

**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: 03-12-24    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.sccscourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.sccscourt.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   |
|------------------------|---------------------------------|---|--|
| <a href="#">LINE 1</a> | 23CV424776<br>OEX               | Bickmore Building Supply, LLC<br>vs Sandie Fisher | All parties are to appear in Department 16 at 9:00 AM. If all parties appear, the Court will administer the oath and the examination will take place off-line. Judgment creditor must arrange for how that will occur. If there is no appearance by the moving party, the matter will be ordered off calendar. |
| <a href="#">LINE 2</a> | 22CV398319<br>Hearing: Demurrer | PATRICK CHIANG vs ASHLEY<br>RO et al              | See Tentative Ruling. Court will prepare final order.  |

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3.1312.)**

|   |   |   |   |
|---|---|---|---|
| <a href="#">LINE 3</a> and<br><a href="#">LINE 13</a> | 20CV367345<br>Motion: Joinder<br>And motion for<br>summary judgment | Abraham Oseguera et al vs Maria<br>Oseguera et al | <p>The motion for joinder of Defendant Jennifer Alcaraz is DENIED. A joinder to summary judgment motion that does not contain its own notice of motion and separate statement of undisputed facts does not constitute a valid summary judgment motion, and the court cannot grant summary judgment based upon such a joinder. <i>Village Nurseries, L.P. v. Greenbaum</i> (2002) 101 Cal.App.4th 26, 47. The motion for joinder by Defendant Maria Oseguera was never accepted for filing. But even if it were, it would be DENIED for the same reason.</p> <p>Defendant Ivan Caballero's Motion for Summary Judgment was continued at moving party's request to June 4, 2024. The request was improper and done without court permission, and as such will not be allowed. The court does not have a tentative ruling for the parties. The matter will be heard on 3/12/24. The Parties are ordered to appear at the 3/12/24 hearing. This will be the only opportunity to argue the motion.</p> |
|---|---|---|---|

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|                        |   |   |  |
|------------------------|---|---|--|
| <a href="#">LINE 4</a> | 23CV419998<br>Motion: Compel                        | Ricardo Montes vs VOLKSWAGEN<br>GROUP OF AMERICA, INC., a New<br>Jersey Corporation           | See Tentative Ruling. Defendant shall submit final<br>order within 10 days.  |
| <a href="#">LINE 5</a> | 23CV419998<br>Motion: Compel                        | Ricardo Montes vs VOLKSWAGEN<br>GROUP OF AMERICA, INC., a New<br>Jersey Corporation           | See Tentative Ruling. Defendant shall submit final<br>order within 10 days.  |
| <a href="#">LINE 6</a> | 23CV419998<br>Motion: Compel                        | Ricardo Montes vs VOLKSWAGEN<br>GROUP OF AMERICA, INC., a New<br>Jersey Corporation           | See Tentative Ruling. Defendant shall submit final<br>order within 10 days.  |
| <a href="#">LINE 7</a> | 23CV419998<br>Motion: Compel                        | Ricardo Montes vs VOLKSWAGEN<br>GROUP OF AMERICA, INC., a New<br>Jersey Corporation           | See Tentative Ruling. Defendant shall submit final<br>order within 10 days.  |
| <a href="#">LINE 8</a> | 20CV367765<br>Motion: Set Aside<br>Default/Judgment | Joselito Gonzales vs NBS Auto<br>Showroom et al   | See Tentative Ruling. Plaintiff shall submit the final<br>order within 10 days.  |
| <a href="#">LINE 9</a> | 20CV372366<br>Motion: leave to<br>amend             | California Department Of Fair<br>Employment And Housing et al vs<br>Cisco Systems, Inc. et al | Plaintiff failed to file an amended notice of the<br>hearing date, and as such, notice is not proper.<br>However, it appears that Plaintiff informed<br>Defendant Cisco, the sole remaining defendant, and<br>that Cisco does not oppose the motion. The Court<br>ORDERS that both sides attend the hearing and that<br>if it is not opposed, the motion will be GRANTED.<br>If it is opposed, or if Cisco fails to appear, then the<br>matter will be continued to allow for proper notice.<br>Finally, the parties are advised that since October<br>2023, a motion's date can be reserved by calling the<br>clerk's office, such that there should not have been a<br>need for an amended notice. |

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|                         |   |  |   |
|-------------------------|---|--|---|
| <a href="#">LINE 10</a> | 23CV410157<br>Motion: leave to<br>amend               | Jane Doe vs Support Systems<br>Homes, Inc. et al | See Tentative Ruling. Plaintiff shall submit the final<br>order within and amended complaint within 10 days.  |
| <a href="#">LINE 11</a> | 23CV423504<br>Hearing: Pro Hac<br>Vice Counsel        | Sal Alamayri vs Praveen Ande et<br>al            | The motion is GRANTED. Moving party must<br>submit the final order.   |
| <a href="#">LINE 12</a> | 23CV415808<br>Hearing: Compromise<br>of Minor's Claim | DANIELLE MUNOZ et al vs<br>ROBERT SCHAFER et al  | The GAL and counsel for GAL shall appear at<br>the hearing so that the court can conduct voir<br>dire and determine that the settlement is<br>reasonable and knowing. |
| <a href="#">LINE 13</a> |   |  |   |
| <a href="#">LINE 14</a> |   |  |   |
| <a href="#">LINE 15</a> |   |  |   |
| <a href="#">LINE 16</a> |   |  |   |
| <a href="#">LINE 17</a> |   |  |   |

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## Calendar Line 2

**Case Name:** *Chiang v. Ro, et al.*

**Case No.:** 22CV398319

This action arises from an alleged breach of contract. Ashley Ro, “aka Hee Ro Kyung,” an individual, (“Defendant”) demurs to the operative first amended complaint (“FAC”) filed by Patrick Chiang, an individual (“Plaintiff”).

### I. Background

#### A. Factual

According to the allegations in the operative FAC, on or about May 2021, Plaintiff, a licensed contractor, entered into an independent contractor agreement (“Agreement”) with the Healing Wellness Center, Inc. (“Center,”) a California corporation located in San Jose. (FAC, ¶¶ 1-4, 16.) Plaintiff agreed to provide chiropractic services for the Center’s “group practice.” (FAC, ¶ 17.) The Agreement provided that Plaintiff “would be responsible for his own taxes, but said nothing [about] billing using CHIANG’s Tax ID number, nor was the CENTER using CHIANG’s Tax ID number discussed when negotiating” the Agreement. (FAC, ¶ 18.) The Center was presented to Plaintiff as a “group practice” and holds itself out as such. (FAC, ¶ 19.) The Center maintains both its own tax and “National Provider” identification numbers. (*Ibid.*) Plaintiff claims he “reasonably assumed” that the Center would use its identification numbers, for billing purposes. (*Ibid.*) Plaintiff alleges, upon information and belief, Defendant is an officer, director, manager and/or shareholder of the Center. (FAC, ¶ 13.)

A “few months” after signing the Agreement, Defendant “demanded” that Plaintiff “bill under his individual Tax ID” rather than use the Center’s tax identification number. (FAC, ¶ 20.) Plaintiff acquiesced to Defendant’s request to avoid “disruption” of “service to customers.” (*Ibid.*) Plaintiff alleges that “thousands of dollars” were billed using his tax identification number, and that only “a small fraction” of the amount billed was actually paid to Plaintiff. (FAC, ¶ 21.) Plaintiff asserts on information and belief that this was an improper practice that Defendant required because Defendant was being investigated “by the Acupuncture Board, Department of Consumer Affairs for the State of California” for (1) filing false insurance claims, (2) billing insurance for treatments “not supported in the medical records,” and (3) failing to “adequately” document patient care. (FAC, ¶ 22, 23.)

Plaintiff further alleges Defendant “rerouted” insurance checks that were billed under Plaintiff’s tax identification number, to Defendant’s office. (FAC, ¶ 24.) Defendant “forged” Plaintiff’s signature on the insurance checks and deposited these checks into her “account.” (*Ibid.*) Upon information and belief, Plaintiff alleges both the Center and Defendant have “active fraud” and “criminal cases” pending against them. (FAC, ¶ 25.) Plaintiff was unaware of the pending criminal cases “at any point,” and Plaintiff contends that “is the

reason for [Defendant's] insistence that work done be billed under" Plaintiff's tax identification number. (FAC, ¶ 25.)

The Agreement provided for varying payments to Plaintiff depending on whether the patient treated was one brought to the Center by Plaintiff (known as "Independent Contractor Patients") or one who had been previously treated at the Center (known as "Clinic Patients"). (FAC, ¶ 26.) Plaintiff alleges that Independent Contractor Patients were mistakenly labelled as "Clinic Patients", resulting in underpayment to Plaintiff, and that he was not paid as agreed for his treatment of "Clinic Patients". (FAC, ¶ 28.)

## **B. Procedural**

Plaintiff filed the initial complaint on May 11, 2022. On October 9, 2023, Plaintiff filed the operative FAC<sup>1</sup>, alleging the following seven causes of action against *all defendants*: (1) the first cause of action for breach of contract, (2) the second cause of action for breach of the covenant of good faith and fair dealing ("breach of covenant"), (3) the third cause of action for unjust enrichment, (4) the fourth cause of action for unfair business practices pursuant to California Business and Professions Code section 17200 ("UCL"), (5) the fifth cause of action for fraud, (6) the sixth cause of action for common counts, and (7) the seventh cause of action for conversion.

On December 7, 2023, Defendant filed the instant demurrer, challenging the entirety of the FAC on the ground that the pleading is uncertain (Code Civ. Proc., § 430.10, subd. (f).)<sup>2</sup> (Memorandum of Points and Authorities in Support of Demurrer ("Dem.", p. 3:1-16).) Specifically, Defendant asserts Plaintiff fails to attach the Agreement at issue to the FAC, and he fails to allege specific terms and conditions of the Agreement. (*Ibid.*) Defendant also demurred individually to all seven causes of action. (Dem., p. 4:1-9.) Plaintiff filed an opposition on February 29, 2024. Plaintiff concedes, in his opposition, that he did not attach Exhibit A to the FAC, as contemplated in the FAC, which he asserts is "a true and correct copy of the Agreement." (Opposition ("Opp."), p. 2.) Plaintiff further alleges he asked Defendant "to stipulate for leave to file a Second Amended Complaint ("SAC") after the demurrer was filed, but that request was denied. (*Ibid.*) Plaintiff makes no substantive arguments in opposition to the demurrer and merely requests that the court grant leave to file a SAC to cure the pleading deficiencies described in the demurrer. (*Ibid.*) Defendant filed a reply on March 5, 2024.

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<sup>1</sup> On July 19, 2023, Plaintiff filed an amended notice of motion for leave to file the FAC to restore charges against the Center, pursuant to Code of Civil Procedure section 473, subd. (a)(1). Plaintiff contended that he inadvertently requested a dismissal of Center from the lawsuit back in July 6, 2022. On September 28, 2023, this Court granted Plaintiff's unopposed motion to add Defendant Center to the subsequent FAC.

<sup>2</sup> All further undesignated statutory references are to the Code of Civil Procedure.

## II. Defendant's Demurrer

Here, Defendant argues, the FAC, as a whole, fails to state any cause of action, and is uncertain because it fails to “state any viable allegation specifically against” Defendant (Dem., p. 3:1-16.) Additionally, Defendant asserts that Plaintiff references the Agreement in paragraphs 17, 30, and 35, of the FAC, yet the Plaintiff fails to attach this Agreement as an exhibit to the FAC. (*Id.*, at p. 8.) Alternatively, in lieu of the missing Agreement, Defendant claims Plaintiff fails to allege the “specific terms and conditions” of the Agreement in the FAC. (*Ibid.*) Defendant concludes Plaintiff fails to establish all seven causes of actions due to uncertainty (Dem., pp. 3:17-23, 8.) Defendant also demurs to each claim, individually, on separate grounds. Specifically, Defendant alleges that Plaintiff’s first (breach of contract) and second (breach of covenant) causes of action fail to establish “the basis under which” Defendant breached a contract with Plaintiff per the Judicial Council of California Civil Jury Instructions (“CACI”) (Dem., p. 10.) Next, Defendant alleges Plaintiff’s third cause of action for unjust enrichment fails because it is not “an actual cause of action, but a remedy.” (Dem., p. 11.) Alternatively, Defendant argues Plaintiff fails to identify the wrongful acts and omissions that would establish a unjust enrichment claim. (*Ibid.*) Defendant contends Plaintiff’s fourth cause of action for UCL, also “fails outright” because it is not “consumer related,” is not an issue of “public concern,” and the Agreement was never “fully executed” by the parties. (Dem., p. 12.) Finally, as for the fifth (fraud), sixth (common counts), and seventh (conversion) causes of action, Defendant asserts the claims “lack specificity” according to CACI. (*Id.*, at pp. 12-14.)

In opposition, Plaintiff does not argue substantively against the demurrer and instead seeks to cure the FAC by attaching a copy of the Agreement to a subsequent SAC. Additionally, Plaintiff seeks to address the concerns raised in the demurrer by “pleading with more specificity,” generally, and, specifically, on the following items: (1) explanation of the basis, terms, and conditions of the Agreement, (2) explanation on how Plaintiff is owed \$30,000 by the Center, and (3) amending a “typographical error” in paragraph 51 of the FAC regarding Plaintiff’s area of expertise. (Opp., pp. 3-4.)

In reply, Defendant urges the court to sustain the demurrer without leave to amend, arguing that the FAC cannot be cured by Plaintiff attaching a copy of the Agreement because the Agreement Plaintiff has is unsigned. Defendant asserts that the Agreement was attached to the initial complaint and that Plaintiff is bound by the exhibits attached to the complaint. This argument is without merit because, as Defendant recognizes, a demurrer only tests the pleading itself, not extrinsic evidence. The Agreement is not attached to the operative FAC and it is



therefore, not before the Court at this time.<sup>3</sup> Further, the fact that the copy of the Agreement Plaintiff possesses may not be signed is not necessarily fatal to a determination that an agreement existed between the parties. (See, e.g., Civ. Code, § 1589 [“A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the persons accepting.”]; see also Civ. Code, § 1584 [“acceptance of the consideration offered with a proposal, is an acceptance of the proposal”]; *Fidelity etc. Co. v. Fresno Flume etc. Co.* (1911) 161 Cal. 466, 473, 119 P. 646 [“receipt and acceptance by one party of a paper signed by the other, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper”].)

This Court notes that Plaintiff has not yet had the opportunity to amend in response to a demurrer. (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850 [“... 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”].) As it appears that Plaintiff may be able to allege the existence of an agreement binding Defendant, the Court will allow Plaintiff leave to amend to attempt to cure the defects noted in the demurrer.

Accordingly, the demurrer is SUSTAINED, in its entirety, WITH 20 DAYS' LEAVE TO AMEND on grounds that the pleading is uncertain.

### **III. Conclusion**

The demurrer is SUSTAINED, in its entirety, WITH 20 DAYS' LEAVE TO AMEND.

If Plaintiff chooses to amend, he shall not raise claims entirely unrelated to those originally alleged in the FAC. (See *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1023 [“Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend”].)

The Court will prepare the final Order.

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<sup>3</sup> Defendant has not asked that the Court take judicial notice of the prior complaint or the Agreement itself.

**Calendar lines 4-7**

**Case Name: Ricardo Montes v. Volkswagon Group of America**

**Case No.: 23CV419998**

Defendant moves to compel further responses to its discovery requests. In its opposition, Plaintiff responds to some of the requests.

Request for Admissions

Defendant seeks further response to #18. Plaintiff provided this in Ex. 3 attached to Decl. of Mahnke.

Form Interrogatories

Plaintiff has now answered interrogatories 2.2-2.6 and 17.1. (Ex. 4 to Mahnke Decl). Plaintiff's response to interrogatory 2.7 remains incomplete, as the questions seeks a response including high school, not just higher education. Plaintiff must provide further response to 2.7.

Special Interrogatories

Plaintiff has now answered special interrogatories, 3, 4, 5, 24-27, but must provide further responses to #1, #6, and #34. (Ex. 2 to Mahnke Decl).

Requests for Production of Documents

Defendant seeks further response to RFP 1, 2, 3, 6, 7 8, 9, 12, 14, and 18-28. All of the requests are proper except for #14 which is overbroad. Plaintiff must comply with all requests other than #14.

Plaintiff's failure to timely provide responses required this motion. While Plaintiff claims that Defendant failed to properly meet and confer or specify what information was missing, the Court notes that Plaintiff included no evidence to support this claim and that the claim is belied by Ex. C of the Roberson Declaration.

Plaintiff must provide the code-compliant further discovery as noted above and pay sanctions to Defendant, in the amount of \$1860 (4 hours plus \$60 filing fee), within 10 days of the final order. Defendant shall submit the final order within 10 days.

**Calendar Line 8**

**Case Name: Joselito Gonzalez v. NBS Auto Showroom, et al.**

**Case No: 20CV367765**

Defendant Bryan Shisler moves to set aside the default and judgment in this matter. He claims first that the complaint is void, for failing to state a claim. Code Civil Procedure section 425.10 requires that a complaint contain both a statement of facts constituting a cause of action in ordinary and concise language and a demand for judgment. The essential elements are determined by the substantive law. The evidentiary facts that form a part of plaintiff's proof need not be alleged. *C.A. v. William S. Hart Union High School Dist.* (2012) 53 C4th 861, 872. The facts to be pleaded are the ultimate facts. The complaint with the five (5) page attachment (Complainant: Joselito R. Gonzales) states a cause of action for conversion against Shisler, as conversion is the wrongful exercise of dominion over the property of another. Elements are plaintiff's ownership of the property, the defendant's conversion by a wrongful act or disposition of property rights, and damages. Gonzales alleged all the elements in his document called Complainant: Joselito R. Gonzales.

Defendant next contends that the default was not properly served. First of all, the first default against him was entered November 16, 2020 and sent to him. This was long before he claims to have moved from the address at which he was served and he does not dispute receiving this notice of default. Moreover, there is no dispute that Defendant received notice of the summons and complaint, as Defendant admits as much. He has provided no excusable reason for not responding to the complaint. Though he claims not to have received the default of May 27, 2022 he fails to provide any law suggesting this would serve as a basis to set aside the default. Finally, Defendant admits that he knew of the hearing in the case on June 27, 2023, yet Defendant still failed to take any action for 5 months. As such he fails to show he acted diligently in bringing this motion.

For the foregoing reasons, the motion to set aside the default and judgment is DENIED. Plaintiff shall submit the final order within 10 days.

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**Calendar line 10**

**Case Name: Jane Doe v. Support Systems Home, Inc. et al**

**Case No.: 23CV410157**

Plaintiff Jane Doe brings a motion for leave to amend its complaint to add factual assertions and a claim for punitive damages against Defendants. Plaintiff contends that it received documents in August 2023 from the Department of Health Care Services, documents in October and December 2023 from Defendant SUPPORT SYSTEMS Home, Inc. (SSH), and learned new information from depositions of the Defendants and party affiliated witnesses in December 2023, that revealed extensive new information concerning the management and problems at SSH necessitating the need to file an amended complaint. Because of the new information, Plaintiff now believes a claim for punitive damages is warranted. Plaintiff had initially pled punitive damages but voluntarily dismissed the claim without prejudice on April 10, 2023, approximately three months after filing the initial complaint.

Defendants oppose the motion for leave to amend claiming that none of the information learned in discovery is truly new information. Defendants claims that Plaintiff is using the discovery as a means to reinstate the claim for punitive damages which should not be allowed because Plaintiff previously dismissed the claim.<sup>4</sup>

Legal Standard

Where there will be no prejudice to the opposing side, “courts are bound to apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial’ [citations omitted].” *Atkinson v. Elk Corp.*, 109 Cal. App. 4th 739, 761. “[I]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment.” ( *Kittredge Sports Co. v. Superior Court*, *supra*, 213 Cal. App. 3d at p. 1048 ( *Kittredge*); *Higgins v. Del Faro* (1981) 123 Cal. App. 3d 558, 564 [176 Cal. Rptr. 704], [where no prejudice is shown to the adverse party, the liberal rule of allowance prevails].)

Analysis

Here, Defendants do not claim prejudice, nor could they. The case has not been set for trial and discovery is not closed. Defendants’ true objection is that Plaintiff seeks to add a claim for punitive damages when Plaintiff voluntarily dismissed such claim. Defendants assert that the “new” facts relied upon by Plaintiff to support the claim for punitive damages were already known to Plaintiff such that it should not be allowed to now add the claim back.

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<sup>4</sup> Defendants also claim futility but that is in regard to the use of a pseudonym for defendant Filipos Markolefas. Because Plaintiff indicates in its reply that it will not use John Doe, per the court’s order of February 21, 2024, the Court need not address this argument.

This argument fails for several reasons in light of the liberal standard for granting leave to amend. First, Plaintiff moved to voluntarily dismiss the claim for punitive damages *without prejudice*, such that it was foreseeable that such claim could be reasserted. Moreover, Defendants state that Plaintiff's request to add punitive damages is a "backtrack on a previous agreement reached amongst counsel." Opp. p2. But Defendants proffer no facts in support of such a claim and do not offer anything to suggest that they gave anything to Plaintiff in consideration for the dismissal. Finally, while Plaintiff may have asserted facts in broad strokes regarding Defendants' conducts in the original complaint, it is also true that Plaintiff has learned new information regarding the extent of Defendants' conduct and of SSH's knowledge of the background and conduct of Filipos Markolefas. This is sufficient to allow Plaintiff to amend the complaint to add the new facts and assert a claim for punitive damages.

For the foregoing reasons, the motion for leave to amend is GRANTED. Plaintiff shall submit the final order and file the first amended complaint within 10 days.

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