SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: November 2, 2023 TIME: 9:00 A.M.

TO REQUEST ORAL ARGUMENT: Before 4:00 PM 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 at the hearing to 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 courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO HAVE THE HEARING REPORTED: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.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. Civil Local Rule 8C is in the amendment process and will be officially changed by January 2024.

Where to call for your hearing date:	408-882-2430
When you can call:	Monday to Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	19CV345229	Michelle Gomez vs James Roger Mayers et al	Plaintiff's Motion to Enforce Settlement is DENIED. Please scroll down to Line 1 for full tentative ruling. The Parties are ordered to appear at the hearing for trial setting. Court to prepare formal order.
2	20CV365850	CITIBANK, N.A. vs MATTHEW OLIVIERI et al	Parties are ordered to appear for examination.
3	20CV368575	Kelly Kawashima vs County of Santa Clara	See line 4.
4	20CV368575	Kelly Kawashima vs County of Santa Clara	The County's Motion for Summary judgment is GRANTED. Please scroll down to Line 4 for full tentative ruling. The parties are ordered to appear for trial setting/status conference. Court to prepare formal order.
5	20CV374091	Financial Pacific Leasing, Inc., a Washington corporation vs J. Medina	Parties are ordered to appear for examination.
6	19CV354362	Ronald Long vs Roberto Chavez et al	Parties have settled; this matter is off calendar.
7	21CV386439	Tom Rouse vs The Community of Eagle Ridge Owners Association	The Community of Eagle Ridge Owners Association's Motion for Summary judgment is GRANTED. Please scroll down to Line 7 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
8	22CV402214	Guadalupe Valdes vs City of Palo Alto	Cross-Defendant's Motion to Compel Plaintiff to provide responses to Special Interrogatories, Form Interrogatory No. 12.6, and Request for Production No. 12 is GRANTED. An amended notice of motion with this November 2, 2023 hearing date was served on Plaintiff by electronic mail on September 18, 2303. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) Cross-Defendants served Plaintiff with these discovery requests on April 12, 2023. To date, Plaintiff has not provided a response to these specific discovery requests, despite repeated inquiries. Accordingly, any objections to these requests are waived. Plaintiff is ordered to produce code-compliant responses without objections within 20 days of service of the formal order. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.

9	22CV399041	Jane Doe vs The City of Sunnyvale et al	The Court has reviewed the Parties joint letter outlining their remaining disputes regarding confidentiality and finds that the Santa Clara County model protective order found at https://www.scscourt.org/court_divisions/civil/complex/Model%20Protective%20Order.pdf with the omission of Paragraph 4(c) ("individual parties or officers or employees of a party, to the extent deemed necessary by counsel for the prosecution or defense of this litigation") sufficiently addresses each party's concern. The City of Sunnyvale is ordered to prepare and submit for the Court's signature a form of protective order in compliance with this ruling.
10	22CV399477	Andre LeGrande vs Starr Seifert et al	Off calendar.
11	22CV403780	Martin Borrego vs CAPUTO & VAN DER WALDE, LLP et al	Motion for Leave to File First Amended Answer is GRANTED. Plaintiff is not prejudiced by this amendment, and Plaintiff's futility arguments go to the heart of the parties' factual dispute, not a legally barred defense on statute of limitation or other similar grounds clear from the face of the amendment. On this record, it would be error not to permit amendment. (See *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.) To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
12	20CV370750	MARK BELMESSIERI vs RACHEL DEPALMA	Defendant's Motion for Reconsideration is CONTINUED to November 28, 2023 at 9 a.m. in Department 6 to be heard with Defendant's Motion for Sanctions.

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Calendar Line: 1
Case Name: *Michelle Gomez vs James Roger Mayers et al*
Case No.: 19CV345229

Before the Court is Plaintiff Michelle Gomez's Motion to Enforce Settlement. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

The origins of this case appear to be the end of Plaintiff Michelle Gomez's and Defendant James Roger Mayers' marriage. Plaintiff filed this action on March 25, 2019 and amended her complaint on November 25, 2019. Plaintiff first alleges Mayers committed various acts of domestic violence against her. (Amended Complaint ("AC"), ¶¶9(a)-(r).) Plaintiff further alleges Mayers' stepfather, James P. Dechaine and his stepbrother Roanld Dechaine were involved in a "traunching" fraud scheme involving investments and real estate. (AC, ¶¶13-14.) Plaintiff also seems to allege that Defendants Randy Omoto and his wife Alison Macuch were involved in a scheme with Mayers and the Dechaines to use Plaintiff's credit history and signature to purchase the then-couple's home. (See generally AC.) Plaintiff sued all of these parties, asserting claims for domestic violence, false reports, invasion of privacy-computers, battery, identity theft, identity theft-forgery, unjust enrichment, and infliction of emotional distress.

The procedural history of this case is long and hard fought. While there do not appear to be demurrers, motions to strike, or motions for judgment on the pleadings, there does appear to have been significant and immediate discovery motion practice. It is in the midst of this discovery motion practice that the parties engaged in a lengthy judicially supervised settlement conference with Judge Overton on February 26, 2021. At the close of that conference, Judge Overton presided over the recitation of the settlement terms, which were memorialized through electronic recording. The full transcript of that recording is attached as Exhibit B to the Declaration of Michael Stebbins.

Carlos Alvarez, counsel for the Dechaines, recited the terms agreed to during the conference:

> Yes Your Honor, I'll do my best to set forth the terms of the settlement as I understand it. The settlement calls for a payment, a total payment, to Plaintiff Michelle Gomez of $170,000 to be paid in full within 60 days. The breakdown of who is paying what portion of that $170,000 is as follows: James Mayers or

> James Roger Mayers will be paying $118,334. Randy and Allison Demotto [sic] will be paying collectively, the total of $25,000. James Duchane [sic] will be paying $13,333. A payment by First American on behalf of Ronald Duchane [sic], shall be paid in the amount of $13,333. Those payments collectively add up to the $170,000.
>
> The settlement calls for a dismissal with prejudice of the entirety of the action as I've identified, case number 19CV345229. . . There will also be a release of the claims in this action. There is a related family court action between Plaintiff Michell Gomez and James Roger Mayers. **Counsel for those two parties in that related divorce proceeding will need to review the release and have a meeting of the minds. . . and it's a contingency to this agreement that they have a meeting of the minds and that all parties are in agreement as to the wording of the release**. The parties also agree to a waiver of Civil Code section 1342, with respect to the agreed released matters. The parties have agreed that the settlement will not affect liability in the family law case and that there will be no arguments presented in the family law case. . . (Emphasis added.)

At this point, Judge Overton interrupts Mr. Alvaraz to state: "I think we're not going to put that language on the record now. **That is the contingency**. **So you mention a contingency and the language is not agreed upon**, so we can't put that part of it on the record. I know you've also reached the GreenPoint property and whether or not there's going to be a 664 language." Mr. Alvarez then continues:

> Yes, so let's. . .It was also contingent on Mr. Dresser confirming that there is sufficient money to be released to allow the payment of Mr. Mayers. There is an issue with respect to the Deed of Trust in favor of Brin Point. That is . . . being handled by Orange Coast Title. Both Plaintiff, Michelle Gomez, and Mr. Mayers agreed to reasonably cooperate with Orange Coast Title and to execute any documents reasonably requested by Orange Coast Title, to allow Orange Coast

> Title to release or do what they need to do with respect to the Green Point Deed of Trust. With respect to the release of First American's making the payment where it'll also be included in the new release. . . Mr. Mayers has also agreed to indemnify Michelle Gomez with respect to the Green Pointe Deed of Trust. . . If the parties agree and the court affirms that this agreement will be enforceable, pursuant to 664.6. . .

Judge Overton thanks Mr. Alvarez "for that lengthy and recitation which captures what the court considers to be the essential terms here" then invites other counsel to "either ask if anything needs to be clarified or state whether anything needs to be clarified or augmented." In response, Mr. Stebbins, counsel for the Omotos, states "Just that the payments are due 60 days from today's date." Mr. Kreft, counsel for Mr. Mayers, states: "No, I believe Mr. Alvarez succinctly stated the terms. **It's my understanding that both of the family law lawyers representing Mr. Mayers have to have in put on the language of the settlement agreement** and that that's. . ." (Emphasis added.)

Judge Overton interrupts Mr. Kreft, stating: "And that that is. . .going to be. . . **this whole settlement is going to be contingent upon both sides relative to Ms. Gomez and Mr. Mayers approving such language. So it is contingent, conditional on that.** Mr. Dresser [Plaintiff's then-counsel] did you want to add or clarify anything?" (Emphasis added.) Mr. Dresser responds: "Only that it will include a full mutual release against subject to the contingency of the family law counsel, excluding our reserved claims."

Judge Overton then asks each person present to confirm that the above is their understanding of the settlement terms. During this process, James Duchaine seeks further clarification regarding the contingency:

> James Duchaine: I'm not sure what' respect [sic] the contingency impacts, this, if anything at all.
>
> Judge Overton: So the contingency just has to do with agreement by the family attorney relative to the release language.
>
> James Duchaine: And nothing to do with this case?

Judge Overton: Well, it does have to do with this case in the sense that **that's language that they have to agree upon in order for this settlement to be concluded**.

James Duchaine: Okay.

Judge Overton: Understood?

James Duchaine: Yes.

(Emphasis added.)

Judge Overton again polls each person present to confirm they understood the clarification she provided to James Duchaine. Each party confirms their understanding. Judge Overton then performs some housekeeping with the parties, stating:

> [I]t may be that the parties are not going to be able to fully connect and communicate until Monday. But we do know that the payment of the funds has to be made within 60 days of today's date **unless the settlement falls apart based on the contingency**.
>
> So, it's the court's understanding that Mr. Kreft and Mr. Dresser are going to get together with those attorneys and get together sort of collectively **to make sure that we can consummate the settlement**. I'm going to ask then since they have my cellphone number, to call me immediately to let me know one way or the other. **If we need to go back on the record on Zoom, that's fine or if you can just get the settlement document signed by everybody, that's fine**.
>
> Similarly, **if there is no settlement that's reached**, I'm going to need to be contacted because then we're going to need to go forward with the informal discovery conference. I'm hoping that at the earliest possible time, when you have some information for me, you're going to be able to contact me.

(Emphasis added.)

Just before ending the session, Judge Overton states: "there is one other question that. . . one other thing that I have today. With respect to the terms that have been stated on the record, everybody has agreed. So that means that **if the contingency is met** that basically, signing the settlement is just going to be a formality and everybody understands that. Is that correct?" Everyone answered "yes" to Judge Overton's question.

Thereafter, the parties were unable to agree either to release language or to the payment amounts. Plaintiff moved to set aside the settlement and reopen the case to conduct discovery. While the Court (Hon. Christopher Rudy) did not reach the question of whether a settlement was enforceable under Code of Civil Procedure section 664.6 because he did not have before him the above-quoted transcript, by order dated February 28, 2022, he denied Plaintiff's motion to reopen the case because the case was settled, finding:

> [Plaintiff] does not say that when she entered into the oral settlement before Judge Overton that she expressed any reservations or that she was being forced to agree to any of the settlement terms. . . there is no evidence from Plaintiff that she did not in fact agree to settle her case on the terms recited before Judge Overton. . ..
>
> Because Notice of Settlement has been filed with the Court and at this point there is no proof that the parties have not reached a settlement, the Motion to reopen discovery must be DENIED."

Plaintiff moved for reconsideration of this order, which Judge Rudy also denied because Plaintiff did not meet the requirements of Code of Civil Procedure section 1008(e). In that order, the Court states that it "does not reach the question of whether or not, if authenticated, the transcript meets the requirement of a judicially supervised settlement pursuant to CCP §66[4].6." In the context of this motion practice, Defendants insisted that the case was settled.

On September 9, 2022, Plaintiff dismissed the AC as to Ronald DeChaine with prejudice. On September 14, 2022, James Dechaine requested that the Court dismiss this action to prevent further legal expenses. It is not clear from the record whether the Court (Hon. Christopher Rudy) explicitly ruled on that request, although the case plainly was not dismissed. Until Plaintiff filed the present motion, no party ever moved to enforce the settlement agreement. The parties appeared for several case

management conferences where the issue of settlement gone wrong was raised, and the undersigned set this case for trial to commence on January 22, 2024. James DeChaine then served discovery to prepare for trial, and, when Plaintiff refused to respond on the grounds that discovery was closed, moved to compel. It is in the context of ruling on this motion to compel that the undersigned Court ordered the parties to appear on November 2, 2023 and show cause why the case should not be dismissed because it is settled.[1] In response to that order to show cause, Plaintiff moved to enforce the settlement agreement, which motion the DeChaines and Omotos oppose, now arguing that the case did not actually settle in February 2021.[2]

II. Legal Standard and Analysis

Code of Civil Procedure section 664.6 states, in relevant part:

> (a) If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or **orally before the court**, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

(Code of Civ. Pro. §664.6 (emphasis added).)

Section 664.6 authorizes the court to enter judgement on a stipulated settlement—even where there are disputed issues of fact—where one party refuses to comply with the terms. (*Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 Cal. App. 3d 1182.) The court must first determine whether the parties entered a valid, binding settlement agreement, which determination the court can

[1] Plaintiff contends the Court already decided the case is settled. However, the Court did not determine whether there was an enforceable settlement agreement under Section 664.6. Rather, based on the record the Court had before it at the time of Defendant's motion to compel, from the Court's perspective, the case had settled given the notice of settlement and Judge Rudy's orders denying Plaintiff's motions to set aside. Although baffling as to why it took nearly three years for a party to bring this motion, Plaintiff's motion to enforce settlement is the first time a Court has considered whether the recitation before Judge Overton was sufficient to enter judgment under Section 664.6.

[2] Defendants urge the Court to deny Plaintiff's motion on the basis that she filed her motion late. The Court has discretion to consider late filed papers. (*Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168.) And, where, as here a party provides a substantive response to a late filing, the party waives all defects in service. (*Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 10.) The Court will therefore address the merits.

make based on declarations or other testimony. (*Corkland v. Boscoe* (1984), 156 Cal. App. 3d 989; *Malouf Bros. v. Dixon* (1991) 230 Cal. App. 3d 280.)

There are numerous requirements that must be strictly followed for a court to enter judgment pursuant to Section 664.6. Most relevant here is that the parties' settlement agreement must contain all material terms of the parties' agreement, and the parties must agree to those terms. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793.) *Weddington* appears to this Court to be on all fours with this case. There, the parties agreed to a written "Deal Point Memorandum" summarizing the parties' settlement reached at mediation. The memorandum provided that the parties "will formalize a Licensing Agreement," but did not define the material terms of the licensing agreement. (*Id*. at p. 799.) In a later ADR proceeding, a private judge drafted what he believed to be the material terms of the license agreement pursuant to the Deal Point Memorandum, and a court entered judgment under Section 664.6. (*Id*. at pp. 806-809.) The Court of Appeal reversed, finding there was no substantial evidence that the parties agreed to the material terms of the license agreement, stating: "[a] settlement agreement which incorporates other documents can be enforced pursuant to section 664.6, but only if there was a meeting of the minds regarding the terms of the incorporated documents." (*Id*. at 814, 818.)

Here, it is clear from the transcript that everyone present at the recitation of the settlement terms understood that consummation of the settlement was contingent upon agreeable release language. However, the closest the parties get to discussing any details of such release language is when Plaintiff's counsel states: "Only that it will include a full mutual release against [sic] subject to the contingency of the family law counsel, excluding our reserved claims. . ." This is insufficient under *Weddington* for the Court to enter judgment under Section 664.6. The Court may not modify or add terms to the parties' settlement agreement, and this was a material term about which the parties had plainly not agreed. (See *Leeman v. Adams Extract & Spice, LLC* (2015) 236 Cal. App. 4th 1367; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793.)

Accordingly, Plaintiff's motion to enforce settlement is DENIED.

Calendar Line: 4
Case Name: *Kelli Kawashima v. County of Santa Clara, et al.*
Case No.: 20CV368575

Defendant County of Santa Clara (the "County") moves for summary judgment, or in the alternative, summary adjudication against plaintiff Kelli Kawashima. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action arising out of alleged employment discrimination. According to the Complaint, Plaintiff worked as a physician assistant in the Department of Surgery for the Santa Clara Valley Medical Center ("SCVMA") for 13 years until she tendered her resignation on August 18, 2017. (Complaint, ¶ 2.) In January 2017, Plaintiff took medical leave because of her disability. (Complaint, ¶ 4.) She returned to work in late July 2017, with a Work Status Report from her doctor that contained a restriction, limiting her to no more than 4 hours of work per day. (Complaint, ¶ 5.) The Work Status Report stated "If [the work restriction] is not accommodated by the employer then this patient is considered temporarily and totally disabled from [her] regular work." (*Ibid*.) Within the first few days of her return, she received push back from her supervising physician and for the first time, was told her performance was lacking. (Complaint, ¶ 8.) She worked beyond her 4-hour restriction for two days. (Complaint, ¶¶ 11, 14.) Her doctor placed her off-work from August 1, 2017 to August 19, 2017 and Plaintiff presented a doctor's note to SCVMC on August 1, 2017. (Complaint, ¶ 15.) Plaintiff's supervising physician was annoyed when he was informed of her updated Work Status Report. (Complaint, ¶ 16.) He refused to schedule her at another time and told her that he would make sure she went home on time from her current shift. (*Ibid*.) He instructed her to tell her doctor to revert the order and Plaintiff declined, which angered her supervising physician. (*Ibid*.) Plaintiff found the circumstances to be intolerable and she tendered her resignation on August 4, 2017, effective August 18, 2017. (Complaint, ¶ 17.)

Plaintiff initiated this action on July 22, 2020, asserting: (1) discrimination based on disability (Gov. Code, § 12940, subd. (a)); (2) failure to engage in the interactive process (Gov. Code, § 12940, subd. (n)); (3) failure to accommodate disability (Gov. Code, § 12940, subd. (m)); (4) failure to prevent unlawful discrimination (Gov. Code, § 12940, subd. (k)); (5) harassment based upon disability (Gov.

Code, § 12940, subd. (j)); (6) failure to prevent unlawful harassment (Gov. Code, §§ 12940, subds. (j) & (k); (7) retaliation (Gov. Code, § 12945.2, subd. (f)); (8) retaliation (Lab Code, § 326.5, subd. (c)(1)); and (9) retaliation (Lab. Code, § 233, subd. (c).) On May 31, 2023, the County filed the instant motion, which Plaintiff opposes.

II. Evidentiary Objections

A. Plaintiff's Objections

Plaintiff objects to the declarations of Karen Ketner and Lan Pham.

Objection 1 is SUSTAINED.

Objections 2-6 are OVERRULED.

B. The County's Objections

The County asserts 43 objections to Plaintiff's materials. Objections 2 through 43 pertain to Plaintiff's response to Defendant's Undisputed Material Facts ("UMF").

Objections 2-6, 9-11, 13-15, 17-25, 27-34, 36-38 are SUSTAINED.

Objections 1, 8, 12, 16, 26, 35, 39, 40-43 are OVERRULED.

III. Legal Standard

Pursuant to Code of Civil Procedure section 437c, the County moves for summary judgment against Plaintiff, or in the alternative, summary adjudication of each cause of action.

A. Summary Judgment Generally

Any party may move for summary judgment. (Code of Civ. Proc., §437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, 25 Cal.4th at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra*, 25 Cal.4th at

p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in questions. (*Aguilar, supra*, 25 Cal.4th at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

"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)." (*Aguilar, supra,* 25 Cal.4th at pp. 854-855.) "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." (*Ibid.*)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

B. Summary Judgment/Adjudication in FEHA Discrimination/Retaliation Cases

Special rules govern the allocation of the burden of proof on motions for summary judgment in wrongful termination and employment discrimination cases, under both federal and state law. State courts follow the approach taken by federal courts in these cases. (*Moore v. Regents of Univ. of Calif.* (2016) 248 Cal.App.4th 216, 233.) Because direct evidence of discrimination is seldom available, courts use a system of shifting burdens as an aid to the presentation and resolution of such cases both at trial and on a motion for summary judgment. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354-355 (*Guz*).) "California has adopted a three-stage burden-shifting test established by the United States Supreme Court for trying employment discrimination claims that are based on the disparate treatment theory. Under this '*McDonnell Douglas* test,' (1) the plaintiff must establish a prima facie case of

discrimination; (2) if the plaintiff is successful, the employer must offer a legitimate nondiscriminatory reason for its actions; and (3) if the employer produces evidence on that point, the plaintiff must show that employer's reason was a pretext for discrimination." (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144 [citations omitted]; see also *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 (*King*).) CFRA retaliation claims are also subject to the *McDonnell Douglas* test. (See *Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 560.)

When the employer is the moving party, the initial burden rests with the employer to show that no unlawful discrimination occurred. (Code Civ. Proc., §437c(p)(2); See *Guz*, *supra* at pp. 354-355; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1523 [employee has no obligation to produce evidence until defendant "has established either the existence of a complete defense or the absence of an essential element of plaintiff's claim."].) The employer may do this by presenting admissible evidence either: negating an essential element of the employee's claim; or showing some legitimate, nondiscriminatory reason for the action taken against the employee. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202-203.) An example of negating an essential element would be establishing that no adverse employment action occurred.

An employer may also "move for summary judgment against a discrimination cause of action with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. A legitimate, nondiscriminatory reason is one that is unrelated to prohibited bias and that, if true, would preclude a finding of discrimination. The employer's evidence must be sufficient to allow the trier of fact to conclude that it is more likely than not that one or more legitimate, nondiscriminatory reasons were the sole basis for the adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 (*Featherstone*) [citations omitted].) The burden is then on the plaintiff employee to rebut with evidence raising an inference that intentional discrimination occurred. "The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive." (*Id*. at p. 1159.) Summary judgment for the employer should be granted where,

"given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz*, *supra*, at p. 362.)

If the employer meets the initial burden, to avoid summary judgment the employee must produce "substantial responsive evidence that the employer's showing was untrue or pretextual" thereby raising at least an inference of discrimination. (*Hersant v. Cal. Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.) A plaintiff's "suspicions of improper motives . . . primarily on conjecture and speculation" are not sufficient to raise a triable issue. (*Kerr v. Rose* (1990) 216 Cal.App.3d 1551, 1564.) Evidence showing facts inconsistent with the employer's claimed reasons tends to prove the employer's discriminatory intent; that the stated reason was mere pretext. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735; *Reeves v. MV Transp., Inc.* (2010) 186 Cal.App.4th 666, 675. "Pretext" does not require proof that discrimination was the only reason for the employer's action. It is enough that discrimination was a determinative factor; i.e., that discriminatory intent was a substantial motivating factor in the employer's decision to take the adverse action. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 (*Harris*); *Mendoza v. Western Med. Ctr. Santa Ana* (2014) 222 Cal.App.4th 1334, 1341-1342.) A "plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*King, supra,* 152 Cal.App.4th at p. 433; see also *Doe v. Dept. of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 733, quoting *King*.)

IV. Analysis

A. First Cause of Action-Discrimination Based Upon Disability (Gov. Code, § 12940, subd. (a).)

The Fair Employment and Housing Act (the "FEHA") expressly prohibits physical disability discrimination. (See Gov. Code, § 12940, subd. (a).) "A prima facie case for discrimination "on the grounds of physical disability under the FEHA requires plaintiff to show: (1) he suffers from a disability; (2) he is otherwise qualified to do his job; and (3) he was subjected to adverse employment action because of his disability." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 343-344 (*Arteaga*) [citations and quotations omitted].)

"The FEHA proscribes two types of disability discrimination: (1) discrimination arising from an employer's intentionally discriminatory act against an employee because of his or her disability (disparate treatment discrimination), and (2) discrimination resulting from an employer's facially neutral practice or policy that has a disproportionate effect on employees suffering from disability (disparate impact discrimination). (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004 (*Scotch*) [citations omitted].)

An "adverse employment action" is one that "materially affects the terms, conditions, or privileges of employment." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051 (*Yanowitz*).) An adverse employment action refers not only to "ultimate employment actions" such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Id*. at p. 1054.) "In the case of an institutional or corporate employer, the institution or corporation itself must have taken some official action with respect to the employee, such as hiring, firing, failing to promote, adverse job assignment, significant change in compensation or benefits, or official disciplinary action." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 (*Roby*).)

The County argues Plaintiff was not subjected to any adverse employment actions based on the following facts: Plaintiff was on medical leave from January 23, 2017, to July 18, 2017. (County's UMF, No. 2.) In May and June, she applied and interviewed for an open Orthopedic Physician Assistant position at SCVMC, however she did not get the position. (County's UMF, No. 3.) Plaintiff returned to work at SCVMC from medical leave on July 19, 2017. (County's UMF, No. 4.) Her physician restricted her to a four-hour work day from July 19, 2017 until August 19, 2017. (County's UMF, No. 5.) Paulette Oellerich was Plaintiff's administrative supervisor. (County's UMF, No. 6; Plaintiff's Depo., p. 49:17-25.) She clarified with Plaintiff that there were no other restrictions and informed Plaintiff that her four-hour restriction was cleared with Guy Nuzum, the reasonable accommodation coordinator. (County's UMF, No. 6.) She also informed Dr. Marco Lee, the Chief of Neurosurgery and Ketner, who was the Director of Advanced Practice. (County's UMF, No. 6.)

The advanced practice clinicians ("APCs") in the Neurosurgery Department in 2017 consisted of two physician assistants, including Plaintiff, and one nurse practitioner. (County's UMF, No. 8.) They

worked eight hours shifts covering the hours of 6 a.m. to 6 p.m. on weekdays. (County's UMF, No. 9.) Nurse practitioner Lan Pham coordinated the schedules at the time, and she selected the 2 p.m. to 6 p.m. shift for Plaintiff because the work in the afternoon required the least physical effort, including walking, compared to the morning and midday workload. (County's UMF, No. 11.) The afternoon shift clinician attended to few patients because wound care, pulling drains, notations, and patient discharges were usually completed by the afternoon. (*Ibid*.) There were also more resources available in the afternoon because the attending physicians were on site at that time. (*Ibid*.) Plaintiff did not request to change her schedule shifts in July or August 2017. (County's UMF, No. 12.) She returned to work on July 19, 2017. (County's UMF, No. 34.) Plaintiff worked on e-learning projects as she needed to have a meeting regarding her reasonable accommodation before she could see patients. (County's UMF, No. 13.)

On July 25, 2017, Plaintiff applied for a position with Alignment Healthcare. (County's UMF, No. 14.) On July 26, 2017, Plaintiff met with Ketner to discuss her reasonable accommodations and Ketner confirmed that Neurosurgery could accommodate a 2 p.m. to 6 p.m. shift. (County's UMF, Nos. 15-16.) Plaintiff informed Ketner that her position "is not a hard stop" and 6 p.m. was not always a hard stop time because "medicine does not follow time rules." (County's UMF, No. 17.) She also informed Ketner that she had physical therapy scheduled in the afternoon. (*Ibid*.) Plaintiff conceded that patient consultations occurred during any shift. (County's UMF, No. 19.) Plaintiff also signed a document after the meeting, which stated she agreed to the 2 p.m. to 6 p.m. schedule. (County's UMF, No. 22.)

On July 27, 2017, Plaintiff interviewed with Alignment Healthcare. (County's UMF, No. 23.) That afternoon, she had her first shift on her four-hour schedule, and she does not recall whether she worked past 6 p.m. that day. (*Ibid*; *Id*. at No. 38.) Before her second shift, she wrote to Nuzum regarding her meeting with Ketner, the lack of collaboration in assigning her the 2 p.m. to 6 p.m. shift, and she expressed concern about the alleged games and retaliation from Dr. Lee. (County's UMF, No. 39.) Nuzum informed her that the schedule was likely made based on departmental needs as her doctor's note did not contain a specific time, and he told her to limit her interactions with Dr. Lee if his behavior was less than professional and to report such interactions to Ketner. (County's UMF, No. 40.)

On July 28, 2017, Plaintiff emailed Ketner to inform her that she worked until 6:45 p.m., as she started a consult at 5:40 p.m. (County's UMF, No. 41.) Plaintiff admits the attending physician had arrived by 6 p.m. and she does not remember whether she told him that she needed to leave at 6 p.m. (County's UMF, No. 42.) During her next shift on July 31, 2017, she wrote to her physician informing them that she was having issues being accommodated by her job and requested time off until August 19, which was her original return date. (County's UMF, No. 45.) That day, she worked longer than her four-hour shift, but she does not recall what the exact reason was. (County's UMF, No. 46.) On August 1, 2017, Plaintiff's physician issued a note placing her off work until August 18, 2017. (County's UMF, No. 47.) The County accommodated the request. (County's UMF, No. 48.) Plaintiff submitted her resignation letter on August 4, 2017. (County's UMF, No. 49.)

This is sufficient to establish that Plaintiff was not subjected to any adverse employment actions as her leave was granted, and her doctor's directive for four-hour shifts were accommodated. (County's UMF, No. 52.) She was not transferred nor was she disciplined after her return from medical leave or prior to her resignation. (County's UMF, Nos. 53-55.) Moreover, on August 1, during the meeting with Dr. Lee and Oellerich, Dr. Lee confirmed to Plaintiff that she could hand the Consult Pager over to him or another physician so she could timely end her shifts at 6 p.m. (County's UMF, No. 85.) Plaintiff submitted her resignation on August 4, effective August 18, 2017. (County's UMF, Nos. 55, 65, 89.) The same day, she accepted a job offer from Alignment Healthcare. (County's UMF, No. 64.) Thus, the burden shifts to Plaintiff to demonstrate a triable issue of material fact.

Plaintiff relies on the following facts: she suffered from a physical disability as a result of her osteoarthritis and degenerative joint disease on her left knee. (Plaintiff's Additional Material Facts ("AMF"), No. 1.) In Neurosurgery, the three APCs would cover 6 a.m. to 6 p.m.: the first person starts at 6 a.m. and ends at 2:30 p.m.; the second person starts at 9:30 a.m. to 6:00 p.m.; and the third person could pick a flexible shift between 6 a.m. to 6 p.m. (Plaintiff's AMF, No. 9.) Her duties consisted of tending to patients in the clinic/hospital, assisting with scheduling of surgeries for physicians, tending to patients on surgeon's orders, assisting with disability paperwork, maintaining a daily list of patients and carrying the "Consult Pager" for any consults that came in from the hospital or emergency room. (Plaintiff's AMF, No. 10.) All APCs wore a personal pager in the department, which was used by floor

nurses to contact the holder. (Plaintiff's AMF, No. 12.) At times, an APC would wear a Consult Pager while they were on duty until it was handed off to the attending physician. (*Ibid*.) Other departments and divisions contacted the Consult Pager if there was a consult, and the holder would answer and take down medical information for the patient. (*Ibid*.) At the end of their shift, the APC would find whoever would take the Consult Pager from them and pass it over before they could conclude their shift. (Plaintiff's AMF, No. 15.)

On December 21, 2016, Plaintiff informed Dr. Lee and the administrative assistant for Neurosurgery that she would need leave in January 2017 for surgery. (Plaintiff's AMF, No. 16.) On January 20, 2017, the week before her leave, Plaintiff was called by her son's daycare and told he needed to be picked up. (Plaintiff's AMF, No. 18.) Plaintiff's wife Desiree Fuentez, an administrative assistant for SCVMC, was home sick that day. (Plaintiff's AMF, No. 19.) Plaintiff informed Dr. Lee that she needed to leave, and Dr. Lee insisted Plaintiff stay so she made other arrangements for her son. (Plaintiff's AMF, Nos. 21-23.) On January 23, 2017, she was placed off work a few days early by her doctor and Dr. Lee emailed Ketner and expressed concern and skepticism about her leave. (Plaintiff's AMF, Nos. 24-25.)

Plaintiff's time off was extended by her doctor, which caused Dr. Lee to contact Oellerich and reiterate concerns he had expressed regarding Plaintiff's performance and "lack of professionalism" prior to her leave. (Plaintiff's AMF, Nos. 29-30.)

Plaintiff returned to work on July 19, 2017, but she was informed that she could not see any patients until Ketner was able to meet with her, and they scheduled a meeting for July 26, 2017. (Plaintiff's AMF, No. 35.) At the meeting, Plaintiff learned Dr. Lee and Dr. Gregory Adams, the Chief of the General Surgery Division, assigned her the 2 p.m. to 6 p.m. shift. (Plaintiff's AMF, No. 37.) Plaintiff expressed concerns that the shift would be the most difficult to be released from on time as she would be responsible for the Consult Pager and would be required to respond to all requests for patient consultations. (Plaintiff's AMF, No. 39.) On July 27, 2017, before she saw any patients, Dr. Lee called Plaintiff into his office and questioned her about her return, informed her that their services and duties had changed, and expressed anger that she had not communicated with him. (Plaintiff's AMF, No. 42.) On July 28, 2017, she could not have left work on time without jeopardizing patient care. (Plaintiff's

AMF, No. 46.) On July 31, 2017, she met with Ketner and Dr. Lee, who was confrontational. (Plaintiff's AMF, No. 48.) That evening, Plaintiff left work late, and although she does not recall the exact circumstances, she generally recalls that her duties prohibited her from leaving work at 6 p.m. (Plaintiff's AMF, No. 49.) On August 1, 2017, after Plaintiff presented a doctor's note placing her off work until mid-August, Plaintiff met with Oellerich and Dr. Lee. (Plaintiff's AMF, Nos. 51-52.) Oellerich asked Dr. Lee if he would consider scheduling Plaintiff at another time and he said, absolutely not. (Plaintiff's AMF, No. 53.) Dr. Lee told Plaintiff to tell her doctor to release her back to work and she informed him that she would not. (*Ibid*.) Following the meeting, Dr. Lee corresponded with Ketner, Oellerich, and Dr. Adams, and he expressed discontent regarding Plaintiff going on leave again and reiterated his concerns regarding professionalism and the service provided by the department. (Plaintiff's AMF, No. 54.)

As a result of her alleged horrendous treatment that started before her leave in January 2017, Plaintiff began exploring alternative options while she was on leave. (Plaintiff's AMF, No. 55.) During her time back in the department, Dr. Lee continued to make her experience worse, and the County did not adequately address her concerns, which resulted in an intolerable work environment for Plaintiff. (Plaintiff's AMF, No. 56.) She was forced to resign on August 4, 2017, effective August 18, 2017, and she accepted a position with Alignment Healthcare on the same day she tendered her resignation. (Plaintiff's AMF, No. 57.) She did not intend to leave her job with the County, which is why she sought a transfer and took a pay cut of $30,000 when she left. (Plaintiff's AMF, No. 58.) She also forfeited her lifetime medical benefits that she could receive after retirement. (*Ibid.)*

Prior to Plaintiff's leave, she had an encounter with Dr. Lee on January 20, where she informed him she needed to leave to pick up her sick child, and Dr. Lee suggested he would contact her wife's supervisor so that Fuentez could go pick him up because he was insistent that Plaintiff stay. (Plaintiff's AMF, Nos. 19-23.) After her return, Dr. Lee confronted her about her restrictions, which caused her to feel like she was doing something wrong for needing medical leave. (Opp. p. 18:13-15.) Moreover, when asked if he could schedule her at another time, Dr. Lee answered, "absolutely not". (Plaintiff's AMF, No. 53.) As a result, she was forced to resign (i.e., she was constructively discharged). (Opp. p. 18:22-24; Plaintiff's AMF, No. 57.)

In *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238 (*Turner*), the California Supreme Court stated,

> An employee cannot simply 'quit and sue,' claiming he or she was constructively discharged. The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and serve his or her employer… The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.

(*Id*. at pp. 1244-1246.)

The Supreme Court also stated constructive discharge is determined by an objective standard:

> [T]o establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees.

(*Id*. at p. 1451.)

Plaintiff testified that after she was assigned the 2 p.m. to 6 p.m. shift, she expressed concerns about being able to finish on time, but she did not propose or discuss an alternative shift. (Plaintiff's Depo., p. 59:2-60:13.) She acknowledged that consultations would be performed on any shift as a physician assistant. (Plaintiff's Depo., p. 60:14-20.) Dr. Lee expressed concerns regarding Plaintiff's performance and skepticism as to her leave prior to January 2017 and in July 2017 to Ketner, Oellerich, and Dr. Adams and not to Plaintiff. (Plaintiff's AMF, No. 25.) These alone are insufficient to meet the definition of an adverse employment action. (See *Akers v. City of San Diego* (2002 95 Cal.4th 1441, 1455 ["mere oral or written criticism of an employee is insufficient to meet the definition of an adverse employment action"].) The County took steps to accommodate Plaintiff. (County's UMF, Nos. 78,

85.) While Dr. Lee expressed concerns about Plaintiff's performance and availability, he confirmed to Plaintiff that she could hand off the Consult Pager to a physician so that she could leave on time. (County's UMF, No. 85.)

Plaintiff also applied for another physician assistant position at SCVMC during her leave. and she applied and interviewed with Alignment Healthcare before her first four-hour shift in Neurosurgery on July 27, before any of the subsequent interactions with Dr. Lee. (County's UMF, Nos. 3 & 23.) Plaintiff fails to provide any evidence that the working conditions were "so intolerable that any reasonable employee would resign rather than endure such conditions." (See *Turner, supra,* 7 Cal.4th at pp. 1247.) Plaintiff fails to establish a triable issue of material fact as to an adverse employment action, and the motion for summary adjudication of the first cause of action is GRANTED.

B. Second Cause of Action-Failure to Engage in Interactive Process (Gov. Code, § 12940, subd. (n).)

"The FEHA makes it unlawful for an employer 'to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.'" (§ 12940, subd. (n).) Section 12940, subdivision (n), imposes separate duties on the employer to engage in the "interactive process" and to make '"reasonable accommodations." (*Scotch*, *supra*, 173 Cal.App.4th at p. 1003 [citations omitted].)

"The 'interactive process' required by the FEHA is an informal process with the employee or the employee's representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively. Ritualized discussions are not necessarily required." (*Scotch*, *supra*, 173 Cal.App.4th at p. 1013 [citations omitted].) "The interactive process imposes burdens on both the employer and employee. The employee must initiate the process unless the disability and resulting limitations are obvious. 'Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, … the initial burden rests primarily upon the employee … to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations." (*Ibid*.) "Although it is the employee's burden to initiate the process, no magic words are necessary, and the obligation arises once the employer

becomes aware of the need to consider an accommodation." (*Ibid*.) To prevail on a claim for failure to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available at the time the interactive process occurred." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379 (*Nealy*).)

Here, the County interacted with Plaintiff after it received her work restriction and it clarified with her whether there were other restrictions. (County's UMF, No. 5-6.) Plaintiff met with Ketner, who informed her that she was assigned the 2 p.m. to 6 p.m. shift because her doctor's note did not state a specific work time, that shift was considered to be the least physically taxing, and it gave Plaintiff access to more resources than other shifts. (County's UMF, Nos. 11 & 40.) After she worked over the four-hour limit, the County worked with her to ensure she could leave on time. (County's UMF, No. 85.) This is sufficient for the County to meet its burden.

Plaintiff argues the County failed to interact in good faith because it assigned her the shift without involving her in the process. While Plaintiff voiced concerns regarding the proposed shift, she did not offer or ask about alternative shifts. (See Plaintiff's Depo., p. 59:2-60:13.) Moreover, Plaintiff was concerned that she would have to do consultations that could prevent her from leaving on time, but she conceded that consultations were also performed during other shifts, and someone else coming in at 6 p.m. could perform the duties of the physician assistant. (Plaintiff's Depo., p. 60:5-20.) Plaintiff fails to establish a triable issue of material fact, and the motion for summary adjudication of the second cause of action is GRANTED.

C. Third Cause of Action-Failure to Accommodate Disability (Gov. Code, § 12940, subd. (m).)

The FEHA imposes on the employer the obligation to make reasonable accommodation. "It shall be an unlawful employment practice… For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (Gov. Code, § 12940, subd. (m).) An employer is not required to make an accommodation "that is demonstrated by the employer or other covered entity to produce undue hardship to its operation." (*Scotch*, *supra*, 173 Cal.App.4th at p. 1003.) "The elements of a failure to accommodate claim are (1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the

essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Id.* at pp. 1009-1010.)

Under the FEHA, "reasonable accommodation" means "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 974.) "The employer is not obligated to choose the best accommodation or the accommodation the employee seeks. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228 (*Hanson*).) The employer "providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose…the accommodation that is easier for it to provide." (*Ibid*.)

Here, Plaintiff's doctor's note required a four-hour work restriction, which the County agreed to. (County's UMF, Nos. 5-7.) While Plaintiff expressed concerns about the 2 p.m. to 6 p.m. shift, she did not request another shift. (Plaintiff's Depo., p. 59:2-60:13.) Even if she had, the County was not required to give her a different shift because it had discretion to select the reasonable accommodation easiest for it to provide. (See *Hanson, supra,* 74 Cal.App.4th at p. 228.) Plaintiff fails to establish a triable issue of material fact, and the motion for summary adjudication of the third cause of action is GRANTED.

D. Fifth Cause of Action-Harassment Based Upon Disability (Gov. Code, § 12940, subd. (j).)

FEHA prohibits employment harassment based on "race, religious creed, national origin," and other protected categories including "physical disability." (Gov. Code, § 12940, subd. (j)(1); *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129 (*Avis*).) "To establish a prima facie case of [harassment based on] a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff's] protected status; (4) the harassment unreasonably interfered with [plaintiff's] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 (*Ortiz*).)

The law prohibiting harassment is violated when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. This must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group (or other protected class) as the plaintiff. And the issue of whether an employee was subjected to a hostile environment is ordinarily one of fact. (*Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 263–264 (*Nazir*), [internal citations and quotations omitted].)

> Whether the conduct of alleged harassers was sufficiently severe or pervasive to create a hostile or abusive working environment depends on the totality of the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing and conduct that a reasonable person in the plaintiff's position would find severely hostile or abusive. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that he or she was actually offended.

(See *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 870 (*Serri*) [citations omitted].)

Notably, in 2019, the Legislature altered the above analysis by expressly declaring that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." (Gov. Code, § 12923(b).) "The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination. In that regard, the Legislature affirms the decision in *Reid v. Google, Inc*. (2010) 50 Cal.4th 512 … in its rejection of the 'stray remarks doctrine.'" (*Id*., Gov. Code §12923, subdivision, (c).)

The County argues Plaintiff was not subjected to severe or pervasive harassment as Dr. Lee acted within his role as the Chief of Neurosurgery. Plaintiff's harassment claim is predicated on her interactions with Dr. Lee, before and after her leave. On July 27, he told her that the services in the department and duties had changed, informed her that he wanted to make sure she is current in terms of her skill and consult presentations, in addition to expressing anger that Plaintiff had not contacted him prior to her return. (County's UMF, No. 74.) On July 31, Plaintiff met with Ketner and Dr. Lee, who told her she had not removed a wound drain and he was concerned that she had not been truthful about needing time away before her surgery. (County's UMF, No. 81.) On August 1, Plaintiff's physician issued a note, placing her off work until mid-August. (County's UMF, No. 83.) She brought the note to meet with Oellerich and Dr. Lee, who told Plaintiff she could hand off the Consult Pager so she could end her shift on time. (County's UMF, No. 85.) He demanded Plaintiff tell her physician to change her note and would not agree to assign her an alternative shift. (County's UMF, No. 86.) Here, Dr. Lee's incidents with Plaintiff pertained to his role as the Chief of Neurosurgery and thus, not actionable harassment. (See *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63 [harassment does not include conduct "of a type necessary for management of employer's business or performance of the supervisory employee's job"].)

In opposition, Plaintiff fails to provide evidence of actionable harassment to support her claim. As a result, she fails to raise a triable issue of material fact as to this claim, and the motion for summary adjudication of the fifth cause of action is GRANTED.

E. Fourth Cause of Action-Failure to Prevent Unlawful Discrimination (Gov. Code, § 12940, subd. (k)) and Sixth Cause of Action- Failure to Prevent Unlawful Harassment (Gov. Code, § 12940, subds. (j) & (k).)

"The FEHA makes it unlawful for an employer 'to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.' (§ 12940, subd. (k).)" (*Scotch*, *supra*, 173 Cal.App.4th at p. 1003.) "An actionable claim under section 12940, subdivision (k) is dependent on a claim of actual discrimination: 'Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented.'" (*Id.* at p. 1021.) The FEHA also prohibits harassment based on physical disability. (Gov. Code, §

12940, subd. (j).) A prerequisite to a finding of liability for the failure to take all reasonable steps is a finding that the plaintiff suffered unlawful discrimination, harassment, or retaliation. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 282-283 (*Trujillo*); see also *Scotch*, supra, 173 Cal.App.4th at p. 1021.)

The County contends it is entitled to summary adjudication because there is no underlying discrimination. The Court has granted summary adjudication of Plaintiff's discrimination and harassment claims. As a result, there is no actionable claim under Government Code section 12940, subdivisions (j) and (k). (See *Scotch, supra,* 173 Cal.App.4th at p. 1003; see also *Trujillo, supra,* 63 Cal.App.4th at pp. 288-289.) Thus, the motion for summary adjudication of the fourth and sixth causes of action is GRANTED.

F. Seventh Cause of Action- Retaliation (Gov. Code, § 12945.2, subd. (l)[3].)

The California Family Rights Act ("CFRA"), codified in Government Code section 12945.2, "is intended to give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security." (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 558.) Under the CFRA, it is unlawful "for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of… [a]n individual's exercise of the right to family care or medical leave provided" by the CFRA. (Gov. Code, § 12945.2, subdivision (k)(1).) It is also unlawful "for an employer to interfere with, restrain, or deny the existence of, or the attempt to exercise, any right provided under" the CFRA. (Gov. Code, § 12945.2, subdivision (t).)

"Violations of the CFRA generally fall under two types of claims: (1) interference…, and (2) retaliation claims in which an employee alleges that she suffered an adverse employment action for exercising her right to CFRA leave." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487-488.) The elements for a claim for retaliation are: "(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment

[3] The parties refer to subdivision (l), however, based on the allegations and arguments, it appears this claim is brought under subdivision (k).

action, such as termination, find, or suspension because of her exercise of her right to CFRA leave." (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 885.)

As the Court stated above, Plaintiff failed to demonstrate a triable issue of material fact regarding an adverse employment action. As a result, there is no triable issue of material fact as to this claim. Thus, the motion for summary adjudication of the seventh cause of action is GRANTED.

G. Eighth and Ninth Causes of Action- Retaliation (Lab. Code, §§ 246.5, subd. (c)(1) & 233, subd. (c).)

Labor Code section 246.5, subdivision (c)(1), provides,

> An employer shall not deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing a complaint with the department or alleging a violation of this article, cooperating in an investigation or prosecution of an alleged violation of this article, or opposing any policy or practice or act that is prohibited by this article.

(Lab. Code, § 246.5, subd. (c)(1).)

Labor Code section 233, subdivision (c), states, "[a]n employer shall not deny an employee the right to use sick leave or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness or preventative care of a family member, or for any other reason other specific in [Section 246.5, subdivision (a)]." (Lab. Code, § 223, subd. (c).)

The Government Claims Act, codified in Government Code section 900, et seq, requires a plaintiff to present a claim to a public entity before filing a complaint in Superior Court. (Gov. Code, § 945.4.) "[F]ailure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239 (*State of California*); see also Gov. Code, § 945.4.)

The County provides evidence that Plaintiff did not present a government claim to the County. (County's UMF, Nos. 67-69; Weston Decl., ¶¶ 2-6.) Plaintiff concedes she did not submit a government claim prior to filing this lawsuit. (Opp., p. 20:20-22.) Therefore, Plaintiff fails to demonstrate a triable

issue of material fact as to this requirement. Thus, the motion for summary adjudication of the eighth and ninth causes of action is GRANTED.

Calendar Line: 7
Case Name: *Tom Rouse v. The Community of Eagle Ridge Owners Association*
Case No.: 21CV386439

Before the Court is Defendant The Community of Eagle Ridge Owners Association's motion for summary judgement. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Undisputed Factual Background

This is an action for injunctive and declaratory relief. The Community of Eagle Ridge located in Gilroy, CA, consists of approximately 958 homes, 141 of which are located in a portion of Eagle Ridge called Eagle Ridge Courtyards ("Courtyards"). Plaintiff is an owner within the Courtyards. All owners within the Courtyards are members of Eagle Ridge Owners Association ("Association") and subject to the Eagle Ridge Declaration of Covenants, Conditions and Restrictions ("CC&Rs"). The Courtyards are also subject to the Declaration of Annexation and Supplemental Restrictions for The Community of Eagle Ridge ("Supplement").

The Supplement mandates that the Association is responsible for the maintenance, repair, and replacement of all landscaping of the Courtyards' front yards, including the landscaping irrigation and drainage systems. (Supplement, §§ 6, 7.2.)

In 2020, the Eagle Ridge Board of Directors ("Board") decided that the front yard landscaping in the Courtyards required rejuvenation ("Project"). On March 31, 2021, a Board meeting was held. and landscaping proposals from Alpine Landscapes, BrightView, and Serpico, were considered for the Project. The Board deferred the decision until after the treasurer could review the budget and financials. (Declaration of Ray Ivicevich, Exhibit C (Minutes of March 31, 2021, Board meeting).)

The Association notified members that a Board meeting would be held on April 14, 2021, and in its revised April 9, 2021 notice, it listed unfinished business concerning the Courtyards on the meeting's agenda. (Declaration of Ray Ivicevich, Exhibit D.) At the April 9, 2021 meeting, the Board discussed and considered the landscaping proposals and bids and voted to hire Alpine Landscapes with the start date of May 1, 2021.

In conjunction with landscaping discussions, Alpine Landscapes recommended removal of warping bender boards that edge the landscaping areas and represented that it would maintain edges of turfs and shrubs naturally. (Declaration of Ryan Dinsmore.)

Plaintiff was previously a member of the Eagle Ridge Landscape Committee until 2020 and was a member of the Eagle Ridge Architectural Committee until the April 14, 2021 meeting. Immediately after attending the April 14th meeting, Plaintiff emailed his resignation to the Board.

On June 28, 2021, Plaintiff emailed the Board after Alpine had removed warped wooden bender boards, demanding that the boards be replaced. (Declaration of Ray Ivicevich, Exhibit I.) In the email, Plaintiff threatened that he was organizing a class action lawsuit of his neighbors to sue to have the bender boards replaced.

While ongoing landscaping rejuvenation and maintenance of the Courtyards was being performed, Plaintiff filed his complaint on August 2, 2021. He filed an amended complaint on October 10, 2021, ("FAC") alleging causes of action for injunctive and declaratory relief.

II. Legal Standard

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

"On a motion for summary judgment, the initial burden is always on the moving party to make a prima facie showing that there are no triable issues of material fact." (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) The moving party is entitled to summary judgment if they can show that there is no triable issue of material fact or if they have a complete defense thereto. (*Aguilar*, *supra*, 25 Cal. 4th at 843.)

A defendant moving for summary judgment bears two burdens: (1) the burden of production, i.e., presenting admissible evidence, through material facts, sufficient to satisfy a directed verdict standard; and (2) the burden of persuasion, i.e., the material facts presented must persuade the court that the plaintiff cannot establish one or more elements of a cause of action, or a complete defense vitiates the

cause of action. (Code Civ. Proc., § 437c(p)(2); *Aguilar, supra*, 25 Cal.4th at p. 850-851.) A defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Once the defendant meets this burden, the burden shifts to the plaintiff to show that a "triable issue of one or more material facts exists as to that cause of action or defense thereto." (*Id*.)

"On ruling on a motion for summary judgment, the court is to 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.'" (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 760.) Defeating summary judgment requires only a single disputed material fact. (See Code of Civ. Pro. § 437c(c) [a motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."] [emphasis added].) Thus, any disputed material fact means the court must deny the motion; the court has no discretion to grant summary judgment. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. 8; *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511-1512.)

III. Plaintiff's Evidentiary Objections

Plaintiff objects to portions of declarations submitted by Francisco Martinez, Ryan Dinsmore, and Ray Ivicevich and related exhibits. While the Court views Plaintiff's objections as complying with "format 2" set forth in Rule of Court 3.1354 subsection (b), the structure of that Rule of Court strongly suggests that a separate proposed order must be submitted. Nevertheless, the Court has discretion to consider the objections and will do so.

Plaintiff's hearsay objections to paragraphs 2 and 3 of Mr. Francisco Martinez's declaration and the attached Exhibits D and K are OVERRULED pursuant to Evid. Code § 1271.

Plaintiff's relevance objections to paragraphs 2, 3, and 5 of Mr. Ryan Dinsmore's declaration and the attached Exhibit H are OVERRULED. Plaintiff's additional hearsay objection to paragraph 5 is OVERRULED pursuant to Evid. Code § 127. Plaintiff's objection to paragraph 4 on the basis of unqualified expert opinion is OVERRULED because Mr. Dinsmore, as the owner of Alpine Landscapes reiterates his recommendation and is not rendering an expert opinion.

Plaintiff's hearsay objection to paragraph 5 of Mr. Ray Ivicevich's declaration is SUSTAINED IN PART AND OVERRULED IN PART. To the extent that the paragraph identifies Exhibit D, the objection is OVERRULED pursuant to Evid. Code § 1271. The objection is SUSTAINED to the portion of the declaration referencing Grayson Community Management's service of the notice of Agenda. Additionally, Plaintiff's relevance objects to paragraphs 6, 9, and 10 are OVERRULED. Plaintiff's hearsay objections to paragraphs 7, 8, and 11 are OVERRULED pursuant to Evid. Code § 1271.

IV. Analysis

Plaintiff in his FAC, vaguely and indefinably, alleges his first cause of action for injunctive relief and damages from breach of governing documents and his second cause of action for Declaratory relief. As the basis for these two claims, Plaintiff alleges breach of Article V sections 5.1 and 5.8 of the CC&Rs. Plaintiff quotes from these articles to highlight Defendant's responsibilities in maintaining the common areas and in particular the landscaping in the community. However, the complaint vaguely and conclusively alleges that Defendant has failed and continues to fail to maintain landscaping in accordance with these articles. (FAC ¶¶ 8-11, 13-14) Plaintiff does not allege any facts showing how Defendant breached these articles i.e., how it failed to maintain the landscaping, when the breach occurred, and how Defendant will continue to fail in maintaining the landscaping.

Injunctive relief, alleged as Plaintiff's first cause of action, is not a stand alone cause of action. "Injunctive relief is a remedy and not, in itself, a cause of action …." (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1159, quoting *Shell Oil v. Richter* (1942) 52 Cal.App.2d 164, 168.) Because "[a] permanent injunction is merely a remedy for a proven cause of action [,] [i]t may not be issued if the underlying cause of action is not established." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 647.) Therefore, whether Plaintiff is likely to succeed on his claim for injunctive relief will depend on whether he is likely to succeed on his other claims. Although Plaintiff does not specifically allege a cause of action on which his injunctive relief will depend on, the Court reasonably infers that the underlying cause of action is a breach of contract. Therefore, to prevail on its summary judgment motion, Defendant must show Plaintiff cannot establish one or more elements of a breach of contract claim or a complete defense to the claim.

A. **Breach of Governing Documents (CC&R)**

Defendant asserts:

1. Article V section 5.1 of the CC&Rs obligates Defendant to maintain, repair, replace, manage, operate, paint and upkeep of Common Areas, all improvements situated in the Common Area and any Improvements which a Declaration of Annexation provides are to be maintained by the Association. (Declaration of Ray Ivicevich, Exhibit A.)
2. Section 7.2. (g) of the Supplement obligates Defendant to maintain, repair, and replace all landscaping in the front yards for the Courtyards lots. (Declaration of Ray Ivicevich, Exhibit B.)
3. The Association's Board of Directors is tasked with making decisions about landscaping.
4. No vote of members was/are required for the Board's decisions in maintaining, rejuvenating, or replacing landscaping.
5. Article VII section 7.4 of the CC& R makes the Board the ultimate arbiter of disputes regarding front yards of the Courtyard.
6. The Court must give the Board's decision judicial deference.

Defendant's compendium of evidence establishes that in 2020, its Board of Directors decided to rejuvenate the front landscaping in the Courtyard lots. In a Board meeting held on March 31, 2021, landscaping bids were addressed as part of the Manager's Report and New Business agenda. Upon a seconded motion, the Board tabled its decision on landscaping bids until after its budget review. During the meeting's open forum, homeowners expressed their concerns about removal of sycamore trees, maintenance of the golf course, and landscaping; specifically, one homeowner requested removal of the bender boards. (Declaration of Ray Ivicevich, Exhibit C.) Two weeks later, on April 14, 2021, the Board held a meeting, discussed landscaping needs, and passed a resolution to hire Alpine Landscapes for its rejuvenation plan with the start date of May 1, 2021. Plaintiff, as a Board member, attended the meeting. (Declaration of Ray Ivicevich, Exhibit E.) Three months into the Project, Plaintiff filed this lawsuit.

In his opposition and response to Defendant's Statement of Undisputed Material Facts, Plaintiff does not dispute or object to Defendants' assertions about member's vote, judicial deference, Board's authority to hire a landscape company, or the Board being the arbiter of disputes because they are non-

issue. Instead, Plaintiff reiterates Article V section 5.8 and seemingly argues that Defendant's landscape maintenance and repairs constitute alterations inconsistent with the standards of design and quality as originally established by Declarant. Plaintiff adds that pursuant to Article XII section 11.1.1, proposals for alterations should have been submitted to the Architectural Committee for approval, and Defendant's failure to provide evidence of such application is fatal to its decision to alter the landscaping around his house.

The Court finds Plaintiff fails to specify what Defendant did or proposes to do that is tantamount to an alteration of landscape design or quality. In his answer to Defendant's special interrogatory numbers 1, 4, 7, 10 and 16 asking Plaintiff to specify how Defendant failed to maintain and repair the landscaping, Plaintiff states:

> "Without providing notice of any meeting at which changes in the landscaping were considered, discussed or voted upon, and without having the required meeting or any legal form to vote, Defendant made material changes to the landscaping at the Courtyards lots in violation of Articles 5.1 and 5.8 of the CC&Rs, which changes adversely affect the value of Plaintiff's property and his enjoyment thereof."

(Declaration of Sharon Pratt, Exhibit L.)

Hints about what Plaintiff might believe to be Defendant's wrongdoing are also found in, (1) Plaintiff's response to Defendant's special interrogatory number 16, where he states "[t]hose changes include removal of the bender board _____[sic]." (Declaration of Sharon Pratt, Exhibit L), and (2) Plaintiff's June 28, 2021, email communication with the Board demanding the installation of the lawn bender board and a possible class action suit. (Declaration of Ray Ivicevich, Exhibit I.)

Mr. Dinsmore, owner of Alpine Landscapes, testified: "Alpine Landscapes recommends large homeowners associations remove and not replace bender boards. Bender board edging warps over time and replacement is a financial burden on communities. The edges of turf and shrubs bed can be maintained without bender boards." (Declaration of Ryan Dinsmore, ¶ 4.) Defendant's Board of Directors accepted and implemented this recommendation.

The Court cannot reasonably conclude from the pleadings, moving papers, Defendants' compendium of evidence, or Plaintiff's opposition that the removal of bender board edgings was indeed

the design alteration complained of. Even if the Court was to infer that removal of bender boards was a design alteration, Defendant was not and is not required to obtain Architectural approval for this removal.

Article V section 5.2.1 of the CC&R addresses alterations to common areas and provides: "Approval – Alterations to any Improvements situated in, upon or under the Common Area may be made only by the Association. A proposal for an Alteration to an Improvement may be made at any meeting. A proposal may be adopted by the Board, subject to the limitations contained in the bylaws." (Declaration of Ray Ivicevich, Exhibit A.) Plaintiff's argument that the architectural committee's approval is required for Defendant's alteration in landscaping is without support.

Defendant satisfies its burden to that Plaintiff's claim cannot be established based on lack of evidence on the essential elements of the claim. The burden then shifts to Plaintiff to show that a "triable issue of one or more material facts exists as to that cause of action or defense thereto." (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Plaintiff has fails to provide any evidence to show how Defendant breached the CC&Rs, his claim therefore fails, and Defendant's motion is GRANTED.

B. **Declaratory Relief**

To obtain declaratory relief, Plaintiff must show (1) a proper subject of declaratory relief and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546.) Code of Civil Procedure section 1060 allows a declaratory relief cause of action to be brought by "any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of watercourse …" (Code Civ. Proc. §1060)

Here, Plaintiff is not asking the Court to make a declaration with respect to his legal rights to another person or over a property. Nor is Plaintiff asking for the Court's declaration with respect to Defendant's legal duties to him or over his property. Instead, Plaintiff appears to seek the Court's adjudication that Defendant breached the CC&Rs when it acted outside of it rights in maintaining the landscaping, which, as explained above, Plaintiff cannot show.

Defendant has met its burden on this claim, and its motion is GRANTED.

C. **Defective Notice**

Plaintiff: (1) Defendant's notice of the April 14, 2021 Board meeting was materially defective and (2) Defendant has failed to provide evidence of notice for the March 31, 2021, Board meeting.

Plaintiff does not allege defective or improper notice in the FAC. "[A] summary judgment motion necessarily is addressed to the pleadings." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 172.) "[A] party cannot successfully resist summary judgment on a theory not pleaded." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541.) "[T]he [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings." (*Hutton v. Fidelity National Title Company* (2013) 213 Cal.App.4th 486, 493 [internal citations and quotations omitted].) Because Plaintiff did not plead insufficiency of notice, Plaintiff cannot attempt to defeat Defendant's motion for summary judgement by raising it in his opposition.

Defendant's Motion for Summary Judgment is GRANTED.