, and profited from these businesses with
17 only incidental help from Michael. There is no evidence of a shared understanding that these
18 were Michael’s and Renate’s businesses also. It would have been simple enough to document
19 that the RV businesses were co-owned by the partnership, had the parties so intended, but no such
20 documentation exists. Based on the foregoing, the undersigned will recommend that summary
21 judgment be granted on defendants’ claim for declaratory relief.

22 III. Breach of Contract

23 This claim is predicated on the existence of a global partnership agreement, allegedly
24 breached by plaintiffs. Specifically, Michael and Renate allege that in 2014, Timothy fired the
25 partnership’s accountant without a majority vote, as required by the partnership agreement.
26 (Defs.’ Ans., ¶ 31.) The same year, plaintiffs allegedly breached the contract by diverting funds
27 held in the partnership account at WestAmerica Bank to plaintiffs’ personal account, then closed
28 the partnership account, causing Michael’s checks to bounce. (Id., ¶ 32.) Defendants contend the

1 partnership agreement required “majority approval” for these actions. (Id.) Also in May 2014,
2 Timothy allegedly had Michael’s office at 12731 Loma Drive cleaned out without Michael’s
3 permission, and prevented Michael from using the office at 625 Idaho Maryland Road. (Id., ¶¶
4 33-34.) Additional alleged breaches include engaging in building renovations without majority
5 approval and Timothy’s claim that he has full control of the partnership business. (Id., ¶¶ 37-39.)

6 To state a claim for breach of contract under California law, plaintiff must allege (1) the
7 existence of a contract; (2) plaintiff’s performance; (3) defendant’s breach of the contract; and (4)
8 damages flowing from the breach. CDF Firefighters v. Maldonado, 158 Cal. Ap. 4th 1226, 1239
9 (2008). To establish the existence of a valid contract, plaintiff must allege: (1) parties capable of
10 contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration.
11 United States ex. rel Oliver v. Parsons Co., 195 F.3d 457, 462 (9th Cir. 1999) (citing Cal. Civ.
12 Code § 1550).

13 There is no evidence of a contract with specific terms, i.e., majority vote required for
14 decisions. Rather, as set forth above, Michael admits that the 1974 oral contract was merely an
15 “agreement to do business together” with “no special terms” and “understood loyalty.” Over the
16 years, the oral partnership was adjusted “as need be.” Thus, there appears to be no genuine
17 dispute of fact as to whether Timothy and Margie breached any contract terms by engaging in the
18 alleged actions, and summary judgment should be granted on defendants’ breach of contract
19 claim.

20 IV. Defamation

21 Defendants allege that, as the parties’ relationship deteriorated in 2014, Timothy made
22 statements to third parties that Michael “improperly stole \$1,600 out of a bank account to pay
23 personal phone bills,” impersonated Timothy, stole Timothy’s social security number, was
24 wrongfully occupying a particular building, and owed Timothy \$80,000, among other statements.
25 (Defs. Ans., ¶¶ 71-72, 75.) Defendants allege that, as a result of these defamatory statements,
26 they have been damaged in the amount of \$75,000. (Id., ¶ 76.)

27 In California, “[t]he elements of a defamation claim are (1) a publication that is (2) false,
28 (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special

1 damage.” Wong v. Tai Jing, 189 Cal. App. 4th 1354 (Ct. App. 2010). Per the California Civil
2 Jury Instructions, defendants must prove:

- 3 1. That [name of defendant] made [one or more of] the statement(s)
4 to [a person/persons] other than [name of plaintiff];
- 5 2. That [this person/these people] reasonably understood that the
6 statement(s) [was/were] about [name of plaintiff];
- 7 3. [That [this person/these people] reasonably understood the
8 statement(s) to mean that [insert ground(s) for defamation per se,
9 e.g., “[name of plaintiff] had committed a crime”];
4. That [name of defendant] failed to use reasonable care to
determine the truth or falsity of the statement(s).

or

- 10 1. That [name of defendant] made [one or more of] the statement(s)
11 to [a person/persons] other than [name of plaintiff];
- 12 2. That [this person/these people] reasonably understood that the
13 statement(s) [was/were] about [name of plaintiff];
- 14 3. That because of the facts and circumstances known to the
15 [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure
16 [name of plaintiff] in [his/her] occupation [or to expose [him/her] to
17 hatred, contempt, ridicule, or shame] [or to discourage others from
18 associating or dealing with [him/her]];
- 19 4. That [name of defendant] failed to use reasonable care to
20 determine the truth or falsity of the statement(s);
- 21 5. That [name of plaintiff] suffered harm to [his/her] property,
22 business, profession, or occupation [including money spent as a
23 result of the statement(s)]; and
- 24 6. That the statement(s) [was/were] a substantial factor in causing
25 [name of plaintiff]'s harm.

26 (CACI Nos. 1704 & 1705.) Under either theory, defendants must prove damages. (Id.)

27 In a June 2015 declaration, Michael set forth the details of Timothy’s allegedly
28 defamatory actions on August 27, 2014, when Timothy “explained very loudly to Greg, and
everybody else within about 200 feet that was listening, how terrible I was and how I was a
criminal.” (ECF No. 48, Decl. of Michael DeMartini, ¶¶ 125-138.) “I believe Timothy knew that
his statements were untrue because I had sent him documents stating so,” Michael declares, citing
various emails, checks, and faxes. (Id., ¶¶138-142.) Later that day, the brothers argued and the
sheriff got involved, with Timothy making more allegedly defamatory statements. (Id., ¶¶ 144-

1 152.) More recently, Michael's First and Second Affidavits in opposition to summary judgment
2 do not address the defamation claim. Nor does Renate's two-page affidavit in opposition to
3 summary judgment address this matter.

4 On this record, defendants have failed to create a triable issue of fact as to the elements of
5 defamation, including the requirement to prove actual damages. Thus, summary judgment should
6 be granted as to defendants' defamation claim.

7 Accordingly, IT IS HEREBY RECOMMENDED that plaintiff's motion for summary
8 judgment (ECF No. 202) be granted.

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
11 after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
14 within the specified time may waive the right to appeal the District Court's order. Martinez v.
15 Ylst, 951 F.2d 1153 (9th Cir. 1991).

16 Dated: June 13, 2017

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18 CAROLYN K. DELANEY
19 UNITED STATES MAGISTRATE JUDGE

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