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: December 19, 2023 TIME: 9:00 A.M.

FOR 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.)

FOR APPEARANCES: 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

FOR COURT REPORTERS: 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

FOR 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 in January 2024.

Where to call: 408-882-2430
When to call: Monday through Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	18CV335726	Frank Ardezzone vs Seville Development Group, LLC et al	If Plaintiff fails to appear during the hearing and explain otherwise, this case is dismissed with prejudice. Please scroll down to line 1 for full tentative ruling. Court to prepare formal order.
2	22CV393712	Illinois National Insurance Co. vs Accellion, Inc.	Foley & Lardner LLP's Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to line 2 for full tentative ruling. Court to prepare formal order.
3	22CV407224	Victor Flores et al vs Mark Lasecke	Defendant's Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND as to the general negligence cause of action and SUSTAINED WITH 20 DAYS LEAVE TO AMEND as to the premises liability action. Please scroll down to line 3 for full tentative ruling. Court to prepare formal order.
4	23CV418299	Rajeev Guliani vs Milind Dalal et al	Amended complaint filed; demurrer therefore off calendar.
5	20CV365904	STANFORD HEALTH CARE vs COVENTRY HEALTH CARE, INC.	Matter settled; motion off calendar.
6	20CV366501	Brenda Doyle-Jones et al vs Virginia Pender et al	Defendants Berryessa Union School District, Virginia Pender, and Sara Beltran's Motion for Summary Adjudication as to the first and second causes of action is GRANTED and otherwise denied. Please scroll down to line 6 for full tentative ruling. Court to prepare formal order.
7	21CV387627	Dingware Inc. vs Edge International Supply Group, LLC dba Edge ISG	Dingware, Inc.'s Motion to Compel Edge International Supply Group, LLC's ("Edge") to respond to Plaintiff's First Set of Form Interrogatories, First Set of Special Interrogatories, First Set of Requests for Admission, and First Set of Requests for Production of Documents is GRANTED. An amended notice of motion with this hearing date was served by Federal Express on November 27, 2023. 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).) There is also good cause to grant this motion. Plaintiff served this discovery on November 21, 2022. After numerous extensions, Edge served only objections without substantive information on March 10, 2023. Accordingly, within 20 days of service of this formal order, Edge is ordered to serve supplemental, verified, code compliant responses to this discovery and to pay $5,850 in sanctions. Edge not only failed to produce substantive information, it also stated it would not produce any information. There is no justification for that representation. Edge's answer is also stricken for failure to obtain counsel. On October 31, 2023, the Court ordered Edge to appear on December 19, 2023 and show cause why its answer should not be stricken for failure to obtain counsel. (*Paradise v. Nowlin* (1948) 86 Cal.App.2d 897.) Edge failed to respond. Thus, its answer is stricken. Court to prepare formal order.

8	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	By order dated October 17, 2023, the Court set the following motions to compel for December 19, 2023: Form Interrogatories to Venkatapathi N. Rayapati (Set 1), Form Interrogatories to Vijayasri (Set 1), Form Interrogatories to Cyber Forza Inc. (Set 1), Special Interrogatories to Venkatapathi N Rayapati (Set 1), Special Interrogatories to System Architecture Information Technology (Set 1), Special Interrogatories to Cyber Forza Inc. (Set 1), Special Interrogatories to Venkatapathi N. Rayapati (Set 2), Special Interrogatories to Vijayasri Rayapati (Set 2), and Special Interrogatories to System Architecture Information Technology (Set 2). No oppositions were filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant these motions. This discovery was served on July 7, 2023. Despite extensions, no responses were ever served. Accordingly, responding parties are ordered to serve verified, code compliant responses, without objections, within 20 days of service of this formal order. Responding parties are also ordered to pay a total of $5,060 in sanctions. Court to prepare formal order.
9	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
10	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
11	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
12	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
13	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
14	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
15	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
16	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
17	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
18	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati et al	Please see line 8, above.
19	19CV341732	Calvano/CRP Mountain vs. 1001 Shoreline LLC.	Plaintiff's unopposed motion to seal is granted. Moving party to prepare formal order.
20	19CV351016	John Fernandez et al vs General Motors, LLC et al	Pro hac vice motion is granted. Court to use order on file.

21	19CV351188	SAMUEL CABRERA vs JOSEPH LUMPKIN	Kyle H. Valero/Southwest Legal Group's Motion to Withdraw as Counsel for Samuel Cabrera is GRANTED. Court to use order on file.
22	19CV353214	CREDITORS ADJUSTMENT BUREAU, INC. vs NUMERIC, LLC et al	LinkedIn Corporation's Motion for $44,109 in Attorney Fees is GRANTED. An amended notice of motion with this hearing date was served by electronic mail on September 20, 2023. 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).) The LSA also provides at paragraph 9: "The prevailing party in any litigation may seek to recover its legal fees and costs." The Court found in all respects for LinkedIn, thus making it the prevailing party. The Court also finds the number of hours spent and the billable rates reasonable for this market and case type. Moving party to prepare formal order.
23	20CV365904	STANFORD HEALTH CARE vs COVENTRY HEALTH CARE, INC.	Matter settled; motion off calendar.
24	22CV401170	CAPITAL ONE BANK (USA), N.A. vs BRIAN ALEXANDAR	Plaintiff's Motion to Set Aside Code of Civil Procedure Section 664.6 Dismissal and Enter Judgment Against Defendant is GRANTED. The parties entered a stipulation whereby they agreed that the Court would retain jurisdiction under Code of Civil Procedure Section 664.6. Defendant made a single $50.00 payment then ceased making payments pursuant to the parties' stipulation. Accordingly, the dismissal is set aside, and judgment is entered in the amount of $10,603.30 in favor of Plaintiff and against Defendant. Plaintiff to prepare formal order and judgment.
25	23CV419471	Farhad Noeiosquoei vs. Authur Lin, et. al.	Arthur Lin, Aest Realty, Inc. and Distressed Home Solutions' Motion to Expunge Lis Pendens and for Attorneys' Fees is GRANTED. Please scroll down to line 25 for full tentative ruling. Court to prepare formal order.

Calendar Line 1
Case Name: *Frank Ardezzone vs Seville Development Group, LLC et al*
Case No.: 18CV335726

Plaintiff failed to appear at the November 9, 2023 status conference, and the Court ordered Plaintiff to appear on December 19, 2023 to show cause why this case should not be dismissed. Plaintiff submitted no response to the Court's order, and this case is therefore dismissed.

The Court also finds this case must be dismissed under Code of Civil Procedure section 583.310 states, which states "an action shall be brought to trial within five years after the action is commenced against the defendant." Dismissal of cases not brought to trial within this timeframe is mandatory. Code of Civil Procedure section 583.360, titled "Dismissal", states:

> (a) An action *shall be dismissed* by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.
>
> (b) The requirements of this article are *mandatory* and are not subject to extension, excuse, or exception except as expressly provided by statute. (Emphasis added.)

"The purpose of the five-year rule is to 'promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed . . . [and] to protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time.'" (*Hill v. Bingham* (1986) 181 Cal.App.3d 1, 5 (internal citations and quotations omitted.)) Courts have recognized implied exceptions where going to trial was impossible. *Id.* "The purpose of the statute is. . .to prevent *avoidable* delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years. . ." (*Id.* (emphasis in original).)

"What is impossible, impracticable or futile must be determined in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. *The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case*." (*Hill*, 181 Cal.App.3d at 6 (internal citations and quotations omitted; emphasis in original).)

Court procedures and calendar control are not considered circumstances amounting to impracticality. Thus, in *Hill*, the court affirmed the trial court's dismissal under the five year statue

where the court set a trial date beyond five years, since plaintiff there did not alert the court to the approaching deadline and plaintiff could have corrected the timing issue by requesting that the trial be held within the last remaining two months of the five year period. (*Hill*, 181 Cal.App.3d at 9-10.) *Hill* states:

> "[Reasonable] diligence places on a plaintiff the affirmative duty to make every reasonable effort to bring a case to trial within five years, even during the last months of its statutory life. One means by which this duty may be fulfilled is a motion to specially set the case for trial pursuant to rule 375(b) of the California Rules of Court.. . . If the plaintiff could have acted to bring the case to trial on time and failed to do so, relief will not be given even if the plaintiff claims to have relied on the performance of an official duty. [Where] the delay in going to trial was caused by [plaintiff's] own miscalculation rather than circumstances beyond [one's] control" the exceptions do not apply. (*Id.*)

Plaintiff filed this action on October 2, 2018 and filed an amended complaint on December 13, 2018. Defendant Patrick Oliver was personally served with the First Amended Complaint on January 30, 2019 as an individual and in his capacity as authorized agent for Seville Development Group, LLC. As noted below, Defendant Fran Ardezzone was later served by publication. The chart below summarizes the activity in this case over the five years and two months since Plaintiff filed this case:

Date	Activity
January 15, 2019	Case management conference.
January 28, 2019	Plaintiff obtains new counsel.
March 27, 2019	Default to Patrick Oliver rejected.
May 7, 2019	Case management conference.
June 10, 2019	Court enters order retaining jurisdiction pursuant to CCP § 664.6 as Puerto Escondido, LLC.

June 10, 2019	Plaintiff withdraws earlier filed lis pendens.
June 28, 2019	FAC dismissed with prejudice as to Puerto Escondido, LLC.
August 6, 2019	Case management conference.
December 3, 2019	Case management conference.
December 10, 2019	Default as to Seville Development Group, LLC rejected.
July 14, 2020	Basic default entered for Patrick Oliver and Seville Development Group, LLC.
July 24, 2020	Plaintiff receives order permitting service of Frank Podesta by publication.
October 15, 2020	Case management conference.
November 12, 2020	Proof of service by publication filed.
December 15, 2020	Default against Frank J. Ardezzone entered.
March 9, 2021	Case management conference; Plaintiff not present.
June 22, 2021	Case management conference.
September 7, 2021	Motion to set aside default as to Frank Podesta ordered off calendar for failure to serve amended notice.
October 19, 2021	Case management conference.
January 25, 2022	Motion to set aside default continued again for defective service.
March 3, 2022	Hearing on motion to set aside default continued.
March 15, 2022	Case management conference.
March 21, 2022	Patrick Oliver obtains counsel.
March 21, 2022	BK stay as to Patrick Oliver.

March 24, 2022	Frank Podesta's and Seville Development Group LLC's motion to set aside default denied. Motion as to Patrick Oliver stayed.
June 21, 2022	Case management conference.
November 10, 2022	Status conference; *Court finds no evidence of bankruptcy and lifts partial stay "if any"*
March 7, 2023	Default as to Frank Ardezzone submitted; rejected August 23, 2023.
April 13, 2023	Case status review.
October 12, 2023	Basic default entered as to Frank Ardezzone.
November 9, 2023	Status review; Plaintiff fails to appear.

It is the court's duty to act as a gatekeeper for defaults; they must be done correctly. (See *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1000.) Thus, it was appropriate for the court clerk to reject non-compliant defaults. What was not appropriate was Plaintiff's failure to prosecute this case by staying on top of this matter by following up on the apparently non-existent bankruptcy as to Patrick Oliver and until the default paperwork was done correctly so that judgments were timely entered against all defaulted defendants.

If Plaintiff fails to appear at the December 19, 2023 hearing to explain to the Court why this result should not obtain, this case will be dismissed with prejudice pursuant to Code of Civil Procedure section 583.310.

Calendar Line 2
Case Name: *Illinois National Insurance Co. v. Accellion, Inc.*
Case No.: 22CV393712

Before the Court is cross-defendant, Foley & Lardner's ("Foley") demurrer, alternately motion to strike, Accellion Inc.'s ("Accellion"), amended cross-complaint ("AXC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

A. Plaintiff's Amended Complaint

Plaintiff is an insurance company that issued series of insurance policies to corporate insureds for coverage against cyber-related insurance risks. (Amended Complaint ("AC"), ¶ 2.) Defendant/Cross-complainant is a software company that provides software for secure electronic file sharing and services to customers. (*Id*., ¶ 5.) Defendant/Cross-complainant developed and sold licenses for software called File Transfer Appliance ("FTA"), which it marketed as a secure method of transferring files. (*Id.*, ¶ 7.) Insured A was Plaintiff's insured and one of Defendant's FTA customers in December 2020 and January 2021. (*Id.*, ¶ 31.)

Beginning on December 16, 2020, and again on January 16, 2021, threat actors targeted FTA as a means of committing unauthorized access and threat of release of confidential information. (AC, ¶ 8.) Plaintiff alleges Insured A suffered damages, including paying significant ransom to the threat actors, for which Plaintiff reimbursed Insured A. Plaintiff brought this action against Defendant/Cross-complainant to recover those payouts.

B. Accellion's Cross-Complaint

According to the amended cross-complaint, FTA is Accellion's "legacy" product released in the early 2000s. (AXC, ¶ 25.) Insured A, identified as Foley & Lardner LLP, ("Foley") used FTA pursuant to an end user license agreement ("EULA") with Accellion. The EULA limits Accellion's liability in the event of a data breach involving FTA, clarifies that Accellion has no obligation to indemnify FTA customers for data breach, and limits potential liability to the fees paid by the customer in the previous twelve months. The EULA further provides that each customer is solely responsible and liable for the use of and access to FTA and responsible for deploying critical updates in five days or less. (*Id.* ¶ 27.) Recognizing these limitations, Foley purchased cyber insurance from Illinois National. (*Id.* ¶ 26.)

In January 2014, Accellion launched Kiteworks, a successor product to FTA. Kiteworks is built on a different code base that offered enhanced security, and Accellion began encouraging existing FTA customers to migrate to Kiteworks. (AXC, ¶ 31.) While most of Accellion's customers transitioned to Kiteworks prior to the attacks, others, including Foley, did not. In June 2020, Foley informed Accellion it was unwilling to purchase the upgrade. Accellion could not simply abandon its FTA customers and force them to stop using the product. (*Id.* ¶¶ 33, 34.) Thus, during the years Foley licensed FTA (2006-2021), Accellion provided updates and patches. Sometimes Foley installed the updates and patches within the required five days and other times it did not. (*Id.* ¶ 39.)

In December 2020 and January 2021, cyber criminals exploited previously unknown vulnerabilities in FTA, targeting individual customer's FTA systems. (AXC, ¶ 35.) As soon as Accellion learned of the attacks, it acted swiftly to support its FTA customers by releasing patches for the vulnerabilities and offering to help each customer investigate its FTA system to determine how it had been affected. After the attacks, Accellion engaged a leading forensic consultant to investigate the attacks and its response. (*Id.*, ¶ 37.) The report concluded that the patches Accellion released immediately after the attacks "fully resolved" the vulnerabilities, that FTA had no other potential vulnerabilities as of March l, 2021, and that the attacks were not the result of Accellion's failure to patch a known vulnerability. (*Id.*, ¶ 37, Ex. 2.)

Accellion received the first anomaly report on December 16, 2020, and within four days identified the vulnerability. By December 20, 2020, Accellion developed and circulated a notice of a patch (FTA_9_12_380) to fix the vulnerability. (AXC, ¶¶ 41, 42) On December 20, 2020, Accellion attempted to notify Foley via HubSpot about the patch. On December 21, 2020, Accellion emailed the security engineer at Foley, forwarding the December 20 security alert captioned "Critical Customer Alert: urgent FTA security update." On December 21, 2020, Foley was the victim of a criminal hack. (*Id.,* ¶¶ 40, 42, 43, 44)

As of December 21, 2020, Foley was aware of a "Critical Customer Alert: urgent FTA security update," and in fact installed the first patch: FTA_9_12_380. By that time, Foley's FTA appliance had already been exploited, but there was no indication of exfiltration of data until January 2021. On or around December 23, 2020, Foley was notified of additional patches, FTA_9_12_401 and

FTA_9_12_411; but failed to install them. (AXC, ¶ 48.) Had Foley installed the patches upon notice or within the required five days, it would not have had data downloaded in connection with the December attacks. Foley was a victim of a ransom request and to resolve the breach at its site, it contacted Illinois National, which claims to have incurred fees and costs on behalf of Foley in excess of $1,000,000.00. The ransom amount was paid directly or through Illinois National. At no time prior to making these alleged ransom payments or incurring these costs was Accellion consulted. (*Id.*, ¶¶ 50, 51.)

Accellion pleads that Foley breached the EULA by failing to timely deploy critical updates and paying the ransom amount, directly or through Illinois National, without its consultation. As a result of this breach, Accellion was required to incur charges for executive forensic consultation with Foley and perform additional engineering and security forensic work on the system at Foley.

C. Procedural History

Illinois National initiated this action on January 24, 2022 and filed the operative AC on April 29, 2022, asserting: (1) breach of contract (failure to provide maintenance support services); (2) breach of contract (failure to maintain in confidence); (3) negligent misrepresentation; and (4) violation of the Unfair Competition Law (Bus. Prof. Code, 17200) (the "UCL"). Accellion demurred to each claim and moved to strike portions of the AC. On November 7, 2022, the Court issued its order sustaining the demurrer without leave to amend as to the third cause of action and overruling it as to the remaining causes of action. The Court denied the motion to strike in its entirety.

On November 22, 2022, Accellion filed its Cross-Complaint against Illinois National alleging: (1) breach of contract (EULA § 5); (2) breach of contract (EULA § 13.8); and (3) breach of the implied covenant of good faith and fair dealing. On December 22, 2022, Illinois National demurred to the cross-complaint and on May 10, 2023, the Court sustained the demurrer without leave to amend.

On October 3, 2023, pursuant to a leave from the Court, Accellion filed its operative amended cross-complaint against Foley alleging (1) breach of contract - EULA § 5 and (2) breach of the implied covenant of good faith and fair dealing.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more

of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

The court may, upon a motion or at any time in its discretion and upon terms it deems proper: (1) strike out any irrelevant, false, or improper matter inserted in any pleading; or (2) strike out all or any part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court. (Code Civ. Pro. §§ 436(a)-(b); *Stafford v. Shultz* (1954) 42 Cal.2d 767, 782 ["Matter in a pleading which is not essential to the claim is surplusage; probative facts are surplusage and may be stricken out or disregarded"].)

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id*.)

Foley demurrers, or in alternative moves to strike, Accellion's entire amended cross-complaint arguing, (1) all causes of action are time barred, (2) Accellion fails to allege the elements of a breach of contract claim, (3) breach of the covenant of good faith and fair dealing claim was previously rejected by this Court, and (4) Accellion improperly asserts affirmative defenses as affirmative claims.

III. Judicial Notice

Foley requests that the Court take judicial notice of the EULA (Exhibit A) and consider that it previously took judicial notice of this document on Accellion's request in connection with its demurrer to Illinois National's AC and motion to strike. As the Court noted in its order on that motion, while agreements between private parties are generally not documents that are judicially noticeable, the court may take judicial notice of agreements where the pleading references the agreements and there are no objections to it. (*Salvaty v. Falcon Cable 7T* (1985) 165 Cal.App.3d 798, 800.) The EULA is referenced numerous times in the AC and the AXC, and Accellion does not object to the Court considering it in ruling on the demurrer and motion to strike. Foley's request for judicial notice is therefore GRANTED.

IV. Analysis

The threshold question is whether Accellion's claims against Foley are barred by the statute of limitations.

Foley argues and Accellion concedes that the EULA at paragraph 12.8 contains a one-year suit limitation. Thus, Accellion's claim that (1) Foley breached the EULA when it failed to install patches FTA_9_12_401 and FTA_9_12_411 on or around December 23, 2020 and (2) breached the implied covenant by paying directly or through Illinois National the ransom without consulting Accellion are subject to a one year statute of limitations. Foley argues that even construing the facts most favorably to Accellion and dating its alleged breaches to January 24, 2022, the date Illinois National filed its complaint, the AXC, filed on October 3, 2023, is time barred because the relation back doctrine does not apply to a new defendant who was added after the statute of limitation expired in January of 2023. Accellion does not dispute that its claims against Foley are time-barred, but argues its amended cross-complaint relates back to January 24, 2022 because its initial cross-complaint mirrors the AXC.

Under California law, the filing of the complaint tolls or suspends the statute of limitation as to both compulsory and permissive cross-complaints. (*Trindade v. Superior Ct.,* (1973) 29 Cal.App.3d 857,

860 (*Trindade)* ["It has consistently been held that the commencement of an action tolls the statute of limitations as to a defendant's then unbarred cause of action against the plaintiff, 'relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought…'"]; *ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd.* (2016) 5 Cal.App.5th 69, 92 ["We therefore conclude … that we are bound by California Supreme Court precedent to the effect that a defendant's cross-complaint against the plaintiff, irrespective of whether it is related to the matters asserted in the complaint, is entitled to the benefit of the tolling doctrine. While there are certainly countervailing public policy concerns favoring the application of statutes of limitations to bar stale claims [citation], we cannot ignore existing law that the tolling doctrine is applied broadly to both compulsory and permissive cross-complaints."]; *Paredes v. Credit Consulting Services, Inc* (2022) 82 Cal.App.5th 410, 429-431 ["We decide the trial court did not err in concluding, under ZF Micro Devices, that the filing of the complaint in this action acted to "'toll[]'" or "'suspend[]'" the statute of limitations as to the cross-complaint. Whether the cross-complaint is construed as compulsory … or permissive … , [it] 'is entitled to the benefit of the tolling doctrine.'"].

However, "[a]s to cross-actions against such codefendants or new parties it has regularly been held that the statute of limitations is not tolled by the commencement of the Plaintiff's action." (*Trindade,* 29 Cal.App.3d at 859-860.) The rationale for this distinction is that by filing the complaint, the plaintiff waived the statute of limitations claim and permitted the defendant to make all proper defenses to the cause of action pleaded. (*Id.*) But "[s]ince new parties cannot be said to have engaged in any sort of waiver, the rule does not apply to them." (*Boyer v. Jensen,* (2005) 129 Cal.App.4th 62, as modified (May 12, 2005).) Thus, the waiver applies to Plaintiff but not to new parties.

It cannot be disputed that Foley is not and was not a plaintiff or a cross-complainant. Thus, under these authorities, Foley did not take action that would constitute a waiver of the statute of limitations defense. Accellion attempts to elude this obstacle by citation to Code of Civil Procedure section 474.

Under Code of Civil Procedure section 474, a plaintiff ignorant of the identity of a party responsible for damages may name that person in a fictitious capacity, a Doe defendant, and the time limit prescribed by the applicable statute of limitations is extended as to the unknown defendant. When the complaint is amended to substitute the true name of the defendant for the fictional name, the

defendant is regarded as a party from the commencement of the suit. (*Munoz v. Purdy* (1979) 91 Cal.App.3d 942, 946.) Code of Civil Procedure section 474 must be liberally construed to enable a plaintiff to avoid the bar on the statute of limitations where he is ignorant of the identity of the defendant. The inquiry is restricted to the knowledge of the plaintiff at the time of the filing of the complaint. (*Balon v. Drost* (1993) 20 Cal.App.4th 483.) Plaintiff's ignorance of the defendant's name must be genuine (in good faith) and not feigned. (*Stephens v. Berry* (1967) 249 Cal.App.2d 474, 477; *Snoke v. Bolen* (1991) 235 Cal. App. 3d 1427.) "[A] plaintiff is entitled to the benefits of section 474 unless substantial evidence shows he was not ignorant of the facts he needed to know." (*General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 595.) The question of the plaintiff's good faith is for the determination of the trial court. (*Day* v. *Western Loan & Bldg. Co.* (1940) 42 Cal.App.2d 226.)

Accellion contends it relied on Illinois National's representation that it was the real party in interest until this Court determined, in ruling on its demurrer, that Accellion was required to bring affirmative claims against Foley and not Illinois National. Accellion claims it made an excusable mistake in designating Illinois National as its initial cross-defendant and that desirability of protecting its substantive rights combined with Foley's knowledge of the lawsuit since inception, "entitles" it to proceed against Foley. (Opposition, p.10.) However, Accellion knew the facts constituting its alleged claims when it filed its initial cross-complaint. In fact, Accellion admits knowing about Foley's actual identity and "behind the scenes involvement" since the inception of this case. (Opposition, p. 3.)

More damning to its position, is that Accellion did not designate fictitious Doe cross-defendants in its initial cross-complaint. Without this allegation, Foley cannot be considered named as a Doe defendant. (*Flores v. Smith* (1941), 47 Cal. App. 2d 253 (The provisions requiring a statement of ignorance of the true name of one sued by a fictitious name, and requiring amendment to show the true name when discovered, are mandatory.) Weil & Brown, Civil Procedure Before Trial at section 6:82 states:

> Plaintiff must state in the body of the complaint that he or she is ignorant of the true names of the defendants sued by fictitious names, *and* that such

> names are fictitious. In the absence of such allegations, plaintiff may not utilize CCP § 474 later to substitute in a real person as a defendant.

(Emphasis in original; citing *Kerr-McGee Chemical Corp. v. Superior Court* (1984) 160 Cal.App.3d 594.) Accellion did not do that here. Thus, even if Accellion could successfully argue that it did not know it had claims against Foley, Accellion did not follow the procedures required to take advantage of the statute of limitations tolling provided by Code of Civil Procedure section 474.

Absent application of Code of Civil Procedure section 474 and the relation back doctrine, the Court concludes that the amended cross-complaint is time barred as to Foley. Accordingly, Foley's demurrer to Accellion's amended cross-complaint is SUSTAINED WITHOUT LEAVE TO AMEND.

Calendar Line 3
Case Name: *Maria Flores et. al. v. Mark Lasecke*
Case No.: 22CV407224

Before the Court is Defendant, Mark Lasecke's demurrer to Plaintiffs' complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiffs, Maria Flores individually and as Guardian ad litem for minor Sebastian Flores, David Flores and Victor Flores are collectively surviving heirs to Victor M. Flores ("Decedent"). Maria is the Decedent's wife; Sebastian, David, and Victor are Decedent's children. (PLD-PI-001, MC-025.) The Complaint alleges that on November 12, 2020, Defendant hired Decedent to cut down and remove trees from his private property located at 18702 Bear Creek Road, Los Gatos, California, 95033 ("Subject Property"), knowing that Decedent did not have a contractor license. Defendant allegedly negligently created a dangerous condition on the Subject Property and failed to warn or guard the Decedent against that condition. As a result, Decedent fell from a tree and was injured. Decedent died on March 13, 2022, approximately a year and a half after the accident. The certificate of death lists the causes of death as acute myocardial infarction, coronary artery disease, and chronic kidney disease.

Plaintiffs filed this suit on November 10, 2022, asserting (1) general negligence, (2) premises liability, and (3) negligence- survival cause of action.

II. Judicial Notice

Defendant asks the Court to take judicial notice of Plaintiffs' complaint and Code of Civil Procedure section 377.32 Declarations containing the decedent's death certificate. Pursuant to Evid. Code §§ 452 and 453, the Court GRANTS Defendant's unopposed request for judicial notice.

III. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of

the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendant demurrers to Plaintiffs first cause of action for general negligence and second cause of action for premises liability on the grounds that the complaint fails to allege sufficient facts to state the cause of action. (Code Civ. Proc. § 430.10, subd. (e).)

VI. Analysis

A. First Cause of Action: General Negligence

Defendant contends Plaintiffs cannot maintain this claim because none of them were ever at the Subject Property or personally injured. Plaintiffs argue each cause of action is a survivor claim asserted on the Decedent's behalf as his successors-in-interest.

"Unlike a cause of action for wrongful death, a survivor cause of action is not a new cause of action that vests in the heirs on the death of the decedent. It is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event. The survival statutes do not create a cause of action. Rather, they merely prevent the abatement of the cause of action of the injured person, and provide for its enforcement by or against the personal representative of the deceased…In the typical survivor action, the damages recoverable by a personal representative or successor in interest on a decedent's cause of action are limited by statute to 'the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages

that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.'" (Code Civ. Proc., § 377.34; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1264-1265.)

Here, the complaint plainly states that Victor Flores, David Flores, and Maria Flores as the Guardian ad litem for Sebastian Flores filed this suit in their standing as successors-in-interest for the Decedent and as individuals. Plaintiffs also allege both general negligence and negligence – survival claim based on the same set of facts: one for.

As individuals claiming negligence, Plaintiffs must allege facts demonstrating injuries suffered from Defendant's breach of duties that were owed to them. (See, *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 662.) However, as established by the complaint and confirmed by their opposition, none of the Plaintiffs were ever at the Subject Property. Plaintiffs insist, in their opposition, they are prosecuting claims on behalf of the Decedent and not themselves. Accordingly, Defendant's demurrer to the first cause of action for negligence is SUSTAINED WITHOUT LEAVE TO AMEND.

B. Second Cause of Action: Premises Liability

The elements of a cause of action for premises liability are the same as those for negligence. i.e.: duty, breach, causation, and damages. (*McIntyre v. The Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 671.) Those who own, possess, or control property generally have a duty to exercise ordinary care in managing the property to avoid exposing others to an unreasonable risk of harm. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 37.) Consequently, the "duty to exercise reasonable care can be inferred from the assertion of the fact that defendant owned and managed the property." (See *Pultz v. Holgerson* (1986) 184 Cal.App.3d 1110, 1117 .) The rules of premises liability "govern a land possessor's duty to third parties when a dangerous condition exists on the property." (*Zuniga v. Chery Avenue Auction, Inc*. (2021) 61 Cal.App.5th 980, 992.)

Plaintiffs argue they are prosecuting the complaint on the Decedent's behalf, but they also reference their individual standing throughout the complaint. As stated above, Plaintiffs cannot allege that Defendant owed them a duty since they were never at the Subject Property and thus cannot state a premises liability claim in their individual capacities.

Plaintiffs also allege Decedent's surviving claim for premises liability in a conclusory manner. The complaint fails to allege sufficient facts regarding the existing dangerous condition, how Defendant knew or should have known about this condition, and what injuries were caused as a result. Alleging that a dangerous condition existed at the Subject Property that led to the Decedent's fall from a tree he was hired to cut down, is insufficient.

Accordingly, Defendant's demurrer to Plaintiffs' *individual claims* for premises liability is SUSTAINED WITHOUT LEAVE TO AMEND and Defendant's demurrer to the *surviving claim* for premises liability is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

Calendar line 6
Case Name: *Brenda Doyle-Jones, et al. v. Virginia Pender, et al.*
Case No.: 20CV366501

Before the Court is Defendants Berryessa Union School District's (the "District"), Virginia Pender's, and Sara Beltran's (collectively, "Defendants") motion for summary judgment or in the alternative, summary adjudication against plaintiffs Brenda Doyle-Jones, Asiman Babayev and Doyle-Jones as Guadian ad Litem on behalf of minor, Aygulina Asiman Babayeva (collectively, "Plaintiffs"). 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 the alleged improper suspension of a kindergarten student at Ruskin Elementary School ("Ruskin"), which is in the District. On June 6, 2019, a teacher allegedly saw Aygulina pinning another girl ("K") against the wall and trying to kiss and fondle her. (FAC, ¶ 17.) Aygulina was suspended for one day, which was the last day of school and included the kindergarten graduation ceremony. (FAC, ¶ 25.)

Plaintiffs filed their initial complaint on May 11, 2020, and filed their FAC on September 21, 2020, asserting: (1) violation of due process (42 U.S.C. § 1983); (2) violation of Education Code section 48900, et seq.; (3) intentional misrepresentation; (4) negligence; (5) negligence per se; and (6) intentional infliction of emotional distress. On March 4, 2021, the Court (Hon. Rudy) issued its order (the "Order"), sustaining and overruling the demurrer to the FAC as follows:

(1) Violation of due process: Doyle-Jones' and Babayev's claim against Defendants and Aygulina's claim as to the District and Beltran was sustained without leave to amend, leaving Aygulina's claim against Pender (Order, 7:25- p.8:2);

(2) Violation of Education Code section 48900, et seq.: Doyle-Jones' and Babayev's claim against Defendants and Aygulina's claim against Beltran was sustained without leave to amend, leaving Aygulina's claim against Pender and The District (Order, 9:5-9);

(3) Intentional misrepresentation: sustained without leave to amend (Order 11:13-14);

(4) Negligence: Doyle-Jones' and Babayev's claim against Defendants was sustained without leave to amend, leaving Aygulina's claim against Defendants (Order, 12:17-20);

(5) Negligence per se: sustained without leave to amend (Order, 13:10-11); and

(6) Intentional infliction of emotional distress: sustained without leave to amend as to the District, leaving Plaintiffs' claim against Pender and Beltran (Order, 14:14-17).

To summarize, the claims remaining are (1) Aygulina's violation of due process claim against Pender; (2) her violation of Education Code section 48900, et seq. against Pender and the District; (3) her negligence claim against Defendants; and (4) Plaintiffs' intentional infliction of emotional distress claim against Pender and Beltran.

Pursuant to Code of Civil Procedure section 437c, Defendants move for summary judgment or in the alternative summary adjudication of each remaining cause of action, which motion Plaintiffs oppose.

II. Legal Standard

Any party may move for summary judgment. (Code Civ. Proc., §437c (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 Civ. Proc., 437c (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; Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*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 Civ. Proc., 437c (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.)

A. Parties' Statements of Undisputed Facts

According to Defendants' statement of facts, on June 6, 2019, teacher Beltran witnessed what she believed was a sexual assault in a Ruskin bathroom involving Aygulina as the aggressor. (Defendants Separate Statement of Undisputed Material Facts ("Defendants' UMF"), No. 1.) Beltran intervened in the bathroom incident and took the students to the school office. (Defendants' UMF, No. 2.) Doyle-Jones was contacted after both students were taken to the office. (Defendants' UMF, No. 3.) Aygulina, Doyle-Jones, and Pender met privately regarding the incident. (Defendants' UMF, No. 4.) Pender explained that she received a report of Aygulina pinning another kindergartener against the wall and was trying to kiss her. (Defendants' UMF, No. 5.) Pender called Beltran to the meeting to provide more information. (Defendants' UMF, No. 6.)

Beltran communicated what she had witnessed. (Defendants' UMF, No. 7.) She explained that she had seen Aygulina fondling other student's private parts. (Defendants' UMF, No. 8.) Aygulina admitted that she had kissed the other student but denied doing so forcibly. (Defendants' UMF, No. 9.) Pender suspended Aygulina for one day, due to the incident. (Defendants' UMF, No. 10.) In preparing the suspension form, Pender selected conduct from a drop down menu which she believed most closely described the conduct- "sexual assault". (Defendants' UMF, No. 11.) Aygulina was suspended for the following day, which happened to be the final day of the school year. (Defendants' UMF, No. 12.)

According to Plaintiffs, on June 6, 2019, Aygulina and her family were proud and excited about the graduation ceremony planned for the next day. (Plaintiffs' Additional Material Facts ("Plaintiffs' AMF"), No. 14.)[1] That day, Doyle-Jones was called to the school because Aygulina had been involved

[1] Plaintiffs' AMF numbering continues from their response to Defendants' UMFs, thus, it starts at number 13.

in an incident. (Plaintiffs' AMF, No. 15.) When she arrived at the office, Aygulina was sitting in the front office looking terrified. (Plaintiffs' AMF, No. 16.) Once they were in Pender's office, Pender told Doyle-Jones what Beltran had seen. (Plaintiffs' AMF, No. 17.) When she heard the accusation, Aygulina immediately said, "no, I didn't" and started crying. (*Ibid*.) Pender then informed them that she was going to get Beltran. (*Ibid*.)

While Pender was out of the room, Doyle-Jones tried to calm Aygulina down and asked her what happened. (Plaintiffs' AMF, No. 18.) Aygulina informed her that she went to the bathroom with her friend, K, who was in the same class as her and had been her friend the whole year. (*Ibid*.) They had received permission to go to the restroom together during lunch recess. (*Ibid*.) They shared the stall and took turns using the restroom. (*Ibid*.) K used the restroom first and Aygulina faced the wall and covered her eyes to give her privacy. (*Ibid*.) After she finished her turn, Aygulina went over to the wall where K was standing, tapped her on the shoulder to tell her that she was done. (*Ibid*.) K then told Aygulina that she wanted to be her "best friend" and Aygulina was so happy that she kissed K on the cheek. (*Ibid*.)

Doyle-Jones asked where her hands were, and Aygulina showed her that one hand was on her shoulder and the other was on the side of her waist. (Plaintiffs' AMF, No. 19.) She said she would have never kissed on the lips because she knew that was only for husbands and wives. (*Ibid*.) When Pender returned with Beltran, Pender asked Beltran to explain what she saw. (Plaintiffs' AMF, No. 20.) Beltran explained that she heard voices in the big stall, which had been locked and she looked in and saw Aygulina pinning K against the wall while trying to kiss her. (*Ibid*.) She said that K was pleading with Aygulina and telling her "no." (*Ibid*.) She further said that Aygulina's hands were on K's shoulder and waist, as Aygulina had demonstrated to Doyle-Jones. (*Ibid*.) Afterward, Beltran stated, "I don't want to hurt [Aygulina] because she's standing here, but she was fondling [K].", which she insinuated with a suggestive hand motion. (Plaintiffs' AMF, No. 21.) Beltran's tone was harsh, accusatory, aggressive, and unprofessional. (*Ibid*.) Aygulina started crying again and repeatedly said "no, I didn't" and Beltran replied, "yes, you did." (Plaintiffs' AMF, No. 22.) Beltran then changed her story and said she saw Aygulina's hands on K's privates. (*Ibid*.) Doyle-Jones informed Beltran that she did not believe her and asked how she could see that through the crack in the bathroom door. (*Ibid*.)

Pender said, "Aygulina, can you look at mommy in the eyes and tell her the truth?" and Aygulina, who was still in tears and very upset, insisted she only kissed K on the cheek. (Plaintiffs' AMF, No. 23.) Pender said Aygulina was lying because she wouldn't look Doyle-Jones in the eyes. (*Ibid*.) Pender then told Doyle-Jones, "I can't have you making excuses for her. She sexually assaulted another student. In cases like this I usually call the police, but I won't call the police on you." (*Ibid*.) Doyle-Jones then asked to speak with Pender privately. (*Ibid*.)

Once alone, Doyle-Jones explained that in her culture it was customary to kiss people on both cheeks for many reasons and it did not carry any sexual connotations. (Plaintiffs' AMF, No. 24.) She was disturbed that Beltran would sexualize an innocent interaction. (*Ibid*.) Pender informed her that she didn't believe Aygulina meant any harm, but she couldn't disregard Beltran's statements and thus, she had to suspend Aygulina. (Plaintiffs' AMF, No. 25.) Doyle-Jones asked if Pender had seen or heard of "kinders" behaving this way and Pender stated, "no, never that young." (*Ibid*.) Doyle-Jones also asked if Pender had talked to K about her side of the story and Pender informed her that K was crying, and she couldn't get her to talk. (*Ibid*.) Pender did not ask Doyle-Jones if she had more information about the incident as she was more focused on Beltran's account. (Plaintiffs' AMF, No. 26.)

Aygulina's account never changed, nonetheless, she missed the last day of school and the kindergarten graduation ceremony. (Plaintiffs' AMF, No. 27.) She had no history of inappropriate behavior. (Plaintiffs' AMF, No. 28.) She had been in preschool for two years and kindergarten for one year, and there had never been any complaints about her behavior, or red flags indicating any sexual behavior. (*Ibid*.)

Neither Aygulina nor Doyle-Jones were asked what happened in the bathroom and at no point were they given an opportunity to explain that it had simply been an innocent interaction between two friends. (Plaintiffs' AMF, No. 29.) Pender and Beltran did not make any attempt to find out Aygulina's account, her observations, her explanation, or her understanding of what happened. (*Ibid*.)

On June 10, 219, Pender informed Doyle-Jones that a report had been filed but she discouraged her from looking at it. (Plaintiffs' AMF, No. 31.) The report (the "Report") was dated June 7, 2019. (*Ibid*.) It stated that Beltran took "one of her students" to the bathroom, when in fact she had taken her daughter. (Plaintiffs' AMF, No. 32.) Additionally, it stated Beltran saw Aygulina "aggressively

fondling and forcible kissing" K while pinning her against the way and that Aygulina had her hand on K's vagina. (*Ibid*.) However, Beltran did not make those accusations in the meeting with Doyle-Jones and Aygulina. (*Ibid.*) The Report identified the incident as "Sexual Assault" and listed Aygulina as the "offender". (*Ibid*.)

On June 14, 2019, a Child Protective Services ("CPS") investigator came to Aygulina's house, questioned her family, and determined the allegation against her was "unfounded." (Plaintiffs' AMF, Nos. 35-36.) On June 18, 2019, Doyle-Jones submitted a written complaint to the District about the false sexual assault accusations against her daughter and the unprofessional way she had been treated by Pender and Beltran. (Plaintiffs' AMF, No. 37.) On June 21, 2019, Pender submitted a "Revised Report", which changed the event from "Sexual assault" to "interruption of the educational process" and omitted the statement that Aygulina was seen "aggressively and forcibly kissing K". (Plaintiffs' AMF, No. 38.) Pender admitted that K denied Aygulina touched her private parts. (Plaintiffs' AMF, No. 39.)

Instead of retracting or rescinding the suspension, Pender submitted a Notice of Suspension, which stated that the suspension was due to Aygulina having "willfully used force or violence upon the person of another, except in self-defense." (Plaintiffs' AMF, No. 40.) The document was backdated to make it appear that it was signed on June 6, 2019, and it falsely stated that Aygulina had been given an opportunity to explain the incident. (*Ibid*.) Pender submitted the false document because she found out that the Education Code made it unlawful to accuse or suspend a kindergartener on the basis of sexual assault. (*Ibid*.)

On August 9, 2019, District Superintendent Darrien Johnson wrote to Doyle-Jones that she had investigated the incident and concluded the following: (1) Aygulina should not have been accused of sexual assault; (2) the Report should not have used the term "sexual assault"; Aygulina should not have been suspended for "sexual assault"; and (4) neither Pender nor Beltran intended to be unprofessional but they were concerned about what was "allegedly" witnessed by Beltran. (Plaintiffs' AMF, No. 41.) Beltran testified to that effect as well and she stated that it could have been influenced by her personal experiences. (Plaintiffs' AMF, No. 42-43.)

Doyle-Jones and Aygulina have suffered from major emotional distress and depression. (Plaintiffs' AMF, No. 44.) Aygulina started exhibiting intense anxiety and panic attacks after her

suspension. (Plaintiffs' AMF, No. 45.) She has gone from a happy, joyful, carefree child to a scared, introverted child. (*Ibid*.) After the incident, she could not use the restroom alone or sleep by herself. (Plaintiffs' AMF, No. 46.) She was afraid to return to school as she became fearful of being yelled at by teachers or threatened by the police, which has affected her academics and social belonging. (Plaintiffs' AMF, No. 48.) Aygulina has been transferred to another school, but she still experiences trauma triggers, and she has lost trust in adults who are in positions of authority. (Plaintiffs' AMF, No. 49.) Doyle-Jones felt humiliated and ostracized by the incident. (Plaintiffs' AMF, No. 50.) She was also three months pregnant at the time and was worried about losing her baby. (Plaintiffs' AMF, No. 52.)

B. First Cause of Action: 42 U.S.C. § 1983

When facing a temporary short-term suspension, a student has minimal due process rights, including the right to a hearing. In *Goss v. Lopez* (1975) 419 U.S. 565 (*Goss*), the Supreme Court held that where a suspension of 10 days or less is involved, "[d]ue process requires…that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have, and an opportunity to present his side of the story. (*Goss, supra,* 419 U.S. at 581.)

1. Immunity Under Government Code section 820.2

Government Code section 820.2, provides, "except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of discretion vested in him, whether or not such discretion can be abused." (Gov. Code, § 820.2.) The Court must first decide whether Pender's alleged acts and omissions were discretionary.

Discretionary immunity is broad, but not limitless. It applies to "basic policy decisions" or "quasi-legislative policy making [decisions]," not to "lower-level" decisions which merely implement a basic policy already formulated. (*Caldwell v. Montoya* (1995)10 Cal.4th 972, 981.) Thus, the issue is whether Pender's decision reflected the level of discretion that Section 820.2 contemplates. (See *Johnson v. State* (1968) 69 Cal.2d 782, 794 [stating, "area of quasi-legislative policy-making…are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision"].) "Generally speaking, a discretionary act is one which requires the exercise of judgment or choice. Discretion has also been defined as meaning

equitable decision of what is just and proper under the circumstances." (*Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1437 (*Kemmerer*).) Decisions by a school principal or superintendent to impose discipline on students and conduct investigations of complaints necessarily require the exercise of judgment or choice, and accordingly are discretionary acts. Here, Pender's acts related to disciplining a student, which are discretionary acts.

Relying on *Wormuth v. Lammersville Union Sch. Dist.* (2018) 305 F. Supp.3d 1108 (*Wormuth*), Plaintiffs nevertheless argue Pender is not immune because she did not render a "considered decision" that would implicate policy considerations. In *Wormuth*, a five-year old boy with a speech impediment was bullied and harassed at school. (*Id.* at 1114.) His parents sued the school district and district employees for failing to prevent the bullying and not adequately responding to it. (*Ibid*.) The court determined the principal was not entitled to immunity for his disciplinary decisions under Section 820.2 because he did not "show he rendered a considered decision" or that "in deciding to perform (or not perform) that act which led to plaintiff's injury, [the principal] consciously exercised discretion in the sense of assuming certain risks in order to gain other policy objectives." (*Id*. at 1130.) Similarly here, Pender does not offer any specific argument as to her decision making but rather she asserts her entitlement to blanket immunity. Thus, under *Wormuth*, Pender is not entitled to immunity under Section 820.2.

2. Immunity Under Government Code section 821.6

Government code section 821.6, states, "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." (Gov. Code, § 821.6.)

Defendants rely on *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048 (*Gillan*) and *Richardson-Tunnell v. School Ins. Program for Employees* (2008) 157 Cal.App.4th 1056, 1062 (*Richardson-Tunnell*). However, a recent California Supreme Court case disapproved of *Gillan* and *Richardson-Tunnell*, among a series of other cases, to the extent they were inconsistent with its opinion that "Section 821.6 protects public employees from liability *only for initiation or prosecution* of an official proceeding." (See *Leon v. County of Riverside* (2023) 14 Cal.5th 910, 930-931 (*Leon*) [emphasis added].)

Here, the issue is not the initiation or prosecution of an official proceeding, but rather the investigation. Thus, Defendants' reliance on these cases is unavailing. Moreover, in light of *Leon, supra,* Defendants are not entitled to immunity under Section 821.6.

3. *Due Process*

Relying on *Granowitz v. Redlands Unified School District* (2003) 105 Cal.App.4th 349 (*Granowitz*) Pender next contends that due process was satisfied here. In *Granowitz,* a high school senior was suspended for five days after several students accused him of sexually related misbehavior, including grabbing a girl by the buttocks. (*Id*. at p. 352.) After the principal received the complaints, he investigated the conduct, talked to the plaintiff, other students, school staff, then held a meeting with the plaintiff and his parents to allow plaintiff to respond to the charges against him. (*Id*. at p. 353.) The plaintiff denied most of the alleged misconduct but admitted to touching a girl's buttocks accidentally to get her attention. (*Ibid*.) Following the meeting, the principal decided to impose the suspension. (*Ibid*.)

Quoting *Goss, supra,* the court stated, "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him, an explanation of evidence the authorities have and *an opportunity to present his side of the story*." (*Id*. at p. 355 [emphasis added].) The court reasoned that "an informal meeting between the school official and a student or between the official and a student and his parents has been held to comport with due process." (*Id*. at pp. 355-356.) The court determined that the plaintiff was informed of the complaints against him and given an opportunity to respond. (*Id*. at p. 356.) The court also reasoned that plaintiff admitted to making some comments and gestures and unintentionally touching a girl who strongly objected. (*Ibid*. ("the reasons for the suspension given in the meeting were the same as the grounds listed in the notice of suspension.")

Here, there was an informal meeting between Pender, Aygulina, and Doyle-Jones. During the meeting, Aygulina admitted to kissing K on the cheek, but she denied trying to fondle her. (Plaintiff's AMF, Nos. 17, 22.) Aygulina was informed of what Beltran witnessed, and she denied that account. (*Ibid*.) She was also asked by Pender if she could, "look at mommy in the eyes and tell her the truth?" (Plaintiff's AMF, No. 23.) At that time, while still in tears, Aygulina continued to insist that she only kissed K on the cheek. (*Ibid*.) Under *Granowitz*, Aygulina was given an opportunity to present her side

of the story. Plaintiffs thus fail to raise a triable issue of material fact as to a violation of due process, and Defendants' motion for summary adjudication as to the first cause of action is GRANTED.

C. Second Cause of Action: violation of Education Code section 48900, et seq.

Education Code section 48900, provides: "[A] pupil shall not be suspended from school or recommended for expulsion, unless the superintendent of the school district or the principal of the school in which the pupil is enrolled determines that the pupil has committed an act as defined pursuant to … (k)(1) disrupt school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties." (Educ. Code, § 48900, subd. (k)(1).) "Except as provided in Section 48910, *a pupil enrolled in kindergarten* or any of grades 1 to 3, inclusive, *shall not be suspended* for any of the actions specified in paragraph (1), and those acts shall not constitute grounds for a pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, to be recommended for expulsion." (Educ. Code, § 48900, subd. (k)(2).) Defendants argue there is no private right of action for violations of the Education Code.

Under Government Code section 815, "except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. (b) the liability of a public entity established by this part… is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person." (Gov. Code, § 815, subds. (a) & (b).) Government Code section 815.2 states: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his person representative." (Gov. Code, § 815.2, subd. (a).) "A statute creates a private right of action only if the enacting body so intended." (*Farmers Ins. Exchange v. Super. Ct.* (2006) 137 Cal.App.4th 842, 849.)

In *Tirpak v. Los Angeles Unified School Dist.* (1986) 187 Cal.App.3d 639 (*Tirpak*), the court addressed whether the school district was liable under Government Code section 815.6. The court reasoned that Education Code sections 48900, 48911, and 48918 "can only be read as part of a comprehensive legislative scheme designed to ensure procedural fairness in suspension and expulsion

proceedings. Although, these sections are broader than those litigation … they clearly retain their administrative character. They do not expressly set forth a private cause of action for damages for breach of their provisions… The appropriate remedy for a breach of these statutory provisions is to proceed by way of administrative mandamus or injunction to enforce the procedures contained therein." (*Id*. at pl 645.)

Although *Tirpak* addressed Section 815.6, the Court is persuaded by its reasoning regarding Education Code sections 48900, 48911, and 48918. The Court is also aware of no authority that provides for a private right of action under the Education Code. Plaintiffs appear to concede this point because they fail to address it in their opposition. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].) Thus, Defendants' motion for summary adjudication of the second cause of action is GRANTED.

D. Fourth Cause of Action: Negligence

To prove negligence, Plaintiffs must demonstrate (1) the defendant had a legal duty to conform to a standard of conduct to protect the plaintiff; (2) the defendant failed to meet this standard of conduct; (3) the defendant's failure was the proximate or legal cause of the resulting injury; and (4) the plaintiff was damaged. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) California law imposes a duty on school districts and their employees to "to supervise at all times the conduct of the children on school grounds and to enforce those rules and regulations necessary for their protection." (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 934.) Plaintiffs here base their negligence claim on Defendants' alleged violation of the Education Code.

Defendants contend there is no triable issue of material fact because they followed the protocol in *Goss* and in Education Code section 48911, subdivision (b), and thus could not breach a duty of care. The Court has already found there is no triable issue of material fact as to whether Defendants complied with the due process requirements. Thus, Defendants meet their burden, and the burden shifts to Plaintiffs to demonstrate there is no triable issue of material fact.

Education Code section 48900.2, provides: "In addition to the reasons specified in Section 48900, a pupil may be suspended from school or recommended for expulsion if the superintendent or the

principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment as defined in Section 212.5… *This section shall not apply to pupils enrolled in kindergarten and grades 1 to 3, inclusive.* (Educ. Code, § 48900.2 [emphasis added].) And, under Education Code section 48911:

> (a) The principal of the school… may suspend a pupil from the school for any of the enumerated reasons in Section 48900, and pursuant to 489005, for no more than five consecutive schooldays. (b) Suspension by the principal…shall be preceded by an informal conference conducted by the principal… between the pupil and… the teacher, the principal… At the conference, the pupil shall be informed of the reason for the disciplinary action, including other means of correction that were attempted before the suspension as required by Section 48900.5, and evidence against the pupil, and shall be given the opportunity to present the pupil's version and evidence in the pupil's defense.

(Educ. Code, § 48911, subd. (a) & (b).)

It is undisputed that Aygulina was a kindergarten student at the time of the expulsion. (Plaintiffs' AMF, No. 13.) Plaintiffs argue that kindergartners are not subject to suspension if a determination is made that they committed sexual harassment as defined in Education Code section 212.5. (See Educ. Code, § 48900.2.) Education Code section 212.5 defines sexual harassment as

> Unwelcome sexual advances, request for sexual favors… made by someone from work on in the work or educational setting, under any of the following conditions: (a) Submission to the conduct is explicitly or implicitly made a term or condition of an individual's employment, academic status, or progress.
>
> (b) Submission to, or rejection of, the conduct by the individual is used as a basis of employment or academic decisions affecting the individual.
>
> (c) The conduct has the purpose of effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.

(d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

(Educ. Code, § 212.5.)

However, here, Defendants did not make a determination pursuant to Section 212.5. Thus, Plaintiffs reliance on it is unavailing, they fail to demonstrate a triable issue of material fact, and Defendants' motion for summary adjudication of the fourth cause of action is GRANTED.

E. Sixth Cause of Action: Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) "[E]xtreme and outrageous" conduct is that which exceeds "all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 (*Hughes*).)

Plaintiffs concede this claim as to Beltran. (Opp. at 1:11-16.) Thus, the motion for summary adjudication of the sixth cause of action as to Beltran is GRANTED.

Regarding Pender, Plaintiffs allege Pender's conduct of falsely accusing Aygulina of sexual assault and intentionally humiliating her and her parents was conduct that goes beyond all common notions of decency. (FAC, ¶ 76.)

"Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868 (*Christensen*).) "[M]ere insulting language, without more, ordinarily would not constitute extreme outrage" unless it is combined with "aggravated circumstances." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499 (*Alcorn*).) But, "[b]ehavior may considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946.)

Whether conduct is "outrageous" is usually a question of fact. (*Ragland v. US National Bank Assn.* (2012) 209 Cal.App.4th 182, 204 (*Ragland*).)

The Court has already found there is no triable issue of material fact that due process was satisfied, and Defendants thus establish there is no triable issue of material fact as to whether Pender's conduct was extreme and outrageous, shifting the burden to Plaintiffs.

Plaintiffs contend Pender's conduct of accusing a 6-year-old child of molesting another 6-year-old and telling the child she would ordinarily call the police is outrageous behavior. (Plaintiffs' AMF, No. 23.) Plaintiffs also establish the "aggravating circumstance" that Pender was the principal of the school—a position of power over Plaintiffs. It also appears reasonable people could differ on whether the conduct is outrageous. (See *Alcorn, supra,* 2 Cal.3d at p. 499; see also *Ragland, supra,* 209 Cal.App.4th at p. 204 [whether conduct is "outrageous" is usually a question of fact].) As a result, Plaintiffs meet their burden here. Thus, the motion for summary adjudication of the sixth cause of action is DENIED.

Calendar line 25
Case Name: *Farhad Noeiosquoei vs. Authur Lin, et. al.*
Case No.: 23CV419471

Before the Court is Defendants' Motion to Expunge Lis Pendens. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff Farhad Noeiosquoei leased the residential property located at 1346 Rosalia Avenue, San Jose CA 95130 ("the Property"). Defendants contend Plaintiff failed to pay rent, and Plaintiff contends the Property suffers from numerous habitability issues. Defendants filed and unlawful detainer action to remove Plaintiff from the Property, and Plaintiff filed the instant lawsuit asserting (1) Breach of Implied Warranty of Habitability, (2) Breach of the Covenant of Quiet Enjoyment, (3) Nuisance, (4) Negligence, (5) Violation of San Jose Municipal code Section 17.23.1250(A), (6) Violation of San Jose Municipal Code Section 17.23.010, et. seq., (7) Violation of San Jose Municipal Code Section 17.20.900, et. seq., (8) Violation of California Civil Code section 1942.5, (9) Violation of California Civil Code Section 1950.5, (10) Intentional Infliction of Emotional Distress. Plaintiff seeks general and special damages of $1,000,000 and punitive damages of $5,000,000.

On August 17, 2023, Plaintiff filed a notice of pending action with the Court for the Property. Defendants seek to have that notice expunged.

II. Legal Standard

Code of Civil Procedure section 405.30 provides:

> At any time after notice of pendency of action has been recorded, any party, or any nonparty with an interest in the real property affected thereby, may apply to the court in which the action is pending to expunge the notice. . . Evidence or declarations may be filed with the motion to expunge the notice. The court may permit evidence to be received in the form of oral testimony, and may make any orders it deems just to provide for discovery by any party affected by a motion to expunge the notice. The claimant shall have the burden of proof under Sections 405.31 and 405.32.

(Code Civ. Proc. § 405.30.)

"A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice." (*Urez Corp. v. Superior Court* (1987) 190 Cal. App. 3d 1141, 1144.) "A lis pendens may be filed by any party in an action who asserts a 'real property claim.'" (Code Civ. Proc., § 405.20; *Campbell v. Superior Court* (2005) 132 Cal.app.4th 904, 917-918 (internal citations omitted).) "Section 405.4 defines a 'Real property claim' as 'the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property ….'" (*Kirkeby v. Superior Court* (2004) 33 Cal. 4th 642, 647; *Mira Overseas Consulting Ltd. v. Muse Family Enterprises, Ltd.* (2015) 237 Cal.App.4th 378, 383.).) Whether plaintiff has asserted a real property claim is determined from the causes of action set forth in the pleadings. (*Kirkeby v. Superior Court* (2004) 33 Cal. 4th 642, 648 ("Review involves only a review of the adequacy of the pleading and normally should not involve evidence from either side, other than possibly that which may be judicially noticed as on a demurrer." (internal citations omitted).)

A lis pendens clouds the title, effectively preventing transfer of the property until the litigation is resolved, thus it is to be applied narrowly. (*BGJ Associates LLC v. Superior Court* (1999) 75 Cal.App.4th 952, 966-67.) Thus, "[u]nlike most other motions, when a motion to expunge is brought, the burden is on the party opposing the motion to show the existence of a real property claim." (*Kirkeby v. Superior Court* (2004) 33 Cal. 4th 642, 647, citing Code Civ. Proc., § 405.30.) "[A] motion for expungement may be based on the substantive grounds that the underlying action does not contain a real property claim (§ 405.31), or the real property claim lacks probable validity (§ 405.32). (*J&A Mash & Barrel, LLC v. Superior Court* (2022) 74 Cal. App. 5th 1, 16.)

"[T]he court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." (Code Civ. Proc. § 405.32.) "Probable validity" means "more likely than not that the claimant will obtain a judgment against the defendant on the claim." (*Mix v. Superior Court* (2004) 124 Cal. App. 4th 987, 993, citing Code of Civ. Proc., § 405.3.)

III. Analysis

Plaintiff's argument appears to be that because he is arguing that he has a right to continue living in the Property and because he wants to secure his ability to collect on a judgment if his case is successful, he has a real property claim. Plaintiff is incorrect.

The plaintiff in *Kirby*, upon which Plaintiff heavily relies in opposition, asserted they still owned the subject property because it was fraudulently conveyed to another party. If the plaintiff in *Kirby* succeeded in proving the subject property was wrongfully conveyed, that plaintiff would have regained title to the property. Thus, the lis pendens was properly maintained.

Here, Plaintiff alleges damages claims. If Plaintiff succeeds on every one of his claims, he still would not take possession, i.e., ownership, of the Property. Nor can Plaintiff tie up the Property via lis pendens to make sure he can collect on a later judgment. If either of Plaintiff's arguments were correct, a lis pendens would be proper in virtually every commercial or residential landlord tenant dispute. That is not the law.

IV. Attorneys' Fees

Code of Civil Procedure section 405.38 provides:

> The court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust.

Both sides seek attorneys' fees under this code section. Because Defendants are the prevailing parties on this motion, Plaintiff's motion for attorneys' fees is DENIED.

The Court finds that fees are appropriately awarded to Defendants. Plaintiff failed to cite authority for the position that the claims asserted in the Complaint constitute a real property claim. However, this is a relatively straight-forward motion. The Court thus awards Defendants $3,000 in attorneys' fees and costs payable within 30 days of service of this formal order.