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: 05-23-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 will call the cases of those who appear in person first. If you 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. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to 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. Go to the Court's website at www.scscourt.org to make the reservation.

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	23CV416455 Motion: Quash	N. Charles Podaras vs Valerie Weirauch et al	Matter continued.
LINE 2	23CV416037 Motion: Summary Judgment/Adjudication	Arthur Martinez vs City of Campbell	The matter has been dismissed.
LINE 3	21CV385612 Motion: Compel	Indradevi Joseph vs Xilinx, Inc. et al.	Parties are to come to the hearing and be prepared to discuss the issues indicated below, where a tentative ruling would normally be.
LINE 4	22CV397444 Hearing: Discovery	Swaminathan Nandakumar et al vs David Plagens et al	In light of the Court's 5/21/24 ruling denying Plaintiff's request for protective order from responding to Defendant's requests for admissions, Defendant's motion to deem the requested admissions admitted is DENIED. The request for sanctions is DENIED.
LINE 5	22CV409340 Motion: Compel	Sergey Armishev vs American Honda Motor Co., Inc.	Motion was moved to 6/18/24 based on the refiling of the motion.
LINE 6	23CV417832 Motion: Compel	Reiner Romero Vallecillo vs Nilsene Builder Inc.	See Tentative Ruling. The Court will prepare the final order.

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

LINE 7	18CV338312 Order Motion Default Judgment	Reuben Bush vs Chacho's, Inc.	This must be set for a prove-up hearing, rather than decided on the papers submitted. Date will be July 15, 2024 at 1:30 p.m.in Department 19. If counsel is not available then, counsel shall appear at the hearing to receive a different date.
LINE 8	23CV414023 Motion: Tax Cost	TEKNATIO INC vs ECONOSOFT, INC.	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 9	23CV424739 Motion: Leave to File	JPMorgan Chase Bank, N.A. vs ABHISEK ROY	See Tentative Ruling. The Court will issue the final order.
LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 3
Case Name: Joseph v. Xilinx
Case No.: 21CV385612

The Court asks the Parties to come to the hearing to discuss the following issues:

1. The Court is inclined to think that the motion is timely under 2031.310(c) and should have been filed no later than 45 days from July 18, 2024, yet wonders whether the Court has discretion to consider the motion given that the parties continued to meet and confer regarding the discovery until March 1, 2024, and the motion was filed within 45 days of that date. Please provide any case law regarding discretion;

2. The Court fails to see how Mr. Segers' testimony that Ms. Hagopian told him a study had been done and that it included more than the marketing department is a waiver of all communications relating to the study. First, isn't this information already known to parties outside the privilege, including Plaintiff? How is this even confidential information? It further seems that none of the other information stated in the deposition by Mr. Segers is attributable to information he obtained from Counsel. Mr. Segers was not asked and did not testify as to the source of his knowledge for the remaining testimony, so the Court fails to see how his testimony could constitute a waiver of the attorney-client privilege.

3. As to Mr. Peng's testimony, he stated that in a meeting with Counsel, Ms. Hagopain, and with Ms. Meyer, he was told that the study showed no significant pay differential by gender and that to the extent there were differences, there was a reason for them. How is this not a waiver of attorney-client information at least as to counsel's analysis of the results of the study and as to the reasons for any differences? Counsel for Xilinx was at the deposition and did not object, and Mr. Peng was Xilinx's CEO and continues as AMD's President and he was told this information by Xilinx's then-counsel. If the claim is that the information was told to him by the HR executive, then it would not be subject to the A-C privilege.

4. Is Xilinx refusing to turn over the pay equity analysis done in response to Plaintiff's complaint, claiming it is privileged? How can this be justified given that at least some version of the report has been turned over (see depo of Mr. Peng) and given that Mr. Peng testified that the report was a factor in the termination of Plaintiff?

5. Finally, is it sufficient for Plaintiff to put in the notice and first sentence of her motion that she seeks any analysis undertaken regarding pay inequities, when her entire motion speaks only about communications of counsel and her separate statement also only refers to communications?

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Calendar Line 6
Case Name: *Reiner Romero Vallecillo vs. Nilsene Builder Inc., et al.*
Case No.: 23CV417832

Currently before the Court is Nilsene Builder, Inc.'s ("Defendant") motion to compel further responses to form and special interrogatories.

FACTUAL AND PROCEDURAL BACKGROUND

This is a wrongful termination and retaliation action, among other things. Reiner Romero Vallecillo ("Plaintiff") was employed by Defendant as a tile installer and laborer from approximately March 30, 2018, until Plaintiff was terminated on June 20, 2020. (First Amended Complaint ("FAC,") ¶ 15.) On June 19, 2019, while performing his work-related duties, including cutting tile, Plaintiff injured his left thumb. (FAC, ¶ 23.) The next day, Plaintiff informed Defendant about his work-related injury. (*Ibid.*) Defendant's owner told Plaintiff that he could not report to work with his injuries. (*Ibid.*) A year later, on June 20, 2020, Defendant informed Plaintiff that he could not work with his injury and terminated Plaintiff's employment. (*Ibid.*) During this time, Defendant failed to engage in an interactive process with Plaintiff to explore reasonable accommodations for his injury-related disability. (*Ibid.*) Throughout his employment period, Plaintiff was obligated to appear at the jobsite, but was not reimbursed for his commute or essential travel. (FAC, ¶ 16.) Plaintiff also worked 40 to 60 hours per week with no overtime premium. (FAC, ¶ 17.) Additionally, Plaintiff did not receive required meal and rest periods. (FAC, ¶¶ 18-19, 30, 34.) Finally, Defendant "misclassified" Plaintiff as an independent contractor to allegedly evade various protections owed to Plaintiff, including the duty to indemnify employees and to pay the minimum wage, among other protections. (FAC, ¶ 20-23.)

Plaintiff filed his initial complaint in this action on June 20, 2023. He filed an amended complaint three months later on September 25, 2023, asserting 14 causes of actions relating to various California Labor Codes.

On September 4, 2023, Defendant served its form interrogatories ("FI,") set one, special interrogatories ("SI,") set one, requests for admissions, set one, and requests for production, set one, on Plaintiff. The parties agreed to several extensions of time for amendment of responses. Despite multiple deadline extensions, Defendant claims Plaintiff has not provided complete responses to certain FIs and one SI. Defendant's motion was filed on January 29, 2024. Plaintiff opposes the motion and Defendant has filed a reply.

DISCUSSION

I. Preliminary Matters

A. Meet and Confer

A motion to compel further responses to interrogatories must be accompanied by a meet and confer declaration under section 2016.040. (Code Civ, Proc., §§ 2030.300, subd. (b).) "A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (Code Civ. Proc., § 2016.040.) A reasonable and good faith attempt at informal resolution requires that the parties present the merits of their respective positions with candor, specificity, and

support. (*Townsend v. Super. Ct.* (1998) 61 Cal.App.4th 1431, 1435, 1439.) The level of effort at informal resolution which satisfies the "reasonable and good faith attempt" standard depends upon the circumstances of the case. (*Obregon v. Super. Ct.* (1998) 67 Cal.App.4th 424, 431.)

Here, Defendant filed a meet and confer declaration with respect to the motion evidencing sufficient meet and confer efforts on its part. Any further meet and confer efforts would be fruitless.

II. Analysis

A. Legal Standard

A responding party must provide non-evasive answers to interrogatories that are "as complete and straightforward…to the extent possible," and, if after a reasonable and good faith effort to obtain the information they still cannot respond fully to an interrogatory, the responding party must so state in its response. (Code Civ, Proc., § 2030.220.) If the responding party provides incomplete or evasive answers, or objections without merit, the propounding party's remedy is to seek a court order compelling a further response to the interrogatories. (Code Civ, Proc., § 2030.300.)

B. Merits of the Motion

1. FI (Set One) No. 2.6

Here, Defendant seeks further responses to FI No. 2.6.

The FI No. 2.6 seeks the following information from Plaintiff: the name, address, and telephone number of your present employer or place of self-employment; the name, address, dates of employment, job title, and nature of work for each employer or self-employment Plaintiff has had from five years before the incident until today.

Plaintiff prefaced his discovery responses to this request with a "general objections" section asserting various boilerplate objections (right to privacy, unduly burdensome, attorney-client privilege or attorney work product doctrine, lack of relevance, trade secrets, and premature discovery.) Plaintiff ultimately provided a third amended substantive response to FI No. 2.6:

> After diligent search and reasonable inquiry concerning the matter in this particular request, and to the beset [sic] of Plaintiff's recollection, Plaintiff worked as a self-employed tile installer, with an individual whose name Plaintiff cannot recall, from approximately 2/2015 until approximately late 2017. Plaintiff worked as a self-employed tile installer, from late 2017 until approximately 3/30/2018 for someone named Byron Lanza Elvir. Plaintiff does not recall any of the addresses he worked at during 2015 through 2018 prior to working for Nilsene Builder Inc. Plaintiff began work for Moe on or about 3/30/2018 as a construction worker, installing tiles and repairing broken tiles, spreading tile adhesive, grouting tile lines, and installing other materials necessary to complete the tile installation project and for Moe until on or about June 20, 2020 when Plaintiff was fired by Moe. Plaintiff

> remembers working at the Bret Avenue and Newsome Avenue properties in Cupertino for Nilsene Builder Inc., but cannot remember any of the other addresses.

(See Separate Statement of Disputed Items in Support of Motion by Defendant to Compel Further Responses from Plaintiff to Interrogatories, and Request for Monetary Sanction (Def. Sep. Stat.,) p. 5:5-16.)

As a general matter, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010.) When responding to an interrogatory, each answer must be as complete and straightforward as the information reasonably available to the responding party permits. (See Code Civ. Proc. § 2030.220, subd. (a).) If the responding party lacks sufficient knowledge to respond to an interrogatory, it shall so state "but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." (Code Civ. Proc. § 2030.220, subd. (c).)

Defendant is seeking an objection-free response. As Plaintiff has failed to justify his prefatory "general objections," Defendant is entitled to same. (See *Coy v. Super. Ct.* (1962) 58 Cal.2d 210, 220-221 [If a timely motion to compel a further response to a discovery request has been filed, the burden is on the responding party to justify any objections or failure to fully answer.]; *Fairmont Ins. Co. v. Super. Ct.* (2000) 22 Cal.4th 245, 255 [same].) However, the boilerplate objections are sufficient to preserve the attorney client and work product privilege objections. (See *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1129 ["a responding party preserves its objections based on the attorney-client privilege and work product doctrine by serving a timely written response asserting those objections. It is irrelevant that the objections are asserted as part of a generic or boilerplate response, or that the responding party failed to serve a timely and proper privilege log. Once the objections are timely asserted, the trial court may not deem them waived based on any deficiency in the response or privilege log. [Citations.] Nor may the court overrule the objections unless it receives sufficient information to decide whether they have merit. [Citations.] Instead, the court is limited to ordering further responses and imposing sanctions if the responding party acted without substantial justification in providing a deficient response or privilege log. [Citations.]"].) As Defendant notes in its reply, Plaintiff fails to address the objections in his opposition. (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].) Consequently, the Court will deem Plaintiff's silence as a concession except as to attorney-client privilege and work product objections.

Defendant maintains that a further response to FI No. 2.6 is warranted because Plaintiff's current amended response is evasive and incomplete in that it does not contain full addresses and provides no description regarding Plaintiff's job as a tile installer. (Def. Sep. Stat., p. 6:10-24; Memorandum of Points and Authorities in Support of Motion by Defendant to Compel Further Responses from Plaintiff to Interrogatories, and for Monetary Sanctions ("MPA,") p. 3:17-23.) In opposition, Plaintiff contends that he was misclassified as an independent contractor, and thus, he was never provided with any documents to verify an

employment address or contact information. Plaintiff also contends he made good faith attempts to retrieve the accurate addresses by reaching out to the Defendant, but to no avail. (See Plaintiff's Opposition to MPA ("Opp.,") p. 4:11-18.) Finally, Plaintiff asserts he adequately described his job as tile installer in the amended response. (*Ibid.*) The interrogatory clearly requests Plaintiff to provide his current employer's information and employment information and addresses *for the past five years* before the INCIDENT.[1] But, his response is devoid of both an address and contact information during the requested timeframes. As Defendant notes in its reply, this information is reasonably available to Plaintiff. (Reply to Opp. ("Reply,") p. 3:10-14.) Thus, Plaintiff's response is incomplete because it does not include addresses and contact information of his employers for the past five years before the incident. However, Plaintiff's response as to the nature of his work as a tile installer is adequate.

Accordingly, Defendant's request for further responses of FI No. 2.6 is GRANTED, in part. Plaintiff shall provide the following information to Defendant's counsel within 30 calendar days of the Court's final order: 1) the street address, including the city, state, and zip code, for each employer (or self-employment) Plaintiff has had from five years before the INCIDENT, 2) the street address, including the city, state, and zip code of his present employer or place of self-employment, and 3) the street address, including the city, state, and zip code, while employed by Defendant.

2. FI No. 8.4 and SI No. 1

FI No. 8.4 seeks Plaintiff's monthly income at the time of the incident and how the amount was calculated.

Plaintiff's third amended substantive response to FI No. 8.4, states:

> After diligent search and reasonable inquiry concerning the matter in this particular request, Plaintiff's monthly income varied every month as Defendant paid plaintiff per each project assigned to plaintiff. Approximately $6,000 -- $13,000 per month was paid to Plaintiff. As such, and after reasonable inquiry concerning the matter in this particular request, Plaintiff is unable to definitively state an exact amount of monthly income because it varied every month. Plaintiff only worked for Nilsene Builder, Inc. at the time of the incident, and had no other source of income. Plaintiff has no physical records or other documents related to the cash payments Nilsene Builder Inc. provided for work that Plaintiff performed for Nilsene Builder Inc.

(Def. Sep. Stat., p. 7:21-28.)

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[1] The form interrogatories define INCIDENT as including "the circumstances and events surrounding the alleged accident, injury, or other occurrence or breach of contract giving rise to this action or proceeding."

SI No. 1[2] requests a list of "all money that plaintiff Reiner Josue Romero Vallecillo received from defendant Nilsene Builder Inc. by date, amount, and form of payment (cash, check, electronic deposit, other)."

Plaintiff provided a third amended substantive response to SI No. 1, as follows:

> After diligent search and reasonable inquiry concerning the matter in this particular request, and to the best of Plaintiff's recollection, the money that Plaintiff received from Nilsene Builder, Inc. varied from month to month, but throughout his employment with Nilsene Builder, Inc., Plaintiff received approximately $6,000 -- $13,000 per month, all payments made in cash, paid on various occasions throughout his employment with Nilsene Builder, Inc. Plaintiff has no physical records or other documents related to the cash payments Nilsene Builder Inc. provided for work that Plaintiff performed for Nilsene Builder Inc.

(Def. Sep. Stat., p. 11:10-16.)

Defendant maintains that further responses to FI No. 8.4 and SI No. 1 are warranted because Plaintiff's current amended response "omits dates of payments," and the monthly income information "is extremely vague." (Def. Sep. Stat., pp. 8:22-29-9:1-4; MPA, p. 2; Reply, p. 5.) Defendant claims its request "is material because defendant disputes plaintiff's allegations that [it] employed plaintiff and that defendant paid to plaintiff any employment-based wages." (*Ibid*.) In opposition, Plaintiff argues his role as an independent contractor does not allow for a fixed monthly income, and income may vary based on a given project. (Opp., p. 5:5-24.) In its reply, Defendant contends Plaintiff's refusal to state *any* information about the number of payments he received is "blatantly evasive." (Reply, p. 5:3-9.) This Court agrees. Plaintiff has not provided an adequate explanation for his inability to provide specific dates of payment. He states that he does not have records because the payments were made in cash, but he could at least provide an estimated number of payments and their approximate dates. Plaintiff should provide a further response to clarify his monthly income at the time of the INCIDENT and how the amount was calculated.

Accordingly, Defendant's motion to compel further responses to FI No. 8.4 and SI No. 1 is GRANTED. Plaintiff shall provide the following information to Defendant's counsel within 30 calendar days of the Court's final order: an approximate number of payments received while employed by Defendant. For each payment, Plaintiff shall provide the date, the approximate dollar amount, and form of payment (cash, check, electronic deposit, other.)

C. Requests for Sanctions

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[2] Plaintiff prefaced his discovery response to this request with a "general objection" section asserting various objections (right to privacy, attorney-client privilege or attorney work product doctrine, lack of relevance, trade secrets, and beyond the scope of discovery.) As with FI No. 2.6, Plaintiff's general objections based on attorney-client privilege and work product doctrine are preserved.

In connection with the motion to compel, Defendant requests monetary sanctions in the amount of $6,777.76. (See Supplemental Declaration of David Y. Chun in Support of Motion., p. 2:13-15.)

Defendant cites section 2023.010, which describes acts constituting abuse of the discovery process and section 2023.030, which provides for sanctions as authorized by another provision of the Civil Discovery Act but does not provide its own independent basis for sanctions. (Code Civ. Proc., § 2023.030 ["To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process . . ."].)

Defendant also cites to Code of Civil Procedure section 2030.300, subdivision (d), which provides "The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories, 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."

Defendant seeks a total of $6,777.76 in monetary sanctions against Plaintiff and his counsel of record. The amount is based on 7.9 hours preparing the motion, 4.5 hours reviewing Plaintiff's opposition and drafting a reply, and an anticipated one hour to prepare for oral argument and attend the hearing. Additionally, the amount includes a $77.76 fee for filing the instant motion. Defendant's counsel bills at $500 per hour.

Defendant has made a code-compliant request for monetary sanctions and, as the prevailing party, Defendant is entitled to monetary sanctions unless Plaintiff acted with substantial justification or imposition of sanctions would be unjust. Defendant contends, among other things, that Plaintiff failed to serve "full and complete, code-compliant, verified code-compliant responses without substantial justification and in bad faith even after plaintiff's counsel engaged in reasonable and good faith meet and confer efforts." (See Defendant's Notice of Motion, p. 2:9-13.)

Here, Defendant requests an excessive amount in monetary sanctions for a motion to compel further responses involving only three discovery requests. Additionally, Plaintiff provided three separate supplemental responses. He further states he does not have the records to answer the questions fully, but he attempted to obtain the information sought. Accordingly, the Court will reduce the sanctions request. The Court will order sanctions in the amount of $1,577.76, consisting of two hours preparing the motion, and one hour drafting a reply at $500 per hour plus the $77.76 filing fee. The Court does not award anticipated expenses, and thus, fees associated with oral argument preparation are omitted from calculation. (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, Defendant's request for sanctions is GRANTED, in part. Plaintiff and his counsel of record shall pay $1,577.76 to Defendant's counsel within 30 calendar days of the Court's final order.

Plaintiff also requests monetary sanctions against Defendant under Code of Civil Procedure Sections 2023.010 and 2023.020 on grounds that Defendant misused the discovery process and failed to engage in proper meet and confer efforts. (Opp., pp. 7-8.) Given that Defendant is the prevailing party, the court does not find that it misused the discovery process. Thus, Plaintiff's request for sanctions for misuse of the discovery process is DENIED.

Plaintiff also seeks sanctions under Code of Civil Procedure section 128.5, which states, in pertinent part, "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (a).)[3]

Plaintiff's request for sanctions under Code of Civil Procedure section 128.5 is procedurally improper and will not be entertained. Section 128.5, subdivision (f)(1)(A) provides, "A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay." Here, the motion was not made in a separate document and instead is asserted in Plaintiff's opposition. Therefore, the request for sanctions under Code of Civil Procedure section 128.5 is DENIED.

The Court will prepare the final order.

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[3] " 'Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading. The mere filing of a complaint without service thereof on an opposing party does not constitute 'actions or tactics' for purposes of this section." (§ 128.5, subd. (b)(1).) " 'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party." (Code Civ. Proc., § 128.5, subd. (b)(2).)

Calendar Line 8
Case Name: Teknatio v. Econosoft
Case No.: 23CV414023

Plaintiff seeks to tax costs submitted by Econosoft. Econosoft alleges that it is the prevailing party, under CCP § 1032(a)(4), in its California suit against Plaintiff because the court dismissed the action in its favor. The Court dismissed the case because the parties had agreed that any dispute would be litigated in New Jersey. It seeks costs of $495 in filing fees, $1200 in attorney fees, and $511.24 in electronic filing fees (total of $2,206.24), plus an additional $240 in costs and $1200 in fees related to this motion, for a total of $3,464.24. (Decl. of Nahal).

Plaintiff objects arguing (1) Defendant is not the prevailing party as the case is ongoing and that the case was dismissed here on a procedural or jurisdictional ground, not on a substantive basis; and (2) in any event attorney fees under CCP 1717.5 are not allowed at this point since it has not yet been determined whether Defendant has an obligation owing on the open book account, and a defendant must not owe such an obligation to recover attorney fees under CCP § 1717.5.

Though no party cited it, the facts of this case are very similar to those in *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal. 5th 968. In that case the issue was whether a "defendant in an action arising out of contract [was] entitled to an award of attorney fees under Civil Code section 1717 (section 1717) by virtue of having obtained a dismissal from a California court on the ground that the agreement at issue contained a forum selection clause specifying the courts of another jurisdiction." *Id*. at 971. The Court held that the lower court had not abused its discretion in denying fees because the action had been refiled in the chosen jurisdiction and the parties' substantive disputes remained unresolved, such that the court could reasonably conclude neither party had yet achieved its litigation objectives. *Id*. at 971.

Here, no evidence has been presented demonstrating that Plaintiff refiled his suit in the appropriate forum. Some appellate courts have granted the awarding of fees where the case in California is dismissed on procedural grounds, but it is unknown whether the substantive case will be refiled in another jurisdiction. See *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950. In *Profit Concepts*, the appellate court held that the prevailing party determination must be made without "speculation" over "whether the plaintiff may refile the action after a motion to quash service is granted." See *DisputeSuite*, 2 Cal.5th at 978 (discussing *Profit Concepts* case). As noted by the Court in *DisputeSuite*, *Profit Concepts*' reference to "speculation" about the litigation continuing in another forum distinguishes its holding from the holding in *DisputeSuite*. *Id*.

In California, there is authority both for denying fees until the substantive case is resolved, and there is authority for granting fees where it is unknown whether the case will continue. Plaintiff argues that regardless of whether Defendant is the prevailing party at this point, attorney fees cannot be granted because fees are only available to the party who prevails on the contract and that has not yet been determined. Nor has it been determined that Defendant owes no obligation on the open book account, as is required under Civil Code § 1717.5. Plaintiff further states that there is no basis for granting fees under CCP § 1033.5(a)(10), as the contract did not include an attorney's fees provision. Defendant does not

address this and offers no authority for how he is entitled to attorney fees. His silence must be taken as an admission for purposes of this motion .

While it is not known whether this case has been or will be filed in New Jersey, this Court believes, in general, that before determining a prevailing party, the action should be fully resolved and that costs should not be apportioned piecemeal. Moreover, the Court does not believe that Defendant has shown it is entitled to attorney's fees at this point, even if it were the prevailing party. Accordingly, the Court finds that there is not yet a prevailing party, as the case has not been fully adjudicated. Should Defendant ultimately prevail, it can recover the fees and costs associated with the California part of the case at that end of the case. Should Plaintiff ultimately prevail, Defendant could seek to exclude from Plaintiff's recovery any request for fees or costs associated with the California part of the case and the New Jersey judge can decide whether those costs should or should not be excluded.

Because the case is not over, the Court finds that Defendant has not met its burden to show that is the prevailing party and GRANTS the motion to tax costs, without prejudice to either party seeking to recover its costs and fees at the end of the case and without prejudice to Defendant seeking to refile this motion should it be clear that Plaintiff is not going to file the case in another jurisdiction for adjudication of the underlying claims.

The motion to tax costs is GRANTED. Plaintiff shall submit the final order.

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Calendar line 9
Case Name: JP Morgan Chase v. Roy
Case No.: 23CV424739

Defendant Roy seeks leave to file a cross-complaint against both Plaintiff JP Morgan Chase and against Bank of America.

JP Morgan opposes the motion on multiple grounds. First, JP Morgan states that because the causes of action in the cross-complaint do not relate to the causes of action in its complaint, the cross-complaint fails to comply with the requirements of Code of Civil Procedure (CCP) § 428.10. But under section 428.10, subdivision (a), no such nexus is required. Subdivision (a) allows a party who has been sued to file "any cause of action he has against any of the parties who filed the complaint" against him. It is only subdivision (b) which requires a nexus between the causes of action in the complaint and those in the cross-complaint. Moreover, Roy may join BofA, who was not a party to the original complaint, because joinder would have been appropriate for BofA had the cross-complaint had been filed as an independent action. (§ 428.20; see 2 Cal. Civil Procedure Before Trial (Cont.Ed.Bar 4th ed. 2017) § 26.19, pp. 26-11 to 26-12.)

Next, JP Morgan alleges next that the filing of the cross-complaint is not timely and that Roy has not set out sufficient facts as to justify the late filing to show that allowing it would be in the interests of justice. In this regard, Roy's burden is quite low. CCP § 428.50(c) provides that "leave may be granted in the interest of justice at any time during the course of the action." Because Roy has sought leave of court and did so only four months after filing his answer and no trial date has even been set, the motion is GRANTED.

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