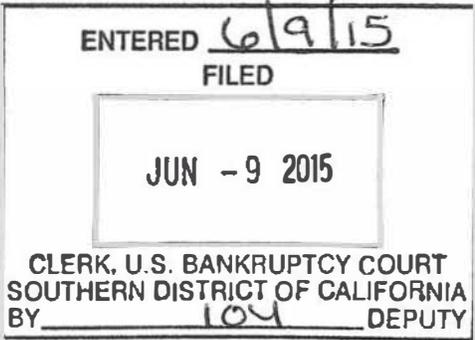


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WRITTEN DECISION – NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy Case No. 09-17553-CL7
)
NELS LOUIS BERG;) Adversary Proceeding No. 13-90174-CL
RACHAEL ANN BERG,)
) Chapter 7
Debtors,)
)
MEMORANDUM DECISION
RICHARD M. KIPPERMAN,)
CHAPTER 7 TRUSTEE,)
)
Plaintiff,)
) Judge: Christopher B. Latham
v.)
)
LORY K. BERG, SUCCESSOR TRUSTEE OF THE)
FRANCES H. BERG TRUST, DATED AUGUST 29,)
1990;)
NELS LOUIS BERG;)
RACHAEL ANN BERG,)
)
Defendants,)
)

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LORY K. BERG, SUCCESSOR TRUSTEE OF THE)
FRANCES H. BERG TRUST, DATED AUGUST 29,)
1990,)

Counter-Claimant,)

v.)

RICHARD M. KIPPERMAN,)
CHAPTER 7 TRUSTEE,)

Counter-Defendant,)

LORY K. BERG, SUCCESSOR TRUSTEE OF THE)
FRANCES H. BERG TRUST, DATED AUGUST 29,)
1990,)

Cross-Claimant,)

v.)

NELS LOUIS BERG;)
RACHAEL ANN BERG,)

Cross-Defendants.)

1 MEMORANDUM DECISION

2
3 Ishmael and Frances Berg had three children: Larry, Lory, and Nels.¹ During their lifetimes,
4 they owned 200 acres of land in Ramona, California. Over the course of several decades, Larry, Lory,
5 and Nels purchased some of that land. Now that both Ishmael and Frances have passed away, Lory –
6 as trustee of Frances’s trust – seeks to undo Nels’s acquisition of 80 acres.

7 After an evidentiary hearing, the court finds: (1) Nels and Frances had a contractual agreement
8 for the purchase of those 80 acres; (2) Nels did not procure a 2008 purchase and sale agreement
9 through undue influence; and (3) Nels fully performed under the agreement.

10
11 **I. PROCEDURAL POSTURE AND TRIAL ISSUES**

12 **A. Procedural Posture**

13 On November 16, 2009, Nels Louis and Rachael Ann Berg filed a voluntary Chapter 7 petition.
14 [Case No. 09-17553-CL7, ECF No. 1.] Richard Kipperman was appointed as the Chapter 7 Trustee.
15 [*Id.*, ECF No. 4.] Nels and Rachael received their 11 U.S.C. § 727 discharge on February 13, 2012.
16 [*Id.*, ECF No. 124.] On November 26, 2012, Nels and Rachael sued Lory, as trustee of the Frances H.
17 Berg Trust, in the San Diego Superior Court (Case No. 37-2012-00086097). The first amended
18 complaint, dated March 25, 2012, lists two causes of action for quiet title and declaratory relief. [Ex.
19 DD-1.]

20 On June 25, 2013, Mr. Kipperman filed the above-captioned adversary proceeding, naming as
21 defendants: Lory K. Berg, as successor trustee of the Frances H. Berg Trust, dated August 29, 1990;
22 Nels Berg; and Rachael Berg (ECF No. 1). Nels and Rachael answered on July 25, 2013 (ECF No. 5).
23 Lory answered on August 7, 2013 (ECF No. 6) and then counter- and cross-claimed on November 7,
24 2013 (ECF No. 8). She listed Mr. Kipperman, Nels, and Rachael as counter- and cross-defendants.
25 On August 29, 2014, Mr. Kipperman moved for summary judgment (ECF No. 49). Lory opposed
26 (ECF No. 55), Nels and Rachael joined the motion (ECF No. 60), and Mr. Kipperman replied (ECF
27

28 ¹ Because the parties – and many of the witnesses – have the same surname, the court refers to them by their first names. It intends no disrespect by this.

1 No. 69). Nels and Rachael also moved for partial summary judgment on the cross-complaint (ECF No.
2 51). Lory opposed (ECF No. 63), and Nels and Rachael replied (ECF No. 77). On October 22, 2014,
3 the court heard oral argument on the motions, and then continued them to hold an evidentiary hearing
4 to resolve factual disputes (ECF No. 91).

5 **B. Jurisdiction and Venue**

6 The court has jurisdiction to hear and determine this matter under 28 U.S.C. §§ 157(b)(2)(A),
7 (K) and 1334(b). Venue is proper in the Southern District of California under 28 U.S.C. § 1409(a).

8 **C. Bifurcation of Issues for Trial Under Rule 7042**

9 The court identified two issues for trial: “1) whether Nels Berg obtained his mother’s assent to
10 the written purchase and sale agreement through undue influence; and 2) whether Nels Berg fully
11 performed under that agreement” (ECF No. 92). Both issues presuppose a contract exists, so the court
12 must necessarily decide that, as well. At the final pretrial status conference on February 28, 2015, the
13 parties discussed damages and the issue of rescission (ECF No. 131). The court accorded the parties
14 an opportunity to brief the matter post-trial.

15 The court held an evidentiary hearing over three days (ECF Nos. 136, 137, and 138). It
16 received documentary evidence, and lay and expert witnesses testified. Thereafter, the parties
17 submitted post-trial briefs (*see* ECF Nos. 153, 154, and 155), and the court took the matter under
18 submission.

19 **D. Burden of Proof**

20 The party asserting that a contract exists bears the burden of proof. But, as undue influence is a
21 defense to contract formation, Lory carries the burden on it – the court considers evidentiary
22 presumptions below. The burden of proving performance also falls on Lory, as she essentially asserts
23 that Nels breached the contract.

24
25 **II. FACTUAL BACKGROUND AND FINDINGS**

26 This matter involves Ishmael and Frances Berg, their family, and their land in Ramona, San
27 Diego County, California. Ishmael and Frances were married.

1 **A. Ishmael and Frances Berg’s Land in Ramona**

2 In 1960, Ishmael and Frances acquired 200 acres of land in Ramona. [Ex. ZZ-1.] This dispute
3 concerns 120 of those acres. The parties have divided the land into three 40-acre parcels: Parcels A, B,
4 and C. Parcel A, APN 246-050-06-00, is located at 23756 Ladrado Lane, Ramona, CA. And it has at
5 least four buildings: the 1908 Historic Ranch House (the “Ranch House”); a barn that Nels converted
6 to a house (the “Barnhouse”); a bunkhouse (the “Bunkhouse”); and a blockhouse built sometime in the
7 1930s. Parcels B and C are actually part of a larger, undivided 80-acre parcel, APN 246-060-32-00.
8 Parcel B is the “lower” 40 acres; it is contiguous with Parcel A. Parcel C is the “upper” 40 acres.

9 **B. The Berg Family**

10 Central to this dispute are Frances and her children: Larry, Lory, and Nels. In 1977, Larry
11 purchased 40 acres in Ramona from his parents by an oral agreement. Larry paid either \$20,000 or
12 \$25,000, in \$200 monthly installments; he also turned his income tax returns over to them. Ishmael
13 and Frances immediately conveyed title to Larry. In 1989, Nels talked with Frances and Ishmael about
14 purchasing part of their Ramona property. They negotiated for some time. Also in 1989, Nels began
15 dating Sheri Haley.

16 Ishmael died in 1990. On August 29, 1990, Frances created the “Frances H. Berg Trust.” [Ex.
17 20.] She named Larry, Lory, and Nels as the remainder beneficiaries. And she designated Lory, Nels,
18 and Larry as successor trustees, in that order. She also listed her Long Beach residence, her property
19 in Ramona, and all her personal property.

20 Sometime in 1990 or 1991, Nels moved to Parcel A. And in 1991, he converted a barn on the
21 property into a house – the Barnhouse – and moved in. At this time, Larry and his first wife lived in
22 the Ranch House. In June 1992, Nels and Ms. Haley broke up. During her relationship with Nels,
23 Ms. Haley became friends with Frances. She maintained this friendship even after the breakup. She
24 visited and called Frances several times a year. Some point later, Nels and Rachael met. Rachael had
25 four children, and they moved onto Parcel A in 1993.

26 In 1993, Nels and Frances agreed orally that he would buy Parcel A for \$40,000, at \$200 per
27 month. He started paying in August 1993. And in June 1994, Rachael and Nels wed.

1 **C. Lory’s and Larene’s Purchases of 40 Acres**

2 In the 1990s, Lory and her husband purchased 40 acres from Frances for \$20,000, paid at \$200
3 per month. This was an oral agreement. Frances immediately conveyed title to Lory. Lory and her
4 husband eventually divorced. And they sold the property to Larene Berg – Larry’s daughter – and her
5 husband, Gary Westerfeld. Mr. Westerfeld first met Frances at Thanksgiving in 1999. Larene later
6 also purchased Parcel C from Frances for \$20,000, payable at \$200 per month. This, too, was an oral
7 agreement. She started making payments in 1998 or 1999, and did not stop until April 2012. Larene
8 never received title.

9 At some point, Larry divorced his first wife. During that process, he employed Helene
10 Armand, a paralegal. And Frances paid for some of Ms. Armand’s work, so the two met. In 2001,
11 Larry reconnected with an old friend, Cindy. And they eventually married. Cindy met Frances in
12 November 2001, and they became fast friends. In February 2002, Cindy moved to the Ranch House,
13 and she and Larry lived there for about a year. They then moved to a house on Larry’s property.

14 **D. Nels’s Purchase of Parcel B**

15 In 2004, Nels and Frances discussed his purchasing Parcel B. But, as with Parcel A, it took
16 several years for the two to finish the deal. On November 9, 2004, Nels wrote Frances a letter about it
17 (the “2004 Letter”). In 2006, Nels and Frances orally agreed that Nels would buy Parcel B for
18 \$25,000, at \$200 per month. And on April 26, 2006, he sent her a \$400 check – \$200 for Parcel A and
19 \$200 for Parcel B.² [Ex. D-2, Check No. 1050.] This was the first of many \$400 payments.

20 In 2007, Frances asked Ms. Armand to draft a revision to her trust (the “2007 Amendment”).
21 And on April 14, 2007, Frances executed it in Nels and Rachael’s house. [Ex. 20.] In it, she provides
22 Parcel A to Nels and Parcel C to Larene. Thereafter, Nels continued sending payments.

23 **E. The 2007 Wildfires**

24 In October 2007, wildfires swept through San Diego County. And the fires encroached onto
25 Parcels A and B. Instead of evacuating, Nels defended the property, to some success. Larene lost
26 items in the fire. Larry and Cindy lost their house, but they rebuilt. Nels and Rachael also rebuilt. In

27 _____
28 ² This check’s memo line states “Rent.” But Nels testified he did not write “rent.” Indeed, the court notes that
the “rent” handwriting differs from the front of the check, but appears very similar to the handwriting that
endorsed the check.

1 addition, after the fires, Nels and Russell Landman, a friend of his and Frances's next-door neighbor in
2 Long Beach, operated a temporary business helping landowners clear their land.

3 On November 27, 2007, Rachael wrote Frances a letter (the "2007 Letter"). [Ex. Q-1.] And
4 Nels continued making payments.

5 On March 8, 2008, Frances executed the "First Amendment to The Frances H. Berg Trust" (the
6 "2008 Amendment"). [Ex. II-2.] She removed Larry as a remainder beneficiary and provided for
7 specific property distributions upon her death. Ms. Armand drafted and notarized the 2008
8 Amendment. She also prepared a codicil to Frances's will.

9 **F. The November 2008 Agreement**

10 Nels continued paying into 2008. Then, he and Frances discussed reducing their agreements to
11 writing. Simultaneously, they modified the payment terms. Nels agreed to pay a lump sum³ and in
12 July began sending her \$500 per month.

13 A few months later, in November 2008, they reduced this modified agreement to writing (the
14 "2008 Agreement"). Ms. Armand drafted it. The 2008 Agreement is titled: "Agreement: Expectancy
15 in Estate, Absolute." [Ex. 1-2.] It identifies two parcels of property: Parcel A and the land comprising
16 Parcels B and C. It acknowledges that Frances and Nels "previously entered into a binding oral
17 contract wherein [Frances] sold to [Nels] . . . two (2) parcels of real property." The terms are: for
18 Parcel A, \$40,000 in \$400 monthly payments; for Parcel B, \$25,000, a \$10,000 lump sum, and then
19 \$100 monthly. If the properties were not paid in full when Frances died, Frances "further agree[d] to
20 forgive all indebtedness owed to [Frances] regarding the aforementioned real properties"

21 On November 29, 2008, Nels retrieved the document from Ms. Armand's office and drove to
22 Frances's house in Long Beach. They signed the 2008 Agreement before a notary, Charles Roath. He
23 signed an acknowledgement page, but failed to affix his notary seal to it. They then returned to her
24 home. There, they spoke with Mr. Landman, who moved next door in 2006 and saw Frances every
25 day. But he had known her for his entire life and thought of her as a second mother. He was married
26 to Blanca Landman, who knew Frances for about 25 years. Nels continued to send monthly payments.

27
28

³ On June 3, 2008, he wrote her a \$10,000 check. [Ex. XXX-1, Check No. 1660.]

1 **G. Nels and Rachael’s Bankruptcy and Frances’s Subsequent Actions**

2 On November 16, 2009, Nels and Rachael submitted their voluntary Chapter 7 case. On their
3 schedules, they omitted Parcels A and B and any corresponding debt or contract.

4 On June 18, 2010, Frances visited Brian Chou, an estate-planning attorney, to revise her trust.
5 On September 8, 2010, she executed her restated trust (the “2010 Restated Trust”). [Ex. B-1.] In
6 Article 2.2, she directs the trustee to distribute the “Ranch House Forty,” Parcel A, to Nels. Article 2.4
7 clarifies that all gifts to Nels “shall be held, administered and distributed as provided in Article 6.”
8 Article 6, in turn, creates a lifetime benefit trust for Nels. Article 6.3 appoints Lory as the first trustee,
9 with Nels as the second. Article 6.7 expresses Frances’s intent that Nels “have the right to reside” on
10 Parcel A, “provided he continues to pay fair market value rent . . . and the costs of maintaining” it.
11 Article 6.9 grants Nels a limited power of appointment. On that same day, Frances also executed the
12 “Last Will of Frances H. Berg.” [Ex. 15] In it, she gifts all remaining property to her trust. Mr. Chou
13 witnessed her signatures.

14 Nels continued to send payments. In 2011, Frances began acting differently. She was
15 forgetful, uncharacteristically repeated herself, and confused Nels and Larry. In February 2011,
16 Rachael posted on Facebook about Frances. [Ex. S-1.] The post upset Frances. On March 22, 2011,
17 Rachael apologized to Frances in a letter (the “2011 Letter”). [Ex. T-1.]

18 On August 9, 2011, Frances met with Mr. Chou to again amend her trust. [Ex. 27.] She
19 disinherited two of Nels’s children. [Ex. D.] In October 2011, Cindy and Larry took Frances to Evan
20 Drexl, another attorney, to draw up a rental agreement. And Frances and Cindy visited him twice to
21 discuss evicting Nels and recovering possession of the properties. Mr. Drexl investigated the Chapter
22 7 proceeding and prepared a draft lease and a few letters. At one of the meetings, Frances showed
23 Mr. Drexl the 2008 Agreement and explained that she did not sign it.

24 Mr. Drexl advised Frances to refuse Nels’s checks if they did not say “rent” on them. So she
25 refused a \$300 check dated September 21, 2011 and a \$500 check dated October 18, 2011. [Exs. U-2,
26 GGG-1, Check No. 2191 and Exs. V-2, DDD-1, unnumbered check.] On December 4, 2011,
27 Mr. Drexl mailed Nels a letter and lease. [Exs. C-1 and PP-1.] He disclaimed the 2008 Agreement
28 and suggested that Nels sign the rental agreement. But Nels refused. [See Ex. FFF-1.] On December

1 13, 2011, Mr. Drexl mailed a letter to Frances and Cindy updating them about the status of Nels and
2 Rachael's bankruptcy case. He also advised Frances that she could keep Nels's checks, but suggested
3 that she write "accept as rent" on them. Accordingly, Frances deposited Nels's November 23, 2011
4 check for \$500. [Ex. XXX-1 and W-2, Check No. 1001.] The memo line contains "accepted as rent"
5 on it. On January 3, 2012, one of Nels's payments bounced. [Ex HHH-1.] Frances told Nels, and he
6 immediately went and gave her \$500 and the \$27 fee.

7 On January 30, 2012, Frances amended her trust yet again. [Ex. E-1.] She conditioned
8 distribution of Parcel A to Nels on his being alive – if he predeceased Frances, the property was to be
9 distributed to Larry and Lory. She altered the order of trustee appointments for Nels's lifetime benefit
10 trust to Lory, Larry, and Larene. And she revised Article 6.9 to extinguish Nels's power of
11 appointment upon his death.

12 In February 2012, the Bergs held two parties for Frances's 89th birthday – one in Long Beach
13 and one at Larry's house in Ramona. During the Ramona party, Frances and Lory walked over to the
14 Ranch House. Nels and his daughter were there. Frances confronted Nels about not paying rent and
15 taking over the property. She poked him in the chest. He turned around and walked off.⁴ Despite this
16 interaction, Nels continued to make his \$500 payments.⁵

17 At some point in 2012, Frances had a stroke. And on September 3, 2012, she died at age 89.
18 Lory, as trustee, administered Frances's personal belongings. Frances had checks, check stubs, notes,
19 pay advices, and other items dating back to the 1950s. Lory shredded some items, kept others, and
20 disposed of yet others. At some point, the parties gathered for a will-trust reading at Mr. Chou's
21 office.

22 On November 26, 2012, Nels and Rachael sued Lory in the San Diego Superior Court. And on
23 June 25, 2013, Mr. Kipperman filed this adversary proceeding.

24 ⁴ At trial, Lory's counsel questioned Lory about Frances's 86th birthday, which would have been in February
25 2009. But the court interprets and understands the question as referring to Frances's 89th birthday. First,
26 neither counsel nor Lory were confident about the particular year. Second, no evidence indicates that a rental
27 agreement was ever discussed, much less drafted, before 2010. And third, the documentary evidence attached to
28 Dr. Raffle's expert opinion – Lory and Larry's declarations – relate a similar confrontation at an 89th birthday.
[SS-1.] The court notes that Larry's declaration suggests the "poking" incident occurred on a separate date,
when Lory was not present.

⁵ The memo line on his \$500 check dated March 9, 2012 reads "rent payment to Mom," but Nels testified that he
did not write it. [Exs. YYY-1 and X-2, Check No. 1203].

1 **III. FRANCES AND NELS BERG HAD CONTRACTUAL AGREEMENTS FOR PARCELS A AND B**

2 The court determines that Frances and Nels contracted for the purchase and sale of Parcels A
3 and B.

4 **A. The Nature of Contracts**

5 In California, a contract is “an agreement to do or not to do a certain thing.” CAL. CIV. CODE
6 § 1549. An enforceable contract requires: (1) capable parties; (2) their consent; (3) a lawful object;
7 and (4) sufficient consideration. CAL. CIV. CODE § 1550. By raising undue influence, Lory disputes
8 only consent.

9 A real property purchase agreement “does not have to be evidenced by a formal contract drawn
10 with technical exactness in order to be binding.” *Patel v. Liebermensch*, 45 Cal. 4th 344, 349 (2008)
11 (internal quotation marks omitted) (citing *King v. Stanley*, 32 Cal. 2d 584, 588 (1948)). Instead, it
12 need merely identify the material terms: the seller; the buyer; the price; and the property. *See id.* at
13 349, 351 & n.4.

14 In California, an installment land sale contract provides that the buyer makes periodic
15 “installment” payments while the seller retains legal title until conditions are met. 1 HARRY D.
16 MILLER, MILLER & STARR’S CALIFORNIA REAL ESTATE § 2:11 (3d ed.). *See Tucker v. Lassen Savs. &*
17 *Loan Ass’n*, 12 Cal. 3d 629, 637 (1974); CAL. CIV. CODE § 2985 (“A real property sales contract is an
18 agreement in which one party agrees to convey title to real property to another party upon the
19 satisfaction of specified conditions set forth in the contract and that does not require conveyance of
20 title within one year from the date of formation of the contract.”).

21 The “doctrine of equitable conversion generally provides that when a valid executory land sales
22 contract is entered into, the purchaser becomes the equitable owner of the land.” *Redevelopment*
23 *Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 678-79 (9th Cir. 2011) (citing cases). The
24 doctrine applies to installment land contracts. *Tucker*, 12 Cal. 3d at 637-38 (“[O]ne holding
25 property . . . who executes an installment land contract . . . thereby ‘sell(s), convey(s), or alienate(s)’
26 *an interest* in the property – to wit, his equitable interest in the property.”) (citing 1 MILLER & STARR,
27 CURRENT LAW OF CAL. REAL ESTATE (1965) p. 262); *Alhambra Redevelopment Agency v.*
28 *Transamerica Fin. Servs.*, 212 Cal. App. 3d 1370, 1375 (1989) (“[A] purchaser of real property under

1 a land sales contract is considered an equitable owner of the property”); *In re Hathaway Ranch*
2 *P’ship*, 127 B.R. 859, 863 (Bankr. C.D. Cal. 1990) (“Under California law, a purchaser of real
3 property under a land sales contract is considered an equitable owner of the property.”). In this
4 situation, the seller has limited rights and “only possesses legal title to the property.” *Alhambra*, 212
5 Cal. App. 3d at 1376. The “seller is considered to be nothing more than a trustee, holding the land in
6 trust for the purchaser as security for the payment of the purchase price until a conveyance of the legal
7 title to the [purchaser] is finally made.” *Id.* (internal quotation marks omitted).

8 California’s “statute of frauds provides that certain contracts ‘are invalid, unless they, or some
9 note or memorandum thereof, are in writing and subscribed by the party to be charged” *Sterling*
10 *v. Taylor*, 40 Cal. 4th 757, 761 (2007) (quoting CAL. CIV. CODE § 1624). It applies to real property
11 sale agreements. CAL. CIV. CODE § 1624(a)(3). *See also* CAL. CIV. PROC. CODE § 1971. Failure to
12 abide by the statute does not render the contract void. *Simmons v. Birge Co.*, 52 F. Supp. 629, 631
13 (S.D. Cal. 1943) (“Failing to comply with the provisions of the statute [of frauds] does not render a
14 contract, otherwise valid, void, but merely unenforceable.”). Instead, complying with the writing
15 requirement “serves only to prevent the contract from being unenforceable” *Sterling*, 40 Cal. 4th
16 at 766 (internal quotation marks omitted) (citing *Casa Herrera, Inc. v. Beydown*, 32 Cal. 4th 336, 345
17 (2004)). *See O’Brien v. O’Brien*, 197 Cal. 577, 586 (1925) (“The statute is said to relate to the remedy
18 only and not to affect the validity of the oral contract.”). The statute “does not require a written
19 contract; a ‘note or memorandum . . .’ is adequate.” *Sterling*, 40 Cal. 4th at 765-66 (quoting CAL. CIV.
20 CODE § 1624). This writing is not the contract – it is evidence of it. *Id.* at 766. The statute is satisfied
21 if the writing “identifies the subject of the parties agreement, shows that they made a contract, and
22 states the essential contract terms with reasonable certainty.” *Id.* *See First Nat. Mortgage Co. v. Fed.*
23 *Realty Inv. Trust*, 631 F.3d 1058, 1066 (9th Cir. 2011). Further, an “oral agreement may be taken out
24 of the operation of the statute [of frauds] by a written memorandum executed subsequently, even
25 though the agreement has already been performed by one party.” *Ayoob v. Ayoob*, 74 Cal. App. 2d
26 236, 242-43 (1946). *See Ito v. Brighton/Shaw, Inc.*, No. 06-CV-01135, 2008 WL 3378120, at *10
27 (E.D. Cal. Aug. 8, 2008).

1 **B. Nels and Frances's Contracts**

2 Initially, Nels and Frances had oral installment contracts for the purchase of Parcels A and B.
3 Nels thus had equitable ownership of the Parcels in 1993 and 2006, respectively. In November 2008,
4 they memorialized these contracts in writing, satisfying the statute of frauds.⁶

5 **1. Parcel A**

6 Nels purchased Parcel A from Frances in 1993 for \$40,000, initially payable at \$200 per month.
7 He started sending payments in August 1993. On this schedule, he would have paid in full by April
8 2010. But in 2008, they agreed to increase payments to \$400 per month; and Nels began making \$400
9 payments in July 2008. At this point, Nels had paid Frances for 178 months – or \$35,600. So he had
10 \$4,400 left to pay. Accordingly, the court determines that Nels paid off Parcel A in June 2009 –
11 months before he and Rachael filed bankruptcy.

12 **2. Parcel B**

13 Nels purchased Parcel B from Frances in 2006 for \$25,000, initially payable at \$200 per month.
14 On April 26, 2006, he wrote her a \$400 check. The court finds that this represents \$200 for Parcel A
15 and \$200 for Parcel B; payments on Parcel B thus began in April 2006. In 2008, Nels and Frances
16 altered the terms. Nels agreed to make a \$10,000 down payment for Parcel B, and he did so on June 3,
17 2008. [Ex. XXX-1, Check No. 1660.⁷] And they agreed to decrease Parcel B's \$200 monthly service
18 to \$100. Nels's first \$100 payment was in July 2008. At this point, he had paid for 26 months – or
19 \$5,200, in addition to the \$10,000 lump sum payment. He thus had \$9,800 left to pay. On this
20 schedule, Parcel B would be paid off in 88 months. But in June 2009, Nels paid off Parcel A, and had
21 \$8,700 remaining on Parcel B. He could have started remitting only \$100 per month, but he instead
22 kept sending \$500. And Frances accepted it. The court concludes that the \$500 was applied to the
23 outstanding principal on Parcel B. Nels thus paid off Parcel B in January 2011.

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25
26 ⁶ Lory at first argued that Frances's signature was a forgery. But she conceded its legitimacy at trial. Tr.
Transcript vol. 3, 272:3-6.

27 ⁷ Lory argues that this check could have been for back rent and contends it was not a lump sum payment for
28 Parcel B. But the court finds this unconvincing. First, the check's memo line states "10k of 25k, upper 40
acres." This encapsulates the contract's material terms. Second, Rachael and Nels both testified that the
payment was for Parcel B. And Lory presented no contrary evidence.

1 **3. Nels Overpaid for Parcels A and B**

2 Even though Nels had paid off Parcels A and B by January 2011, he continued sending Frances
3 \$500 monthly payments. This continued until Frances died – the last check is dated August 9, 2012.
4 [Ex. YYY-1, Check No. 1206.] In total, Nels paid Frances \$75,300, when he only needed to pay
5 \$65,000. So Nels overpaid by \$10,300.

6 **C. Nels Acted Like He Owned the Property**

7 The court also finds that Nels acted as if he owned the property: he made extensive
8 improvements; he partially saved it from a wildfire; and he repaired it after the fire. Nels and
9 Rachael’s letters to Frances do not prove otherwise. Further, even Frances recognized Nels’s assertion
10 of ownership.⁸

11 **1. Nels Improved Parcels A and B**

12 Nels improved Parcels A and B extensively. For Parcel A, he testified that he: built a 20 by 15
13 foot steel gate; planted palm trees along the half mile long driveway; converted the barn and
14 Bunkhouse into houses; added a porch onto the Ranch House and renovated the interior; added about
15 20 acres of plants; built four ponds – ranging in dimensions from 20 by 15 feet to 400 by 30 feet – on
16 the property; and constructed a two-story “loft” with its own sleeping area. For Parcel B, he: planted
17 almost a hundred species of bamboo; irrigated the bamboo; installed two new \$5,000 gallon tanks into
18 the well; built a block façade in front of a container, including a rock courtyard; and landscaped
19 extensively. Shawn O’Brien – an inspector – corroborated much of Nels’s testimony. Nels estimated
20 the improvements’ value at \$500,000 or more.

21 **2. Nels Protected Parcels A and B**

22 Nels bravely protected Parcels A and B during the 2007 wildfires. Instead of evacuating, he
23 defended the property – at his own peril. He suffered burns to his hand, arms, and face. He
24 constructed a firebreak. When any of the houses caught fire, he put it out. He was able to save the
25 four homes, but lost many of the trees, the hangar, his airplane, his “desert toys,” a trailer, and a boat.
26 Nels testified that, if he did not own the property, he would not have protected it. Rachael also

27 _____
28 ⁸ Lory testified that Frances wanted Nels “to cease taking over like he owned the place.” And in late 2011, Lory
took notes about Frances’s questions for a visit with Mr. Drexl. Due to liability concerns, Frances apparently
wanted Nels to stop “taking over the entire ranch.” [Ex. M-1.]

1 testified that Nels would not have risked his life to save the property if it did not belong to him. The
2 court finds this testimony credible.

3 **3. Nels Repaired Parcels A and B**

4 And after the fire, Nels repaired the property – at his own cost. Frances never offered to repair
5 Parcels A and B. He replaced the irrigation, fixed the road, cleared culverts, ran new electric wires,
6 and restored the properties to livable condition.

7 **4. Nels and Rachael’s Letters Do Not Show Otherwise**

8 Lory and her expert contend that Nels and Rachael’s letters to Frances show that they believed
9 they did not own Parcels A and B. The court disagrees, evaluates each letter, and attributes any
10 contrary statements to confusion about equitable versus legal title.

11 In the 2004 Letter, Nels explains that he has offered to buy his 40 acres many times, but
12 Frances refuses. He reiterates an offer to buy Parcels A and B for \$80,000. And he expresses surprise
13 at Frances’s announcement that she was selling the land to a third party. Before Nels wrote this letter,
14 Frances stated that she needed money and intended to cancel the sale of Parcel A to Nels. In her 2007
15 Letter, Rachael apologizes for taking Frances’s inhaler from Long Beach to Ramona – she thought it
16 was Nels’s. She then explains that Frances, as legal owner of the property, needs to sign a farm-
17 worker housing agreement before a notary. Because Frances had not yet transferred title, she was the
18 legal owner; Nels and Rachael had equitable ownership. In her 2011 Letter, Rachael is again
19 apologetic – this time for a Facebook post. She also expressed surprise at Frances’s threat to sell the
20 Ranch. Rachael testified that she intended to apologize and to ask Frances to be kinder to Rachael’s
21 family; she did not intend to imply that Frances could eject them from the property.

22 The court concludes that the letters do not prove a lack of ownership – or even that Nels and
23 Rachael thought they did not own the Parcels. Instead, any contrary statements are attributable to
24 confusion over equitable as opposed to legal title. Both Nels and Rachael understood that Frances held
25 legal title.

26 **D. Lory’s Denial of the Contracts Is Unpersuasive**

27 Throughout her testimony, Lory offered the following narrative for why Frances and Nels
28 cannot have entered into a contract: Frances felt such animus toward Rachael that she would never

1 have sold any “Berg land” to Nels, since he is married to Rachael. The court finds this explanation,
2 and the logic on which it is based, to be unpersuasive. The trial testimony overwhelmingly indicated
3 that Frances disliked Rachael. Yet the true reasons for it remain unclear. Lory asserts that Frances
4 resented Rachael for moving into the Barnhouse – which Nels was supposedly converting into a house
5 for Frances to use on her occasional visits from Long Beach. But the court finds it unreasonable to
6 believe that Frances bore a lifelong grudge against Rachael because of the Barnhouse. And the court
7 finds credible Nels’s testimony that Frances did not ask him to convert the Barnhouse for her use. In
8 any event, the timeline is inconsistent. Rachael and her children moved to Parcel A in 1993. But in
9 June 1994, Frances participated in Nels and Rachael’s wedding and, in Nels’s words, “everything was
10 great.”

11 All that said, Frances and Rachael’s relationship soured. No one provided a coherent, rational
12 explanation why; instead, the witnesses were largely reticent and circumspect.⁹ All agree that Frances
13 disapproved of Rachael. And Frances intended to keep the “Berg Ranch” in the family – and Rachael
14 was not family.¹⁰ Frances apparently insisted on this fiction despite the fact that Rachael is married to
15 her son and is the mother of her granddaughter, Cheyenne. In the end, this sad dynamic is not
16 persuasive as an explanation of why, as Lory would have it, Frances never actually sold Parcels A and
17 B to Nels.

18 **E. Conclusion**

19 In conclusion, the court finds that Nels and Frances had oral installment contracts for the sale
20 of Parcel A in 1993 and for Parcel B in 2006. Although Frances retained legal title, Nels received
21 equitable ownership of the Parcels.¹¹ And in November 2008, they reduced their agreements to
22 writing, bringing them within the statute of frauds.

23
24 ⁹ Nels explained there was “a little trouble” one night. He also hypothesized that Frances disapproved of
25 Rachael because his brother and sister did not like her. Cindy testified that Frances, in the last four years of her
26 life, wanted nothing to do with Rachael. When asked why, Cindy said she could not give a definitive answer
27 and explained that Frances “just did not like [Rachael]. That’s all I can say.”

28 ¹⁰ Lory testified that Frances did not care for Rachael and did not consider Rachael’s children “Bergs.” Cindy
explained that – unfortunately, in her opinion – Frances did not consider Rachael a Berg. Larry testified that
Frances detested Rachael and did not want her to get any of the property. He explained: “She told me that
[Nels] will never, ever have any of this property, and I won’t state how she spoke of Rachael.”

¹¹ Lory concedes that Nels would have received equitable title if the 2008 Agreement is valid (ECF No. 154, pg.
14).

1 delay; (5) use of multiple persuaders by the dominant side against a servient party; (6) absence of
2 third-party advisors to the servient party; and (7) statements that there is no time to consult financial
3 advisers or attorneys.” *Id.* at 1142. *See Spencer v. DHI Mortgage Co.*, 642 F. Supp. 2d 1153, 1167-68
4 (E.D. Cal. 2009) (citing *Myerchin v. Family Benefits, Inc.*, 162 Cal. App. 4th 1526, 1540 (2008)).

5 The court evaluates the “presence or absence of each of the above factors in light of all the
6 circumstances.” *Olam*, 68 F. Supp. 2d at 1142. The central inquiry is whether “there is a ‘supremacy
7 of one mind over another by which that other is prevented from acting according to his own wish or
8 judgment, and whereby the will of the person is over-borne and he is induced to do or forbear to do an
9 act which he would not do, or would do, if left to act freely.’” *Id.* at 1141 (quoting *Webb v. Saunders*,
10 79 Cal. App. 2d 863, 871 (1947)).

11 **2. Testamentary Undue Influence**

12 “[I]n the context of a testamentary disposition of property by will or trust,” undue influence is
13 “‘pressure brought to bear directly on the testamentary act, sufficient to overcome the testator’s free
14 will, amounting in effect to coercion destroying the testator’s free agency.’” *Lintz v. Lintz*, 222 Cal.
15 App. 4th 1346, 1354 (2014) (quoting *Rice v. Clark*, 28 Cal. 4th 89, 96 (2002)). *See CAL. PROB. CODE*
16 § 6104; *Hagen v. Hickenbottom*, 41 Cal. App. 4th 168, 181-82 (1995) (“Mere general influence,
17 however strong and controlling, not brought to bear upon the testamentary act, is not enough . . .”).

18 The person asserting undue influence “ordinarily bears the burden of proving undue influence
19” *Rice*, 28 Cal. 4th at 96 (citing CAL. PROB. CODE § 8252). But a “presumption of undue
20 influence, shifting the burden of proof, arises upon the challenger’s showing that (1) the person alleged
21 to have exerted undue influence had a confidential relationship with the testator; (2) the person actively
22 participated in procuring the instrument’s preparation or execution; and (3) the person would benefit
23 unduly by the testamentary instrument.” *Id.*

24 **3. Undue Influence in the Elder Abuse and Dependent Adult Civil Protection** 25 **Act**

26 In the Elder Abuse and Dependent Adult Civil Protection Act (the “Elder Abuse Act”), undue
27 influence means “excessive persuasion that causes another person to act or refrain from acting by
28

1 overcoming that person’s free will and results in inequity.” CAL. WELF. & INST. CODE § 15610.70(a).
2 The statute lists four factors for courts to consider. *Id.* at § 15610(a)(1)-(4).

3 First is the victim’s vulnerability. And relevant evidence may include: “incapacity, illness,
4 disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or
5 dependency, and whether the influencer knew or should have known of the alleged victim’s
6 vulnerability.” *Id.* at § 15610.70(a)(1). The second factor is the influencer’s apparent authority,
7 including the person’s “status as a fiduciary, family member, care provider, health care professional,
8 legal professional, spiritual adviser, expert, or other qualification.” *Id.* at § 15610.70(a)(2). Third,
9 courts may consider the influencer’s tactics. These include: controlling the victim’s necessities of life,
10 interactions with others, access to information, or sleep; using affection, intimidation, or coercion; or
11 “initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes,
12 effecting changes at inappropriate times and places, and claims of expertise in effecting changes.” *Id.*
13 at § 15610.70(a)(3). And fourth, the inequity of the result matters. Relevant is “the economic
14 consequences to the victim, any divergence from the victim’s prior intent or course of conduct or
15 dealing, the relationship of the value conveyed to the value of any services or consideration received,
16 or the appropriateness of the change in light of the length and nature of the relationship.” *Id.* at
17 § 15610.70(a)(4).

18 **B. Nels Did Not Unduly Influence Frances to Sign the 2008 Agreement**

19 The court finds that Nels did not unduly influence Frances to sign the 2008 Agreement. It
20 concludes that the contractual definition of undue influence applies because Lory argues that Nels
21 procured the 2008 Agreement through undue influence. The 2008 Agreement is a contract – not a will
22 or trust. Frances had both a will and a trust, and each was amended many times; but Lory does not
23 contest any of those amendments. Further, Lory does not allege elder abuse. Nevertheless, the court
24 considers the other definitions and their factors as relevant. It concludes that Nels did not, under any
25 definition, unduly influence Frances.¹²

26
27
28 ¹² Because the court concludes that the Elder Abuse Act’s first through third factors are absent, it need not consider whether the fourth is present. *See* CAL. WELF. & INST. CODE § 15610.70(b) (“Evidence of an inequitable result, without more, is not sufficient to prove undue influence.”).

1 As a general matter, the court finds Nels and Rachael credible. They were present in the
2 gallery throughout the trial. And the court was able to evaluate their credibility on the stand. The
3 court finds Lory’s testimony generally not credible. During cross-examination, her testimony deviated
4 from her prior, sworn testimony; counsel impeached her on numerous occasions. For instance, she
5 provided conflicting testimony about the price she paid for her land – initially, she said \$40,000, but
6 when confronted with the deed of trust, she corrected the amount to \$20,000. The court further
7 explores Lory’s contradictory testimony about Frances’s personal documents below. And the court
8 does not find Larry’s testimony persuasive, based upon his own words.¹³

9 In addition, Mr. Kipperman and Lory hired expert witnesses to address undue influence.
10 Dr. Blum, Mr. Kipperman’s expert, concluded that Nels did not unduly influence Frances. And
11 Dr. Raffle, Lory’s expert, determined that Nels did unduly influence Frances. The court considers
12 their reports below.

13 1. Confidential Relationship

14 Frances and Nels did not have a confidential relationship. Accordingly, no evidentiary
15 presumption of testamentary undue influence arises, nor is the Elder Abuse Act’s second factor
16 present.

17 A “confidential relationship exists when trust and confidence are reposed by one person in the
18 integrity and fidelity of another.” *Estate of Sanders*, 40 Cal. 3d 607, 615 (1985) (quoting *Nicholson v.*
19 *Rose*, 106 Cal. App. 3d 457, 462 (1980)). It “exists when one party gains the confidence of the other
20 and purports to act or advise with the other’s interests in mind; it may exist although there is no
21 fiduciary relationship; it is particularly likely to exist when there is a family relationship or one of
22 friendship.” *Id.* (internal quotation marks omitted) (quoting *Kudokax v. Balkus*, 26 Cal. App. 3d 744,
23 750 (1972)). The existence of a confidential relationship is a question of fact. *See Richelle L. v.*
24 *Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 272 n.6 (2003), *as modified* (Mar. 17, 2003). *See,*
25 *e.g., Estate of Llewellyn*, 83 Cal. App. 2d 534, 562 (1948) (“The evidence negatives any inference that
26 such trust and confidence was reposed by decedent in the integrity and fidelity of his brother as would
27

28 ¹³ Shortly before trial, Larry passed away – news which was kept from Nels for some time. The parties
designated and read into the record portions of Larry’s deposition transcript.

1 establish the existence of a confidential relationship between them.”); *Buchmayer v. Buchmayer*, 68
2 Cal. App. 2d 462, 470-71 (1945) (finding that the facts showed no confidential relationship between a
3 husband and wife and thus “were sufficient to negative the existence of a confidential relationship and
4 furnished no basis for a presumption that undue influence had been exercised”).

5 Here, Frances reposed no trust in Nels or his business acumen. Likewise, he had no control
6 over her. Indeed, she was dismissive – if not outright contemptuous – of him. Dr. Raffle opined that
7 Frances believed Nels invested foolishly and failed to properly manage his monies. And Dr. Blum
8 rightly concluded that Frances viewed Nels as an unreliable person for real estate, estate planning, or
9 financial decisions. She thought he lied and was irresponsible. Although she cared for him, she did
10 not trust him with financial matters.¹⁴

11 **2. Undue Susceptibility**

12 Frances was not unduly susceptible. On the contrary, she “exercised a free and untrammelled
13 mind” when she signed the 2008 Agreement. *Olam*, 68 F. Supp. 2d at 1141. Frances was capable
14 when she signed the 2008 Agreement. The trial testimony established that she was capable before,¹⁵
15 in,¹⁶ and after¹⁷ November 2008. Indeed, the overwhelming weight of the evidence establishes that
16 Frances was strong willed.¹⁸ Her general capability diminished, however, in 2011. She became
17
18
19

20 ¹⁴ Rachael and Nels both testified that he never handled any of Frances’s financial affairs.

21 ¹⁵ Based on her interactions with Frances over more than 20 years, Ms. Haley judged Frances as mentally sharp.
22 When Frances executed the March 2008 trust amendment, Ms. Armand screened her for mental capacity and
23 determined nothing was amiss cognitively.

24 ¹⁶ Lory, who spoke with Frances almost every Sunday, testified that in November 2008 there was nothing
25 mentally wrong with Frances.

26 ¹⁷ Larry testified that Frances had no mental incapacity in 2008 and handled her financial affairs perfectly. In
27 fact, he explained that she drove a car up to the day she passed away and “was always sharp as a pin.” Lory
28 testified that, in 2008, Frances was “sharp enough to live by herself, take care of her home, pay her bills, [and]
put on her makeup every morning.” In 2010, Mr. Chou (one of Frances’s attorneys) met with Frances about
four times. And he testified that she showed no signs of lessened mental capacity. He recalled, in particular,
that although she was elderly, she had exceptional clarity of mind and purpose.

¹⁸ Nels described Frances as strong willed. Rachael explained that Frances was not easily manipulated – in fact,
Frances intimidated her. Cindy said that Frances was “feisty,” strong willed, and had a mind of her own.
Ms. Armand stated that Frances was willful, and not easily manipulated by people. Mr. Landman testified that
Frances was very strong-willed in 2008. And Mrs. Landman said that in 2008 Frances was opinionated and said
whatever she wanted.

1 forgetful. She would confuse Nels and Larry. She repeated herself. And she became belligerent.
2 Frances's death certificate lists respiratory failure and Alzheimer's dementia as causes of death.¹⁹

3 Having concluded that Frances acted with a free and untrammelled mind, the court need not
4 consider the individually delineated factors. But it does. Frances did not lack full vigor due to her age.
5 Instead, as Lory and Larry testified, Frances lived independently and was vigorous.²⁰ As such, no
6 evidence suggests she was in poor physical condition or physically exhausted in 2008. Last, Frances
7 did not have emotional anguish.²¹

8 The Elder Abuse Act's first factor (the victim's vulnerability) is also relevant here. The court
9 has already considered Frances's capacity, age, cognitive functioning, and emotional distress. And it
10 does not find any relevant evidence of illness, disability, injury, education, or isolation.²² Frances did
11 rely on Nels's handiwork, but this did not amount to dependence on him.

12 3. Undue Pressure

13 Nels did not exert undue pressure on Frances. The court considers the *Odorizzi* factors as well
14 as the Elder Abuse Act's third factor.

15 *Discussing the Transaction at an Unusual or Inappropriate Time*

16 There is no evidence that Nels discussed the transaction at an unusual or inappropriate time.
17 Accordingly this factor is of neutral effect.

18
19 ¹⁹ Larry testified that he never suspected that Frances was suffering from Alzheimer's. But Mr. and Mrs.
20 Landman, Frances's next-door neighbors, both testified that, in the last year of her life, Frances seemed forgetful
21 and tended to repeat things – uncharacteristically, compared to her previous self. And Rachael testified that, in
22 2011, Frances acted differently. The strange behavior continued until her death. Dr. Blum noted that the first
23 hint of Frances's cognitive problems was sometime in 2011; and Dr. Raffle acknowledged that Frances had a
24 stroke, at some point, and that she likely lost cognitive capacity following that. The court finds the death
25 certificate and the testimony of Mr. Landman, Mrs. Landman, and Rachael persuasive on this point.

26 ²⁰ The experts disagree on age. Dr. Raffle explained that Frances, at 86 years old, was more intellectually fragile
27 and vulnerable than a younger person; older people tire easily, making them more susceptible to confusion,
28 distraction, or argument. Last, Dr. Raffle discussed how older people are not as mentally sharp as they
previously were. Dr. Blum countered that some people's verbal reasoning improves with age. The court finds
Dr. Raffle's explanation unhelpful because he offered a comparison to Frances's younger age – even if she were
more vigorous in her youth, Frances could still have full vigor later. And the testimony indicated she was strong
willed.

²¹ Dr. Blum suggested that Frances was conflicted about Nels. She cared for him, but did not trust him. The
court finds that this does not rise to the level of emotional anguish.

²² Frances's general well being also negates the existence of a confidential relationship. *See Richelle L.*, 106
Cal. App. 4th at 273 (“The vulnerability that is the necessary predicate of a confidential relation, and which the
law treats as ‘absolutely essential’, usually arises from advanced age, youth, lack of education, weakness of
mind, grief, sickness, or some other incapacity.”).

1 **4. Frances Arranged for the November 2008 Agreement**

2 The court finds that Frances arranged for the November 2008 agreement. Lory argues that Nels
3 controlled the Agreement’s drafting – and that this is highly relevant. The court disagrees.²³

4 Nels and Frances had different reasons for reducing the agreement to writing. Nels did not
5 trust Lory, who was to be the trustee of the amended trust. And Rachael told Nels the agreement
6 needed to be in writing. Frances, for her part, viewed this as a chance to renegotiate the terms. She
7 was about 85 years old and was concerned that, on the present payment schedule, she would not enjoy
8 the benefit of the payments before she passed away. Accordingly, the court finds that Nels did not
9 substitute his own will for Frances’s in drafting the Agreement.

10 Frances also directed how the document was to be prepared. Nels admitted that Ms. Armand
11 drafted the agreement at his request. But he explained that Frances: asked him to use Ms. Armand;
12 told her the contents; and paid for her to draft it. Ms. Armand testified that Nels provided the
13 substance and directed her to draft the document. Further, Frances paid for the notary. That said, as
14 noted earlier, the document lacks a notary seal. But the court finds Rachael’s testimony about the seal
15 persuasive. She explained that the notary was very ill and died shortly after the document was signed.
16 Moreover, Frances kept the original agreement, while Nels received a photocopy.

17 The court thus finds that Frances arranged the creation and execution of the 2008 Agreement.
18 She also understood its purpose.

19 **5. Frances Believed She Sold the Property**

20 Frances knew she had sold the property. First, she understood that she entered a contract. In
21 preparation for a visit with Mr. Drexler, Cindy took notes about what Frances wanted. [Ex. I-1.] She
22 wrote: “Returned check because Nels in breach of the contract when unable to make regular monthly
23 payments” And Frances believed that she had sold the property. Mr. and Mrs. Landman, who
24 lived next door to Frances in Long Beach, both testified that Frances knew she had sold the property to
25 Nels. The court thus finds that Frances understood the nature of the 2008 Agreement and what she had
26 done. But she later changed her mind.

27 _____
28 ²³ Dr. Raffle – Lory’s expert – considered this a minor factor. He assumed Nels prepared the 2008 Agreement,
but explained that his ultimate opinion would not change even if Nels had not prepared the agreement.

1 **6. Frances’s Fear of Nels “Losing” the Property**

2 Despite clear, uncontroverted evidence that she signed the 2008 Agreement, Frances
3 disclaimed doing so on multiple occasions. The court considers this contradiction, and finds that
4 Frances was worried about “losing” the property to Nels’s creditors.

5 The undisputed testimony established that Frances intended for the Ramona land to stay in the
6 “Berg family.” But she was worried. As Cindy’s notes, written in Frances’s voice, relate: “I talked to
7 a bankruptcy, real estate lawyer. You have debts you can’t handle and it would be futile to put 40
8 acres in your name, as it would be taken away for passed [sic] debts owed.” Frances believed Nels
9 would lose the land.²⁴ So she tried to protect it by asking Nels to sign a rental agreement²⁵ and by
10 creating a lifetime benefit trust.²⁶ The court concludes, then, that Frances was afraid that Nels’s
11 bankruptcy would deprive the “Berg family” of Parcels A and B.

12 **7. The Experts’ Opinions**

13 The court finds Dr. Blum’s testimony and opinions are more reliable than Dr. Raffle’s.
14 Dr. Blum’s methodology likewise was more reliable and precise, while Dr. Raffle’s reasoning was
15 circular.

16 Dr. Blum analyzed four categories of issues – which roughly correspond to the factors listed in
17 the Elder Abuse Act. First, he considered Frances’s vulnerabilities, and determined that, although
18 Frances was elderly, she had no unique vulnerabilities or medical issues. Second, he evaluated the
19 nature and quality of Nels and Frances’s relationship to decide whether she was reliant upon him – and
20

21 ²⁴ Lory said Frances would never sell land to Nels because she was concerned that it would be lost. Instead,
22 Frances put the property in the trust, where it would be safe. Cindy related that, in the last four years of her life,
23 Frances was disappointed in Nels and felt that he would lose any property she turned over to him.
24 Mr. Westerfeld testified that Frances “was concerned that if the Ranch got into Nels’s hands, that it could be lost
25 due to past business practices.” Rachael believed Frances was concerned about losing the property in
26 bankruptcy. And Nels and Rachael both testified that Frances first became concerned after they filed
27 bankruptcy.

28 ²⁵ Larry explained that Frances wanted Nels to sign the rental agreement because he would otherwise lose the
property in his bankruptcy.

²⁶ At her June 18, 2010 meeting with Mr. Chou, Frances expressed a concern about Nels’s creditors acquiring
the property. [Ex. 26.] Mr. Chou then drafted the 2010 Restated Trust and created Article 6.9 – Nels’s lifetime
benefit trust – to protect assets from Nels’s creditors. At the August 9, 2011 meeting with Mr. Chou, Frances
again wanted to amend her trust to prevent Nels’s creditors from accessing the property. [Ex. 27.] But
Mr. Chou explained to her that the lifetime benefit trust prevented Nels’s creditors from encumbering the
property.

1 he concluded there was no reason to suspect she depended upon Nels for care. Third, Dr. Blum looked
2 to Nels's actions, antics, and strategies. He noted that Frances did not sign the document at an unusual
3 location, she was not threatened, and she could contact an attorney. Last, Dr. Blum considered the
4 objective and subjective outcomes. There, Frances continued to have relationships with Nels, his wife,
5 her other children, and her friends. Thus, Dr. Blum concluded that Nels did not unduly influence
6 Frances.²⁷

7 Dr. Raffle opined that Nels unduly influenced Frances to sign the 2008 Agreement. He
8 reasoned that Frances believed she owned Parcels A and B before and after she signed the 2008
9 Agreement; thus, when she signed it she did not understand that she transferred ownership to Nels.
10 But Dr. Raffle's ultimate opinion relies upon the logical fallacy of *petitio principii*. His reasoning is
11 essentially circular: Nels must have lied to Frances about the 2008 Agreement because she did not
12 understand what the Agreement did, and Frances did not understand what the Agreement did because
13 Nels lied to her.²⁸ In addition, to establish Frances's belief that she owned the property after she
14 signed the 2008 Agreement, Dr. Raffle looked to the 2010 Restated Trust and 2012 amendment. The
15 court finds this unpersuasive for two reasons. First, Frances's fear of Nels losing the property in
16 bankruptcy predates these documents. Thus, she had an ulterior motive in asserting ownership.
17 Second, Dr. Raffle acknowledged that Frances thought she owned the land because she had not yet
18 transferred title, so she would naturally include them.

21 ²⁷ Lory objected to this conclusion as untimely and not previously disclosed. And in her post-trial brief, she asks
22 the court to exclude the opinion. She cites *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 37 (D.D.C. 2013),
23 *aff'd sub nom. Wannall v. Honeywell, Inc.*, 775 F.3d 425 (D.C. Cir. 2014) and *Lindner v. Meadow Gold Dairies,*
24 *Inc.*, 249 F.R.D. 625 (D. Haw. 2008). Admittedly, Dr. Raffle's precise phrasing at trial did not appear verbatim
25 in his expert report. In it, he concluded that there was insufficient medical evidence to render a proper
26 psychiatric analysis about whether Nels unduly influenced his mother. [Ex. 25.] In his deposition, however, he
27 expanded his opinion: "It is my opinion that there's insufficient evidence to conclude that [the 2008 document]
28 was the result of undue influence." Dr. Blum explained that his phrasing at trial was the application of the
clinical or medical approach – he applied all of the undue influence models (Dr. Singer's; Heisler's;
Dr. Bematz's; Dr. Shulman's; etc.) and none yielded an undue influence finding. So he concluded that,
clinically or medically, there was no evidence of undue influence – thus, it did not happen. The court
determines that this is not a new opinion. Rather, it merely articulates what naturally and logically must be true
given the already existing opinion. Because *Wannall* and *Lindner* address untimely expert reports and new
opinions, they are inapposite and do not require a different result.

²⁸ When questioned, Dr. Raffle confirmed that this was his logic. Tr. Transcript vol. 2, 111:9-19.

1 But these ledger books went missing. When Frances died, Lory took possession of all of
2 Frances's personal belongings – including the ledger books. Rachael and Nels testified they last saw
3 the “cow” ledger at the will–trust reading after Frances died; Nels saw it in Lory's satchel. Lory, on
4 the other hand, testified that she had her own ledger book, not Frances's. On this point, the court finds
5 the testimony of both Nels and Rachael persuasive. And in any event, the ledger book was never
6 produced.

7 Lory admitted that she likely disposed of the ledger books – but her testimony on this topic
8 varied. She first testified that she was by herself with Frances's belongings for six weeks. She
9 admitted that she shredded documents, did not keep a list of destroyed items, and was alone when she
10 shredded them. But she also testified that she disposed of the ledger books because they did not seem
11 important, there was so much to keep, and there were many people going in and out of the house. She
12 also testified that she kept copies of everything important, such as checks. But this is inconsistent with
13 her deeming the ledger books as not important. Last, she testified in immediate succession that: she
14 never destroyed any ledger books; she did not remember if she did; and she did not know what
15 happened to them. The court notes that Lory's testimony on this matter is internally inconsistent and
16 not credible. And it concludes that Lory disposed of the ledger books.

17 2. Nels's Performance

18 With the most probative documentary evidence about performance unavailable, the court must
19 reconstruct Nels's payment history. First, Nels testified that he paid in cash on many occasions.
20 Second, he sent Frances checks and money orders. At trial, he offered seven years' worth of checks.³⁰
21 The existing documentary evidence demonstrates that Nels and Rachael sent Frances the following:

- 22 • *August 12, 2004*: \$200 to Frances Berg – Money Order No. 57-22079594 [Ex. C-2];
- 23 • *April 26, 2006*: \$400 to Frances Berg – Check No. 1050 [Ex. D-2];
- 24 • *January 29, 2007*: \$400 to Frances Berg – Check No. 1245 [Ex. XXX-1];
- 25 • *March 1, 2007*: \$400 to Frances Berg – Check No. 1270 [Ex. XXX-1];
- 26 • *May 2007*: \$400 to Frances Berg – Check No. 1317 [Ex. XXX-1];

27
28 ³⁰ Nels kept copies of his pre-2007 payments. But he lost them in the 2007 wildfires, which burned his office. Larene also lost her payment records in the 2007 fires.

- 1 • *June 20, 2007*: \$400 to Frances Berg – Check No. 1351 [Ex. XXX-1];
- 2 • *August 20, 2007*: \$400 to Fran Berg – Check No. 1390 [Ex. XXX-1];
- 3 • *October 15, 2007*: \$400 to Frances Berg – Check No. 1462 [Ex. XXX-1];
- 4 • *December 17, 2007*: \$800 to Mom Berg – Check No. 1486 [Ex. XXX-1];
- 5 • *March 10, 2008*: \$500 to Frances Berg – Check No. 1613 [Ex. XXX-1];
- 6 • *April 11, 2008*: \$400 to Frances Berg – Check No. 1629 [Ex. XXX-1];
- 7 • *June 1, 2008*: \$400 to Fran Berg – Check No. 1659 [Ex. XXX-1];
- 8 • *June 3, 2008*: \$10,000 to Frances Berg – Check No. 1660 [XXX-1.];
- 9 • *May 19, 2008*: \$400 to Frances Berg – Check No. 1660 [Ex. XXX-1];
- 10 • *July 25, 2008*: \$500 to Frances Berg – Check No. 1725 [Ex. XXX-1];
- 11 • *October 3, 2008*: \$500 to Frances Berg – Check No. 1666 [Ex. XXX-1];
- 12 • *December 10, 2008*: \$500 to Frances – Check No. 1676 [Ex. XXX-1];
- 13 • *February 26, 2009*: \$500 to Frances Berg – Check No. 1679 [Ex. XXX-1];
- 14 • *August 18, 2009*: \$250 to Frances Berg – Check No. 1691 [Ex. XXX-1];
- 15 • *January 5, 2011*: \$200 to Frances Berg – Check No. 2125 [Ex. XXX-1];
- 16 • *January 31, 2011*: \$500 to Frances Berg – Money Order No. 81-01510454 [Ex. T-2.];
- 17 • *September 21, 2011*: \$300 to Fran Berg – Check No. 2191 [Ex. U-2, GGG-1];
- 18 • *October 18, 2011*: \$500 to Fran Berg – Unnumbered check [Ex. V-2, DDD-1];
- 19 • *November 23, 2011*: \$500 to Fran Berg – Check No. 1001 [Exs. XXX-1 and W-2];
- 20 • *March 9, 2012*: \$500 to Fran Berg – Check No. 1203 [Ex. YYY-1];
- 21 • *April 17, 2012*: \$500 to Fran Berg – Check No. 1221 [Ex. YYY-1, Y-2];
- 22 • *May 15, 2012*: \$500 to Fran Berg – Check No. 1204 [Ex. YYY-1];
- 23 • *July 10, 2012*: \$500 to Fran Berg – Check No. 1205 [Ex. YYY-1]; and
- 24 • *August 9, 2012*: \$500 to Fran Berg – Check No. 1206 [Ex. YYY-1].

25 In addition, on January 3, 2012, one of Nels's payments was rejected for insufficient funds.
26 [Ex HHH-1.] When Frances called about it, Nels promptly gave her \$500 and the \$27 fee. And third,

1 Nels provided in-kind services. He estimated their market value as between \$80,000 and \$100,000.³¹
2 But, because she was his mother, he charged Frances a different amount. And she recorded about
3 \$10,000 worth of work in the ledger book.

4 The court finds Nels and Rachael's testimony about Nels's payment history credible and
5 persuasive. Rachael testified that Nels never missed a payment (whether check, cash, or in-kind)
6 between August of 1993 and August of 2012. Nels last checked the ledger books sometime in 2010 or
7 2011. And they showed no missed payments. The court credits this testimony and concludes that Nels
8 fully performed on the contract. In fact, he over-performed.

9 **B. Nels Overpaid by \$10,300**

10 The court finds that Nels over-performed by \$10,300. Lory argues that Nels's overpayment
11 shows that he's not credible and that he was paying rent. The court disagrees. Instead, it concludes
12 that Nels wanted to be supportive of his mother. Moreover, Frances had been threatening to take the
13 property away from him, and the court infers that Nels did not want to provoke her. And Nels admitted
14 that he likely overpaid for the property, but explained that neither he nor Frances ever added the
15 amount up. Further, Larene also overpaid, apparently without realizing it. She had paid for Parcel C
16 in full sometime in 2006, but kept paying until 2012, when Frances told her that she had paid more
17 than enough.

18 Even if Nels had not fully performed, Frances agreed to forgive any outstanding indebtedness
19 upon her death. "It is hornbook law that a contract, to be enforceable, must be supported by
20 consideration." *Patriot Scientific Corp. v. Korodi*, 504 F. Supp. 2d 952, 960 (S.D. Cal. 2007). Further,
21 "[p]ast consideration cannot support a contract." *Id.* (quoting *Passante v. McWilliam*, 53 Cal. App.
22 4th 1240, 1247 (1997)). But the court concludes that there was consideration for this promise. In
23 exchange for the debt cancellation, Nels agreed to provide an additional \$10,000 lump sum payment
24 and increase his total monthly payments from \$400 to \$500.

25
26
27 ³¹ Rachael testified that Nels installed a water heater in the 1990s and in 2008 or 2009; he did yearly yard
28 cleaning; he installed a drip system, a skylight, and an air-conditioning system; he replaced Frances's bathtub
and rebuilt the bathroom floor; remodeled the bathrooms; replaced the internal piping; demolished and replaced
a patio covering; enclosed a patio; helped with the trim and woodwork; and he fixed the roof, back gate, and
other items.

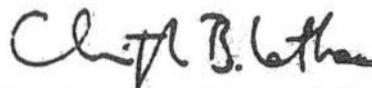
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VII. CONCLUSION

In conclusion, the court finds that: (1) Nels and Frances had installment contracts for Parcels A and B; (2) Nels did not unduly influence Frances in procuring the 2008 Agreement; (3) and Nels fully performed under the contracts.

IT IS SO ORDERED.

Dated: June 9, 2015



CHRISTOPHER B. LATHAM, JUDGE
United States Bankruptcy Court

In re Nels Louis Berg & Rachael Ann Berg, Bk. No. 09-17553-CL7

Richard M Kipperman v. Lory K. Berg, Nels Louis Berg, & Rachael Ann Berg, AP #13-90174-CL

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed via first class mail to the parties at their respective addresses listed below:

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Said envelope(s) containing such document was deposited by me in the City of San Diego, in said District on June 9, 2015.


Jillmarie R. McGrew, Deputy Clerk