SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 10-17-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV408471 Motion: Strike	Idean Pourshams vs Elizabeth Rourke et al	See Tentative Ruling. Court will prepare the final order.
LINE 2	22CV408471 Hearing: Demurrer	Idean Pourshams vs Elizabeth Rourke et al	See Tentative Ruling. Court will prepare the final order.
LINE 3	23CV410539 Hearing: Demurrer	SHAHRYAR Rokni vs LOS GATOS-SARATOGA UNION HIGH SCHOOL DISTRICT et al	See Tentative Ruling. Court will prepare final order.
LINE 4	20CV369640 Motion: Summary Judgment/Adjudication	JAMES CAMPAGNA vs NICHOLAS PASTORE et al	See Tentative Ruling. Court will prepare final order.
LINE 5	21CV384411 Motion: Compel	CREDITORS ADJUSTMENT BUREAU, INC. vs HAYDEN SARJI et al	See Tentative Ruling. Plaintiff shall prepare final order.
LINE 6	21CV384411 Motion: Compel	CREDITORS ADJUSTMENT BUREAU, INC. vs HAYDEN SARJI et al	See Tentative Ruling. Plaintiff shall prepare final order.
LINE 7	21CV384411 Motion: Compel	CREDITORS ADJUSTMENT BUREAU, INC. vs HAYDEN SARJI et al	See Tentative Ruling. Plaintiff shall prepare final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 8	21CV384411 Hearing: OSC Dismissal Failure to Appear	CREDITORS ADJUSTMENT BUREAU, INC. vs HAYDEN SARJI et al	See Tentative Ruling. Plaintiff shall prepare final order.
LINE 9	19CV357295 Motion: Withdraw as attorney	Info Way Solutions LLC vs Infobahn Softworld, Inc.	Notice appearing proper and good cause appearing, Plaintiff's Counsel's unopposed motion to withdraw is GRANTED. Moving counsel shall (re)submit the final order.
LINE 10	22CV408303 Motion: Withdraw as attorney	THERESA FOSTER vs RLJ LODGING TRUST, L.P. et al	It does not appear that an amended notice of hearing was filed, defeating proper notice. Moving counsel must appear and if notice was not proper, the motion will be continued. If moving counsel fails to appear, the motion will be taken off calendar.
LINE 11	2009-1-CV-153711 Hearing: Motion Objection to undertaking 3rd party	First Century Plaza LLC vs Sorrento Pavillion Llc, et al	See Tentative Ruling. Plaintiff will prepare the final order.
LINE 12	2009-1-CV-15371 Hearing: Motion Determine 3rd party claimant	First Century Plaza Llc vs Sorrento Pavillion Llc, et al	See Tentative Ruling. Plaintiff will prepare the final order,
LINE 13	2009-1-CV-153711 Motion: Order Recalling & Quashing the Writ	First Century Plaza Llc vs Sorrento Pavillion Llc, et al	See Tentative Ruling. Plaintiff will prepare the final order.

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Calendar Lines 1-2 Case No.: 22CV408471
Case Name: *Pourshams v. Rourke, et al.*

I. Factual and Procedural Background

Dr. Idean Pourshams ("Plaintiff") is self-represented and filed his First Amended Complaint ("FAC") against Elizabeth Rourke ("Defendant"). The FAC is the subject of the demurrer and motion to strike currently before the Court.

Plaintiff and Defendant met when he began taking classes at Yoga Source where she worked. (See FAC, ¶ 19.) In early 2020, at the front desk of Yoga Source, employee Melissa Bearden ("Ms. Bearden") "loudly proclaimed" that Plaintiff had sex with Defendant, which embarrassed them both. (*Id.* at ¶ 6.) Plaintiff immediately stated that the claims were not true. (*Ibid*.) Defendant, a manager at Yoga Source, told Plaintiff she spoke with Ms. Bearden about the unprofessional behavior. (*Ibid*.) Defendant denied ever suggesting anything that would lead Ms. Bearden to "conclude any facts that would substantiate defamatory statements regarding intimate contact with [Defendant.]" (*Id.* at ¶ 3.) Further, Defendant told Plaintiff that Ms. Bearden had stated "I do not like brown boys" however, this was fabricated by Defendant, as Ms. Bearden stated she did not utter this phrase. (*Id.* at ¶ 9.) Defendant further harassed Plaintiff by stating "Let's go to my place and get naked." (*Id.* at ¶ 11.)

Through discovery completed in an action filed against Ms. Beaden, Plaintiff learned Defendant was the actual source of false statements being spread about him. (See FAC ¶ 1.) During the previous depositions, Ms. Bearden stated Defendant was the "source of slanderous lies despite simultaneously sending the Plaintiff emails of apology and claiming [Ms. Bearden] is 'toxic' . . . and the sole cause of the Plaintiff's distress." (*Id.* at ¶ 7.) Defendant told others that Plaintiff made out with her and kissed her breasts, in an attempt to ruin Plaintiff's "budding relationship with Cecilia Orozco." (*Id*. at ¶ 24.) However, Plaintiff never had a physical relationship with Defendant. (*Id*. at ¶¶ 25, 26.) Defendant "orchestrated the entire effort to defame and ostracize the Plaintiff." (*Id.* at ¶ 25.) The false statements "had an immensely negative effect on Plaintiff's well-being, relationships, and standing in the community" and caused him to "endure[] immense embarrassment, anxiety and emotional distress." (*Id*. at ¶¶ 2, 26.) Additionally, Plaintiff needed to be treated by a mental health professional because of Defendant's lies. (*Id.* at ¶¶ 2, 38.)

On December 16, 2022, Plaintiff filed a Judicial Form complaint including attachments, asserting causes of action for: negligent infliction of emotional distress, intentional tort (intentional infliction of emotional distress), and defamation.

On March 6, 2023, defendants Leslie and Elizabeth Rourke each filed demurrers to the complaint and filed a joint motion to strike allegations from the pleading. The Court sustained the demurrer without leave to amend as to the defamation cause of action and sustained the causes of action for negligent and intentional infliction of emotional distress with leave to amend. The motion to strike was moot.

On July 3, 2023, Plaintiff filed his FAC against Defendant asserting a single cause of action for intentional infliction of emotional distress. Defendant filed a demurrer and motion to strike portions of the FAC. Plaintiff opposes the motions.

II. Demurrer

A. Preliminary Matters

1. Dismissal of Leslie Rourke

At the June 13, 2023 Hearing on Defendants' demurrers to Plaintiff's initial complaint, Plaintiff agreed to dismiss Leslie Rourke from this action. Subsequently, on June 23, 2023, Plaintiff filed a request to dismiss Leslie Rourke with prejudice. Plaintiff filed his FAC on July 3, 2023 and Leslie Rourke is still a named defendant. (See also FAC, ¶ 17.) Further, Plaintiff's opposition, filed on September 28, 2023, refers to "Defendants" on multiple occasions. However, the Court notes, for clarification purposes, that Leslie Rourke is no longer a party to this action.

2. Plaintiff's Opposition

As an initial matter, the Court notes that while Plaintiff has filed an opposition to the demurrer, aside from one citation, it is entirely devoid of case law or supporting authority, thus allowing the Court to treat his contentions as waived. Moreover, it appears Plaintiff is merely reiterating allegations made in the FAC or adding additional facts to support his IIED claim. (See *Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 [a "blanket statement, with no citation to authority or discussion of the authority as it applies to the facts of this case" is waived argument]; *Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939 ["[t]he absence of cogent legal argument or citation to authority allows this court to treat the contention as waived"].) The Court reminds Plaintiff he is held to the same standard as other civil litigants. (See e.g., *Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267 [self-represented litigant is entitled to the same, but no greater, consideration than other litigants and attorneys].) That said, courts have a policy favoring disposition of cases on the merits rather than on procedural grounds. (See e.g., *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) Thus, the Court will address the merits of Defendant's demurrer.

3. Plaintiff's Request for Judicial Notice

Plaintiff requests the Court take judicial notice of the FAC's attachments, Exhibits A through L. (FAC, 1:26-27.) As the Court's consideration of the facts alleged include those found in the FAC's exhibits, the Court finds it unnecessary to take judicial notice of Exhibits A through L. (See e.g., *Satten v. Webb* (2002) 99 Cal.App.4th 365, 375.) However, any facts appearing in attached exhibits control over contradictory factual allegations in the operative pleading. (See *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 38-39.) Accordingly, the Court need not rule on Plaintiff's request for judicial notice found in the FAC.

4. Defendant's Request for Judicial Notice

In support of her demurrer, Defendant requests the Court take judicial notice of the following:

1) Complaint filed in *Idean Pourshams MD v. Melissa Bearden, et al.*, 21CV386632 ("Ex. A"); and

2) Court's June 14, 2023 Order on Defendants' Demurrers and Motion to Strike Plaintiff's Initial Complaint ("Ex. B").

The unopposed request for judicial notice of Ex. A and Ex. B is GRANTED. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records].)

However, as for Ex. A, the Court may only take judicial notice of the document's existence and not the truth of the matters asserted therein. (*Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 768.) Thus, Defendant's request that this Court take judicial notice of specific allegations within Ex. A is DENIED.

B. Legal Standard

"A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) The only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

C. Intentional Infliction of Emotion Distress

Defendant demurs to the FAC's sole cause of action for intentional infliction of emotional distress.

To state a cause of action for intentional infliction of emotional distress ("IIED"), Plaintiff must allege: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe emotional distress; and (3) the defendant's extreme and outrageous conduct was the actual and proximate cause of the severe emotional distress. (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1007.)

Defendant asserts the following arguments in support of her demurrer: 1) Plaintiff failed to sufficiently plead extreme and outrageous conduct; 2) Plaintiff did not suffer extreme or severe emotional distress; and 3) there is no causal connection between the alleged statements and Plaintiff's damages.

Extreme and Outrageous Conduct

A claim for intentional infliction of emotional distress requires Plaintiff to allege outrageous conduct by Defendant which is intentional or reckless, causing severe emotional distress. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259.) "Conduct, to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized society. While the outrageousness of a defendant's conduct normally presents an issue of fact to be determined by the trier of fact, the court may determine in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883 [internal quotations and citations omitted]; *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235 ["many cases have dismissed [IIED] cases

on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law"].) Moreover, "liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities, but only to conduct so extreme and outrageous as to go beyond all possible bonds of decency." (*Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 400 [internal citations and quotations omitted] (*Wayans*).)

Here, the alleged conduct includes several comments made by Ms. Bearden about a sexual relationship Plaintiff had with Defendant, including that he made out with Defendant and kissed her breasts (FAC, ¶ 24); comments attributed to Defendant that Plaintiff was gay (*Id.* at ¶ 40); and a comment made by Defendant stating that Ms. Bearden told her she does not like "brown boys" (*Id.* at ¶ 9). While these comments may have been hurtful to Plaintiff, the Court does not find these allegations amount to "extreme and outrageous conduct" as a matter of law. (See e.g., *Carlisle v. Fawcett Publications, Inc.* (1962) 201 Cal.App.2d 733, 744 [Court of Appeal affirmed trial courts sustaining of defendant's demurrer, stating "[t]he statement that a young man has kissed a willing and pretty girl is not generally considered degrading"]; *Wayans*, *supra*, 8 Cal.App.5th at p. 400 [Court of Appeal held that "boorish and/or juvenile comments" about Plaintiff's physical appearance, while hurtful, did not amount to conduct that was "so extreme as to exceed all bounds of that usually tolerated in a civilized community"]; *Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 781 [comments made to plaintiff that, "if true, demonstrate[s] a callous disregard for plaintiffs' professional and personal well-being, the alleged conduct as stated is not extreme or outrageous to support a cause of action for [IIED]"]; *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 495-496 [boyfriend's message that he wanted to book a flight for girlfriend on an airline that had experienced a major crash was not outrageous and did not support an IIED claim; stating also "parties to an intimate relationship gone bad were now feuding. Those feuds are often accompanied by an exchange of hostile unpleasantries . . . [w]hile the pain inflicted might be real, the tort of [IIED] was never intended to remove all such barbs"]; *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 (*Hughes*) [Supreme Court affirmed Court of Appeal conclusion that alleged sexual harassment comments made to plaintiff in public, while inappropriate, fall short of outrageous conduct].)

Based on the foregoing, Plaintiff has failed to sufficiently allege extreme and outrageous conduct and the demurrer may be sustained on this basis.

The demurrer is SUSTAINED in its entirety. Having sustained the demurrer on the basis of failing to sufficiently allege extreme and outrageous conduct, the Court declines to address Defendant's remaining arguments regarding severe emotional distress and causation.

D. Leave to Amend

While "[i]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory[] [a]nd it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment," the burden is still on the plaintiff to demonstrate the manner in which the complaint might be amended; otherwise, if no liability exists as a matter of law, a demurrer without leave to amend should be sustained. (*Gutkin v. Univ. of S. Cal.* (2002) 101 Cal.App.4th 967, 976; see also *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618 [to satisfy plaintiff's burden of proving a reasonable possibility of amendment he "must show in what manner he can amend . . . and

how that amendment will change the legal effect of his pleading by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action"][internal quotations omitted].)

In this case, Plaintiff has not requested leave to further amend his pleading and thus, fails to indicate in what manner he would be able to amend his pleading to cure its deficiencies. Further, Plaintiff was given an opportunity to amend his pleading, per this Court's prior order (see RJN, Ex. B), and has failed to cure such defects. Thus, for the foregoing reasons, leave to amend is DENIED.

III. Motion to Strike

Defendant moves to strike Plaintiff's request for punitive damages, attorney fees, and several paragraphs of the FAC. As discussed above, the Court has sustained Defendant's demurrer in its entirety without leave to amend. Accordingly, the motion to strike is MOOT.

IV. Conclusion and Order

The demurrer to the sole cause of action for intentional infliction of emotional distress is SUSTAINED without leave to amend. The motion to strike is MOOT.

The Court will prepare the final order.

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Calendar Line 3
Case Name: *Rokni v. Los Gatos-Saratoga Union High School District, et al.*
Case No.: 23CV410539

I. Factual and Procedural Background

Shahryar Rokini, as *Guardian ad Litem* for Darab Rokini ("Rokini" or "Plaintiff"), brings this First Amended Complaint ("FAC") against defendants Los Gatos-Saratoga Union High School District ("Defendant" or "the District"), Aaron Brin, Gennady Brin, Valerie Bring, Brayden Smith-Berquest, Deke Smith, Alicia Smith, and Flabio Barney Santiago.

Rokini is a student at Los Gatos High School ("Los Gatos"). (FAC, ¶ 21.) On February 9, 2022, Los Gatos hosted a boys' varsity soccer game. (FAC, ¶ 22.) Rokini attend the district-sponsored, extra-curricular activity. (*Ibid*.) Once the game ended, Rokini promptly attempted to leave the school facilities. (FAC, ¶ 23.) Near the school parking lot, Rokini and his friend were confronted by a group from behind the bleachers. (FAC, ¶ 24.)

The group of students, comprised largely of male varsity athletes, had a known history of bullying Rokini, including based on his race. (FAC, ¶¶ 2, 27.) The group approached Rokini, circled him, confronted him by verbally insulting him, including with racially charged statements. (FAC, ¶¶ 25-26, 29, 31-33.) Rokini tried to leave the situation; however, the encounter quickly turned violent. (FAC, ¶ 2.)

Rokini was thrown to the ground and beaten up by the group while they mocked him and filmed the incident on a cell phone. (FAC, ¶¶ 30, 31.) The attack concluded after the group slammed Rokini's body to the ground and then realized they had broken his right arm. (FAC, ¶¶ 33-34.)

Thereafter, Rokini was rushed to the hospital and underwent emergency surgery. (FAC, ¶ 34.) Rokini suffers from severe and permanent injuries, pain, suffering, and emotional distress. He continues to face threats of further harm from the group. (FAC, ¶¶ 4, 35-39.) The District failed to reasonably supervise and protect its students. (FAC, ¶ 4.)

On April 12, 2023, Plaintiff filed his FAC asserting the following 10 causes of action:

1) Negligent Failure to Supervise – Public Entity [against the District];
2) Negligence – Public Entity [against the District];
3) Negligence Per Se Based on Safe Place to Learn Act [against the District];
4) Ralph Civil Rights Act [against the Attackers[1]];
5) Bane Civil Rights Act [against the Attackers];
6) Assault [against the Attackers];
7) Battery [against the Attackers];
8) Intentional Infliction of Emotional Distress [against the Attackers];
9) Parental Negligence [against the Parents[2]]; and

[1] The "Attackers" include defendants Aaron Brin, Brayden Smith-Berquest, and Flabio Barney Santiago. (See FAC, ¶ 14.)

10) Vicarious Parental Responsibility [against the Parents].

On June 21, 2023, the District filed a demurrer to the third cause of action for Negligence Per Se based on the Safe Place to Learn Act. Plaintiff opposes the motion.

II. Demurrer

A. Meet and Confer Efforts

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code Civ. Proc., § 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (Code Civ. Proc., § 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (Code Civ. Proc., § 430.41, subd. (a)(4).)

In this case, Defendant indicates the parties met and conferred by telephone but were unable to resolve their dispute regarding the third cause of action. (Defendant's Decl., ¶ 2.) However, Plaintiff indicates he "offered to add the word 'adopt' to the FAC" (see Opposition, p. 2:17-19; see also Opposition, Ex. 1),[3] thereby resolving the sole objection raised in the demurrer. Accordingly, the Court finds the meet and confer efforts by Defendant to be insufficient. While the demurrer may not be sustained on this basis, the Court reminds Defendant it should not treat Code of Civil Procedure section 430.41 as a procedural hurdle and should, instead, undertake the obligations set forth therein with sincerity and good faith.

B. Legal Standard

"A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) The only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

C. Analysis

Defendant's demurrer to the third cause of action is based primarily on Plaintiff's use of the word "implement" rather than "adopt." Defendant contends Plaintiff's third cause of action for negligence per se based on the Safe Place to Learn Act fails to state sufficient facts

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[2] The "Parents" include defendants Gennady Brin, Valerie Brin, Deke Smith, and Alicia Smith. (See FAC, ¶ 15.)

[3] The Court relies on Ex. 1 solely for purposes of analyzing meet and confer efforts and does not rely on Ex. 1 in ruling on the demurrer. (*Hibernia Sav. & Loan Soc. v. Thornton* (1897) 117 Cal. 481, 482 [extrinsic evidence may not properly be considered on demurrer].)

because Plaintiff alleges the District "failed to implement" appropriate procedures rather than "adopt" appropriate procedures in compliance with Education Code section 234.4. (See Demurrer, p. 3:4-7.) Plaintiff asserts that the allegations of the FAC are consistent with a reasonable interpretation of the Legislature's intent. (See Plaintiff's Opp., p. 6:5-13.)

Education Code section 234.4, subdivision (a) states, in relevant part: "A local educational agency shall **adopt** . . . procedures for preventing acts of bullying[.]" (Ed. Code, § 234.4, subd. (a) [emphasis added].) The FAC alleges "The District was *per se* negligent when its agents ***failed to implement*** appropriate procedures for preventing acts of bullying" (FAC, ¶ 56 [emphasis added]). Defendant takes issue with the language of this allegation as the Education Code states the District is required to *adopt* procedures to prevent bullying.

The Court is not persuaded by this argument. First, aside from referencing the Safe Place to Learn Act (Education Code section 234, *et seq*.), Defendant's legal argument is devoid of any citations to authority. (See e.g., *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [a point asserted without citation to authority will be disregarded]; *Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal.App.4th 927, 934 [trial court not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide"]; see also Plaintiff's Opp., p. 2:10-14 [noting the demurrer does not contain legal authority].)

Next, using the world "implement" rather than "adopt" is not necessarily determinative of this cause of action's sufficiency, as "simply parroting the language of [a statute] in [a] complaint is insufficient to state a cause of action under the statute." (*Hawkins v. TACA Internat. Airlines, S.A.* (2014) 223 Cal.App.4th 466, 478; see also *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 410 [use of statutory terminology on its own is insufficient to state a cause of action].) Because a demurrer tests the legal sufficiency of a pleading, the Court is concerned with Plaintiffs ability to allege *sufficient facts* establishing every element of a cause of action in order to "acquaint the defendant with the nature, source, and extent of [a] cause of action." (*Gressley v. Williams* (1961) 193 Cal.App.2d 636, 643-644.) Thus, the Court is not necessarily concerned with singular words but whether the pleading, taken as a whole, states a cause of action. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 ["we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context"].)

Here, Plaintiff alleges: the District had an affirmative duty to adopt procedures for preventing bullying (FAC, ¶ 55); the District failed to implement appropriate procedures for preventing bullying (FAC, ¶ 56) such that Plaintiff was bullied, threatened, and discriminated against by the same group on the school campus and the District was aware of the bullying and threats (FAC, ¶¶ 57-58); the District failed to intervene[4] after becoming aware (FAC, ¶ 59); Plaintiff was attacked on the school's campus while attending a school-sponsored soccer game (FAC, ¶ 60); and "[h]ad there been proper procedures, policies, training and supervision by The District, the attack on Plaintiff could have been prevented" (FAC, ¶ 61). The Court finds these facts sufficient to support the third cause of action for negligence per se pursuant to Government Code section 815.6 under the Safe Place to Learn Act (Education Code section

[4] Ed. Code, § 234.1, subd. (b)(1) requires "that, if school personnel witness an act of discrimination, harassment, intimidation, or bullying, they shall take immediate steps to intervene when safe to do so."

234, *et seq*.), as Plaintiff alleges Defendant did not have procedures in place and did not intervene despite being aware of the bullying and discrimination. (See *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1111 [the complaint must be liberally construed and given a reasonable interpretation, with a view to substantial justice between the parties].)

Defendant also asserts in Reply that amending the third cause of action to include an allegation that the District "failed to adopt a policy would be fruitless because the Act does not provide a predicate for a negligence per se cause of action." (Reply, p. 2:21-23.) However, "[p]ursuant to Government Code section 815.6, a public entity's failure to comply with a mandatory safety regulation designed to protect a class of persons which includes the plaintiff may . . . constitute negligence per se." (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 134; see also Gov. Code, § 815.6.) Here, the enactment was designed to protect students from bullying, discrimination, harassment, and intimidation. Plaintiff alleges Defendant failed to comply with the enactment and Plaintiff was injured as a result. (FAC, ¶¶ 56, 59-61.) Accordingly, Plaintiff may rely on Education Code section 234, et seq. to support a negligence per se cause of action.

Based on the foregoing, the demurrer to the third cause of action is OVERRULED.

III. Conclusion and Order

The demurrer to the third cause of action is OVERRULED.
The Court will prepare the final Order.

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Calendar line 4
Case Name: *Campagna v. Pastore, et al.*
Case No.: 20CV369640

After full consideration of the evidence, the separate statements submitted by the parties, and the authorities submitted by each party, the court makes the following rulings:

According to the allegations of the complaint, plaintiff James Campagna ("Campagna") and defendants Nicholas Pastore ("Pastore"), and J. Michael Fitzsimmons ("Fitzsimmons") (collectively, "Defendants") were co-members and co-managers of FJP, LLC ("FJP"). (See complaint, ¶ 7.) The operating agreement states that the parties are members and managers of FJP and owe a fiduciary duty to one another. (See complaint, ¶¶ 8-10.) On December 29, 2017, Pastore formed NP, LLC ("NP"), of which Pastore was the sole member. (See complaint, ¶¶ 11-13.)

On January 1, 2018, FJP, as landlord, entered into a commercial lease with NP as the tenant for a term of five years from January 1, 2018 to December 31, 2022. (See complaint, ¶ 14.) As of July 1, 2020, the NP base rent was $10,052 per month plus NP's proportionate share of operating expenses. (See complaint, ¶ 15.) NP subsequently subleased a portion of NP leased space to be occupied by Campbell, Warburton, Fitzsimmons, Smith, Mendell & Pastore. ("CW firm"), of which Fitzsimmons was a member partner and/or shareholder, and Pastore was a co-member and partner. (See complaint, ¶¶ 17-18.) As Pastore controlled NP, he subleased all or a portion of the leased premises to CW firm. (See complaint, ¶¶ 20-21.) Pastore and Fitzsimmons controlled 60% of FJP, the landlord of the property; and Pastore and Simmons also acted as the tenants of the property. (See complaint, ¶¶ 22-23.)

On June 5, 2020, Pastore and Fitzsimmons, in their dual capacity as the controlling landlord and controlling tenant, noticed a special meeting of FJP. (See complaint, ¶ 24.) On June 18, 2020, Pastore and Fitzsimmons voted to reduce the monthly rent owed to FJP from $10,052.00 to $8,050.00 per month, commencing August 1, 2020 through December 31, 2020, and informed Campagna that the rents commencing January 1, 2021 may be further reduced. (See complaint, ¶ 25.) During the June 18, 2020 special meeting wherein Pastore and Fitzsimmons voted to reduce the rent, Campagna informed Defendants that they had conflicting roles as both landlord and tenant, and that their actions were detrimental to Campagna and FJP. (See complaint, ¶ 26.) Despite Campagna's objection, Pastore and Fitzsimmons voted to reduce the rent so that they could reduce the rent of the leased premises for their personal gain. (See complaint, ¶¶ 26-28.)

On August 19, 2020, Campagna filed his complaint against Pastore and Fitzsimmons, asserting causes of action for:

1) Breach of contract (against Pastore and Fitzsimmons);
2) Breach of the covenant of good faith and fair dealing (against Pastore and Fitzsimmons);
3) Breach of fiduciary duty (against Pastore and Fitzimmons);
4) Civil conspiracy (against Pastore and Fitzsimmons); and,
5) Injunctive relief (against Pastore and Fitzsimmons).

On October 21, 2020, Pastore and Fitzsimmons filed a cross-complaint ("XC") alleging that on December 15, 2005, Pastore, Fitsimmons and Campagna entered into an Operating Agreement for the operation of FJP. (See XC, ¶ 8, exh. A.) On January 1, 2018, FJP as landlord entered into a commercial lease with NP, of which Pastore is the single member. (See XC, ¶¶ 11-12.) Since the inception of FJP, the anchor tenant/sub-tenant at the property has always been CW firm. (See XC, ¶ 13.) In March 2020, the Covid-19 pandemic took hold and other tenants of the subject property—Victra and Picasso's—subsequently terminated its leases, vacated the premises and no longer paid rent to FJP as of May 14, 2020. (See XC, ¶¶ 14-16.)

On May 14, 2020, Pastore emailed Campagna, proposing discussion and a vote on rent reduction for CW firm from $10,052.00 to $7,200 per month effective June 1, 2020 to offset the loss of revenues for CW firm while keeping CW firm as a tenant and subtenant on the property through the pandemic. (See XC, ¶ 16, exh. B.) Despite owning 40% of FJP, Campagna acted and spoke as if he was the sole, controlling member of FJP, without meeting or seeking a vote as required by the Operating Agreement by: 1) establishing a reserve/rainy day account with FJP funds over which Pastore and Fitzsimmons had no control; 2) spoke on behalf of FJP when he responded to Pastore's suggestion that FJP meet to vote on a decision by stating that "***we*** strongly encourage Campbell Warburton/NP to take full advantage of any programs, grants and/or loans offerings to help them meet their financial obligations" and on May 18, 2020, concluding that "nevertheless, I am willing to work with Campbell Warburton/NP by offering a rent deferment for a period of three months. The deferred rent will not be discharged or forgiven, but may be amortized for the remaining lease term." (See XC, ¶¶ 17-18, exh. C.)

Campagna failed and refused to respond to requests for an FJP meeting regarding the rent reduction issue, and on June 5, 2020, Fitzsimmons, in accordance with notice requirements set forth in the Operating Agreement, sent written notice to all FJP members calling for a special meeting to discuss matters addressed in Pastore's May 14, 2020 email entitled "Proposed NP, Inc./rent reduction." (See XC, ¶ 19, exh. D.) On June 18, 2020, by agreement of all members, the FJP special meeting was held virtually on a Ring Central conference line. (See XC, ¶ 20.) Members were discussing the issues when Campagna abruptly hung up on his co-members and left the meeting in anger. (*Id*.) As the FJP meeting still had a quorum, Fitzsimmons and Pastore continued the meeting, and voted on and approved the proposal to reduce NP's rent from $10,050.00 to $8,050.00 for August 1, 2020 through December 31, 2020. (*Id*.) However, Campagna breached the terms of the Operating Agreement by acting as the sole controlling landlord of the property without meeting or holding a vote as required by the Operating Agreement regarding the establishment of a reserve/rainy day account with FJP funds over which Pastore and Fitzsimmons had no control and speaking on behalf of FJP, denying Pastore's proposal for a rent reduction for NP without approval from FJP's other members. (See XC, ¶¶ 21-43.)

On October 21, 2020, Pastore and Fitzsimmons filed the XC against Campagna, asserting causes of action for:

1) Breach of contract;
2) Breach of the implied covenant of good faith and fair dealing;
3) Breach of fiduciary duty; and,
4) Accounting.

Campagna moves for summary judgment as to both his complaint and the XC, or, in the alternative, moves for summary adjudication of the first through third causes of action of the complaint and each of the causes of action of the XC.

CAMPAGNA'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF CAUSES OF ACTION

Campagna moves for summary judgment of both his complaint and the XC. As to the summary judgment of his complaint, plaintiff Campagna cites case authority only for motions by a moving defendant. (See Pl.'s memorandum of points and authorities in support of motion for summary judgment ("Pl.'s memo"), pp.9:1-28, 10:1-21.) A plaintiff's burden on summary judgment is fundamentally different from a moving defendant:

Plaintiff's burden on summary judgment/adjudication of the complaint

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact—one sufficient to support the position of the party in question that no more is called for. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) Plaintiffs moving for summary judgment bear the burden of persuasion that each element of the cause of action in question has been proved, entitling the party to judgment. (Code Civ. Proc. § 437c, subd.(p)(1).) Plaintiffs, who bear the burden of proof at trial by preponderance of evidence, therefore "must present evidence that would require a reasonable trier of fact to find the underlying material fact more likely than not—otherwise he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar*, *supra*, 25 Cal.4th at p.851.) "'Once the plaintiff... has met that burden, the burden shifts to the defendant... to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.'" (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1195 (Sixth District case), quoting Code Civ. Proc. § 437c, subd. (p)(1).)

Plaintiff Campagna fails to meet his initial burden to demonstrate that he is entitled to judgment on the breach of fiduciary duty cause of action.

As Campagna notes, "[t]he elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; see also *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1164 (stating that "[t]he elements of a cause of action for breach of fiduciary duty are: (1) [the] existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach").) In support of his motion, Plaintiff cites to his own declaration and allegations of the XC.

Here, the material facts set forth in Campagna's separate statement are: the parties are members of FJP in which Plaintiff owns a 40% interest, Pastore owns a 40% interest and Fitzsimmons owns a 20% interest (see Pl.'s separate statement of undisputed material facts no. ("UMF") 1); the parties entered into a written operating agreement for FJP (UMF 2); the sole asset of FJP is the subject property (UMF 3); on January 1, 2018, FJP entered into a commercial lease for office premises at the subject property with NP (UMF 4); the CW firm is NP's subtenant (UMF 5); Pastore and Fitzsimmons occupy offices at the property leased by NP (UMF 6); Campagna does not maintain any office space at the property (UMF 7); in May

2020, Pastore and Fitzsimmons sent an email to Campagna stating that they wanted FJP to reduce NP's rent by $3,000 (UMF 8); Campagna did not agree to a rent reduction but discussed a possible rent deferment (UMF 9); on June 5, 2020, Pastore and Fitzsimmons sent Campagna a Notice of a Special Meeting for FJP, set for June 18, 2020, to discussed a proposed NP/CW firm rent reduction (UMF 10); Campagna attended the special meeting but he objected to the proposed rent reduction (UMF 11); on June 19, 2020, Fitzsimmons sent Campagna a letter entitled "Notice of vote outcome" that stated that the special meeting was convened, Campagna abruptly left the meeting in anger, Pastore and Fitzsimmons continued the meeting as they had a quorum and voted that NP will pay $10,050 rent for July 2020 and from August 1, 2020 to December 31, 2020, NP's rent was reduced to $8,050 per month (UMF 12); Pastore and Fitzsimmons voted for the rent decrease despite Campagna's objection (UMF 13); NP paid the decreased rent of $8,050 per month from August 1, 2020 to December 31, 2020 (UMF 14); the FJP lease with NP terminated by its terms on December 31, 2022 (UMF 15); the monthly base rent as of December 2022 was $10,666.29 and the lease at Section 26 contains a holdover provision that states that if NP holds over beyond the expiration or termination of the lease, the base rent would be increased to 150% of the base rent on the expiration or termination of the lease (UMF 16); the holdover base rent between FJP and NP is $15,355.62 per month (UMF 17); on December 7, 2022, Fitzsimmons purported to notice a "special meeting" of FJP for December 19, 2022 to discuss NP's offer to pay $7,200 per month (UMF 18); Campagna did not attend the December 19, 2022 meeting (UMF 19); Fitzsimmons and Pastore, claiming to have a quorum, voted to approve NP's offer to lease the subject property at $7,200 per month (UMF 20); thereafter, NP paid the $7,200 monthly rent amount instead of the $15,355.62 holdover tenant amount (UMF 21); after NP paid the reduced rent, the FJP bank account was depleted (UMF 22); on March 30, 2023, Pastore made a "capital call" to Campagna, informing him that the FJP checking account had less than a $4,000 balance and that Campagna had not deposited his $5,000 contribution pursuant to the capital call made in January 2023, and that, after paying the mortgage payment, the balance will be approximately $6,200 and that property taxes of $13,400 are due on or before April 10, 2023 (UMF 23); the Operating Agreement provides that no capital call can be made without unanimous approval of the members (UMF 24); Campagna did not approve any capital call in 2023 but Campagna nevertheless paid $5,000 in the FJP account on April 8, 2023 to avoid default (UMF 25); article 14 of the Operating Agreement states that the standard of the fiduciary duty owed to each member and manager are those of a partner to a partnership, and the standard of conduct owed to the company and other members is to act in the highest good faith to the members and managers and may not seek to obtain an advantage in the company affairs by the slightest misconduct, misrepresentation, concealment, threat or adverse pressure of any kind (UMF 26); and, the monthly lease amount due for the office space leased by NP was $10,666.29 and the monthly amount due beginning January 2023 was $15,355.62, and the vote to decrease the rent resulted in a loss of over $52,000 through the date of this filing, not including interest and late charges (UMF 27).

Campagna's supporting memorandum notes that "[t]he first step in any motion for summary judgment/adjudication is an analysis of the pleadings." (Pl.'s memo, p.10:15-16.) "It is irrelevant if the plaintiff could have made other allegations—'In a summary judgment proceeding, the pleadings define the issues.'" (Pl.'s memo, p.10:18-19, citing *Henry v. Clifford* (1995) 32 Cal.App.4th 315, 321; see also *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 536 (stating that "[o]n summary judgment motions, the pleadings always define the issues"); see also *Lewis v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 690, 694 (stating that "[w]e first review the complaint, because the pleadings define the issues addressed

in a summary judgment motion").) "A court may not consider theories of liability not asserted in the complaint." (Pl.'s memo, p.10:20-21, citing *Danieley v. Goldmine Ski Assocs*. (1990) 218 Cal.App.3d 111, 119.)

Here, Campagna's undisputed material facts concern, in part, his grievance that FJP was owed rent from NP as a holdover tenant in 2022 and 2023, a December 19, 2022 FJP meeting at which Fitzsimmons and Pastore voted to reduce NP's rent, a purported January 2023 capital call and a March 30, 2023 capital call, resulting in asserted damages of "over $52,000." (See UMFs 15-27.) However, the complaint—filed on August 19, 2020—fails to allege any actions by Fitzsimmons and Pastore in 2022 and 2023. It is clear that Campagna fails to meet his initial burden to demonstrate that he is entitled to judgment on the breach of fiduciary duty cause of action as he fails to support the amount of damages. In fact, Campagna does not even proffer an amount of damages; this alone is a basis to deny the motion. (See *CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239 (stating that the plaintiff "could not establish a prima facie entitlement to summary judgment without showing both the fact *and the amount* of damages"), quoting *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1106; see also *Paramount Petroleum Corp. v. Super. Ct. (Building Materials Corp. of America)* (2014) 227 Cal.App.4t 226, 241 (stating that "[a]s damages are an element of a breach of contract cause of action [citation], a plaintiff cannot obtain judgment on a breach of contract cause of action in an amount of damages to be determined later").) As Campagna fails to meet his initial burden as to the element of damages, the motion for summary judgment and the alternative motion for summary adjudication of the third cause of action of his complaint for breach of fiduciary duty is DENIED.

Further, Campagna fails to meet his initial burden to demonstrate that he is entitled to judgment on the breach of fiduciary duty cause of action as he fails to show that there is no triable issue of material fact with respect to a breach of a fiduciary duty as to issues framed by the complaint. Corporations Code section 17704.09, subdivision (e) states that a member of a limited liability company does not violate a fiduciary duty under an operating agreement or the Corporations Code regarding limited liability companies merely because the member's conduct furthers the member's own interest." (Corp. Code § 17704.09, subd.(e).) Here, Campagna asserts that article 14 of the Operating Agreement states that the standard of conduct owed to the company and other members is to act in the highest good faith to the members and managers and may not seek to obtain an advantage in the company affairs by the slightest misconduct, misrepresentation, concealment, threat or adverse pressure of any kind. (See UMF 26.) However, the asserted acts by Fitzsimmons and Pastore—sending an email seeking a reduction in rent, sending a Notice of a Special Meeting for FJP to Campagna regarding a proposed rent reduction, attending the special meeting, voting on the proposed rent reduction at that meeting over Campagna's objection, sending a "Notice of vote outcome" after Campagna left the meeting, and paying the reduced rent of $8,050 per month from August 1, 2020 to December 31, 2020—do not evidence any conduct to obtain an advantage in FJP's affairs by any misconduct, misrepresentation, concealment, threat or adverse pressure. In fact, the May 14, 2020 email attached to Campagna's declaration indicates that NP and CW firm were, like all businesses in May 2020, impacted by the COVID-19 pandemic and shelter in place orders. (See Campagna decl. in support of motion for summary judgment ("Campagna decl."), exh. C.) The May 14, 2020 email further notes that: FJP will lose rental income from Victra and Verizon; NP was "further impacted by COVID-19… [such that] a substantial rent adjustment is needed to continue in business and remain as tenant and subtenant of FJP" and as a source of

revenue of FJP, a rent reduction would decrease tax liability for all parties; and noted that the rent reduction could be revisited. (*Id*.) Campagna does not present admissible evidence or a material fact that Fitzsimmons and Pastore's concerns were untruthful, intended to cause harm to Campagna, were in bad faith, or were otherwise threatening or pressuring Campagna. Accordingly, as Campagna fails to meet his initial burden as to the element of breach of fiduciary duty, the motion for summary judgment and the alternative motion for summary adjudication of the third cause of action of his complaint for breach of fiduciary duty is also DENIED on this basis.

Plaintiff Campagna fails to meet his initial burden to demonstrate that he is entitled to judgment on the first cause of action for breach of contract.

A complaint for breach of contract must include: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff therefrom. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913.) As Pastore and Fitzsimmons note in their opposing separate statement, the material facts for the first cause of action are nearly identical to those of the third cause of action. (See UMFs 28-54; compare with UMFs 1-27.)

Here, as with the motion as to the third cause of action, Campagna asserts that the amount of damages he seeks is "over $52,000." (See UMF 54.) However, as with the motion as to the third cause of action, the proffered material facts include NP's asserted failure to pay rent as a holdover tenant in 2022 and 2023, a December 19, 2022 FJP meeting at which Fitzsimmons and Pastore voted to reduce NP's rent, a purported January 2023 capital call and a March 30, 2023 capital call (see UMFs 42-54)—none of which is alleged in the first cause of action. (See *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 536 (stating that "[o]n summary judgment motions, the pleadings always define the issues"); see also *Lewis v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 690, 694 (stating that "[w]e first review the complaint, because the pleadings define the issues addressed in a summary judgment motion").) Therefore, it is clear that Campagna fails to meet his initial burden to demonstrate that he is entitled to judgment on the breach of contract cause of action as he again fails to support the amount of damages, or even proffer an amount of damages. (See *CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239 (stating that the plaintiff "could not establish a prima facie entitlement to summary judgment without showing both the fact *and the amount* of damages"), quoting *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1106; see also *Paramount Petroleum Corp. v. Super. Ct. (Building Materials Corp. of America)* (2014) 227 Cal.App.4th 226, 241 (stating that "[a]s damages are an element of a breach of contract cause of action [citation], a plaintiff cannot obtain judgment on a breach of contract cause of action in an amount of damages to be determined later").) As Campagna fails to meet his initial burden as to the element of damages, the motion for summary adjudication of the first cause of action of his complaint for breach of contract is DENIED.

Additionally, Campagna fails to meet his initial burden to demonstrate that he is entitled to judgment on the first cause of action for breach of contract because he fails to show that there is no triable issue of material fact with respect to a breach. As previously stated, Campagna's material facts 42-54 include material facts regarding 2022 and 2023 that are not alleged in the complaint, and thus, are not properly the subject of the motion for summary adjudication. (See *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 536 (stating that "[o]n summary judgment motions, the pleadings always define the issues"); see also *Lewis v.*

Chevron U.S.A., Inc. (2004) 119 Cal.App.4th 690, 694 (stating that "[w]e first review the complaint, because the pleadings define the issues addressed in a summary judgment motion").) The only alleged breaches that are the subject of the first cause of action are that Pastore and Fitzsimmons reduced rent to themselves from $10,052.00 per month to $8,050 per month from August 1, 2020 through December 31, 2020 and also informed Campagna that rents may be further reduced on January 1, 2021. (See complaint, ¶ 32.) Here, there are no material facts presented by Campagna concerning the reduction of rent on January 1, 2021; therefore, the rent reduction from August 1, 2020 through December 31, 2020 is the lone issue. Campagna alleges that the rent reduction breached the provision of the Operating Agreement that required Pastore and Fitzsimmons to: act in the highest good faith to the members and managers; act as a fiduciary of other members; and, to refrain from seeking to obtain an advantage in the company affairs by the slightest misconduct. (See complaint, ¶ 30.) For reasons already stated above regarding the third cause of action, Campagna fails to meet its initial burden with respect to the breach of the Operating Agreement to the extent that it is premised on an alleged breach of a fiduciary duty. As to the provisions of the Operating Agreement requiring Pastore and Fitzsimmons to act with the highest good faith and to refrain from seeking to obtain an advantage in the company affairs by the slightest misconduct, Campagna does not present admissible evidence or a material fact that Fitzsimmons and Pastore's concerns were untruthful, intended to cause harm to Campagna, were in bad faith, or were otherwise sought to obtain an advantage in the company affairs. As stated above regarding the third cause of action, the evidence presented by Campagna indicates that Fitzsimmons and Pastore were concerned regarding the impacts of the COVID-19 pandemic and shelter in place orders on the business, the possibility of NP no longer "remain[ing] as tenant and subtenant" and source of revenue of FJP, and the resulting decreased tax liability for all parties from a temporary rent reduction. As Campagna fails to meet his initial burden as to the element of breach, the motion for summary adjudication of the first cause of action of his complaint for breach of contract is also DENIED on this basis.

Plaintiff Campagna fails to meet his initial burden to demonstrate that he is entitled to judgment on the second cause of action for breach of the implied covenant of good faith and fair dealing.

As Campagna states, "[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658.) Campagna's sole argument regarding the second cause of action is that "to use their majority vote to exclusively benefit themselves, Defendants' conduct, by using their majority votes to self-deal to Plaintiff's detriment, is a breach of good faith and fair dealing." (Pl.'s memo, p.17:2-5.) Campagna's proffered material facts in support of the motion as to the second cause of action are identical to those in support of the first cause of action. (See UMFs 56-83; compare with UMFs 28-55.) For identical reasons then, it is clear that Campagna fails to meet his initial burden to demonstrate that he is entitled to judgment on the second cause of action for breach of the implied covenant of good faith and fair dealing as he again fails to support the amount of damages, or even proffer an amount of damages. (See *CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239 (stating that the plaintiff "could not establish a prima facie entitlement to summary judgment without showing both the fact *and the amount* of damages"), quoting *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1106; see also *Paramount Petroleum Corp. v. Super. Ct. (Building Materials Corp. of America)* (2014) 227 Cal.App.4th 226, 241 (stating that "[a]s damages are an element

of a breach of contract cause of action [citation], a plaintiff cannot obtain judgment on a breach of contract cause of action in an amount of damages to be determined later").) Additionally, as stated above, Campagna does not present admissible evidence or a material fact that Fitzsimmons and Pastore's concerns were untruthful, intended to cause harm to Campagna, were in bad faith, or were otherwise sought to obtain an advantage in the company affairs. Accordingly, Campagna's motion for summary adjudication of the second cause of action of his complaint for breach of the implied covenant of good faith and fair dealing is DENIED.

Cross-defendant's burden on summary judgment/adjudication of the XC

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Campagna fails to meet his initial burden to demonstrate that Fitzsimmons and Pastore cannot demonstrate a breach of the Operating Agreement as to the XC's first cause of action.

The XC alleges that Campagna breached the Operating Agreement by establishing a reserve/rainy day account without meeting or having the votes required by the Operating Agreement, and for speaking on behalf of FJP and unilaterally deciding that Pastore's proposal for a rent reduction for NP would be denied. (See XC, ¶ 25.) Fitzsimmons and Pastore allege that Campagna breached the Operating Agreement terms that require Campagna to: act in the highest good faith to other members, refrain from seeking an advantage in the company against Fitzsimmons and Pastore, unilaterally attempting to control the company without notice, meetings or voting despite being a minority member, and jeopardizing the financial liability of the company during the COVID-19 pandemic where two of the three tenants on the premises

were not paying rent and the third was in financial distress and reasonably requesting a short-term rent reduction. (See XC, ¶ 26.)

Campagna argues that Fitzsimmons and Pastore cannot establish the first cause of action because: "Defendants cannot show that Plaintiff breached the Operating Agreement."

The Operating Agreement provides for the operation of FJP, and provides for special meetings so as to vote on certain issues as called by a member. (See Campagna decl., exh. A ("Operating Agreement"), § 10.02.) The quorum and voting procedures are described within the Operating Agreement. (See Operating Agreement, §§ 10.02-10.05-11.01-11.03.) An action may be taken without a meeting if all the members sign a written approval of that action. (See Operating Agreement, § 12.01.) All available cash of FJP is required to be distributed at the end of each calendar year to the members, pro rata, in accordance with their percentage interests, except to a reasonable working capital reserve in an amount to be determined by the members, either by vote or by unanimous written approval. (See Operating Agreement, §§ 10.02, 12.01, 13.02.) A member has the power to do business with FJP at any time, provided that the transaction is fair and equitable to FJP, in FJP's best interest, and in accordance with any fiduciary duties. (See Operating Agreement, §14.02.) This includes the power to lease property from FJP at fair market value. (*Id*.)

Here, Campagna asserts that he has not breached the Operating Agreement; however, he agreed to FJP's operation, but now refuses to accept certain decisions voted on by a majority of the members, resulting in chaos in FJP's operation, and makes decisions without approval from the other members, outside the requirements of the Operating Agreement. With regards to the reserve, for example, the Operating Agreement requires that the amount is to be determined by either a special meeting or by written approval of all members. Campagna fails to provide any evidence that either he either called a special meeting to vote on the determination of a rainy day reserve amount, the issue was voted upon at a special meeting, or the written approval of the amount of the capital reserve by all members. Campagna presents Fitzsimmons' response to form interrogatory 17.1, indicating that prior to COVID-19, he deferred to Campagna's point of view, but in 2020, he believed that the rainy day was here and the reserved needed to be used. (See UMF 112.) Not only did Fitzsimmons fail to provide written approval of the amount of a rainy day reserve, but Fitzsimmons also repudiated any approval and there was no evidence of any written (or oral) approval by Pastore. As such, Campagna fails to meet its initial burden to demonstrate that he did not breach the Operating Agreement. Campagna also argues that "maintaining a reserve in the company operating account, as a matter of law, does not amount to self-dealing." (Pl.'s memo, p.17:20-24.) However, whether Campagna's actions can be considered self-dealing is immaterial; at issue is whether Campagna's actions are in violation of the Operating Agreement and Campagna has failed to present admissible evidence demonstrating he acted in accordance with the Operating Agreement.

Campagna also argues that "Defendants… acted in conflict with their obligations to Plaintiff and the company and reduced their own rent over Plaintiff's objections, and… depleted FJP's operating account by reducing scheduled lease payments…." (Pl.'s memo, p.19:11-13.) Here, it appears that Campagna assumes that Fitzsimmons and Pastore conspired with each other to breach certain contractual obligations owed to Campagna. However, Campagna presents no evidence that establishes that Fitzsimmons and Pastore entered into an agreement to commit wrongful acts against him such that two minority owners of FJP might

act in concert to deprive Campagna of the benefits of the Operating Agreement. (See *Kidron v. Movie Acquisition Corp*. (1995) 40 Cal.App.4th 1571, 1582 (stating that "the basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act… [c]onspiracies cannot be established by suspicions… [t]here must be some evidence… [m]ere association does not make a conspiracy").) Therefore, Campagna also fails to meet his initial burden to demonstrate that Fitzsimmons and Pastore acted in conflict with their contractual obligations to Plaintiff and the company.

Campagna's motion for summary adjudication of the first cause of action of the XC is DENIED.

Campagna fails to meet his initial burden to demonstrate that Fitzsimmons and Pastore cannot demonstrate a breach of the covenant of good faith and fair dealing as to the XC's second cause of action.

Campagna argues that "as set forth more fully above, Defendants do not and cannot allege that maintaining a rainy day/reserve fund for the company is a breach of the covenant of good faith and fair dealing." (Pl.'s memo, p.20:18-20.) However, as stated above with respect to the first cause of action, Campagna failed to meet his initial burden to present admissible evidence demonstrating he acted in accordance with the Operating Agreement. Accordingly, as with the motion for summary adjudication of the first cause of action of the XC, Campagna's motion for summary adjudication of the second cause of action of the XC is likewise DENIED.

Campagna fails to meet his initial burden to demonstrate that Fitzsimmons and Pastore cannot demonstrate a breach of the fiduciary duty as to the XC's third cause of action.

Campagna argues that, as with the prior two causes of action of the XC, Fitzsimmons and Pastore cannot demonstrate a breach of any fiduciary duty because "responsible stewardship of the company by objection to lease reductions (and alternatively suggesting deferral), and requiring NP, LLC to pay, as provided under its written lease, as a matter of law does not breach any fiduciary duty to Defendants." (Pl.'s memo, p.21:6-17.) However, a majority of the members voted to modify the term of NP's lease, pursuant to the terms of the Operating Agreement. Campagna does not address whether "requiring NP, LLC to pay, as provided under its written lease," refusing to accept the modified terms, "as a matter of law does not breach any fiduciary duty to Defendants." Campagna actually fails to provide any case authority to support his position. Further, Campagna cites to facts, including the capital calls in 2022 and 2023 that are outside the scope of the allegations of the XC. (See *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 536 (stating that "[o]n summary judgment motions, the pleadings always define the issues"); see also *Lewis v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 690, 694 (stating that "[w]e first review the complaint, because the pleadings define the issues addressed in a summary judgment motion"). Campagna fails to meet his initial burden with respect to the third cause of action of the XC; Campagna's motion for summary adjudication of the third cause of action of the XC is also DENIED.

Campagna demonstrates that the fourth cause of action for accounting lacks merit; Fitzsimmons and Pastore fail to demonstrate the existence of a triable issue of material fact.

"A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) "An action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation." (*Id*.) "A plaintiff need not state facts that are peculiarly within the knowledge of the opposing party." (*Id*.)

Campagna argues that while the XC alleges that "PASTORE and FITZSIMMONS are unable to determine the amounts received and disbursed by Cross-Defendant CAMPAGNA without an accounting of the transactions" (FAC, ¶ 46), "in this case, there is a single checking account for FJP… [a]ll three managing members are signatories to the bank account and have the ability to access the account online… [n]o member is excluded from access to the company records and accounts… [and t]he members use a third-party bookkeeping service, and they have CPA Lou Rodriguez, Pastore's CPA, to prepare the tax returns which all members authorize for e-filing." (Pl.'s memo, p.22:7-17; see also UMFs 210-214.) These indeed are facts that demonstrate that there does not appear to be a relationship between the parties that requires an accounting or that some balance is due to Fitzsimmons and Pastore that can only be ascertained by an accounting. Thus, Campagna meets his initial burden to demonstrate that the fourth cause of action of the XC for accounting lacks merit.

In opposition, Pastore and Fitzsimmons do not appear to make any argument as to the fourth cause of action of the XC. In their opposing separate statement, they do not dispute that there is a single checking account for FJP or that all three managing members are signatures to the account and have online access, but clarify that Campagna "has always had the FJP checkbook and has always written all of the checks." (See UMFs 115, 117, 210, 212; see also Pastore and Fitzsimmons' additional material fact, no. ("AMF") 226.) However, it is unclear why this fact could possibly alter the relationship between parties such that it would require an accounting. As Pastore and Fitzsimmons do not make any argument or cite to any case authority supporting the relevance of the clarification, they fail to demonstrate the existence of a triable issue of material fact as to the fourth cause of action of the XC for accounting.

Campagna's motion for summary adjudication of the fourth cause of action of the XC for accounting is GRANTED.

Campagna made 124 objections to evidence submitted by Pastore and Fitzsimmons. As Campagna failed to meet his initial burden with respect to each of the causes of action except as to the fourth cause of action of the XC for accounting, the Court did not rely on any of the evidence submitted by Pastore and Fitzsimmons in ruling on those causes of action. As to the fourth cause of action of the XC for accounting, the evidence submitted by Pastore and Fitzsimmons that demonstrate that that Campagna "has always had the FJP checkbook and has always written all of the checks," Campagna did not object to this evidence. Accordingly, the Court declines to rule on Campagna's objections to evidence.

CONCLUSION

Campagna's motion for summary judgment, and his alternative motion for summary adjudication of the first through third causes of action of his complaint are DENIED.

Campagna's motion for summary adjudication of the first through third causes of action of the XC is DENIED.

Campagna's motion for summary adjudication of the fourth cause of action of the XC for accounting is GRANTED.

As the Court did not consider the evidence submitted by Pastore and Fitzsimmons and objected to by Campagna, the Court declines to rule on Campagna's objections to evidence.

The Court shall prepare the Order.

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Calendar Lines 5-8 (and Line 4 on the 10/19 Calendar)
Case Name: *Creditors Adjustment Bureau, Inc. v. Sarji, et al.*
Case No.: 21CV384411

I. Background

Plaintiff Creditors Adjustment Bureau, Inc. ("Plaintiff") filed its complaint on June 17, 2021 against defendants Hayden Sarji ("H. Sarji"); Roxana Sarji ("R. Sarji"); and Venice Tile & Marble Inc. ("Entity Defendant")(collectively, "Defendants"), after Defendants became indebted to Plaintiff's assignor, State Compensation Insurance Fund ("SCIF") for $133,744.39 due on insurance premiums earned by SCIF.

On May 30, 2023, Plaintiff filed four motions to compel further discovery responses from H. Sarji, R. Sarji, and Entity Defendant. Defendants opposed the motions.

II. Preliminary Matters

a. Motions to Compel Against Individual Defendants

On October 11, 2023, Plaintiff withdrew its motions to compel further responses to requests for document production against individual defendants H. Sarji and R. Sarji. Accordingly, the Court will not address these two motions or the untimely opposition filed by H. Sarji and R. Sarji's new counsel.

b. Untimely Oppositions After Substitution of Counsel

The Court acknowledges that Entity Defendant filed a substitution of attorney and a subsequent opposition to the motion to compel on October 11, 2023. However, oppositions to the motions to compel were due by October 4, 2023. Further, Entity Defendant failed to appear at the OSC to appoint corporate counsel on September 26, 2023. (See Minute Order, September 26, 2023.) Finally, Entity Defendant's former counsel filed substantive oppositions to the motions. For these reasons, the Court exercises its discretion and declines to consider Entity Defendant's untimely filed opposition. (See *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765 [trial court has "broad discretion" to refuse to consider papers served and filed beyond the deadline].)

c. October 19, 2023 Motion to Compel

As the Court's ruling on Plaintiff's motion to compel further responses to special interrogatories against Entity Defendant, relies on the same arguments, and results in the same outcome as the October 17, 2023 motion to compel further responses to document requests against Entity Defendant, the Court has advanced the motion to the October 17, 2023 Calendar. As such, the Court will additionally address the October 19 Motion to Compel below.

d. Meet and Confer Efforts

A motion to compel further discovery responses must be accompanied by a meet and confer declaration pursuant to Code of Civil Procedure section 2016.040. (Code Civ. Proc., § 2031.310, subd. (b)(2) [document requests]; Code Civ. Proc., § 2030.300, subd. (b)(1) [interrogatories].) Section 2016.040 requires a moving party to make a "reasonable and good

faith attempt at an informal resolution of each issue presented by the motion." A determination of whether an attempt at informal resolution was adequate depends upon the particular circumstances and involves the exercise of discretion. (See *Obregon v. Superior Ct*. (1998) 67 Cal.App.4th 424, 431; see also *Stewart v. Colonial Western Agency, Inc*. (2001) 87 Cal.App.4th 1006, 1016 [meet and confer rule is designed to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order].)

Given the emails sent by Plaintiff's Counsel, and given Defense Counsel's subsequent responses, although not detailed, the Court finds the parties sufficiently met and conferred before the filing of this motion.

III. Motion to Compel – RPDs

A party failing to timely respond to RPDs effectively waives any objection to that demand, including objections based on privilege or work product. (Code Civ. Proc., § 2031.300, subd. (a); *Korea Data Sys. Co. v. Superior Ct.* (1997) 51 Cal.App.4th 1513, 1517.) Similarly, untimely supplemental responses need not be considered by the Court. (See *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 409 (*Sinaiko*).) If the requests are served by mail, responses to the requests for production are due within 30 days. (Code Civ. Proc., § 2031.260, subd. (a).) If a request is served by mail within California, a party has an additional 5 calendar days to respond. (Code Civ. Proc., § 1013, subd. (a).)

"The trial court may relieve the party of its waiver, but that party must first demonstrate [on motion] that (a) it subsequently served a response to the demand; (b) its response 'is in substantial compliance' with the statutory provisions governing the form and content of the response; and (c) '[t]he party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.'" (*Sinaiko, supra,* 148 Cal.App.4th at p. 404.)

Here, Plaintiff served Entity Defendant by mail on January 13, 2023. (See Brown Decl., ¶ 2 and Ex. 2, Proof of Service, p. 7.) Entity Defendant's responses to these requests were therefore due on February 17, 2023. According to Entity Defendant's proof of service, the responses were not served until March 10, 2023. (See Brown Decl., Ex. 2, Proof of Service, p. 10.) It appears the parties agreed to a deadline extension for supplemental responses, due by May 2, 2023. (See Brown Decl., Ex. 4.) Entity Defendant did not timely respond by May 2, 2023. (See Brown Decl., Ex. 5 ["Supplemental discovery responses were due on May 2, 2023. We have received nothing to date"].) Entity Defendant has not filed a motion for relief from waiver. (Code Civ. Proc., § 2031.300, subd. (a) ["The court, on motion, may relieve that party from this waiver on its determination that [two] . . . conditions are satisfied"].) Thus, Entity Defendant's responses are untimely and subsequently waived.

Based on the foregoing, Plaintiff's motion to compel further responses to RPDs is GRANTED.

IV. Motion to Compel – SIs

Plaintiff moves to compel further responses to SI Nos. 1 and 6. Pursuant to Code of Civil Procedure section 2030.290, subdivision (a), "[i]f a party to whom interrogatories are directed fails to serve a timely response" the party "waives any right to exercise the option to produce writings under Section 2030.230, as well as any objection to the interrogatories,

including one based on privilege or on the protection for work product[.]" (Code Civ. Proc., § 2030.290, subd. (a); see also *Sinaiko*, *supra*, 148 Cal.App.4th at p. 408 ["If a party fails to serve a timely response to interrogatories, then by operation of law, all objections that it could assert to those interrogatories are waived"].)

Similar to above, Entity Defendant's responses to the SIs are likewise untimely. Again, Entity Defendant has not filed a motion for relief from waiver. Accordingly, Entity Defendant's objections are waived.

As such, Plaintiff's motion to compel further responses to SIs is GRANTED.

V. Monetary Sanctions

a. Motion to Compel RPDs

The Court shall impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to a demand or interrogatory, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Code Civ. Proc., § 2031.310, subd. (h); Code Civ. Proc., § 2030.300, subd. (d).)

Plaintiff has made a request for monetary sanctions against Entity Defendant and its former counsel. In this case, the Court agrees Plaintiff is entitled to monetary sanctions against Entity Defendant. However, the Court declines to award monetary sanctions against Defense Counsel. Former counsel for Entity Defendant, Peter Rasla ("Mr. Rasla") indicates he responded to the RPDs based on information he received from his client, Entity Defendant, at the time. (Rasla Decl., ¶¶ 8-10). Additionally, he made several, good faith attempts at avoiding a discovery dispute, including: advising Entity Defendant to respond to the requests (Opp., ¶ 28); attempting on numerous occasions to get in touch with Entity Defendant and asking for their compliance (Opp., ¶¶ 10, 29; see also Rasla Decl., ¶¶ 9, 14); and subsequently determining he could not continue to represent Entity Defendant and submitting a motion to withdraw on May 5, 2023 (Opp., ¶ 30; see also Rasla Decl., ¶ 15).[5] Moreover, Plaintiff concedes that Mr. Rasla "cannot help that there has been a 'breakdown of the attorney-client relationship[.]'" (Plaintiff's Memo, p. 6:4-5.) As such, sanctions against Mr. Rasla would be unjust under the circumstances.

Plaintiff seeks a total of $4,000 in monetary sanctions for 4 hours preparing the motion, as well as an anticipated 4 hours reviewing the opposition and drafting a reply. Plaintiff's Counsel bills at $500 an hour. The Court, however, does not award anticipated expenses. (See *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1551 [the court awards sanctions only for expenses actually incurred, not for anticipated expenses].)

Accordingly, the Court awards $2,000 to Plaintiff (4 hours on the motion x $500/hour). Entity Defendant shall pay $2,000 to Plaintiff's counsel within 30 calendar days of this Order.

b. Motion to Compel SIs

Plaintiff seeks a total of $4,000 in monetary sanctions for 4 hours preparing the motion, as well as an anticipated 4 hours reviewing the opposition and drafting a reply. Plaintiff's

[5] This Court granted Mr. Rasla's motion to be relieved as attorney for Defendants on September 29, 2023.

Counsel bills at $500 an hour. As stated above, the Court does not award anticipated expenses. Further, the Court finds the amount requested to be excessive as Plaintiff only moves to compel further responses to two SIs and the reasons for a further response to both are the same. Moreover, as the Opposition notes, Plaintiff misstates Entity Defendant's response to SI Nos. 1 and 6, in violation of California Rules of Court, Rule 3.1345, subdivision (c). (See also *Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894 [deficient separate statement provides ground to deny motion to compel further responses].)

As such, the Court awards $500 to Plaintiff. Entity Defendant shall pay $500 to Plaintiff's Counsel within 30 calendar days of this Order.

VI. Conclusion and Order

Based on the foregoing, the motions to compel are GRANTED. Entity Defendant shall serve verified, code-compliant further responses, without objections, and produce all non-privileged responsive documents within 30 calendar days of this Order.

The requests for monetary sanctions are GRANTED, in part. Entity Defendant shall pay $2,500 to Plaintiff's Counsel within 30 calendar days of this Order.

Plaintiff shall prepare the final Order.

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Calendar lines 11-15
Case Name: First Century Plaza v. Sorrento Pavilion, LLC et al.
Case No.: 2009-1-CV153711

This case comes before this Court on three claims. First, Defendant Teri Ha Nguyen ("Defendant") moves to recall and quash the writ of execution and levy for lack of service and for lack of proper notice as to the property being levied upon. Second, First Century Plaza ("Plaintiff") seeks a determination on third-party claimant Justin Nguyen's ("Justin"[6]) claim that he owns the property in the safe deposit box. Third, Justin object's to Plaintiff's undertaking. Justin also moves to join in Defendant's motion to quash and evidentiary objections.

Request for Judicial Notice

Defendant requests judicial notice of the Second Amended Complaint (A), the docket in this case (B), the proof of service for the Application for Renewal of Judgment (C), the Notice of Levy (D), the Memorandum of Garnishee (E), and the Plaintiff's Undertaking (F). The request is granted as to Exhibits A-C as records of the court. The Request is granted as to D-F as they are facts not in dispute and relied on by Plaintiff as well as Defendant.

Evidentiary Objections

Defendant objects to portions of the Declaration of Sugarmen. See Filing of 6/27/23. Objections 1, 2, 4, and 5 are sustained for lack of foundation and/or hearsay. Objection 3 is overruled, although the court did not rely on this fact in rendering its decision. Justin's joinder in the objections is granted.

Facts

On September 1, 2011, judgment was entered against Defendants Vinh Nguyen and Teri Ha Nguyen in favor of Plaintiff. The judgment for $1,813,468.22 was renewed on August 23, 2021 and notice of the renewal of judgment was served on July 26, 2022. On October 18, 2022, Plaintiff obtained a Writ of Execution. Decl. of Sugarman, Ex 13. Pursuant to the writ, a Notice of Levy was served on Comerica Bank on October 20, 2022, describing the property to be levied upon as "All monies, stocks including but not limited to certificate, mutual funds in account held in the name of Judgment Debtor Teri Ha Nguyen. SS# xxx-xx-5122.". Decl. of Teri Ha Nguyen, Ex. C. On October 24, 2022, garnishee Comerica Bank served a Memorandum of Garnishee which identified safe deposit box 0067 as property of Defendant that had not been levied upon but was in possession of the bank. Decl. of Sugarman, Ex. 4.

On March 16, 2023, the Santa Clara County Sheriff's Office served a notice of third party claim in which Defendant's son, Justin Nguyen, claimed that the property in the safe deposit box belongs to him. Decl. of Sugarman, Ex. 7. On March 30, 2023, Plaintiff filed an undertaking with the Sheriff's Office for $10,000. Decl. of Sugarman, Ex. 15.

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[6] Justin Nguyen is referred to by his first name to distinguish him from Defendants Teri Ha Nguyen and Vinh D. Nguyen. No disrespect is intended.

On April 3, 2023, Justin filed a Motion re Third-Party Claimant's Objection to Undertaking. On April 14, 2023, Plaintiff filed his Opposition to Third Party Claim of Ownership Filed by Their Party Claimant Justin Nguyen. On June 27, 2023, Defendant filed her Motion for an Order Recalling and Quashing the Writ of Execution and Levy Obtained by Plaintiff. Justin filed a claim of exemption with the Court on July 26, 2023.

Motion to Recall and Quash the Writ of Execution and Levy

Defendant Teri Nguyen claims that the writ of execution and levy obtained must be recalled and quashed due to lack of proper service. In deciding whether service is valid, the statutory provisions regarding service of process are to be liberally construed in favor of finding service proper. *Dill v. Berquist Construction Co.* (1994) 24 Cal. App. 4th 1426, 1436-1437. Where there is actual notice, "substantial compliance is sufficient." *Id*.

Defendant claims she never received notice of the writ of execution or notice of levy. Dec. of Teri Nguyen, ¶¶ 2, 4. 6. Defendant claims she no longer lived at the address where the notices were mailed in Saratoga, and that Plaintiff was aware it was not her current address. *Id*., ¶7. Defendant further claims that to effectuate proper service of these documents, Plaintiff was required to serve her in the same manner as a summons, citing CCP §§ 684.020(a) and 684.110(a)(1). As such, service was required to be done by personal service (§ 415.10), substitute service (§ 415.20), service by mail coupled with the party's written acknowledgment of receipt (§ 415.30), or by publication (§ 415.50).

Plaintiff claims that lack of service is not a legal basis to quash or recall a writ of execution and related notice of levy issued upon a valid judgment. Defendant cites no cases indicating that improper service of the writ of execution upon the judgment debtor is sufficient to quash or recall the writ. Citing CCP § 699.550, Plaintiff also states "even a complete failure to serve a writ of execution or notice of levy does not render them or the lien created by the execution levy invalid or ineffective." Opp. at p6. But § 699.550 states "[i]n any case where property has been levied upon and, pursuant to a levy, a copy of the writ of execution and a notice of levy are required by statute to be posted or to be served on or mailed to the judgment debtor or other person, failure to post, serve, or mail the copy of the writ and the notice does not affect the execution lien created by the levy. Failure to serve on or mail to the judgment debtor a list of exemptions does not affect the execution lien created by the levy." As stated in *Grover v. Bay View Bank* (2001) 87 Cal.App.4th 452, 459-60, "[t]hat section merely states that once property has been levied on, the failure to serve the *judgment debtor* with the levy papers does not affect the execution lien. It does not excuse failure to serve proper levy papers." (Emphasis in original.) The Court does not find § 699.550 to be applicable in this case.

Despite her declaration stating that she was not served with the Writ of Execution or Notice of Levy, and despite Defendant's claims that the address in Saratoga is no longer a good address for her, the facts suggest otherwise. Justin was able to timely file a third party claim to the contents of the safe deposit box and prevent the content of the safe deposit box from being turned over to Plaintiff. While Defendant may not currently live in Saratoga, the address is still owned by and used by Defendant. See Decl. of Sugarman, Exs. 11A-C (address listed as property of Defendant's husband in bankruptcy proceedings). Because service is to be construed liberally and because Defendant has not been prejudiced by any deficiency in process, the motion to quash or recall the writ of execution or notice of levy on this basis is DENIED.

Defendant next claims that the Notice of Levy must be quashed because it was for "monies, stocks including but not limited to certificate, mutual funds in account held in the name of Judgment Debtor Teri Ha Nguyen," and did not specifically include safe deposit box or the contents of any safe deposit box. Yet, Comerica Bank in response to the Writ of Execution and Notice of Levy notified the parties that Defendant had a safe deposit box at the bank. See Memorandum of Garnishee attached as Ex. 14 to Decl. of Sugarman. Construing the Notice of Levy broadly, it includes assets at Comerica and thus provided the requisite notice. Again, Plaintiff has not been prejudiced by the lack of specificity in the Notice of Levy. Plaintiff is aware that the safe deposit box's contents are at issue, her son has timely made a claim for the property, and a hearing is being held. As such, the motion to quash or recall the Writ or Notice of Levy on this basis is also DENIED.

Justin has filed a motion to join in the Defendant's motion to quash or recall, but such a motion can only be filed by a party to the action. *Vest v. Superior Court* (1956) 140 Cal.App.2d 91, 93. In any event, it is a moot issue given that the motion to quash is denied.

Determination of Third Party Claim

Justin Nguyen has filed a claim that the contents of the safe deposit box belong to him. As a third party claimant, it is his burden to show that the property belongs to him. CCP § 720.360; *Whitehouse v. Six Corp.* (1995) 40 Cal.App.4th 527, 536.

Plaintiff claims that Comerica has indicated the safe deposit box belongs to the debtor Teri Ha Nguyen. Plaintiff also asserts that Justin's claim is defective because it includes the wrong address, does not adequately or accurately describe the property in the box, and does not provide proof of ownership beyond the assertion that it is his. Plaintiff claims that based on these deficiencies, Justin's claim of ownership is not credible.

Justin filed additional evidence in opposition to Plaintiff's Petition for a Hearing to Determine a Third Party Claim. Plaintiff objects to the Court considering this evidence, citing CCP 720.350. That provision states that "[t]he third party claim constitutes the pleading of the third person." To submit more, the Court may permit an amendment in the interest of justice. Justin did not file for leave to permit an amendment. As such, the Court will not consider the declaration of Justin filed in support of response to Plaintiff's petition.

The Court believes it would be helpful to have an evidentiary hearing on the question of whether Justin owns the contents of the safe deposit box. At the hearing on Tuesday, Plaintiff, Defendant, and Justin shall appear to set a time for any further hearing, which will likely be necessary.

Undertaking

Because the issue regarding the sufficiency of the undertaking will be mooted once ownership of the contents of the box is determined, this issue will be reserved until ownership is determined.

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