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: October 5, 2023 TIME: 9:00 A.M.

TO REQUEST ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

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

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO HAVE THE HEARING REPORTED: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

TO SET YOUR NEXT hearing date: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed by January 2024.

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

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	20CV370807	Shadi Figuli et al vs Ali Milaninia et al	Defendants' Motion for Summary Judgment/Adjudication is GRANTED. Please scroll down to Line 1 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order. Court to prepare formal order.
2	19CV345229	Michelle Gomez vs James Roger Mayers et al	Defendant James Dechaine's Motion to Compel Plaintiff to provide responses to Special Interrogatories (Set Two) is GRANTED. An amended notice of motion with this October 5, 2023 hearing date was served on Plaintiff by electronic mail on July 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 Court notes Plaintiff is self-represented. Self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Plaintiff received the special interrogatories, requested an extension to respond, and served no responses. Where a responding party fails to timely respond to Interrogatories, absent a demonstration that the failure to respond was due to mistake, inadvertence, or excusable neglect and responses have since been served, the responding party waives all objections to the interrogatories, including objections based on privilege or on the protection for work product. (Code of Civ. Proc. §2030.290(a).) Here, Plaintiff made no such effort or showing. Plaintiff is therefore ordered to serve code-compliant responses without objections and to pay Dechaine $2,507 in attorneys' fees within 20 days of service of this final order. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
3	22CV404527	Lorenzo Lopez vs KIA AMERICA, INC	Plaintiff's Motion to Compel Deposition of Kia America's Person Most Knowledgeable and Production of Documents and Things and for Sanctions is GRANTED, IN PART. Please scroll down to Line 3 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

4	22CV407295	Royal Farms USA LLC vs Genflora Processing LLC	Kevin Moore's Motion for Protective Order is DENIED. Plaintiff's request for sanctions is GRANTED. There is no legal basis for preventing depositions from going forward in this case simply because one party seeks to challenge the pleadings. The Court notes the second amended complaint could already be in the demurrer stage if Mr. Moore had followed through on his agreement to stipulate to Plaintiff filing it. The Court finds that $500 per hour for this Silicon Valley Market is reasonable and 5 hours to be a reasonable number of hours to spend negotiating and responding to this motion for protective order. Accordingly, Defendant Kevin Moore is ordered to pay $2500 in discovery sanctions to Plaintiff within 60 days of service of the formal order. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
5	23CV410293	JOSE EDUARDO MACIAS PIMIENTA vs GENERAL MOTORS LLC	Plaintiff's Motion to Compel Defendant to Produce Documents and Provide Further Responses to Requests for Production and for Sanctions is DENIED. Please scroll down to Line 5 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
6	21CV377884	Jeffery Duncan vs Redwood Electric Group, Inc et al	Plaintiff's Motion for an Order Approving Good Faith Settlement is GRANTED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
7	22CV407295	Royal Farms USA LLC vs Genflora Processing LLC	Royal Farms USA LLC's Motion for Leave to File a Second Amended Complaint is GRANTED. "[T]he trial court has wide discretion in allowing the amendment of any pleading. (*Bedolla v. Logan & Frazer* (1975) 52 Cal. App. 3d 118, 135-136.) '[It] is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery* v. *Green*, 95 Cal. 630, 633; *Marr* v. *Rhodes*, 131 Cal. 267, 270.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend. (*Nelson* v. *Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton* v. *Bassett*, 158 Cal. 425, 427.)" (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). There is no prejudice to Defendant. Plaintiff claims the existing facts also support an intentional misrepresentation claim. Defendant is free to disagree with this contention and attack the pleading, but Plaintiff has met the low threshold required for leave to amend. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
8	19CV356353	Jean Kim vs Pets'Rx, Inc. et al	Parties are ordered to appear for argument regarding Defendants' Ex Parte Application to Continue Trial Date.

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Calendar Line: 1
Case Name: *Shadi Figuli, et.al. v. Ali Milaninia, et.al.*
Case No.: 20CV370807

Before the Court is Defendants', Ali Milaninia and Iman Milaninia, motion for summary adjudication. Defendants both seek summary adjudication of the second cause of action for breach of written agreement. Iman Milaninia seeks summary adjudication of the first cause of action for breach of oral agreement. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

A. Factual

According to the First Amended Complaint ("FAC"), Plaintiff Shadi Figuli is a licensed real estate broker and has been in business as an interior designer operating under the name and business entity Lilac Level Interiors, LLC since 2016. (FAC ¶ 6.) In May 2018, Ms. Figuli was approached by Defendants' daughter, Kimya, a friend familiar with Ms. Figuli's interior design work, regarding homes Kimya's father was constructing for profit in Campbell at 125 Rosemary Lane ("Subject Property") and 127 Rosemary Lane ("Back House"). (FAC,¶¶ 3, 8.) On May 22, 2018, Kimya, on Mr. Milaninia's behalf and with his authorization, asked Ms. Figuli to become involved on a professional basis and to assist with the interior design for both the Subject Property and the Back House. (FAC,¶¶ 3, 8.) In August 2018, Ms. Figuli entered into an oral agreement with Mr. Milaninia to provide interior design services ("Design Agreement") for the foregoing properties at an hourly rate of $175.00. (FAC,¶ 8.)

Mr. Milaninia advised Ms. Figuli that his construction budget was very tight and requested that she defer payment for her services until after the properties were sold; to which Ms. Figuli agreed and began providing design services in August 2018. (FAC ¶¶ 9, 10.)

In June 2019, Mr. Milaninia and Ms. Figuli negotiated a listing agreement whereby Ms. Figuli was to receive a 1.5% sales commission and list the properties for $2.38 million and $2.48 Million, respectively. (FAC ¶ 12.) On June 15, 2019, Ms. Figuli met with Mr. Milaninia to review the terms of the listing agreement and added handwritten terms to the document stating Ms. Figuli would receive payment for her incurred expenses should the contract be terminated early. Although Mr. Milaninia agreed to the terms, he wanted to discuss it with his wife, Iman, even though Iman had never been involved in any prior discussions with Ms. Figuli about the properties. Mr. and Mrs. Milaninia signed

the listing agreement ("Listing Agreement") and sent the image of the document to Ms. Figuli on June 15, 2019. (FAC ¶ 13.)

On June 17, 2019, Mr. Milaninia and Ms. Figuli met and discussed staging the properties. Ms. Figuli agreed to receive $5000.00 for the first month and $2500.00 for each subsequent month for her staging services. Ms. Figuli then handwrote and added the terms of this staging agreement to the Listing Agreement and took the Agreement home to copy. (FAC ¶ 14.)

On August 21, 2019, the Back House was sold for $1.975 million, and Defendants paid Ms. Figuli $29,625.00 for her deferred designed services and sales commission. (FAC ¶ 17.)

On September 6, 2019, Ms. Figuli met Mr. Milaninia at the Subject Property and was informed that he wanted to hire another agent. Ms. Figuli stated that she would cancel the agreement, though its term ran through December 31, 2019, and reminded him that he would still be obligated to compensate her for her design services and staging. (FAC ¶ 18.)

After no further interest from potential buyers, Defendants terminated the listing agreement on November 3, 2019, and Mr. Milaninia informed Ms. Figuli that he intended to hold the property as a rental unit. The Subject Property was destaged on November 7, 2019, and the MLS listing was cancelled on November 13, 2019. (FAC ¶ 19.) Thereafter, Mr. Milaninia refused to compensate Ms. Figuli for her incurred expenses associated with staging, photography, and marketing the Property as well as her design fees.

In February of 2020, Ms. Figuli learned that the Subject Property was in a pending escrow for sale and recorded a mechanic's lien on the property for her unpaid fees and expenses, but Defendants bonded around the liens. (FAC ¶ 21.)

Ms. Figuli further alleges in paragraphs 24–27 that Defendants posted negative reviews and comments about her on Yelp which exposed her to ridicule and affected her business negatively.

B. Procedural

Plaintiff filed this action on September 16, 2020 and the operative FAC on February 3, 2021 asserting (1) breach of oral contract, (2) breach of written contract, (3) quantum meruit, (4) trade libel, and (5) intentional interference with prospective economic relations.

On April 5, 2021, pursuant to the Code of Civil Procedure § 425.16, Defendants filed a special motion to strike the fourth and fifth causes of action from the FAC. Ms. Figuli opposed the motion. The matter was heard on July 22, 2021, and the Court's order, granting Defendants' motion, was entered on August 6, 2021. Consequently, Plaintiff's claims for trade libel and intentional interference with prospective economic relations have been stricken.

Defendants now move for summary adjudication of the second cause of action for breach of written contract. Iman Milaninia seeks summary adjudication of the first cause of action for breach of oral agreement. Plaintiff opposes the motions.

II. Legal Standard

"A party may move for summary adjudication as to one or more causes of action within an action … if that party contends that the cause of action has no merit … ." (Code Civ. Proc., § 437c, subd. (f)(1).) "The aim of the procedure is to discover whether the parties possess evidence requiring the weighing procedures of a trial." (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1057 (*Marron*).) "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgement and shall proceed in all procedural respects as a motion for summary judgement." (Code Civ. Proc., § 437c, subd. (f)(2).)

For defendants to prevail on a summary adjudication motion, they must meet their burden of proving that a cause of action has no merit. Therefore, defendants need to show that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) "Once the defendants have met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid*.) The opposing party must show by reference to specific facts the existence of a triable issue as to that cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

"Summary adjudication of a cause of action is appropriate only if there is no triable issue of material fact as to that cause of action and the moving party is entitled to judgement on the cause of action as a matter of law." (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1232-33 (citations omitted).) "A triable issue of material fact exists if, and only if, the evidence would allow a

reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. Thus, a party cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact." (*All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 953-54 (internal citations omitted).)

In ruling on a motion for summary adjudication, the court must "consider all of the evidence" and all of the "inferences" reasonably drawn therefrom [citing Code Civ. Proc, § 437c, d. (c)] and must view the evidence and inferences "in the light most favorable to the opposing party." *(Aguilar*, supra, at 843.) The moving party's papers are to be strictly construed, while the opposing party's papers are to be liberally construed. (*Committee to Save Beverly Highland Homes Ass'n v. Beverly Highland* (2001) 92 Cal.App.4th 1247, 1260; *Everett v. Superior Court* (2002) 104 Cal.App.4th 388, 392.)

III. Evidentiary Objections

A. Plaintiff's Objections

Ms. Figuli's objections to the declarations of Jeffrey Gillet, Defendants' expert, and Ali Milaninia do not comply with Rule of Court 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. Plaintiff submitted one document that attempts to be both the objections and the proposed order, in violation of Rule 3.1354. Consequently, the Court declines to rule on the evidentiary objections. (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]; *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 filing properly formatted papers].) Objections that are not ruled on are preserved for appellate review. (Code of Civ. Proc., § 437c, subd. (q).)

B. Defendants' Objections

Defendants' objection to declaration of Shadi Figuli is also submitted as one document in violation of Rule 3.1354. Consequently, the Court declines to rule on their evidentiary objections. These are preserved for appellate review.

IV. Request for Judicial Notice

Defendants that the Court take judicial notice of Plaintiff's First Amended Complaint. Defendants' request does not comply with the requirements of California Rules of Court, rule 3.1113(l), which provides "Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with rule 3.1306(c)." However, the Court may on its own motion take judicial notice of the case file in its own docket, and the FAC frames the issues for this motion. Accordingly, the Court will take judicial notice of the FAC.

V. Analysis

Plaintiff alleges Defendants breached an oral Design Agreement formed in August 2018 and the written Listing Agreement.

The elements of a cause of action for breach of contract are (1) existence of a valid contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (3) resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.) A Defendant moving for a summary adjudication may present affirmative evidence that negates one of these essential elements. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

A. First Cause of Action for Breach of Oral Design Agreement

Iman Milaninia, moves for summary adjudication on the ground that there is no triable issue of material fact as to this claim since Ms. Figuli does not possess, and cannot reasonably obtain, needed evidence proving the two entered any contract. In support, Defendants submit (1) Ms. Milaninia's declaration, (2) 101pages of transcript reflecting text communications between Ali Milaninia and Ms. Figuli, and (3) Plaintiff's First Amended Complaint.

In her declaration, Ms. Iman Milaninia attests that she never had any discussions or communications with Ms. Figuli concerning design or construction of either property, and she never entered into an oral contract with her for anything. (Defendants' Supporting Evidence, Ex. 4). Ms.

Milaninia's contention is supported by the large number of text messages exchanged between Mr. Milaninia and Ms. Figuli from October 15, 2019 to December 5, 2019. Review of these text messages show that Ms. Figuli directed her comments, questions, suggestions, and concerns about the design, construction, listing, and sale of the properties to Mr. Milaninia *only*. Ms. Figuli texted Mr. Milaninia and sought his opinion and decision on paint colors, curtains, tiles, grout colors, cabinets, light fixtures, landscaping, etc.

Pages and pages of text messages show that Ms. Figuli only texted and communicated with Mr. Milaninia throughout their working relationship and with the exception of two texts, she did not even refer to Ms. Milaninia. These two text messages were in relation to Ms. Milaninia's signature on the Listing Agreement and the sale / purchase agreement of the Back Property. In the text sent on June 15, 2019, Ms. Figuli writes, "Salaam Ali joon, can you and Iman joon please sign the forms tonight and scan them over to me?" Later, in a text sent on August 2, 2019 referencing the contract for the sale and purchase of Back Property, Ms. Figuli writes, "Hi Ali joon! I sent the contracts over via DocuSign to you and Iman joon. Can you sign them today please?" From these text communications, the Court reasonably infers that, (1) Ms. Milaninia was not involved in the interior or exterior design of the properties, and (2) Ms. Figuli had no communication with Ms. Milaninia about the design or sale of the properties—even a request for her signature was communicated through Mr. Milaninia.

Plaintiff also specifically alleges in paragraph 8 of her FAC that she "*entered into an oral agreement with Ali* to provide interior design services for the Projects (the "Design Agreement")." (Emphasis added.) Plaintiff further alleges in paragraph 13 that Ms. Milaninia "had never been involved in any prior discussions with Figuli about the Projects."

The Court concludes that Ms. Milaninia has met her initial burden and thus, the burden of production shifts to Ms. Figuli to show a triable issue of fact as to whether a valid contract was formed with Ms. Milaninia.

In support of her claim, Ms. Figuli submits her declaration with four attached exhibits: (A) copy of the Listing Agreement, (B) invoice for her design services, (C) copies of four emails exchanged with Mr. Milaninia on June 10, 2019, and (D) copies of selected text communications with Mr. Milaninia from November 3, 2019, to November 11, 2019. Ms. Figuli asserts that in 2018 Ali and Iman Milaninia

asked that she assist with the interior and exterior design of the properties. She declares that "[i]n August 2018, we verbally agreed I (as the LLC) would provide such services at an hourly rate of $175.00. Ms. Figuli does not dispute and in fact admits that she worked with Mr. Milaninia and his daughter, Kimya, on an ongoing basis for about nine months and assisted Mr. Milaninia with selection and installation of various design elements. (Figuli Decl. ¶ 4).

Ms. Figuli has the burden of setting forth *specific facts* showing that a triable issue of material fact exists as to her claim against Ms. Milaninia. Ms. Figuli may rely upon inferences that are reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork. (*Aguilar*, *supra*, at p. 843; *Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161.) However, Ms. Figuli declares, vaguely and elusively, that in 2018 Ali and Iman Milaninia asked for her design assistance, and in August 2018 they reached a verbal agreement. Ms. Figuli's declaration is devoid of any specific facts supporting her alleged conversation with Ms. Milaninia, and their alleged oral agreement. Instead, Ms. Figuli's declaration and exhibits B, C, and D demonstrate Ms. Figuli only communicated with Mr. Milaninia and his daughter throughout the entire project.

The Court finds that Ms. Figuli has failed to produce admissible evidence raising a triable issue of fact. Accordingly, the Court GRANTS Ms. Milaninia's motion for summary adjudication as to count 1, breach of oral contract.

B. Second Cause of Action for Breach of Written Listing Agreement

Ms. Figuli alleges that on or about November 3, 2019 Defendants terminated the Listing Agreement ahead of its end date of December 31, 2019. As a result of this early termination, and in accordance with the terms of their agreement, Ms. Figuli was entitled to recover her incurred marketing, photography, and staging expenses. Ms. Figuli claims Defendants breached their Agreement when they refused to pay for her expenses.

Ali and Iman Milaninia move for summary adjudication on the ground that there is no triable issue of fact as to this cause of action since Ms. Figuli does not possess the needed evidence supporting the breach element of this claim. Defendants contend they did not prematurely terminate the Listing Agreement, nor did they ask or instruct Ms. Figuli to cancel the Agreement. Although Defendants

instructed an early cancellation of the MLS listing, they argue that this cancellation was not equivalent to termination of the Listing Agreement; a point that was repeatedly communicated to Ms. Figuli.

In support of their argument that a cancellation of the MLS listing is not tantamount to a termination and/or breach of the Listing Agreement, Defendants submit the expert declaration of Mr. Gillet, a licensed real estate broker with 30 years of experience and the managing broker of the Coldwell Bank office in Orinda. Mr. Gillet opines that standard industry practice for real estate agents is to document the cancellation of any listing agreement through a written, signed cancelation. He adds:

> The California Association of Realtors, of which I understand Figuli to be a member and which produced the form of the Listing Agreement itself, provides a form Cancelation of Listing Agreement to its members. The purpose of the form cancelation of listing agreement is to ensure that the parties understand and agree to their respective rights and obligations relating to a cancelation… In my 30 years as a real estate agent, I have never seen a licensed agent or broker conclude that a cancelation had occurred based on correspondence without at least attempting to have the client execute a cancelation of the listing agreement.

Mr. Gillet furthermore declares:

> It is my understanding that Figuli contends that cancelation of the MLS listing is the equivalent of, or constitutes, a cancelation of the Listing Agreement. That is patently false, as demonstrated by the clear and unambiguous language of the Listing Agreement itself. The Listing Agreement provides in paragraph 5 that Figuli is a subscriber to MLS and will list the Property with MLS "unless otherwise instructed in writing" by the client. The Listing Agreement further provides an explanation of the MLS and cautions the client as to the consequences of opting out of the MLS. The decision as to whether and when to list a property with MLS belongs to the client. Client requests to remove a property from the MLS are relatively common when a property does not sell quickly. In no event would a client's instruction to remove a property from MLS constitute a cancelation of a listing agreement. It is also relatively common for an agent or

> broker and the client to disagree as to the appropriate sales price for a particular property. The client has no legal obligation to sell a property for less than the price specified in the listing agreement. In every instance in which an agent or broker enters into a listing agreement, they do so with the knowledge that any efforts to sell the property may result in zero compensation if no offers at or above the list price are received.

Ms. Figuli submits no evidence to challenge or negate Mr. Gillet's sworn declaration.

In support of their motion, Defendants also submit (1) the Declaration of Ali Milaninia, (2) Estimated Sellers Closing Statement for the sold Back Property, and (3) 101 pages of transcript reflecting text communications between Ali Milaninia and Ms. Figuli.

Ali Milaninia attests that he believed November 6, 2019 was the Listing Agreement's termination date, and believing it would be favorable to cancel the MLS listing prior to the termination of the Listing Agreement, he instructed Ms. Figuli to cancel the MLS listing, but he made clear to Ms. Figuli that he was not canceling the Listing Agreement. The 101 pages attached as Exhibit B to Mr. Milaninia's declaration showing the entirety of his text communications with Ms. Figuli from October 15, 2019, to December 5, 2019 show:

- Toward the end of October 2019, both Mr. Milaninia and Ms. Figuli were frustrated with lack of interest in the Back Property. Ms. Figuli declined to hold any more open houses unless the sale price was reduced again.
- On October 21, 2019, Mr. Milaninia asks if it would be a "good idea to remove the listings and relist after 30 days." Ms. Figuli disagrees and recommends a price reduction.
- On October 25, 2019, the parties debated and disagreed over another price reduction. Ms. Figuli, in apparent frustration, expressed her regret in taking the listing claiming loss of $40,000.00 in working with Mr. Milaninia. Ms. Figuli inquired if Mr. Milaninia wanted to terminate the listing; to which he responded, "Shadi Jon, as I have told you many times, I am not going to terminate the listing, it will expire another 2 weeks, …"
- On November 3, 2019, after some discussion about credit card receipts, Mr. Milaninia texted, "Since Our contract is ending in couple of days please cancel the listing and also arrange to

remove your furniture's thank you very much I do have a prospect tenant who wants to moving as soon as possible, have a Great Day, bye." (Emphasis added) There is no reply to this text and Ms. Figuli's now declares that Mr. Milaninia terminated the Listing Agreement via this text and phone conversations. (Figuli Decl. ¶ 9)

- On November 4, 2019, the parties exchange texts regarding a destaging date and Mr. Milaninia texts: "Thanks, please cancel listing, before it expires. I was told it is best not to expires. Thanks. What happened to the two showings?"
- On November 5, 2019, Mr. Milaninia texts, "Hi Shadi jon. I'm talking to your friend I don't know what I'm going to do. Per our agreement please cancel the listing so we can stop in the clock thanks."
- On November 7, 2019, Mr. Milaninia texts, "Hi Shadi Jon what time are going to be at the house to destage. Also please cancel the listing thank you. It is very important for the listing to cancel as soon as possible Thanks." Ms. Figuli responds, "Hi Ali jaan, I will cancel the listing today. When can I pick up my check?" Two hours later, Mr. Milaninia responds, "I Shadi jon, please keep in mind that I'm not canceling the contract our contract has expired as of 11/6/2019 and we have no obligation toward each other. Your listing needs to be removed from mls since you made a mistake on your listing end date. Your cooperation is sincerely appreciate it thanks." Ms. Figuli texts, "Your contract ends on 12/31/19. The house has been destaged per your cancellation. I have a signed contact. I don't know where you getting the 11/6/19 end date?? The contract for both 125 and 127 says end date of 12/31/19." Mr. Milaninia responds, "We signed on 5/6/2019, as stated I am not cancelling, the contract you told me before our contract ends on 11/6/2019." The parties exchange additional texts regarding the end date and eventually Mr. Milaninia responds, "If that is the case keep the listing till the end of contract. The cancellation was based on you."
- On November 11, 2019, Mr. Milaninia texts, "Hi Shadi jon, I went to the house it is destaged and your sign is gone, I assume you have cancel the listing. I am going to find the right person to rent or wait one month to have a clean record … After one month we will talk for next step. Thanks"

Ms. Figuli asserts Mr. Milaninia's text messages sent on November 3, 4, 5, and 7 collectively constitute express repudiation of the Listing Agreement which operates as a breach. Ms. Figuli additionally argues that Mr. Milaninia breached the Listing Agreement by instructing Ms. Figuli to stop her work, stop trying to sell the Subject Property, and informing her that he intended to lease out the property. She contends that these actions were for the purpose of preventing her from performing the Contract and constitute a breach. To support her argument, Ms. Figuli references the same above-referenced text messages.

Express repudiation of the contract is a new claim raised for the first time in Ms. Figuli's opposition. In her FAC, Ms. Figuli only claimed and alleged that Defendants terminated the Listing Agreement on November 3, 2019, and subsequently breached the Agreement when they refused to pay for her incurred expenses. Even considering Ms. Figuli's repudiation claim, the Court is still not persuaded that Mr. Milaninia breached the Listing Agreement as a matter of law.

"California law recognizes that a contract may be breached by nonperformance, by repudiation, or a combination of the two." (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 514, fn. omitted; see Rest.2d Contracts (1981) § 236.) Nonperformance typically refers to an unjustified or unexcused failure to perform a material contractual obligation when performance is due. (*Central Valley*, supra, at p. 514, fn. 3.) But "[t]here can be no *actual* breach of a contract until the time specified therein for performance has arrived." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 (*Taylor*).) By contrast, "an anticipatory breach of contract occurs when the contract is repudiated by the promisor before the promisor's performance under the contract is due." (*Central Valley*, supra, at p. 514, citing *Taylor*, at p. 137.) In other words, "if a party to a contract expressly or by implication repudiates the contract before the time for his or her performance has arrived, an anticipatory breach is said to have occurred." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489.) An express repudiation "is a clear, positive, unequivocal refusal to perform." (*Taylor,* supra, 15 Cal.3d at p. 137.) "However, if the repudiation is retracted prior to the time of performance, then the repudiation is nullified and the injured party is left his remedies, if any, invocable at the time of performance." (*Taylor,* supra, 15 Cal.3d at pp. 137-138.)

The Court finds that Mr. Milaninia's November 3, 4, 5, and 7 text messages—the contents of which are not disputed—do not rise to the level of an express repudiation because they do not form a clear, positive, unequivocal refusal to perform under the terms of the Listing Agreement. To the contrary, these texts demonstrate Mr. Milaninia's confusion about the end date of the Listing Agreement, his request for the cancellation of the MLS listing prior to the end date, and his agreement to have Ms. Figuli list the Subject Property until her claimed end date of the contract.

Ms. Figuli also swears in her own declaration that the Listing Agreement was terminated on November 3, 2019. Accordingly, Mr. Milaninia could not have repudiated the contract on November 4, 5, and 7 as a matter of law. And even if the Court agreed that Mr. Milaninia repudiated the Listing Agreement, it is evident from the undisputed material facts that Mr. Milaninia retracted the repudiation at least three times on November 7, 2019, well before his performance under the Listing Agreement was due.

Finally, Ms. Figuli's assertion that Mr. Milaninia breached the Listing Agreement by preventing her performance is unsupported by any evidence. Ms. Figuli mischaracterizes the November 3, 4, 5, and 7 text messages. None of these texts include any instruction or even a suggestion from Mr. Milaninia that Ms. Figuli should stop her work and stop trying to sell the Subject Property. In fact, on November 4, Mr. Milaninia asks about the status of two showings, and on November 11 he writes that he wants to talk to Ms. Figuli in one month to decide the next steps for the sale.

Accordingly, the Court finds that Ms. Figuli has failed to meet her burden of production to demonstrate a triable issue of material fact regarding the breach element. Accordingly, the Court GRANTS Defendants' motion for summary adjudication of the second cause of action.

Calendar Line: 3
Case Name: *Lorenzo Lopez vs KIA AMERICA, INC*
Case No.: 22CV404527

Before the Court is Plaintiff's Motion to Compel Deposition of Kia America, Inc.'s ("Kia") Person Most Knowledgeable and Production of Documents and for Sanctions. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a lemon law case. On March 15, 2022 Plaintiff Lorenzo Lopez leased a 2022 Kia Sorento (the "Vehicle"). Plaintiff filed this lawsuit against Kia on September 19, 2022 for breach of warranties. The complaint does not appear to have any more specific allegations for this Vehicle.

Plaintiff now seeks to compel Kia to produce person(s) most knowledgeable for deposition and documents. Kia argues the topics are overbroad and Plaintiff failed to adequately meet and confer.

II. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Cal. Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

III. Analysis

A. Topics and Document Requests

First, as noted below, Kia's argument that the Court should deny this motion for Plaintiff's failure to adequately meet and confer is well taken. However, for the sake of efficiency for both the parties and the Court, the Court will reach the merits of the motion to compel.

Next, the Court agrees with Kia that many of the topics are overbroad. This is a very simply plead Song-Beverly case. What is relevant is the repair history of the Vehicle and limited policies surrounding responses to repurchase requests. Accordingly, the Court provides the following rulings regarding the topics and document requests.

Category 1: GRANTED. This topic is related directly to the Vehicle.

Category 2: GRANTED, IN PART. Kia is ordered to produce a witness for "all technical bulletins applicable to the [] Vehicle but not technical bulletins "superseded."

Category 3: GRANTED, IN PART. Kia is ordered to produce a witness for this topic only as it relates to the Vehicle.

Category 4: DENIED. This topic is overbroad.

Category 5: GRANTED, IN PART. Kia is ordered to produce a witness for this topic only as it relates to the Vehicle and not for superseded recalls.

Category 6: GRANTED, IN PART. Kia is ordered to produce a witness for this topic only as it relates to the Vehicle and not for superseded recalls.

Category 7: GRANTED.

Category 8: GRANTED.

Category 9: DENIED. This topic is vague.

Category 10: GRANTED solely as to the Vehicle.

Category 11: DENIED. This topic is overbroad.

Request 1: GRANTED solely as to the Vehicle.

Request 2: GRANTED solely as to the Vehicle.

Request 3: GRANTED, IN PART. Kia need not produce superseded technical bulletins.

Request 4: GRANTED, IN PART. Kia need not produce superseded recalls.

Request 5: GRANTED solely as to the Vehicle.

Request 6: GRANTED, IN PART. Kia is ordered to produce documents sufficient to show its policies and procedures for evaluating and/or investigating whether a vehicle qualifies for repurchase or replacement in place from 2022 to the date when Plaintiff made his request for repurchase.

Request 7: DENIED. This topic is overbroad.

B. Sanctions

Plaintiff's request for sanctions is denied. Kia had substantial justification for seeking to limit the discovery produced in response to Plaintiff's topics and document requests.

As for Plaintiff, Code of Civil Procedure section 2023.020 states: "the court *shall* impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as result of that conduct." (Emphasis added; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 448 (failure to participate in meet and confer process in good faith is independent discovery abuse for which sanctions are authorized by statute); *Ellis v. Toshiba Am. Info. Sys., Inc.* (2013) 218 Cal.App.4th 843, 879-880 (substantial monetary sanction appropriate for failure to cooperate in setting protocol for expert inspection as ordered).) This monetary sanction is mandatory regardless of how the court rules on the offending party's motion. (Code Civ. Proc. §2023.020.) The Court agrees with Kia that Plaintiff failed to adequately meet and confer before bringing this motion. Kia has apparently already produced some of the documents requested and was willing to produce one or more persons most knowledgeable after meeting and conferring regarding the scope of Plaintiff's topics. Plaintiff did not adequately meet and confer to narrow the scope of these topics or document requests. The Court believes sanctions would be appropriate on this record. However, the Court did not see a request for sanctions from Kia. Without notice of a request for sanctions to Plaintiff, the Court does not believe it appropriate to award them despite the Court's findings.

The parties are ordered to meet and confer and identify a mutually agreeable date, time and location for the deposition. To the extent Kia has already produced the documents the Court ordered produced in this order, Kia may simply identify those documents in its written responses to these document requests; it need not produce them again. Kia is ordered to produce amended written responses and any additional documents at least two court days before the deposition.

Calendar Line: 5
Case Name: *JOSE EDUARDO MACIAS PIMIENTA vs GENERAL MOTORS* LLC
Case No.: 23CV410293

Before the Court is Plaintiff's Motion to Compel Further Responses and Documents to Plaintiff's Requests for Production of Documents (Set One) from Defendant General Motors ("GM"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a lemon law case. Plaintiff Jose Eduardo Macia Pimienta alleges he purchased a 2018 Chevrolet Silverado 1500 ("Vehicle") on or about July 1, 2018 and obtained an express warranty. Plaintiff further alleges that during the warranty period, the Vehicle developed defects, including a defective transmission system and defective body system. Plaintiff brought this case against GM on January 20, 2023 asserting various warranty claims.

Plaintiff now seeks an order compelling GM to produce documents relating to (1) GM's internal investigation and analysis of the Powertrain Defect and Suspension Defect in the Vehicle and (2) GM's warranty and vehicle repair purchase policies.

II. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Cal. Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial

limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) A party may move for an order compelling a further response to a document demand on the ground that (1) an objection is without merit or too general, (2) a statement of compliance with the demand is incomplete, or (3) a representation of inability to comply is inadequate, incomplete, or evasive. (Code Civ. Pro. §2031.210(a).) A party seeking to compel is required to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) This burden may be satisfied by a fact-specific showing of relevance. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448.)

What is relevant in this case are documents related to the Vehicle and documents sufficient to show GM'S policies and procedures for evaluating repurchasing requests in place at the time Plaintiff requested that GM repurchase his vehicle. GM has already agreed to and actually did produce documents related to the Vehicle; Plaintiff does not dispute this. If GM has not produced documents sufficient to show its repurchasing policies and procedures in place when Plaintiff requested repurchase, GM is ordered to produce such documents within 20 days of service of the formal order.

The balance of what Plaintiff seeks is overbroad and/or vague and not likely to lead to the discovery of admissible evidence for this Vehicle. Plaintiff's motion is therefore DENIED.