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

November 14, 2024
9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

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 will appear at the hearing to contest the tentative

If you fail to so notify the court or opposing side, the Court will not hear argument, and the tentative ruling will be adopted.

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

APPEARANCES

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LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV375332	Chris Wilson vs SoundHound Inc. et al	SoundHound's motion for summary adjudication is GRANTED, IN PART. Scroll to line 1 for complete ruling. Court to prepare formal order.
2	2014-1-CV-271852	Developers Surety And Indemnity Company vs Weinstock Family Trust, et al	Judgment Assignee Sunnycove Investments, Inc.'s motion for post-judgment attorney's fees is GRANTED. Review of the court file for this case reveals the arduous journey taken to collect this judgment duly entered by the sister state court of Washington. It appears undisputed that Sunnycove is entitled to an award of the fees and costs it incurred in collecting the judgment. The only issue raised is with the hourly rate. The Court finds $600 per hour to be reasonable for Silicon Valley and this case type. The Court also finds the number of hours spent and the care counsel took to remove hours not spent on judgment collection and to reduce paralegal time that, upon reflection, could have been billed as administrative time, reasonable. Accordingly, the Court awards Sunnycove $83,455 in fees and costs. Court to prepare formal order.
3	21CV389465	Naren Chaganti vs Fifth Third Bank	Plaintiff's motion to tax costs is DENIED. First, it does not appear to the Court that this motion was served. Plaintiff's proof of service states the motion documents "are served electronically via the ECF system on all parties who appeared in this case." This is a federal court practice. The Court does not currently "electronically via the ECF system [serve] on all parties who appeared in [a] case." Even if it did, that would not alleviate Plaintiff's obligation to serve the motion. However, this motion is not well-taken in any event, and is denied on the separate ground that the memorandum of costs was served. Plaintiff cites no authority that supports Plaintiff's apparent position that if parties generally favor one form of service over another during a lawsuit that is the only service method permissible. If, for example, the memorandum of costs had been served personally or by certified mail return receipt, would that service warrant striking the memorandum of costs because it was not also emailed to Plaintiff? The Court is unaware of any authority supporting this view. The costs sought are also appropriate. Accordingly, Plaintiff's motion is DENIED. Court will prepare formal order.
4-6	22CV403628	Thien Dang vs Long Vu et al	Plaintiff filed three motions to compel. The parties agree that thereafter, Defendant who had previously been self-represented, served verified, code compliant responses. Plaintiff further avers that Defendant offered to pay half of the attorneys' fees sought for preparing the motions but would not agree to pay the costs. The Court notes that had Plaintiff taken Defendant's offer and withdrawn the motions to compel, neither party (nor the Court) would have had to continue working on this dispute. The Court finds Defense counsel's prompt efforts to correct the discovery issues caused by the previously self-represented client and affirmative offer to pay half of Plaintiff's attorneys' fees was reasonable. Defendant (not Defense counsel) is therefore ordered to follow through on that offer and pay Plaintiff $675 in attorneys' fees within 30 days of the service date of the formal order, which formal order the Court will prepare.
7	22CV404372	UM GURUNG et al vs GARLIC FARM TRUCK CENTER, LLC et al	Before the Court is Defendants' motion regarding the propriety of Plaintiffs' Doe amendment to add Ashraf Ali as a defendant pursuant to Code of Civil Procedure section 474. The parties' briefing focuses on what they regard to be technical non-compliance with various rules. However, based on this record, the Court observes the following: (1) if Ashraf Ali formally moved to set aside default, that motion would likely be granted based on controlling law, (2) if Plaintiff moved to amend the complaint to add Ashraf Ali as a defendant (rather than adding Ashraf Ali through the Doe amendment process), such motion to amend would likely be granted under controlling law, and (3) there does not appear to be a statute of limitations or other similar issue that would prevent Plaintiffs from moving forward with their case against Ashraf Ali. This Court is not fond of motions resulting in orders that simply create more motion practice to get to the same result that could obtain from the original motion (or, even better, a stipulation). Accordingly, the parties are ordered to appear and explain why they could not stipulate to these technical procedural issues to expedite resolution of this dispute on the merits, which is the type of resolution the law favors.

8	23CV422394	Zenaida Seid vs Lucian Naum et al	Plaintiff Zenaida Seid's motion for terminating sanctions is GRANTED, IN PART. Code of Civil Procedure section 2031.310(i) provides: "if a party fails to obey an order compelling further [discovery] responses, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction." (See also *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154.) There are four types of terminating sanctions: (1) striking pleadings in whole or in part; (2) staying further proceedings by a party until it obeys a discovery order; (3) dismissing the action or part of it; and (4) rendering a default judgment. (Code of Civ. Pro. §2023.030(d).) The trial court has broad discretion to impose discovery sanctions; a judge's sanction order will not be reversed absent "a manifest abuse of discretion that exceeds the bounds of reason." (*Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1191.) However, a sanction should not provide a windfall to the other party by putting that party in a better position than it would have been in if the party had obtained the discovery. (*Kwan Software Eng'g, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74-75.) The basic purpose of a discovery sanction is to compel disclosure of discoverable information. (*Rutledge*, 238 Cal.App.4th at 1193.) Sanctions may not be imposed solely to punish the offending party. (*Id.*; *Kwan*, 58 Cal.App.5th at 74-75.) Here, Defendant failed to respond to requests for production directed to documents in support of Defendant's affirmative defenses. On July 2, 2024, the Court ordered Defendant to produce code compliant responses without objections and to pay $830.00 in sanctions within 20 days of the service date of the July 2, 2024 order. To date, Defendant has not complied with the Court's July 2, 2024 order. In fact, Defendant failed to (1) respond to the requests for production, (2) oppose Plaintiff's motion to compel responses to those request for production, (3) comply with the Court's order granting that motion to compel, (4) respond to Plaintiff's repeated inquiries regarding that failure to comply, or (5) oppose this motion for terminating sanctions. Plaintiff's declaration is somewhat vague on this point, but Plaintiff seems to imply that since the clerk's office rejected Defendant's cross-complaint, Defendant has ceased participating in the litigation. However, the Court cannot make such a finding on this record, and although Defendant's lack of activity in the case is troubling, the Court finds the drastic sanction of default is not (yet) supported here. The case law teaches that sanctions are not designed to punish and/or put the moving party in a better position than the party would have been if it had received the discovery. It is the Court's view that striking the answer and entering default would do just that here. A more appropriate sanction at this juncture is to strike all of Defendant's affirmative defenses. Accordingly, (1) Defendant's affirmative defenses are stricken, and Defendant is ordered to (2) produce verified, code compliant written responses without objections to the April 19, 2024 requests for production, (3) produce all documents sought by those requests, and (4) pay Plaintiffs $830 in monetary sanctions within 20 days of the service date of the formal order, which formal order the Court will prepare. Defendant is on notice that failure to strictly comply with this order will likely result in increased sanctions, including striking Defendant's answer and entry of default against Defendant.
9	23CV424247	Trailer Terrace, Inc. vs. D. Ledesma Sr.	Trailer Terrace, Inc.'s motion for judicial declaration of abandonment is GRANTED. Petitioner satisfied all requirements set forth in Civil Code § 798.61. However, the supporting declaration does not have the referenced exhibits attached. Petitioner is ordered to submit those exhibits to Department6@scscourt.org by 5 pm today or, if such exhibits cannot be so submitted, to appear at the hearing. After the exhibits are submitted or Petitioner appears at the hearing, Petitioner shall prepare the formal order for the Court's review.

10	24CV431703	Pingping Xiu et al vs Dinggang Xu et al	Plaintiffs' Pingping Xiu and Weiwei Shen's motion to set aside October 10, 2024 Order of Dismissal Without Prejudice is GRANTED. Code of Civil Procedure section 473(b) provides, in relevant part: "the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any . . . resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." The Court dismissed the case without prejudice on October 10, 2024 for Plaintiffs' two failures to appear. Plaintiffs moved to set aside that dismissal on October 22, 2024. The motion is supported by counsel's declaration attesting to counsel's neglect to respond to or appear at the OSC, which neglect the Court finds excusable on this record, which includes other activity by Plaintiffs in the case. Within 30 days of the service date of the formal order, Plaintiffs are ordered to pay Defendants $2,009.85 in attorneys' fees and costs Defendants incurred as a direct result of Plaintiffs' failure to appear at or respond to the OSC and the consequent dismissal. The Court finds Defense counsel's hourly rate reasonable for this case type in Santa Clara County and the 3.6 total hours to prepare documentation and counsel Defendants regarding the dismissal appropriate. Court to prepare formal order.
11	24CV443969	Ruthelma Hart vs Capital One, N.A.	Off calendar.

Calendar Line 1
Chris Wilson v. Soundhound, Inc. et al. Case No. 21CV375332

Before the Court is defendants SoundHound Inc.'s, SoundHound AI's, and Keyvan Mohajer's ("Mohajer") (collectively, "SoundHound") motion for summary judgment or in the alternative summary adjudication against plaintiff Chris Wilson. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Alleged Facts

According to the fifth amended complaint ("5AC"), Wilson was employed by SoundHound from November 29, 2011, to August 30, 2019. (5AC, ¶ 19.) SoundHound is a digital voice application company that enables humans to speak naturally to their smartphones and other devices. (5AC, ¶ 19.) Wilson was initially hired as a Principal Engineer and later he was promoted to Architect. (5AC, ¶ 20.) He created a significant amount of SoundHound's intellectual property, and he was an integral employee. (*Ibid*.)

Over the course of his seven-and-a-half-year employment, Wilson received 170,000 shares in stock option grants, in addition to his annual base salary and cash bonuses. (5AC, ¶¶ 21-23.) The total value of his vested stock options in 2019 totaled approximately $4.8 million to $5.9 million in equity. (5AC, ¶ 23.)

On May 10, 2019, without advanced notice or good cause, SoundHound placed Wilson on a leave of absence, and in September 2019, terminated his employment. (5AC, ¶ 24.) The termination was the culmination of an unlawful retaliation campaign against Wilson for exercising his privacy rights under the California Constitution by refusing to sign an intrusive digital data agreement with SoundHound, whereby the company sought to monitor all professional and personal communications of all employees on any device at any time. (*Ibid*.) After the termination, SoundHound refused to permit Wilson to exercise the equity on the terms agreed to in his written and oral employment contracts. (5AC, ¶ 25.)

Wilson initiated this action on January 24, 2021, and on February 6, 2023, he filed his amended complaint, which asserted: (1) wrongful termination in violation of public policy; (2) retaliation; (3) detrimental reliance; (4) violation of the covenant of good faith and fair dealing;

(5) fraud and deceit; (6) declaratory relief and specific performance; (7) reformation and partial recission; (8) injunctive relief; (9) breach of fiduciary duty; (10) violation of penal code sections 484 & 496; and (11) failure to maintain wage statements. SoundHound filed a demurrer to the fourth, tenth, and eleventh causes of action. On June 9, 2023, the Court issued its order sustaining the demurrer to the amended complaint.

On June 20, 2023, Wilson filed his third amended complaint ("TAC") which asserted the same causes of action. On July 19, 2023, SoundHound filed a demurrer to the fourth, tenth, and eleventh causes of action. On October 27, 2023, the Court issued its order (the "Order") sustaining the demurrer to the fourth and tenth causes of action with leave to amend and overruling the demurrer as to the eleventh cause of action.

On January 4, 2024, Wilson filed his 5AC, asserting, (1) wrongful termination in violation of public policy; (2) retaliation; (3) detrimental reliance; (4) fraud and deceit; (5) violation of the covenant of good faith and fair dealing; (6) declaratory relief; (7) reformation and partial recission; (8) injunctive relief; (9) breach of fiduciary duty; (10) violation of penal code sections 484 & 496. On June 3, 2024, the Court issued its order sustaining SoundHound's demurrer to the fourth and tenth causes of action without leave to amend. On August 30, 2024, SoundHound filed the instant motion, which Wilson opposes.[1]

II. Evidentiary Objections

A. Wilson's Initial Objections

Wilson's objections do not need to be ruled upon because they do not comply with Rule of Court 3.1354 ("Rule 3.1354"). Rule 3.1354 requires the objections to be numbered and Wilson submits 15 pages of objections to SoundHound's evidence without any numbers. Thus, the Court declines to rule on Wilson's objections. (See *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1 (*Hodjat*) [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at

[1] Trial is set for December 2, 2024, however, on August 7, 2024, the Court granted SoundHound's ex parte application to have this matter heard within 30 days of trial. (See Code Civ. Proc., § 437c, subd. (a)(3).)

filing properly formatted papers].) Objections that are not ruled on are preserved for appellate review. (See Code of Civ. Proc., § 437c, subd. (q).)

B. Wilson's Objections to SoundHound Reply Papers

While Code of Civil Procedure section 437c does not authorize filing reply separate statements, such a statement is not evidence in any event. Thus, the Court will not consider Plaintiff's objections to the reply separate statement.

"The general rule of motion practice…is that new evidence is not permitted with reply papers…'[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case...' and if permitted, the other party should be given the opportunity to response." (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538 (*Jay*).) Reply evidence should not address substantive issues in the first instance but only fill gaps in the evidence created by the opposition. (*Ibid*.)

SoundHound's reply declaration responds to contentions raised in Wilson's opposition. Therefore, the Court exercises its discretion and considers the reply evidence.

C. SoundHound's Objections

SoundHound's objections also do not need to be ruled upon because they do not comply with Rule 3.1354, which requires two documents to be submitted when evidentiary objections are made: the objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule. (See *Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) [trial courts only have duty to rule on evidentiary objections presented in the proper format].) SoundHound submitted only one document with the objections, in violation of Rule 3.1354. Consequently, the Court declines to rule on the evidentiary objections. Objections that are not ruled on are preserved for appellate review. (See Code of Civ. Proc., § 437c, subd. (q).

III. Procedural Deficiencies

In its reply, SoundHound argues Wilson filed an oversized memorandum and that the declaration of Stephen Henry's ("Henry"), Wilson's counsel, is unsigned. On November 11, 2024,

Henry filed a notice of errata correcting the errors. Nevertheless, counsel is admonished to comply with court rules and procedure in future filings.

IV. Legal Standard

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.)

Pursuant to Code of Civil Procedure section 437c, SoundHound moves for summary judgment, or in the alternative, summary adjudication of the first, second, third, sixth, seventh, eighth and ninth causes of action as well as Plaintiff's prayer for punitive damages.[2]

V. **Analysis**

SoundHound's undisputed material facts are as follows: Wilson's employment was at will and he had to adhere to standards professionalism, loyalty, integrity, honesty, reliability, and respect for all. (SoundHound's Undisputed Material Facts ("UMF"), Nos. 1-2.) The company's executives determined that as the company scaled, Wilson was unable to efficiently and effectively collaborate with team members on the level needed. (SoundHound's UMF, No. 3.) Three of the company's co-founders—Mohajer, Tim Stonehocker ("Stonehocker"), and James Hom—determined Wilson refused to delegate tasks without ultimately having his hands on every assignment. (SoundHound's UMF, No. 4.) In January 2017, Wilson "was very busy with many things and he was unable to do everything that everyone wanted from [him]," and he "wasn't able to do all the things," other employees needed. (SoundHound's UMF, No. 5.) Wilson acted with hostility towards multiple colleagues. (SoundHound's UMF, No. 6.) His hostile behavior caused several employees to request reassignment to a different team and caused other employees to leave the company entirely. (SoundHound's UMF, No. 7.) Several core products failed to progress because of Wilson, including two of the company's main products at the time—Hound and Houndify—which grew stagnant as Wilson repeatedly "blocked" employees from working on code, failed to respond to colleagues who required his input, rejected "unauthorize" changes to what Wilson called "my code," and demanded control of every

[2] In his opposition, Wilson states he "is no longer asserting a claim for declaratory relief on his sixth cause of action." (Opp. p. 3, fn. 2.)

component of a project necessary to launch a new feature. (SoundHound's UMF, No. 8.) Wilson concedes he "overreacted in e-mail and made things worse," and that he had "done that in other situations in the past." (SoundHound's UMF, No. 9.) Wilson failed to meet deadlines and his performance jeopardized the business relationships between SoundHound and other significant customers. (SoundHound's UMF, Nos. 10-11.)

Starting in early 2018, Mohajer and Stonehocker—SoundHound's Chief Technology Officer—started meeting with Wilson once a week ("Weekly Meetings") and Wilson was informed that his current performance would lead to the company's failure. (SoundHound's UMF, Nos. 12-13.) SoundHound viewed the Weekly Meetings as a performance improvement plan and a measure of escalation to correct the trajectory. (SoundHound's UMF, No. 13.) After the Weekly Meetings started, multiple employees continued to report inappropriate conduct by Wilson. (SoundHound's UMF, No. 14.) In December 2018, Wilson was repeatedly late for virtual meetings with important third-party teams, and he responded with hostility when Mohajer corresponded with him about it. (SoundHound's UMF, Nos. 15-16.)

In early 2019, SoundHound rolled out a Digital Data Policy (the "Policy") and Wilson, along with other employees, voiced concerns about the Policy and SoundHound informed them that they did not need to sign it. (SoundHound's UMF, Nos. 28, 30-31.) Wilson made a Facebook post about it. (SoundHound UMF, No. 32.) SoundHound withdrew the policy. (SoundHound's UMF, No. 33.)

On May 10, 2019, SoundHound put Wilson on a three-month paid leave and during his leave, SoundHound attempted to negotiate the terms of an advisory arrangement with Wilson. (SoundHound's UMF, Nos. 17-18, 34.) During his employment, Wilson received 170,000 stock option grants (some were vested, and some were already exercised and sold). (SoundHound's UMF, No. 19.) SoundHound provided Wilson with the full benefits of his employment, including the benefits associated with his stock options, while he was on leave and the parties negotiated for more than six weeks over a proposed advisory agreement that would have extended the term of his stock option agreements. (SoundHound's UMF, Nos. 20-21.) His stock option agreements contained a Term that the options would expire following thirty (30) days after

Wilson's employment with SoundHound ended and Wilson's employment ended on August 30, 2019. (SoundHound's UMF, Nos. 22-23.) The company extended Wilson's paid leave by three weeks to give him more time to consider an advisory agreement. (SoundHound's UMF, Nos. 24.) His stock option agreements contained an integration clause and did not allow for oral modification or amendment thereof. (SoundHound's UMF, Nos. 25-26.) SoundHound terminated Wilson because of his performance. (SoundHound's UMF, No. 27.)

Plaintiff's additional material facts are as follows: While Mohajer denies he was upset or angry by Wilson's whistleblower complaint, Wilson was aware that he was upset and it was known at SoundHound that Mohajer was angry about Wilson's Facebook post. (Plaintiff's Additional Material Facts ("AMF"), Nos. 1-2.) In October 2018 and on March 6, 2019, Mohajer had an expectation that Wilson would remain employed at SoundHound and would continue to earn stock options. (Plaintiff's AMF, Nos. 3-4.) SoundHound maintains Wilson made the decision not to return to work. (Plaintiff's AMF, No. 5.) Wilson understood it was "very, very, very unlikely" that Mohajer "was going to want [him] to come back because of the way he had removed [him] from [his position], without notice and suddenly put [him] on leave and barred [him] from all contact with the company, both physical and electronic." (Plaintiff's AMF, No. 6.) However, Wilson wanted to return and if he had been given the opportunity, he would have. (Plaintiff's AMF, No. 6.) Mohajer understood he had an obligation to honor the commitment he made prior to, and acknowledged after, Wilson was terminated, to ensure that Wilson would not lose his stock options and that the company had a mechanism to effectuate such an agreement. (Plaintiff's AMF, No. 7.) SoundHound has an established business practice of entering Consulting Agreements to allow individuals, including former employees, to retain stock options. (Plaintiff's AMF, No. 8.) SoundHound failed to provide Wilson a Consulting Agreement that protected his right to retain his stock options and instead provided him with one that gave SoundHound unilateral control to terminate the agreement with 120-days notice for any reason. (Plaintiff's AMF, No. 9.) Mohajer stated that the stock options Wilson was rewarded were deferred compensation for his work as an employee at SoundHound. (Plaintiff's AMF, No. 10.) SoundHound was able to extend the time to negotiate the Consulting Agreement but refused to

do so. (Plaintiff's AMF, No. 11.) The Consult Agreement provided to Wilson on September 21, 2019, needed to have an effective date of September 1, 2019, for Wilson to have "continuous service" at SoundHound. (Plaintiff's AMF, No. 12.)

A. Second Cause of Action-Retaliation

To establish a prima facie case of retaliatory discharge under section 1102.5, a plaintiff must show that "(1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 468.) An employee engages in protected activity when she or he discloses "to a government agency…to a person with authority over the employee, or to another employee who has the authority to investigate, discover, or correct the violation or noncompliance… if the employee has reasonable cause to believe that the information discloses… a violation of or noncompliance with a local, state, or federal rule or regulation…" (Lab. Code, § 1105.2, subd. (a).)

The California Supreme Court recently clarified that: "Section 1102.6 provides the governing framework for the presentation and evaluation of whistleblower retaliation claims brought under Section 1102.5. First, it places the burden on the plaintiff to establish, by a preponderance of evidence, that retaliation for an employee's protected activities was a contributing factor in a contested employment action. The plaintiff need not satisfy *McDonnell Douglas* in order to discharge this burden. Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reason even had the plaintiff not engaged in protected activity." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718.)[3]

The Court later explained that "[u]nder section 1102.6, a plaintiff does not need to show that the employer's nonretaliatory reason was pretextual. Even if the employer had a genuine, nonretaliatory reason for its adverse action, the plaintiff still carries the burden assigned by statute if it is shown that the employer also had at least one retaliatory reason that was a

[3] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 articulates a three-part burden shifting test.

contributing factor in the action." (*Lawson*, *supra*, 12 Cal.5th at pp. 715–716.) It further noted that "were we to adopt PPG's bifurcated approach, employee plaintiffs might never have the opportunity to show at trial that retaliation was a contributing factor in an adverse action, because they would have first been required to show at summary judgment that retaliation was, in effect, the *only* factor. . . . To the extent PPG is concerned that the existing framework sets the plaintiff's bar too low by requiring only a showing that retaliation was a contributing factor in an adverse decision, PPG's remedy lies with the Legislature that selected this standard, not with this court." (*Id*. at pp. 717-718, internal citations omitted, emphasis in original.)

"'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P*. (1981) 28 Cal.3d 908, 919; see also CACI 201 [Highly Probable—Clear and Convincing Proof]. "Under the clear and convincing standard, the evidence must be so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind." (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1158, internal quotations omitted.)

SoundHound provides Stonehocker's declaration, in which he states, when he met Wilson, he thought he was a "very competent engineer and a gifted coder." (Stonehocker Decl., ¶ 3.) However, in 2017, Wilson's performance did not meet expectations as he started to clash with colleagues which was often caused by his need to control his codebase and refusal to accept any edits or modifications. (*Ibid*.) One example involved Keni Fukushima ("Fukushima") who was part of the Tokyo team and worked on products for the Japanese market. (*Ibid*.) While Fukushima was proficient in English and Japanese, Stonehocker states he believes the language barrier between them caused part of the dispute and they did not always see eye to eye on software developments. (*Ibid*.) Stonehocker cautioned Wilson about his approach with Fukushima and warned him to refrain from doing things that would bring out the worst in him. (*Ibid*.) Fukushima resigned from his position, and he identified his experience with Wilson as very negative. (Stonehocker Decl., ¶ 4.) Two weeks later, another employee, Rob Macrae ("Macrae") resigned because of Wilson. (Stonehocker Decl., ¶ 5.) By the end of 2017 and early 2018, Wilson was engaging in hostile conduct that caused employees to resign and his need for

total control over his codebase resulted in multiple missed deadlines because Wilson could not keep up with the level of workflow. (Stonehocker Decl., ¶ 6.)

To address these issues and put Wilson "on a path to success" Stonehocker and Mohajer decided to meet with Wilson on a weekly basis. (Stonehocker Decl., ¶ 7.) SoundHound management viewed the meetings as a performance plan that was escalating the issues and to correct his problematic conduct. (*Ibid*.) In early 2018, they gave him a presentation about how his conduct was effecting the company. (*Ibid*.) He was informed that his conduct had to stop or else the company would not be able to scale, which would lead to its failure. (*Ibid*.) Through 2018, Wilson continued to have disputes with multiple engineers for the same reasons. (Stonehocker Decl., ¶ 10.) In March 2019, he received word from Joe Aung ("Aung") that the Tokyo team was "at the breaking point with Wilson" as he continued to overrule any changes they made and failed to make them feel empowered. (*Ibid*.) In May 2019, his performance was no longer sustainable for the company as he refused to delegate in any material way, which resulted in missed deadlines and continued disputes with his colleagues. (Stonehocker Decl., ¶ 11.) Stonehocker states he is aware of multiple individuals who complained about the policy but were not terminated for doing so. (Stonehocker Decl., ¶ 12.) He further states, "[t]he only reason Wilson was terminated from SoundHound was because of his poor performance. The company simply could no longer function with having one of its key engineers act[ing] with total dominance over his code, all the while getting into hostile disputes with his colleagues if they tried to do their jobs by so much as editing the same. The policy has no bearing on Wilson's leave or termination." (Stonehocker Decl., ¶ 13.)

SoundHound also provides Mohajer's declaration in which he identified incidents between Wilson and his colleagues in January and February 2017. (Mohajer Decl., ¶¶ 6-7.) Wilson originally reported to the Chief Science Officer and Senior Vice President Majid Emami ("Emami"), however, because of Wilson's disrespectful conduct towards Emami, Mohajer took him on as a direct report. (Mohajer Decl., ¶ 11.) Mohajer detailed the weekly meetings with Wilson and Stonehocker, the presentation given to him, and the issues Wilson needed to address and how to address them. (Mohajer Decl., ¶¶ 12-17.)

In December 2018, Mohajer became aware that Wilson was showing up late to important meetings with overseas third-party teams. (Mohajer Decl., ¶ 19.) After one incident, Mohajer told Wilson "please…not do this anymore" because "it makes them take us less seriously and impacts their performance," and he told another employee to start the meetings on time, even if Wilson was running late or unavailable. (*Ibid*.) Wilson responded by stating, "I've never had a boss anywhere else who treated me so rudely," and complained that Mohajer directly contradicted him to the employee, and if Mohajer had a problem with the information Wilson gave to the employee, then Mohajer should talk directly with Wilson. (*Ibid*.) Mohajer responded by informing Wilson he was "WAY out of line!" and told him to "take this email as notice that I will not tolerate this kind of disrespectfulness if it happens again (to me or anyone else in the company). (*Ibid*.)

In March 2019, Mohajer became aware of another incident between Wilson and the Tokyo team, and the situation deteriorated to the point that in April 2019, the Tokyo team sent a letter to Mohajer informing him that the entire team would likely quit if Wilson did not change his ways. (Mohajer Decl., ¶ 20.) The Tokyo team identified the same issues, i.e., Wilson's failure to work collaboratively and his failure to delegate tasks which blocked what others could work on. (*Ibid*.) By May 2019, Mohajer "was dealing with issues related to Wilson on a seemingly daily basis—multiple employees quit their jobs because of him and some even cried in my office. Multiple customers sent us official letters about missed deadlines. One customer that we were working on for years cancelled their expansion plans with SoundHound because it lost confidence in our ability to deliver on time… Wilson repeatedly failed to deliver… because… he refused to work collaboratively with others—an issue that he was specifically informed of in early 2018…and which I continually discussed with him on repeat at our weekly meetings ever since." (Mohajer Decl., ¶ 22.)

As a result, Mohajer states,

> Because of Wilson's performance, I decided to put him on leave in May 2019 for three months. I did this because by May 2019, I believed at least the following different data points warranted a separation between him and the company: 1) he

> created a toxic environment that negatively impacted most SoundHound employees, 2) he frequently displayed bullying, rage, and hostile behavior towards coworkers, despite being informed such behavior was prohibited, 3) he was unwilling to cooperate, collaborate, and compromise, 4) he repeatedly missed deadlines which caused severe damage to the company's business, staff, and reputation, 5) he refused to follow guidelines and suggestions, 6) he created significant and numerous dependencies on himself, then threatened to stop working on high priority tasks, 7) he refused to embrace modern technologies and used non-standard tools which caused SoundHound to fall behind, 8) he ignored requests from coworkers and executives, 9) he created a software engineering dictatorship that blocked collaboration, impeded success, and restricted contributions, learning opportunities, decision-making, and growth without his unilateral discretion, which often times he refused to timely provide, 10) he forced others to remain idle until he provided input which brought projects to a halt causing millions of dollars of loss, and harming the company's reputation, 11) he demanded preferential treatment, 12) he created a constant fear and anxiety among several teams, 13) he caused numerous employees to quit, or threatened to quit their project or their job due to Wilson's personality and unprofessionalism, and 14) he put the company on the path of complete failure.

(Mohajer Decl., ¶ 24.)

This is sufficient for SoundHound to meet its burden to show it would have taken the same actions even if Wilson had not complained about the Policy. Thus, the burden shifts to Wilson to show at least one retaliatory reason that was a contributing factor to his termination.

Wilson directs the Court to Stonehocker's deposition testimony, as follows,

> I can't remember if it was the same conversation or a different one shortly thereafter, but I do remember him asking how I would see the team operating if we went with what I referred to as plan B earlier, if Chris weren't on the team and we were trying to use NTERC, is it ready? What would that look like to use that?

How would I apportion responsibilities to fill the void that Chris would be leaving in order to set us up to begin performing at a much higher level?

So it was in roughly this time frame, I would say within somewhere – some number of at least days or weeks after this email that I provided a tentative plan.

As best I can recall, I told him, if you are wanting us to act on this, it would be helpful if I had a bit of lead time to plan it better. And I recall him saying something to the effect of, it's worth your time to plan out what we do, I haven't made a final decision yet, but we may need your plan. So please have a plan ready in the coming weeks.

Q. Did you prepare a written plan?

A. Not that I recall.

I do recall meeting with [Mohajer] in his office and verbally discussing a plan in some detail shortly thereafter.

Q. And this – that meeting and that discussion was after March 6, 2019?

A. Yes.

Q. I'm sorry, after –

A. I mean, a bit after.

Q. March 12th, sorry.

A. Yeah. In the – in the – I referenced several things now, but it was all in the days and weeks immediately following March 12, 2019.

(Henry Decl., Exh. 3, p. 217:6-218:14.)

Wilson relies on a portion of testimony which begins in the middle of a question. However, with its reply papers, SoundHound provided the context of the testimony, which is as follows,

Q. This is now 2019, Mr. Aung is essentially reporting that [Wilson] is too busy to provide what the Tokyo team needs.

So what did you do or what did you suggest to [Mohajer] that he do to provide [Wilson] with more time to give Tokyo what they needed?

A. As best I can recall, I talked to Keyvan in response to this and gave my diagnosis and recommendations. My diagnosis was everything we suggested in mode two and mode one, that slide deck. [Wilson] has basically continued to operate in mode one, the needs are going up, its getting completely untenable.

At this point, I have lost all confident that [Wilson] can or will make any attempt to change meaningfully. And I believe it was very shortly after this that I was very clear that I don't see any path to success with him on the project and I recommend that he not be in his current role.

And the reason I had that diagnosis… is the whole thing we've been talking about, I think the only way that [Wilson] wouldn't be in a massive backlog, given that, you know, [Mohajer] was bringing forth tasks that needed to be done in order for us to succeed at making revenue and run a business, so there's things we needed to do for partners, there's things we needed to do to run a company…[Wilson was in a mode of forbidding that or saying he will do the things we talked about earlier. And we had kept trying it, we'd kept trying to see maybe he – maybe he can catch up, maybe he can – you know, maybe this one will be two days, maybe there's a way. There was a lot of trying that.

And I believe, as best I can remember, I told [Mohajer], look, it's not working. It's – I don't think its going to work. I think if we continue for much longer to attempt to do the same things and expecting different results we're going to be very disappointed because we should just expect at this point – to have the same results.

(Manoukian Decl., Exh. A, p. 215:14-217:5.)

In the full context, this portion of Stonehocker's testimony does not support Wilson's contention that the supposed plan to move forward without him resulted from his complaint about the Policy. In fact, it supports SoundHound's position that it was working on a plan to operate without Wilson *before* Wilson complained about the Policy.

Wilson also relies on his own deposition testimony:

> Q. We've talked about a few incidences. We talked about the incident with Victor, the incident with Kenny, Rob Macrae, [Mohajer], and the one and a half years that the declaration was pending, the Tokyo team – the Tokyo team complains, and now the Tyler complaints.
>
> Do you have any understanding as to whether or not these incidences in the aggregate had any effect – or excuse me – has a substantial factor in your termination?
>
> …
>
> [A]. So these are isolated incidents over a long period of time where there were many, many positive interactions that I had with many people and many things that were successful that we did.
>
> So my understanding was that this was never – these isolated incidents were not jeopardizing my job. I was never told they were jeopardizing my job.
>
> In fact, all the evidence I was given, all the feedback that I was given was while – while there were some things that I had feedback that I could do better on, there were many more pieces of feedback that I was valued and that I was being rewarded during all this time; and that – so to me, the evidence is pretty

overwhelming that these were not substantially responsible for me being terminated.

(Henry Decl., Exh. 2, p. 346:14-347:15.)

When asked why he believed he was terminated in retaliation, Wilson testified:

Again, the fact that over seven and a half years, I have continually given rewards and praise. And while there were many things I was given negative feedback about, there were many more things I was given positive feedback about.

So I was led to believe at every point before May 10, 2019, every single day before that, I was led to believe that my – that they were very happy with me overall; and that the weight of the negatives was much less than the weight of the positives.

Q. Did anyone ever tell you that the weight of the positives was better than the weight of the negatives?

A. In those words?

Q. Something similar.

A. That was the message that I got from [Mohajer] often.

(Henry Decl., Exh. 2, p. 348:15-24.)

Wilson also states at the next all-hands meeting after he complained and before he was placed on leave, Mohajer spent his time talking about "what he called a life lesson, which is that you should trust people. And in particular, he said here's an example, you know, we asked you – we asked people to sign this new digital agreement, but some – but people complained, but the people who are complaining were being – just being emotional, they weren't being rational, because you should trust the company; and that you shouldn't worry about the details of a legal

agreement that they're telling you that you should sign. So the fact that he even though he didn't say by name, a lot of people knew that I had been kind of organizing the complaints about it; and he was – he was implicitly criticizing me for doing that exact thing and anyone who believed in me. So it shows that this really bothered him. And also I remember hearing from someone else that [Mohajer] was really angry about what happened with the whole digital data policy." (Henry Decl., Exh. 2, p. 352:17-353:16.) However, Wilson's own testimony, without more, is insufficient to create a triable issue of fact. (*Horn v. Cushman & Wakefield W., Inc.* (1999) 72 Cal.App.4th 798 [employee's subjective judgments of their competence alone do not raise a genuine issue of material fact].)

The only evidence Wilson submits other than his own testimony is the declaration of Diane Paisley, in which she states, "I recall that [Wilson] posted information on Facebook about a complaint he made regarding [the Policy] being proposed by SoundHound and I learned from my boss, the Director of Finance, Steven Emberland, that [Mohajer] was upset about [Wilson]'s posting and was going to ask [him] to remove it. (Paisley Decl., ¶ 3.)

Given the overwhelming evidence of Wilson's performance problems, this is insufficient as a matter of law to create a triable issue of material fact regarding the reason for Wilson's termination. What this record demonstrates is that Wilson was, in fact, a very valued SoundHound employee who was critical to the initial development of the organization's core technology but who had difficulty working on a team, which difficulties caused SoundHound numerous personnel headaches as it tried to grow. For the company to scale and become profitable, people other than Wilson had to be involved in continued code development, but Wilson would not let go. At a certain point, Wilson's constant run ins with other employees were so troublesome and threatening to the company's future survival, that SoundHound began to plan for a future without Wilson. This all took place, including the planning for a SoundHound after Wilson, before Wilson ever complained about the Policy.

Moreover, Wilson was not immediately fired but instead placed on paid leave with benefits—including continued stock option vesting, the company tried to negotiate a continuing contract with Wilson so his stock could continue vesting, and Wilson was not terminated until

five months after his complaint about the Policy and only after he communicated that he no plans to return to SoundHound in any event. Notably, no employee signed the Policy, and the Policy was changed in response to numerous employee complaints.

SoundHound's motion for summary adjudication of the second cause of action is GRANTED.

B. First Cause of Action-Wrongful Termination in Violation of Public Policy

To prevail on a claim for wrongful termination in violation of public policy, a plaintiff must show that (1) the plaintiff was employed by the defendant, (2) the defendant discharged the plaintiff, (3) a violation of public policy was a motivating reason for the discharge, and (4) the discharge harmed the plaintiff. (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1343.)

The plaintiff must show that he or she was terminated in violation of a policy that is "(1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental." (*Stevenson v. Super. Ct*. (1997) 16 Cal.4th 880, 894 (*Stevenson*); see also *Holmes*, *supra*, 17 Cal.App.4th at p. 1426 ["To recover in tort for wrongful discharge in violation of public policy, the plaintiff must show the employer violated a public policy affecting 'society at large rather than a purely personal or proprietary interest of the plaintiff or employer.' [Citations.]"].)

When deciding issues of adverse employment actions, such as discrimination and retaliation, the court applies the *McDonnell Douglas* test. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) Under the test, if the employee successfully shows a prima facie case exists, the burden shifts to the employer to provide a legitimate, nonretaliatory reason for the adverse employment action. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.) If the employer produces evidence showing a legitimate reason for the adverse employment action, the presumption of retaliation drops out of the picture and the burden shifts back to the employee to provide "substantial responsive evidence" that the

employer's proffered reasons were untrue or pretextual. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1109.)

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.)

Wilson does not argue that SoundHound's proffered reason for his termination was untrue. Wilson relies on the same evidence as he did for the retaliation claim, which insufficient to create a triable issue of material fact.

SoundHound's motion for summary adjudication of the first cause of action is accordingly GRANTED.

C. Third Cause of Action-Detrimental Reliance[4]

"In California, under the doctrine of promissory estoppel, 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third party, which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.' Promissory estoppel is 'a doctrine which employes equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.'" (*Kajima/Ray Wilson v. Los Angeles County Metropolitian Transportation Authority* (2000) 23 Cal.4th 305, 310 [citations omitted].)

The elements of a promissory estoppel claim are: '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable' and (4) the party asserting the estoppel must be injured by his reliance.'" (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901.)

Wilson alleges SoundHound made the following representations to him:

[4] The parties treat this claim as one for promissory estoppel, thus the Court will address it accordingly.

- **That he would have every opportunity to exercise his stock options upon vesting at liquidity events,**
- **That he was "more like a founder" who would have the opportunity to exercise stock options at liquidity events without restriction, and**
- **He would have further opportunity to exercise his stock options if he signed the AA and agreed to provide consulting services to SoundHound. (5AC, ¶ 107.)**

He alleges he relied on the representations, changed his position to his detriment, and as a result, he has been damaged. (5AC, ¶¶ 106-112.)

SoundHound argues the claim fails as a matter of law because the alleged promises are too vague to be enforceable.

"Estoppel cannot be established from such preliminary discussions and negotiations." (*National Dollar Stores, Ltd. v. Wagnon* (1950) 97 Cal.App.2d 915, 919.) "A promise is an indispensable element of the doctrine of promissory estoppel… [and t]he promise must, in addition, be 'clear and unambiguous in its terms.'" (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1044 (*Garcia*).)

In opposition, Wilson relies on the following portions of his deposition testimony,

> Q. Okay. Was there any other promises that [Mohajer] made in connection with these shares?
>
> A. Well, he promised that he was – multiple times that he was on my side; and that he could – I could trust him; and that – I remember one time he said that you're going to be very wealthy. All of his promises were that I could expect to have value from these shares.

(Henry Decl., ¶ 2, Exh. A, p. 287:6-13.)[5]

> Q. What were the terms?
>
> A. That I would work; and that in exchange, I would be able to – in the event of a liquidity event, I would be able to get – based on the amount that I had vested, that

[5] Wilson repeatedly cites to page 286 of his deposition testimony, however, that page was not included in his evidence and thus is not before the Court at this time.

the vesting was earning these, and what I earned, then at the time of the liquidity event, I would be able [to] get the difference between the price then and the strike price of the options.

(Henry Decl., ¶ 2, Exh. A, p. 298:3-9.)

Q. Have you given me the entirety of your recollection of these conversations during your testimony today?

A. Yeah, I think so. I mean, I remember that he said in one conversation that you're going to be very wealthy. I remember him saying that I could trust him. Not necessarily in these conversations, I guess. So I guess I don't remember for sure if he said that in these conversations – these particular conversations.

(Henry Decl., ¶ 2, Exh. A, p. 301:21-302:5.)

Q. So it's your contention that however [Mohajer] did it, whether through an AA agreement or some other mechanism, that he had the responsibility to provide you with the opportunity to exercise your stock options in perpetuity?

A. Not in perpetuity, but until there was a liquidity event.

Q. Okay. So after the first liquidity event, then if you didn't exercise them at that point, he could take them away?

A. Potentially, yes.

Q. What were the – okay. So now it seems to me the terms of the agreement are shifting somewhat. What was – it wasn't that they had to be provided to you forever, they had to be provided to the first liquidity event.

Are there any other terms of this agreement that you can offer us?

A. That's my understanding that it was understood that the -- until the liquidity event, then there was no realistic way that I could get the value out of them. So there was an obligation to not take them away with – in a way that robbed me of the value. Once there was a liquidity event, it would not rob me of any value.

(Henry Decl., ¶ 2, Exh. A, p. 379:19-380:15.)

Wilson contends he relied on the promise *that his earned equity would remain in his possession*. (Opp., p. 20:7-8 [emphasis added].) However, Wilson's evidence does not support such a promise. Mohajer's representations that Wilson could trust him, that he was on Wilson's side, and that he would be a wealthy man do not constitute a clear and unambiguous promise. Wilson further argues that Mohajer made representations regarding his right to exercise his stock options following his termination, however, Wilson fails to identify or articulate any such promise by Mohajer. Wilson's understanding of the situation does not constitute a clear and unambiguous promise by Mohajer.

In *Barton v. Elexsys Internat., Inc.* (1998) 62 Cal.App.4th 1182, a senior vice president asserted a claim that his company's CEO made an enforceable oral promise that modified his compensation agreement to allow him to exercise the right to exercise certain stock options after his employment was terminated. (*Id*. at p. 1189.) However, the CEO had only represented in general terms "that the key executives 'had to be taken care of.]' and [the plaintiff] did not ask [the CEO] what he meant by the phrase 'taken care of,' and he did not express his own subjective interpretation of these words (that key executives' stock options would continue to vest and be exercisable throughout the period of salary protections)." (*Id*. at p. 1190.) Wilson attempts to distinguish *Barton* from the instant matter by arguing that unlike in *Barton*, here there is a dispute as to whether Mohajer made oral promises or representations to him regarding his right to exercise his stock options after his termination. However, as noted above, Wilson fails to provide any evidence to support his contention nor to support any modification of his written agreement. Wilson fails to raise a triable issue of material fact as to a promise that is clear and unambiguous in its terms. Thus, SoundHound's motion for summary adjudication of the third cause of action is GRANTED.

D. Fifth Cause of action-Breach of the Covenant of Good Faith and Fair Dealing

"The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties." (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.) "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from

unfairly frustrating the other party's right to receive the benefits of the agreement actually made. [Citation]. The covenant thus cannot be 'be endowed with an existence independent of its contractual underpinnings.' [Citation] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 (*Guz*).)

"The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract…[it] rests upon the existence of some specific contractual obligation." (*Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1204.) "In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which frustrates the other party's rights to the benefits of the contract." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1153 (*Love*).) A breach of implied covenant good faith and fair dealing involves something beyond breach of the contractual duty itself. (See *Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 528; see also *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54.) "Where breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." (*Guz, supra*, 24 Cal.4th at p. 327; see also *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1644 fn.3.)

Wilson alleges SoundHound breached the covenant when it:

- **unfairly and unlawfully terminated his employment in violation of the law,**
- **wrongfully terminated his employment to avoid delivering his vested and unvested shares of stock options,**
- **unfairly retaliated against him for reporting what he believed to be unfair, invasive, and unlawful policies, and**
- **failed to uphold its promises to him.**

(5AC, ¶ 131.)

As relevant here, "Labor Code section 2922 establishes the presumption that an employer may terminate its employees at will, for any or no reason. A fortiori, the employer may act

peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning, fair procedures, objective evaluation, or preferential reassignment. Because the employment relationship is 'fundamentally contractual' limitations on these employer prerogatives are a matter of the parties' specific agreement, express or implied in fact. The mere existence of an employment relationship affords no expectation, protectible by law, that employment will continue, or will end only on certain conditions, unless the parties have actually adopted such terms. Thus, if the employer's termination decisions, however, arbitrary, do not breach such a substantive provision, they are not precluded by the covenant." (*Guz, supra,* 24 Cal.4th at p. 350.)

Therefore, " 'breach of the implied covenant cannot logically be based on a claim that [the discharge [of an at-will employee] was made without good cause.'" (*Ibid*.) And "because the implied covenant protects only the parties rights to receive the benefit of their agreement, and in an at will relationship there is no agreement to terminate only for good cause, the implied covenant standing alone cannot be read to impose such a duty." (*Ibid*.)

"The same reasoning applies to any case where an employee argues that even if his employment was at will, his arbitrary dismissal frustrated his contract benefits and thus violated the implied covenant of good faith and fair dealing. Precisely because employment at will *allows* the employer freedom to terminate the relationship as it chooses, the employer does not frustrate the employee's contractual rights merely by doing so. In such a case, 'the employee cannot complaint about a deprivation of the benefits of continued employment, for the agreement never provided for a continuation of its benefits in the first instance.' [Citation.]" *(Guz, supra,* 24 Cal.4th at p. 350.)

It is undisputed that Wilson was an at will employee. SoundHound's motivations for termination Wilson are immaterial because the employment agreement allowed for termination at will. While the "Covenant prevents a party from acting in bad faith to frustrate the contract's *actual* benefits" (See *Guz, supra,* 24 Cal.4th at p. 353, fn. 18), the stock options stated when they expired. Moreover, Wilson admitted that the reason he could not exercise his options was

because the time to do so had lapsed. (Ellenberg Decl., Exh. A, p. 422:6-18.) Thus, SoundHound meets its burden and the burden shifts to Wilson to demonstrate a triable issue of material fact.

It appears Wilson argues SoundHound breached the covenant through its conduct, which prevented the parties from reaching an agreement for Wilson's consulting services which would then extend his ability to exercise his stock options through the "continuous service" provision, despite the fact that providing such consulting agreements were within its established business practices and the language in the agreements.

However, Wilson fails to direct Court to any language in the Continuous Service provision or any other part of the Stock Option Agreements which *requires* SoundHound to come to an agreement with an employee in order to not terminate their services such that the failure to come to an agreement would breach the agreement. (See Ellenberg Decl., Exh. E, Exh. 1, Attachment 2; see also *Guz, supra,* 24 Cal.4th at p. 350 [the covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement].) Wilson goes beyond the express terms of the agreements to predicate his claim on the fact that he was not able to retain his stock options via the Continuous Service provision. The parties spent weeks negotiating a consulting agreement, but the consulting agreement cannot support this claim because the parties never reached an agreement.

Thus, SoundHound's motion for summary adjudication of the fifth cause of action is GRANTED.

E. Seventh Cause of Action-Reformation and Rescission

Wilson seeks reformation of the Confidential Agreement and Invention Assignment Agreement, which he does not believe he signed. (5AC, ¶¶ 139-142.)

"While sometimes referred to as a 'cause of action,' reformation is merely one of several remedies for a single wrong. Where a cause of action is based on the failure to perform the intended agreement, the plaintiff may seek reformation, in addition, damages for breach, specific performance, etc." (*Landis v. Superior Court* (1965) 232 Cal.App.2d 548, 555.) Rescission is a remedy and not a cause of action. (*Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 70; *Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 12, fn. 2.)

Civil Code section 3399, provides, "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." (Civ. Code, § 3399.)

While SoundHound is correct that reformation is a remedy and not a cause of action, here, Wilson does not have a separate cause of action based on the Confidential Agreement and Invention Assignment Agreement for reformation to constitute a remedy. Therefore, he utilizes this claim to seek the remedy. Moreover, he alleges that he does not believe he signed the Confidential Agreement and Invention Assignment Agreement and that it fails to represent the true intentions of the parties. SoundHound fails to offer any argument or evidence as to the substance of the claim.

Thus, SoundHound's motion for summary adjudication of the seventh cause of action is DENIED.

F. Eighth Cause of Action- Injunctive Relief

Injunctive relief is a remedy, and not a cause of action. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 65.) A cause of action must exist before a court may grant a request for injunctive relief. (*County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973.)

Wilson's eighth cause of action is based on his seventh cause of action, for which the Court denied summary adjudication. SoundHound fails to provide any substantive argument as to this claim.

Accordingly, SoundHound's motion for summary adjudication of the eighth cause of action is DENIED.

G. Ninth Cause of Action-Breach of Fiduciary Duty

"'The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach.'" (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 932.) The breach of fiduciary duty

can be based on either negligence or fraud, depending on the circumstances. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 563.)

Wilson alleges SoundHound violated its duties as the managing agent and putative majority shareholder when it improperly required a release of claims from Wilson in return for Wilson's ability to convert his shares, which prevented Wilson from converting and selling his shares for 15 days. (5AC, ¶¶ 152-157.)

SoundHound argues it did not breach its duty to Wilson and he cannot establish any evidence of bad faith in the agreements SoundHound AI presented to Wilson to convert his shares.[6] SoundHound relies on Mohajer's declaration, in which he states, he is informed and believes that the letter of transmittal that Wilson received is the same letter that each and every SoundHound shareholder received at the time in connection with a merger to take SoundHound public. (Mohajer Decl., ¶ 30.) SoundHound fails to provide any authority in support of its contention that this is sufficient to establish it did not breach its fiduciary duty. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [points asserted without supporting authority are waived].) Moreover, a breach of fiduciary duty is a question of fact. (See *Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 790.) SoundHound similarly fails to provide any authority to support its contention that failure to provide evidence regarding bad faith is fatal to a breach of fiduciary claim.

Thus, SoundHound's motion for summary adjudication of the ninth cause of action is DENIED.

H. Punitive Damages

Code of Civil Procedure section 437c, subdivision (f)(1) which states, "*A party may move for summary adjudication as to* one or more causes of action within an action, one or more affirmative defenses, *one or more claims for damages*, or one or more issues of duty, *if that party contends* that the cause of action has no merit or that there is no affirmative defense thereto, or

[6] SoundHound argues, in its reply, that it does not owe a fiduciary duty to Wilson. However, the Court declines to consider this argument because it was asserted for the first time in the reply. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [issues raised for first time in reply brief are generally not considered, "because such consideration would deprive the respondent of an opportunity to counter the argument"] (*Reichardt*).)

that there is no merit to an affirmative defense as to any cause of action, or both, or *that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code*, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Emphasis added.)

SoundHound argues Wilson cannot establish by clear and convincing evidence that SoundHound acted with oppression, fraud, or malice towards him in the commission of any tortious conduct.

A claim for punitive damages requires "clear and convincing" evidence that the defendant has been guilty of "oppression, fraud, or malice" in the commission of a tort. (Civil Code § 3294(a).) "Malice is defined as either 'conduct which is intended by the defendant to cause injury to the plaintiff,' or 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' Oppression is 'despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.'" (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1048-1049 (*American Airlines*).)

"The standard for a motion for summary adjudication on a claim for punitive damages is whether clear and convincing evidence exists to support that claim." (*Szarowicz v. Birenbaum* (2020) 58 Cal.App.5th 146, 171.) "The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence." (*Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 113.)

"In ruling on a summary judgment or summary adjudication motion, 'the judge must view the evidence presented through the prism of the substantive [clear and convincing] evidentiary burden…[This] holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,

whether he is ruling on a motion for summary judgment or for a directed verdict.'" (*American Airlines, supra,* 96 Cal.App.4th at p. 1049.)

"Accordingly, although the 'clear and convincing' evidentiary standard is a stringent one, it does not impose on a plaintiff the obligation to 'prove' a case for punitive damages at summary judgment. However, where the plaintiff's ultimate burden of proof will be by clear and convincing evidence, the higher standard of proof must be taken into account in ruling on a motion for summary judgment or summary adjudication, since if a plaintiff is to prevail on a claim for punitive damages, it will be necessary that the evidence presented meet the higher evidentiary standard." (*American Airlines, supra,* 96 Cal.App.4th at p. 1049.)

SoundHound argues Wilson cannot establish any oppressive, fraudulent, or malicious conduct.

"Malice" is defined as conduct which is "intended by the defendant or cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others." (Civ. Code., § 3294, subd. (c)(1).) "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in a conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) "Fraud" means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).)

SoundHound relies on declarations from Mohajer, Stonehocker, and Hom.

Mohajer states, "I believe I treated Wilson more than fairly. I certainly never intended to cause Wilson injury, or willfully and consciously disregarded his rights or safety. I also never subjected Wilson to any cruel and unjust hardship in conscious disregard of Wilson's rights, and I never made an intentional misrepresentation, deceived, or concealed a material fact from Wilson with the intention of depriving him of any property or legal rights or otherwise causing him injury." (Mohajer Decl., ¶ 32.) Stonehocker and Hom declared the same. (See Stonehocker Decl., ¶ 14; Hom Decl., ¶ 21.) This is sufficient to meet SoundHound's burden and thus, the burden shifts to Wilson.

In opposition, Wilson argues a jury could find malice from Mohajer's decision to terminate him after 7.5 years of critical contributions to the company's success and the proximity to his whistleblower complaint. While punitive damages are available for violations of whistleblower statutes such as Labor Code section 1102.5 (see *Mathews v. Happy Valley Conference Center, Inc.* (2019) 43 Cal.App.5th 236, 267), Wilson must meet his burden to show that clear and convincing evidence exists to support his claim for punitive damages. Wilson fails to provide evidence in support of his argument. Consequently, he fails to meet the higher evidentiary standard to overcome summary adjudication of his claim for punitive damages.

SoundHound's motion for summary adjudication of Wilson's claim for punitive damages is GRANTED.

I. Damages for Expiration of Wilson's Stock Options

SoundHound argues Plaintiff admits he was unable to exercise his stock options because the time frame set out in the agreements lapsed, thus he is not entitled to damages flowing from the expiration of his stock options.

Code of Civil Procedure section 437c, subdivision (f)(1), does not authorize the relief SoundHound seeks. The language of the summary adjudication statute suggests a claim for damages may be summarily adjudicated only if it pertains to punitive damages. This is so because of the reference to the punitive damages statute, Civil Code section 3294. To read it otherwise would render the reference to Civil Code section 3294 superfluous. (See Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶¶10:41 – 10:43, pp. 10-12 to 10-13 citing *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97 ["The purpose of the enactment of Code of Civil Procedure section 437c, subdivision (f) was to stop the practice of piecemeal adjudication of facts that did not completely dispose of a substantive area."]

Code of Civil Procedure section 437c, subdivision (t) further supports this conclusion: "Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages *other than punitive damages* that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision." (Emphasis added.)

The statute does not permit summary adjudication of compensatory damages that do not dispose of any entire cause of action. (*DeCastro West Chodorow & Burns, Inc. v. Superior Court* (1996) 47 Cal.App.4th 410, 422.) SoundHound does not identify any cause of action that is completely disposed of. In fact, it contends the Court should adjudicate Wilson's entitlement to these damages regardless of how it rules on the causes of action.

SoundHound only avenue for such relief is to comply with Code of Civil Procedure section 437c, subdivision (t), which it did not. Thus, SoundHound's motion for summary adjudication of Wilson's claims for damages for the expiration of this stock options is DENIED.