SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 08-15-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV398994 Motion: Strike	Sharon Lewis vs City of Milpitas et al	See Tentative Ruling. Court will issue the final order.
LINE 2	22CV408145 Hearing: Demurrer	Ali Adelkhani vs Yeganeh Bakery and Cafe,LLC et al	See Tentative Ruling. Court will issue the final order.
LINE 3	22CV404731 Motion: Summary Judgment/Adjudication	Michael Smith vs Black Diamond Paver Stones & Landscaping, Inc. et al	See Tentative Ruling. Court will issue the final order.
LINE 4	20CV369211 Motion: Discovery	David Wessel et al vs City of Cupertino et al	See Tentative Ruling. City shall submit the final order within 10 days.
LINE 5	20CV369903 Motion: Compel	NICOLAZ RODRIGUEZ-ORTIZ vs GREEN WASTE RECOVERY, INC. et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 6	23CV427403 Motion: Reconsider	ATHELAS, INC. vs Sumit Mahendru	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 7	24CV429843 Motion to Expunge LIS Pendens	395 S WINCHESTER REALTY LLC vs CENTURY TOWER LLC et al	Notice appearing proper and good cause appearing, the unopposed motion to expunge the lis pendens is GRANTED. Moving Defendants shall submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 8	2012-1-CV-220303 Motion to Enter Renewal of Judgment Nunc pro Tunc	Cavalry SPV I, LLC vs O. Williams	See Tentative Ruling. Court will issue the final order.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 1
Case Name: *Sharon Lewis v. City of Milpitas et al.*
Case No.: 22CV398994

I. Factual and Procedural Background

This is a breach of contract action brought by pro per plaintiff Sharon Lewis ("Plaintiff") against defendants City of Milpitas ("the City"), City of Milpitas Housing Authority ("Housing Authority"), Tim Wong ("Wong"), and Julie Edmonds-Mares ("Edmonds-Mares") (collectively, "Defendants") over a condominium located at 340 Celebration Drive, Milpitas, California ("Condo").

Plaintiff initiated this action by filing a complaint on June 9, 2022. Plaintiff filed the first amended complaint on May 15, 2023.

On October 30, 2023, Plaintiff filed the operative second amended complaint ("SAC"). The SAC alleges Plaintiff and the City signed a Residential Purchase Agreement and Joint Escrow Instructions ("2013 Contract") on October 18, 2013, formalizing the sale of the Condo to Plaintiff. (SAC, ¶ 23.) The terms of the 2013 Contract included a $175,000 sale price, a seller credit to buyer of $20,000, a $250 Home Warranty provided by seller. (*Id.* at ¶ 11.)

On January 15, 2018, Plaintiff opened escrow to record and close the 2013 Contract. (SAC, ¶ 48.) On March 1, 2018, the City, Wong, and Plaintiff executed an oral contract separate from the Condo's escrow transaction, stipulating Defendants would provide $57,000 for repairs to the Condo. (*Id.* at ¶¶ 92, 94.) On August 26, 2018, Plaintiff signed a new purchase contract ("2018 Contract") with Defendants for the Condo under fraud and duress. (*Id.* at ¶ 7.)

The 2018 Contract unilaterally added $35,000 to the price, a 45-year ownership restriction, and approximately $140,000 in costs for an undisclosed loan and APR terms. (SAC, ¶ 7.) Defendants allegedly substituted the 2018 Contract in escrow and forced Plaintiff to sign. (*Id.* at ¶ 23.)

The SAC alleges the following causes of action against Defendants:

1) Breach of Contract;
2) Negligent Misrepresentation, Fraud;
3) Intentional Interference with Performance of Contract;
4) Breach of Oral Contract;
5) Breach of Implied Duty to Deal in Good Faith, Fair Dealing, and/or with Care; and
6) Specific Performance.

On December 4, 2023, Defendants filed a demurrer to the SAC. On April 5, 2024, this Court (Hon. Rosen) overruled, in part, and sustained, in part the demurrer. Defendants had ten days to file an answer. (See Cal. Rules of Court, Rule 3.1320(g); Code Civ. Proc., § 472b.)

On May 7, 2024, Plaintiff filed a motion to strike the answer to the SAC. On August 5, 2024, Defendants filed their opposition to the motion to strike. Plaintiff filed her reply on August 8, 2024.

II. Plaintiff's Request for Judicial Notice

In support of her motion, Plaintiff requests the Court take judicial notice of Defendants' answer and proof of service, dated May 1, 2024. The requested is GRANTED as to the existence of the documents. (See Evid. Code, § 452, subd. (d).)

III. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

IV. Motion to Strike Answer

Plaintiff moves to strike Defendants' answer on the grounds Defendants: 1) failed to timely serve their answer on Plaintiff after the April 5, 2024 order; 2) failed to verify their answer; and 3) failed to conform their answer to laws of the State and this court.

A. Untimely Service

As to untimely service, Plaintiff argues Defendants had ten days from April 5, 2024 to serve their answer but that she did not receive service of the answer until May 4, 2024. (Motion, p. 3:7-10.)

In opposition, Defendants concede they had ten days from the Court's April 5, 2024 order to serve Plaintiff. (Opposition, p. 3, subd. IV(A).) However, they argue, that they placed their answer in the mail on April 15, 2024 to be delivered to Plaintiff at her Milpitas address. (Opposition, p. 3:1-2.) The envelope was returned to sender as not deliverable on April 30, 2024 and Defendants thereafter emailed Plaintiff to advise her that the answer had been returned as undeliverable and to provide her a courtesy copy. (Opposition, p. 3:4-9.) Defendants cite to Code of Civil Procedure section 1013, subdivision (a) to argue that service is complete at the time of the deposit in the mail. (Opposition, p. 4:2, quoting Code Civ. Proc., § 1013, subd. (a).)

California courts have repeatedly held that service is complete upon its deposit in the mail and "the addressee incurs the risk of the failure of the mail[.]" (*McKeon v. Sambrano* (1927) 200 Cal. 739, 741; see also *Carlon v. Gray* (1935) 10 Cal.App.2d 658, 663 [stating "when a copy of a pleading is enclosed in an envelope, properly addressed, the service is complete, and whether the person whose address appears on the envelope does or does not receive the enclosed paper, is wholly immaterial"][overruled on other grounds]; *Silver v. McNamee* (1999) 69 Cal.App.4th 269, 283; Code Civ. Proc., § 1013, subd. (a).)

On its own motion, the Court takes judicial notice of the proof of service of the answer, currently on file with the Court. (See *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752 ["the court may take judicial notice on its own volition"]; *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) The proof of service indicates that the answer was served by mail on April 15, 2024 to 340 Celebration Drive, Milpitas, California. This is the address the Court currently has on file for Plaintiff and is listed on Plaintiff's motion to strike. The April 15, 2024 service by mail took place exactly ten days after the Court's April 5, 2024 order on demurrer. Thus, Defendants are deemed to have timely served their answer and the Court declines to strike the answer on this basis.[1] In any event, even if the Answer had been untimely, the Court would decline to exercise its discretion to strike the answer, given court's favor of disposition of a matter on its merits. (See *Bank of Haywards v. Kenyon* (1917) 32 Cal.App. 635, 636 ["An answer filed late is an irregularity and not an absolute nullity, and the plaintiff was not, as a matter of strict right, entitled to have it stricken from the files. Discretion to do this is lodged in the trial court."]; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds].)

B. Verified Answer

Plaintiff next asserts that Defendants failed to verify their answer despite being required to do so as government entities. (Motion, p. 3:10-11.) In opposition, Defendants argue that because Plaintiff's SAC was not verified, their answer did not need to be verified. (Opposition, p. 5:22-25, citing Code Civ. Proc., § 446, subd. (a).)

Where a complaint is unverified, a defendant's answer requires no verification. (*Kraus v. Walt Disney Productions, Inc.* (1963) 221 Cal.App.2d 736, 742; see also Code Civ. Proc., § 446, subd. (a) ["When the complaint is verified, the answer shall be verified."].) Plaintiff directs the Court to *Johnson v. Dixon Farms Co.* (1915) 29 Cal.App. 52, 55 (*Johnson*) to support her argument. *Johnson* however explicitly states that "[t]he ***complaint having been verified***, it was necessary for the defendant . . . to have filed a verified answer." (*Ibid*. [emphasis added].) Here, nothing in the SAC, or attached to the SAC, indicates that the pleading is verified. Thus, Defendants were not required to verify their answer. The Court will not strike the answer on this basis.

C. Conformity with Laws of the State and Court

Finally, Plaintiff argues Defendants' answer is not filed in conformity with the laws of this state, court rules, or orders of court. Plaintiff cites the following to support her argument: Code of Civil Procedure sections 436, 446, and 1010.6; *Buck v. Morrossis* (1952) 114 Cal.App.2d 461, 464 (*Buck*); and *Collins v. Bicknell* (1919) 41 Cal.App. 291 (*Collins*).

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[1] In Reply, Plaintiff argues the letter containing the answer that was returned as undeliverable does not contain her address. (See Reply, p. 3:14-18.) The Court assumes she is referring to Exhibit C of the Lewis Declaration. On a motion to strike, the Court does not review extrinsic evidence and neither party has requested judicial notice of Exhibit C. Thus, the Court does not rely on Exhibit C in reaching its conclusion.

Code of Civil Procedure section 436 provides the legal standard for a motion to strike. The Court has already dispensed of Plaintiff's argument related to Code of Civil Procedure section 446, above. Code of Civil Procedure section 1010.6 indicates when a document may be served electronically. Here, Defendants served Plaintiff my mail. The email to Plaintiff including the answer was a courtesy copy served after the answer was returned as undeliverable. Thus, Code of Civil Procedure section 1010.6 is not implicated here.

As to *Buck*, it is not entirely clear to the Court in what way Plaintiff is relying on the case. Moreover, *Buck* involved an order striking a demurrer to the complaint. The Court of Appeal held the trial court did not err in striking the demurrer because the demurrer was untimely filed. (*Buck*, *supra*, 114 Cal.App.2d at p. 464.) Here, there is no untimely demurrer and further, as noted above, Defendants timely served their answer. Thus, *Buck* is inapposite.

As for *Collins*, the Court of Appeal affirmed a trial courts judgment striking an untimely answer and cross-complaint, noting also that the cross-complaint was frivolous, sham, and wholly without merit, in addition to being untimely filed. The *Collins* Court explained that a trial court has discretion to strike out a late answer. The Court is aware that it may strike an answer; however, none of Plaintiff's arguments to support her motion to strike are availing. Thus, the Court declines to strike the answer on the ground it does not conform with the laws of this State or court.

Based on the foregoing, the motion to strike Defendants' answer is DENIED. The Court shall prepare the final order.

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Calendar Line 2
Case Name: *Adelkhani v. Yeganeh Bakery and Café, LLC, et al.*
Case No.: 22CV408145

Plaintiff Ali Adelkhani ("Plaintiff") initiated this employment action alleging that his former employer, Yeganah Bakery and Café ("Yeganah") and its owner Reza Tarighat ("Tarighat" or "Defendant") harassed and discriminated against him. Defendants Yeganah Bakery and Café and Reza Tarighat (collectively, "Defendants") demur to the third, fourth, sixth, seventh, eighth, ninth, tenth, and eleventh causes of action in the operative Second Amended Complaint ("SAC").

I. BACKGROUND

A. Factual

According to allegations of the SAC, Plaintiff was employed at Yeganah. (SAC, ¶¶ 19-20.) During Plaintiff's employment, Tarighat "routinely" addressed Plaintiff in a "derogatory and demeaning" manner by calling him "dumbass," among other things, and blamed him for "any errors…caused by anyone," including Defendant. (SAC, ¶¶ 21-23.) Plaintiff was approximately 20 years old and "the youngest employee of the Defendants" at the time, and he allegedly performed his job "with excellence." (SAC, ¶¶ 21, 32.) Initially, Plaintiff apologized to Defendant for "anything he was blamed for" because he did not want to lose his job. (SAC, ¶ 24.) But, when Defendant exhibited more "aggressive and abusive" conduct, Plaintiff began defending himself by stating that most, "if not all," errors were caused by other staff, including Defendant himself. (*Ibid*.)

On or about August 28, 2021, Plaintiff pointed out to Tarighat that he believed Tarighat had made a mistake with a customer's food order. (SAC, ¶ 25.) Tarighat became upset and began yelling at Plaintiff and calling him names in "Farsi." (SAC, ¶ 26.) Despite Plaintiff's attempt to apologize, Tarighat threatened Plaintiff, approached Plaintiff at his workstation, and then "grabbed" the knife Plaintiff was using to cut sandwiches. (SAC ¶¶ 27-29.) When Plaintiff turned his back on Tarighat, he attempted to grab Plaintiff's shoulder, but Plaintiff pushed Tarighat's hand away. (SAC, ¶ 29.) After "screaming" more threats, Tarighat told Plaintiff to leave the store, so he did so. (SAC, ¶¶ 30-31.)

As a result of this incident, Plaintiff claims to have suffered "pain and emotional distress, anxiety, depression, headaches, tension, and other physical ailments, as well and past and future lost wages and benefits." (SAC, ¶ 34.) The SAC also alleges that Plaintiff suffered adverse employment actions, harassment, and discrimination stemming from the same incident described above.

B. Procedural

Plaintiff filed his initial complaint on December 5, 2022. On February 7, 2023, Plaintiff filed his FAC alleging causes of action for: (1) battery, (2) assault, (3) hostile work environment (Gov. Code, § 12940, subd. (j)), (4) negligent supervision and retention, (5) intentional infliction of emotional distress, (6) termination in violation of public policy, (7) discrimination in violation of Government Code section 12940, et seq., (8) retaliation in violation of the Fair Employment and Housing Act ("FEHA"), (9) failure to prevent

discrimination and retaliation in violation of Government Code section 12940, subdivision (k), (10) violation of the Ralph Civil Rights Act (Civ. Code, § 51.7), and (11) violation of the Tom Bane Civil Rights Act (Civ. Code, § 52.1).

On May 12, 2023, Defendants filed a demurrer to some of the causes of action in the FAC and a motion to strike portions of the FAC. After the hearing on February 20, 2024, this Court issued a final order sustaining the demurrer as to the third and ninth causes of action, (on the ground of failure to state a claim), with 30 days' leave to amend. Additionally, this Court sustained the demurrer with 30 days' leave to amend as to the seventh, eighth, tenth, and eleventh causes of action on the ground of uncertainty. Finally, the demurrer was overruled as to the fourth, fifth, and sixth causes of action. (See Court Order Case No. 22CV408145 entitled *Ali Adelkhani vs. Yeganeh Bakery and Café, LLC, et al.*, filed on February 22, 2024.) On February 27, 2024, Plaintiff filed his operative pleading, the SAC, alleging the following claims: (1) battery, (2) assault, (3) hostile work environment (Gov. Code, § 12940, subd. (j)), (4) negligent supervision and retention, (5) intentional infliction of emotional distress, (6) failure to prevent discrimination in violation of Government Code section 12940, (7) discrimination in violation of Government Code section 12940, et seq., (8) retaliation in violation of the Fair Employment and Housing Act ("FEHA"), (9) violation of the Ralph Civil Rights Act (Civ. Code, § 51.7), (10) violation of the Tom Bane Civil Rights Act (Civ. Code, § 52.1), and (11) wrongful termination in violation of public policy.

On May 6, 2024, Defendants filed a demurrer to the third, fourth, sixth, seventh, eighth, ninth, tenth, and eleventh causes of action. On August 1, 2024, Plaintiff filed an opposition. Defendant filed a reply on August 6, 2024.

II. DEMURRER

A. Legal Standard

The Court in ruling on a demurrer treats it "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.) 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.)

B. Analysis

Defendants demur to the third, fourth, sixth, seventh, eighth, ninth, tenth, and eleventh causes of action in the SAC. The grounds for demurrer listed in the demurrer are the same for each cause of action:(1) failure to state a cause of action and (2) uncertainty.

As a preliminary matter, Defendants' memorandum of points and authorities collectively addresses the SAC allegations as opposed to each cause of action individually.

But, the memorandum of points and authorities was filed concurrently with the notice of demurrer and demurrer, which address each cause of action, and Plaintiff was able to respond to Defendants' arguments related to them, in the opposition. Accordingly, the court will overlook this defect.

i. Third Cause of Action – Hostile Work Environment (Gov. Code, § 12940, subd. (j))

The notice of demurrer indicates that Defendants challenge the third cause of action on the ground of (1) failure to state a cause of action, and (2) uncertainty.

As noted in this Court's prior order, Government Code section 12940, subdivision (j)(1) prohibits employers from harassing employees because of their membership in a protected class, including race, national origin, gender, and age, among other things. The elements of a FEHA hostile workplace cause of action are (1) the plaintiff was a member of a protected class; (2) he or she was subjected to unwelcome harassment; (3) the harassment was based on the plaintiff's protected status; and (4) the harassment unreasonably interfered with his or her work performance by creating an intimidating, hostile, or offensive work environment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.) With respect to claims for age discrimination specifically, membership in the protected class is shown if *the plaintiff was 40 years of age or older* at the time of the adverse employment action. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1003 (*Hersant*), italics added.)

In the SAC, Plaintiff contends that he is a member of a protected class "because of his age" and he asserts that he was harassed "specifically because of his age." (SAC, ¶ 63.) The SAC also asserts that Tarighat "verbally harassed" Plaintiff and threatened him with a knife creating a hostile work environment. (SAC, ¶¶ 63-67, 70.) But, the SAC also indicates that Plaintiff is "a very young man, of about 20 years old." (SAC, ¶¶ 31, 126.) In both the notice of demurrer and demurrer, Defendants argue that Plaintiff does not identify any statute that stands for the proposition that a person being discrimination against "because of their youth" can bring a claim under FEHA. (See Notice of Demurrer ("Dem. Not.,") p. 3:8-13 and Memorandum of Points and Authorities in Support of Defendants' Demurrer to SAC ("Dem. MPA,") p. 3:3-12.) Consequently, Defendants conclude the third cause of action is uncertain and fails to state facts sufficient to constitute a cause of action. (Dem. MPA, p. 5.)

This Court agrees with Defendants that Plaintiff has failed to adequately allege facts that show that the alleged harassment was based on his protected status. As noted above, for age discrimination claims, membership in the protected class is shown if "the plaintiff was 40 years of age or older" at the time of the adverse employment action. (*Hersant, supra,* 57 Cal.App.4th at p. 1003.) Plaintiff alleges that he was approximately 20 years old at the time of his alleged unlawful termination. (SAC, ¶¶ 20, 21, 126.) Consequently, based on these allegations, Plaintiff is not a member of a protected class for purposes of age discrimination. Notably, Plaintiff's opposition is completely silent as to Defendants' contentions regarding the third cause of action. Thus, Plaintiff impliedly concedes Defendants' argument. (See *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 (*Westside*) [failure to challenge a contention results in the concession of that argument].)

Accordingly, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND as to Plaintiff's hostile work environment claim on the ground of failure to state a claim. Plaintiff

was already given an opportunity for leave to amend per this Court's previous order, and it is clear on the face of the SAC that a cause of action for FEHA hostile workplace cannot be cured (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 (*Stockton*) [if a plaintiff has not had an opportunity to amend the complaint in response to a demurrer, leave to amend is liberally allowed as a matter of fairness].) In light of this conclusion, the Court need not address Defendants' uncertainty argument.

ii. Fourth Case of Action – Negligent Supervision and Retention

In their notice of demurrer, Defendants contend the fourth cause of action is uncertain because, on the one hand, it is based on Government Code section 12940, subdivision (a) which involves "a refusal to employ a person based on upon certain protected characteristics," but, on the other, Plaintiff alleges "he was employed by Defendants." (Dem. Not., p. 3:15-22.) Defendants assert that Plaintiff erroneously alleges a violation of Government Code section, 12926, subdivision (l), which involves disability discrimination. (*Id*., p. 3:19-22.) Plaintiff does not rely on any statutory authority for its fourth cause action in the SAC, but instead cites a case not involving either of these statutes. Although this Court acknowledges the fourth cause of action incorporates the previous paragraphs by reference, it is still unclear why Defendant is asserting that Plaintiff improperly alleges a violation of Government Code section 12926, subdivision (l). (See SAC, ¶ 92.) The SAC does not allege a violation of this section until the later causes of action. (See, e.g., SAC, ¶ 92.) Thus, this argument lacks merit.

Defendants also raise the same arguments in the instant demurrer as it did in its demurrer to the FAC. Specifically, they argue that the fourth cause of action is uncertain[2] because it incorporates by reference "the earlier age discrimination claim." (Dem. Not., p. 3:19-22; Dem. MPA, p. 5:7-11.) Defendants do not flesh out the reason why they believe this renders the fourth cause of action uncertain or unintelligible. As that argument has been rejected in this Court's prior order, it is rejected here as well.

Defendants' demurrer is accordingly OVERRULED as to the fourth cause of action on both uncertainty and failure to state a claim grounds.

iii. Sixth through Eighth Causes of Action – FEHA-Related Claims

With respect to the sixth, seventh, and eighth causes of action, Defendants again argue that Plaintiff improperly appears to be claiming that he was discriminated against because of his "youth or young age." (Dem. MPA, p. 5:1-2.) Defendants maintain that Plaintiff does not identify any statute that stands for the proposition that a person being discriminated against because of their youth can bring claims under FEHA. (Dem. MPA, p. 5:4-6.) Yet again, in

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[2] In opposition, Plaintiff argues generally that the uncertainty arguments must be rejected because a demurrer on the ground of uncertainty must specify the page and line numbers at which the uncertainty appears. (See Plaintiff's Opposition to SAC ("Opp.,") p. 2:1-19.) Notably, Defendants' demurrer to the SAC has not identified "uncertain portions" by page and line number, and generally assert that the SAC is uncertain. Also, notable, is Plaintiff's failure to properly cite the authorities it relies on for this proposition as the authors' names are not included. (Opp., p. 2:9-12.) In any event, given that Defendants' demurrer on grounds of uncertainty has been OVERRULED, in its entirety, *infra,* the Court will overlook the defect.

opposition, Plaintiff is silent as to Defendants' contentions on demurrer as to the sixth through eighth causes of action on the ground of failure to state a claim. This Court will view his silence, in opposition, as a concession. (*Westside, supra,* 42 Cal.App.4th at p. 529.) Consequently, in light of *Hersant*, *supra,* Defendants' demurrer as to the sixth through eighth causes of action on the ground of failure to state a claim, is SUSTAINED WITHOUT LEAVE TO AMEND. (See *Hersant, supra,* 57 Cal.App.4th at p. 1003.) In light of this ruling, the Court need not address Defendants' uncertainty arguments.

iv. Ninth Cause of Action – Violation of Ralph Civil Rights Act (Civ. Code § 51.7) and Tenth Cause of Action – Violation of Tom Bane Civil Rights Act (Civ. Code, § 52.1)

With respect to the ninth and tenth causes of action, violations of the Ralph Civil Rights Act and Tom Bane Civil Rights Act, respectively, Defendants contend that these causes of action fail to allege sufficient facts to show that Defendants' actions were motivated by discriminatory animus. In opposition, Plaintiff alleges these claims are not dependent on Plaintiff being over the age of 40 years and the SAC directly alleges discrimination and violence based on age. (Opp., p. 5:14-16.)

Civil Code section 51.7[3] "broadly provides that all persons have the right to be free from violence and intimidation by threat of violence based on, among other things, race, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute." (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1146 (*Stamps*).) "Under the Ralph Act, a plaintiff must establish the defendant threatened or committed violent acts against the plaintiff or their property, and a motivating reason for doing so was a prohibited discriminatory motive, or that defendant aided, incited, or conspired in the denial of a protected right." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1291.)

Civil Code section 52.1 similarly requires a discriminatory motive. " '[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes. [Citation.]" (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290.)

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[3] The Ralph Act, codified in Civil Code section 51.7, provides: "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of [Civil Code section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive."

Civil Code section 51, subdivision (b) provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Civil Code section 51.7, subdivision (b), provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, *or services in all business establishments of every kind whatsoever*." (Civ. Code § 51.7, subd. (b), italics added.)

Here, the prior paragraphs of the SAC are now consistently incorporated by reference into the ninth and tenth causes of action, (SAC, ¶¶ 148-153, 156-159), and it is clear that for Civil Code section 51.7, the list of protected classes is non-exhaustive. (See Dem. Not., pp. 4:22-24-5:1-15; see Defendants' Reply in Support of Dem. MPA ("Reply,") p. 2:20-22; see also *Stamps, supra,* 136 Cal.App.4th at p. 1146 ["[Civil Code section 51.7] broadly provides that all persons have the right to be free from violence…based on, among other things, race, religion, ancestry..."].) Defendants' argument that Civil Code section 51.7 makes no mention of age, and is inapplicable, is unavailing given that the statute includes a non-exhaustive list of protected classes. (Dem. Not., p. 5:1-3.) Of importance, Plaintiff correctly cites *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 880-882 (*Austin B.*) for the proposition that a motivating reason for defendant's violence may include age and/or disability, among other things, as a protected activity. (See Opp., p. 5:1-5; see also *Austin B., supra,* 149 Cal.App.4th at pp. 880-881, quoting former CACI No. 3023 (now 3063) ["CACI No. 3023 sets forth the elements of a Ralph Act claim: '1. That [the defendant] threatened or committed violent acts against [the plaintiff or his or her property]; [¶] 2. That a motivating reason for [the defendant's] conduct was [[his/her] perception of [the plaintiff's age or disability]]; [¶] 3. That [the plaintiff] was harmed; and [¶] 4. That [the defendant's] conduct was a substantial factor in causing [the plaintiff] harm'"].)

Additionally, Defendants' argument that claims under the Ralph Civil Rights Act and the Tom Bane Civil Rights Act "do not apply to an employment relationship" is equally unavailing. (Dem. Not., p. 5:1-4.) In *Stamps,* the Court of Appeal explained, "[w]e conclude that nothing in either the language of sections 51.7 and 52.1 or in their history expresses a legislative intent to exclude employment discrimination or other employment cases from their ambit. On the contrary, given the need for employees to be protected from the conduct condemned by the Ralph Civil Rights Act of 1976 and the Tom Bane Civil Rights Act, limitations as suggested by real parties would do serious disservice to the effectiveness of this legislation." (*Stamps, supra,* 136 Cal.App.4th at p. 1459.)

It is unclear, as Defendants point out in their motion, whether Tarighat's actions were a result of Plaintiffs' position in a labor dispute for purposes of a Ralph Act violation. (Reply, p. 2:2-22). But, as noted above, the statute is not limited to just labor disputes, and Plaintiff adequately alleges that Tarighat threatened or committed violent acts, while in an employment relationship with Plaintiff. (See SAC, ¶¶ 22, 26-31.) Specifically, Plaintiff contends that Tarighat physically intimidated Plaintiff by invading his personal space in the workplace and threatening him with a knife. (*Ibid*.) Defendant's actions appear to rise to the level of violence or threats of violence to state a valid claim.

Accordingly, the demurrer to the ninth cause of action is OVERRULED on failure to state a claim grounds. Additionally, this cause of action is not so unintelligible or uncertain as

Defendants were able to address the argument, and thus, the demurrer to this claim on grounds of uncertainty is also OVERRULED.

As for Plaintiff's tenth cause of action under the Bane Act (Civ. Code., § 52.1), "[t]he Bane Act provides a civil cause of action against anyone who 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' [Citations.]" (*Simmons v. Super. Ct.* (2016) 7 Cal.App.5th 1113, 1125.)

"The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." (*Austin B., supra,* 149 Cal.App.4th at p. 883.)

Here, Plaintiff alleges Defendants interfered (by threat, intimidation, or coercion) with the exercise or enjoyment of Plaintiff's rights under the Constitution, namely, a right to a safe work environment. (See SAC at ¶¶ 158-160; see also Opp., p. 5:14-16.) The SAC adequately establishes that Tarighat's threatening, coercive, and intimidating actions interfered with Plaintiff's statutory rights to a safe workplace environment to support a claim under the Bane Act. (SAC, ¶¶ 21-26; (*Stamps, supra,* 136 Cal.App.4th at p. 1459.) Contrary to Defendants' claims, Bane Act claims broadly apply to employment relationships. (*Stamps, supra,* 136 Cal.App.4th at p. 1459.)

Accordingly, the demurrer to the tenth cause of action is OVERRULED for failure to state a claim. Additionally, Plaintiff's tenth cause of action is not so unintelligible or uncertain as Defendants were able to address the argument. It follows that the demurrer to the tenth cause of action on grounds of uncertainty is OVERRULED as well.

v. Eleventh Cause of Action – Wrongful Termination in Violation of Public Policy

"To prevail on a claim for wrongful termination in violation of public policy, a plaintiff must show that (1) the plaintiff was employed by the defendant, (2) the defendant discharged the plaintiff, (3) a violation of public policy was a motivating reason for the discharge, and (4) the discharge harmed the plaintiff." (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1343.) In addition, there must be a policy: (1) delineated in either constitutional or statutory provisions, (2) "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual, (3) well established at the time of the discharge, and (4) substantial and fundamental. (See *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 894; see also *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 (*Tameny*).) "[A] *Tameny* cause of action must be 'carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions.'" (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 898.)

With respect to the eleventh cause of action, Defendants again argue that Plaintiff's cause of action is "based upon Sex, Race, Creed, Color or National Origin" and incorporates all previous allegations of all causes of action into it, rendering it unintelligible and uncertain.

(Dem. Not., p. 5:16-22; Reply, p. 2:1-2.) Defendants also contend the eleventh cause of action fails to state a claim. (Dem. Not., p. 5:20-22.) As noted in Plaintiff's opposition, these arguments must fail given that Plaintiff's SAC allegations as to the eleventh cause of action generally include instances of assault, battery, and harassment by another employee, and his claim does not hinge on being in a protected class. (See Opp., p. 7:6-12; see also SAC, ¶¶ 165-166, 167.) Plaintiff correctly cites *Franklin v. The Monadnock Co.* (2007) 151 Cal.App.4th 252, 259-260 (*Franklin*) for the proposition that allegations of assault, battery, and harassment are sufficient for purposes of a wrongful termination cause of action. (Opp., p. 6:5-11.) Specifically, the Court in *Franklin,* wrote:

> Labor Code section 6400 et seq. and Code of Civil Procedure section 527.8, when read together, *establish an explicit public policy requiring employers to provide a safe and secure workplace, including a requirement that an employer take reasonable steps to address credible threats of violence in the workplace. A credible threat is one that an employee reasonably believes will be carried out, so as to cause the employee to fear for his or her safety or that of his or her family.* (See Code Civ. Proc., § 527.8, subd. (b)(2) [defining "[c]redible threat of violence" as "a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose"]; Pen. Code, § 139, subd. (c) [defining a "credible threat" as "a threat made with the intent and the apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family"]; Pen. Code, § 646.9, subd. (g) [defining "credible threat" as "a verbal or written threat ... made with the intent ... and ... with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family"]; see also Pen. Code, § 76, subd. (c)(5) [defining "threat" as a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target to reasonably fear for his or her safety or the safety of his or her immediate family"].) And it is the policy of this state to protect an employee who complains "in good faith about working conditions or practices which he reasonably believes to be unsafe." (*Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 299-300[].)

(*Franklin, supra,* 151 Cal.App.4th at p. 259-260, italics added.)

As noted above, Plaintiff's FAC includes allegations demonstrating "credible threats of violence." (*Ibid.*) For example, Plaintiff alleges Defendant "grabbed" the knife Plaintiff was using to cut sandwiches, attempted to "grab" Plaintiff's shoulders aggressively, and yelled "threats." (SAC ¶¶ 27-29.) Consequently, Plaintiff adequately pleads the eleventh cause of action.

Additionally, this cause of action is not so unintelligible or uncertain as Defendants were able to address the argument. Defendants also raise the same arguments in the instant demurrer as it raised in its demurrer to the FAC. Specifically, they argue that the eleventh cause of action is uncertain because it incorporates by reference all prior allegations. Defendants do not flesh out the reason why they believe this renders the eleventh cause of

action uncertain. As that argument has been rejected in this Court's prior order, it is rejected here as well.

The demurrer is OVERRULED as to the eleventh cause of action.

III. Conclusion

Defendants' demurrer to the SAC is SUSTAINED IN PART AND OVERRULED IN PART. The demurrer is SUSTAINED WITHOUT LEAVE TO AMEND as to the third, sixth through eighth causes of action on the ground of failure to state a claim. The demurrer is OVERRULED as to the fourth, ninth, tenth, and eleventh causes of action. The demurrer on the ground of uncertainty is OVERRULED in its entirety.

The Court will prepare the Final Order.

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Calendar Line 3
Case Name: *Smith v. Black Diamond Paver Stones & Landscaping, Inc.*
Case No.: 22CV404731

After full consideration of the evidence, the separate statements submitted by the parties, and the authorities submitted by each party, the court makes the following rulings:

This is an action for wrongful termination, discrimination, retaliation and harassment based on age and disability. According to the allegations of the first amended complaint ("FAC"), defendant Black Diamond Paver Stones & Landscape, Inc. ("Defendant") interviewed plaintiff Michael Smith ("Plaintiff") on the phone, and offered him a position with an expected start date of October 18, 2021. (See FAC, ¶¶ 19-21.) Plaintiff physically visited Defendant's office for the first time on October 4, 2021 and accepted the position. (See FAC, ¶ 22.) No one made any mention of Plaintiff's disability when Plaintiff signed the documents. (*Id*.) On October 11, 2021, Defendant's manager texted Plaintiff, stating:

> Hi, Mike,
>
> Didn't forget about you. I was setting up a job site walk with the office and they said you have some mobility challenges? Was it a walker you were using when you came by the office? Is that a permanent thing? Or short term injury thing? Most [sic] the job sites we have are hard enough to walk on even for me and my two relatively good balanced legs. :-)

(FAC, ¶ 25.)

On October 12, 2021, Plaintiff responded via text, stating that he was shocked by the comments that the manager made, explaining that he uses a walker because of a bad hip and uses a cane whenever he can, noting that his "last two years of landscape designs, quotes and project managing were done with [his] handicap" and explained that he uses a helper to measure sites on a hill, as he had done designing and building his last two golf courses, but could make indoor sales calls as an alternative work option. (FAC, ¶ 26.) Defendant's manager noted that "after a demo, the job has to be walked, and just isn't safe without good balance… [and that Defendant] can't hire measure techs, it's just not something we do." (*Id*.) On October 12, 2021, Defendant's manager followed up with Plaintiff, stating:

> Okay, so let's skip training for now. I talked to Roger, it wouldn't be till January February that we would be looking for a person to make phone calls, but I think you would be awesome at it.
>
> It's just not safe having you on job sites, and we can't bring in measure techs.
>
> So for now, no training…. but you are first on our list for a position we don't have yet, but really should make!
>
> How's that sound?

(FAC, ¶ 27.)

Plaintiff agreed. (*Id*.) In December 2021, Plaintiff called Defendant to follow up regarding the indoors sales call position, but Defendant's manager said that he was very busy and hadn't had a chance to discuss the position yet with Roger. (See FAC, ¶ 28.) Plaintiff never again heard from Defendant. (See FAC, ¶ 29.)

On October 20, 2022, Plaintiff filed the FAC against Defendant, asserting causes of action for:

1) Discrimination based on age in violation of the FEHA;
2) Harassment based on age in violation of the FEHA;
3) Discrimination based on disability in violation of the FEHA;
4) Harassment based on disability in violation of the FEHA;
5) Failure to engage in the interactive process in violation of the FEHA;
6) Failure to provide reasonable accommodation in violation of the FEHA;
7) Retaliation in violation of the FEHA; and,
8) Wrongful termination in violation of public policy.

Defendant moves for summary judgment, or, in the alternative, moves for summary adjudication of each cause of action.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION

Defendant's burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"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.) 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." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

***McDonnell Douglas* burden shifting framework**

"Under *McDonnell Douglas*, courts use a burden-shifting framework to assess claims alleging employment discrimination or retaliation." (*Choochagi v. Barracuda Networks, Inc*. (2020) 60 Cal.App.5th 444, 457 (Sixth District case); see also *Hodges v. Cedars-Sinai Medical Center* (2023) 91 Cal.App.5th 894, 904 (stating that "[f]or purposes of evaluating FEHA discrimination claims, California courts have adopted the burden-shifting framework enunciated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792"); see also *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 860 (Sixth District, stating that "[i]n cases alleging employment discrimination, we analyze the trial court's decision on a motion for summary judgment using a three-step process that is based on the burden-shifting test that was established by the United States Supreme Court for trials of employment discrimination claims in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792").) "In the summary judgment context, 'the employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory [or retaliatory] factors.'" (*Choochagi*, *supra*, 60 Cal.App. 5th at p. 457; see also *Serri*, *supra*, 226 Cal.App.4th at p.861 (stating same).) "To state a prima facie case for discrimination in violation of the FEHA, a plaintiff must establish that (1) she was a member of a protected class, (2) she was performing competently in the position she held, (3) she suffered an adverse employment action, and (4) some other circumstance suggests discriminatory motive." (*Galvan v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 549, 558.) "If nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct." (*Serri*, *supra*, 226 Cal.App.4th at p.861, quoting *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358.) "[T]he ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*." (*Serri*, *supra*, 226 Cal.App.4th at p.861 (emphasis original), quoting *Guz*, *supra*, 24 Cal.4th at p.358.) "Thus, 'legitimate' reasons… in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*.'" (*Serri*, *supra*, 226 Cal.App.4th at p.861 (emphasis original), quoting *Guz*, *supra*, 24 Cal.4th at p.358.) "If the employer meets this initial burden, the plaintiff must 'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with discriminatory [or retaliatory] animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination [or retaliation] or other unlawful action.'" (*Choochagi*, *supra*, 60 Cal. App.5th at p. 457; see also *Serri*, *supra*, 226 Cal.App.4th at p.861 (stating same).)

First cause of action for discrimination based on age in violation of FEHA

Defendant argues that Plaintiff cannot meet his burden of proof because Plaintiff has no evidence that he suffered any adverse employment action based on age, and that it had a legitimate, nondiscriminatory reason for not hiring Plaintiff in that Plaintiff stated that he needed a helper to perform the essential functions of the position offered to him.

<u>Defendant meets its initial burden to demonstrate that Plaintiff cannot establish discrimination based on age.</u>

In support of its argument that Plaintiff cannot present evidence regarding discrimination based on age, Defendant presents Plaintiff's deposition testimony in which he states that he does not remember Defendant "asking me for my age." (Becker decl. in support of Def.'s motion for summary judgment ("Becker decl."), exh. D ("Pl.'s depo"), p.50:4-8.) Plaintiff also testified that when he visited the office to sign the paperwork, nobody said or did anything either offensive, discriminatory, retaliatory or harassing or otherwise inappropriate to him. (*Id*. at pp.56:11-25, 57:1-23, 58:3-10 (also stating that "[t]hey were very warm and welcoming to me… [t]hey were anxious for me to get started"), 72:14-25, 73:1-25, 74:1-12, 109:16-23 (also stating that "[t]he employees in the office were very congenial… [w]illing to help, and take my help as well").) Additionally, in the three to five times that Plaintiff interviewed with Peter Smith, Peter Smith did not say anything that Plaintiff found to be offensive, and did not otherwise say anything offensive about being over 40 years old or about Plaintiff's age. (*Id*. at pp.62:14-19, 126:17-22.) Plaintiff also testified that in his interview with Roger Van Alst, Van Alst did not engage in any conduct that Plaintiff felt was offensive, discriminatory, harassing, retaliatory or unlawful. (*Id*. at pp.69:10-25, 70:1-25, 71:1-3, 123:17-22, 124:5-25, 125:1-2.) Plaintiff also testified that in his interview with HR, HR did not engage in any conduct that was offensive, harassing, retaliatory, inappropriate or unlawful. (*Id*. at pp.71:4-25, 72:1-13, 118:7-17, 125:4-25, 125:1-16, 147:1-25, 148:1-14, 150:17-25, 151:1-8.) Plaintiff also had "no idea" if Peter Smith or Roger Van Alst knew if Plaintiff was over 40 years old at the time that he was interviewed by them or when provided paperwork for signing. (*Id*. at pp.74:13-25, 105:22-25, 106:1-4.) In his job interviews, Plaintiff never disclosed that he was over 40 years old and no one made any references to Plaintiff being over 40 years old. (*Id*. at p. 76:11-18.) No one asked Plaintiff for his age when he went to the office for the paperwork or training and some people say that Plaintiff looks younger than he is. (*Id*. at pp.106:6-19, 108:21-24.) During his training, no one harassed or discriminated against him based on his age. (*Id*. at pp.109:24-25, 110:1-7, 120:22-25.) Plaintiff testified that he does not believe that anybody at Black Diamond had any issues with him based on his age. (*Id*. at p.120:12-21.) Plaintiff also testified that no one at Black Diamond ever said anything offensive to him about being over 40 years old or Plaintiff's age. (*Id*. at p.129:14-19.) Other than the single text message talking about Peter Smith's "two relatively good balanced legs," no one at Black Diamond said anything that Plaintiff felt was unlawful, offensive, inappropriate, discriminatory or harassing. (*Id*. at pp.130:5-25, 131:1-7.) Plaintiff also never complained to anyone at Black Diamond about discrimination, harassment or retaliation. (*Id*. at pp.148:15-25, 149:1-25, 150:1-16, 155:2-11.)

Defendant meets its initial burden to demonstrate that Plaintiff cannot establish discrimination based on age.

<u>Defendant also meets its burden to demonstrate that Plaintiff's non-hiring was based upon a legitimate, nondiscriminatory reason</u>

In support of its argument that the non-hiring of Plaintiff was based upon a legitimate, nondiscriminatory reason, Defendant presents the job posting for the Sales/Designer/Project Manager which states that one of the job responsibilities is that they "Sketch & Measure projects for proposal development" and the text messages from Plaintiff in which he states that he "use[s] a walker because of a bad hip… [and] a cane when ever [he] can… [and] use[s] a helper to measure if the job site is on a hill" and a text message response from Peter in which he responds that "after demo[,] the job has to be walked, and just isn't safe without good

balance… [w]e also have lots of projects with walls and hillsides, especially during the winter, this would be really difficult…[w]e can't hire measure techs at this time, it's just not something we do… [a]nd we can't just have you hire someone, they wouldn't be covered under our insurance." (Becker decl., exh. C; see also Pl.'s depo, pp.63:6-25, 64:1-25 (testifying as to the text messages between Plaintiff and Peter Smith), 139:7-9 (stating that Peter Smith texted "you might not be able to do the job on one good leg"); see also FAC, ¶¶ 25-27.) Plaintiff also testified that he previously "used a helper when there was—if I used a helper it was because of funny angles, funny design in the yard… [m]aybe circles and sharp turns." (Pl.'s depo, pp.91:5-7, 93:2-6 (stating that "I brought in helpers for that… I didn't know well enough what Black Diamond does and didn't do… [s]o if there's something that they didn't do, I'd have to bring in a helper"), 93:18-25 (stating that Plaintiff has previously used a helper about 50 times before in other jobs), 94:3-25 (stating that during the job interview, Plaintiff mentioned a helper and Peter Smith mentioned a measuring tech, Plaintiff did not explain what a helper was and Plaintiff mentioned that he may need a helper for jobs he would work with at Black Diamond, but Peter Smith responded that Defendant could not hire a measuring tech), 97:21-25 (stating that Plaintiff expected to be able to get a helper when performing work for Black Diamond).)

Defendant also presents the deposition testimony of Peter Smith, who states that Plaintiff was "the only person who's ever applied for a position outside in the field where [Peter] was concerned for his safety in that position…. [a]nd it's [a]bsolutely… a concern for safety… there's just only so much you can do with a walker safely, so all of my concerns were based on safety." (Becker decl., exh E ("Peter depo"), pp.44:7-21, 76:11-18 (stating that Plaintiff's "ability to measure accurately the entire site and then supervise the installation after… the concrete had been demoed… would be limited" by Plaintiff's mobility challenges as "it just wasn't—wasn't flat ground").) Peter Smith also testified that he "couldn't bring in a helper or, you know, I called it measuring tech… [because he] couldn't hire two people for a job that was slated for one person." (*Id*. at p.90:1-4.) Peter Smith also testified that Plaintiff told him both in phone conversations and in text that Plaintiff used a helper in prior jobs. (*Id*. at p.94:1-10.) The first meeting in any job for Plaintiff's position is "walking the property with the homeowner… really walk all aspects of the property, so if there's any kind of hills, they're going to walk up and down those hills… [and i]f there's… any concerns for the homeowner with their space, they're going to walk through that." (*Id*. at p.110:8-22.) Thereafter, "their next step is going to be… walking around and taking a look at the property and then every day during construction, so our first step is always demo… [w]e're going to take out all the concrete, get rid of all the… hardscape the homeowner wants removed, and … access all aspects of the project." (*Id*. at p.112:3-25.) In terms of what percentage of jobsites do not involve hills, Peter Smith stated that "there's a very low percentage of our appointments that don't have some kind of hill… the South Bay has a lot… has hills all the way around it." (Id. at p.90:11-15.)

Defendant also presents the deposition excerpt of Roger Van Alst who states that the duties and responsibilities of a project design specialist are "to sketch and measure a jobsite… go on to said jobsite and measure from one portion of the property to the other, traverse up hills to measure for steps and/or walls… traverse into backyards that may or may not be already landscaped and then measure those areas. Some are active construction sites for remodeled homes." (Becker decl., exh. F ("Van Alst depo"), p.67:9-21.) Once they have a design, "[t]hey will help the client with selection of product… [and] will need to bring samples---block or wall samples, concrete, you know, fairly heavy block and wall samples to the client for

choice as well as share with them catalogs." (*Id*. at pp.67:22-25, 68:1-3.) Then, the project design specialist will "do a pre-construction walk-through… [b]e there at the day of demolition to confirm excavation variation depth… [t]raverse… the areas of demolition, excavation of footings and trenches, [] install wall footings and pergola footings, electrical, gas, if necessary." (*Id*. at p.68:5-14.) Most jobsites "are in some form of disarray because that's why we've been invited to remodel them… [o]ften they are overgrown with weeds… [i]t might be like a tiny tract that you have to travel through that, you know, have to turn sideways to get through it because it's—it's been completely overgrown. [Others are y]ards that are just dirt and gravel and unfinished. Often times the clients attempted to perform demolition on their own and then realized that work is just going to be way too hard for them… [s]o we[ha]ve broken up pieces of concrete and the yards are often quite a mess." (*Id*. at pp. 69:4-25, 70:1-9.)

Defendant also meets its burden to demonstrate that Plaintiff's non-hiring was based upon a legitimate, nondiscriminatory reason: Plaintiff could not perform essential functions of the available position by himself.

Plaintiff's objections to Defendant's evidence numbers 2-8 are OVERRULED. Plaintiff's objection number 1 is also OVERRULED as Defendant's memorandum is not evidence.

<u>In opposition, Plaintiff fails to present substantial evidence that there was discrimination based on age.</u>

In opposition, Plaintiff provides: the text messages; excerpts of Plaintiff's deposition; excerpts of Peter Smith's deposition; excerpts of Roger Van Alst's deposition; the declaration of Zohar Hamer, owner of High Class Builders and Remodeling, Inc.; and, Plaintiff's declaration. [4]

Here, there is nothing in the text message history that reveals any discrimination based on age. There is no mention of age or anything age-related.

Similarly, the cited portions of Plaintiff's deposition (see Pl.'s separate statement in opposition, undisputed material facts nos. ("UMFs") 12-19, 22-25, and additional material facts nos. ("AMFs") 19-22, 23, 33, 43-48) likewise fails to mention age or anything age-related. There is mention of "two good legs," "one bad leg" and "one bad hip" but these do not demonstrate any basis for discrimination based on age.

The cited portions of the depositions of Peter Smith and Roger Van Alst also fail to mention age or anything age-related. The cited portions concern "mobility challenges" but do not demonstrate any basis for discrimination based on age.

Lastly, Plaintiff's declaration also fails to mention age. Plaintiff's declaration cannot demonstrate any basis for discrimination based on age.

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[4] Defendant notes in reply that the opposition is untimely. Indeed, Plaintiff's opposition was submitted one day late. However, the Court will nonetheless consider the opposition and the late-submitted evidence submitted in support of the opposition.

In opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact by producing substantial evidence that Defendant acted with discriminatory animus based on age, such that a reasonable trier of fact could conclude that Defendant engaged in intentional discrimination based on age. Defendant's motion for summary adjudication of the first cause of action is GRANTED on this basis.

In opposition, Plaintiff also fails to present substantial evidence that Defendant's stated reasons for not hiring him was untrue or a pretext for discrimination based on age.

In opposition to Defendant's assertion that Plaintiff was not hired because he could not perform an essential function of the position, Plaintiff argues that "the evidence demonstrates that Plaintiff could successfully perform that duty." (Pl.'s opposition to Def.'s motion for summary judgment ("Opposition"), p.17:6-7, citing AMF 12.) However, "[t]he [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." (*Wills v. Super. Ct*. (2011) 195 Cal.App.4th 143, 160, quoting *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 (also stating that "[i]t is not enough for the employee simply to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound… [w]hat the employee has brought is not an action for general unfairness but for age discrimination… [w]hile, given the inherent difficulties in showing discrimination, the burden-shifting system established by the Supreme Court is a useful device to facilitate the adjudication of claims of discrimination, it ultimately, however, does not change what the employee must prove… [i]n our judgment the fact an employee is the member of a protected class and has demonstrated triable issues concerning the appropriateness of the adverse action taken does not so readily demonstrate a discriminatory animus that it is alone sufficient to establish the fact of discrimination or alone sufficient to avoid summary judgment… the [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' … and hence infer 'that the employer did not act for the [asserted] non-discriminatory reasons'"); see also *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1159 (stating same, also stating that "[i]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct… [w]hile the objective soundness of an employer's proffered reasons supports their credibility … , the ultimate issue is simply whether the employer acted with a motive to *discriminate illegally*") (emphasis original); see also *Nakai v. Friendship House Assn. of American Indians, Inc*. (2017) 15 Cal.App.5th 32, 39 (stating same).)

AMF 12 cites to paragraph 21 of Plaintiff's declaration, page 81, lines 17-22 of Plaintiff's deposition, and paragraphs 5-24 of the Hamer declaration. Paragraph 21 of Plaintiff's declaration discusses Plaintiff's familiarity with measuring sites on hills using laser technology, wheel rollers, orange chalk and simple math. (See Pl.'s decl., ¶ 21.) The cited portion of Plaintiff's deposition indicates that Plaintiff does have to walk around the job site to measure, and uses a 200-foot tape measure and sometimes, a red beam, to perform this task. (See Pl.'s decl., p.81:17-22.) Paragraphs 5-24 of the Hamer declaration only discusses other tools available to measure area and/or slope of terrain from either a single point in the terrain, or without visiting the site at all. This evidence does not demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered

legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons. Rather, this evidence solely appears to simply attempt to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound—which is insufficient for Plaintiff on summary judgment.

Plaintiff also argues that "Plaintiff can perform all the job responsibilities Defendant listed in its job posting". (Opposition, p.17:20-21, citing ADFs 2-6.) In support of these arguments, Plaintiff cites to portions of his deposition in which he testified about work he did at his prior job, which included measuring (Pl.'s depo, pp.19:14-25, 20:1-25), that he "didn't need accommodations at all" and neither indicated on his job application that he was disabled or needed any accommodations because he could do the job without accommodations (*id*. at pp.50:21-25, 52:14-25, 53:1-9), and that the discrimination Plaintiff asserts is "when he said he didn't think I could do the job because he has two good legs and he has sometimes trouble doing the job… [and that Plaintiff] can do it with a walker or a cane." (*Id*. at p.67:1-17.) However, this argument and evidence does not support the demonstration of a discriminatory animus based on *age*. Moreover, Plaintiff submitted the text conversation between him and Peter Smith that is the basis for both the FAC (see FAC, ¶¶ 25-27) and his submitted deposition testimony, and the text conversation indicates that Peter Smith asked about Plaintiff's mobility challenges after Plaintiff's nondisclosure of any asserted or unasserted disability, and Plaintiff responded that he was "shocked about the job sites [being difficult] for 2 good legs… [he] use[s] a walker because of a bad hip… [and] a cane when ever [he] can… [and] a helper to measure if the job site is on a hill." (Pl.'s evidence, exh. 1, p. SMITH000085-SMITH000086 (acknowledging that "San Francisco would be hard to get into back yards").) Plaintiff then stated "if you feel uncomfortable about me being in the field, I understand." (*Id*. at p. SMITH000087.) Peter Smith then stated "Yeah, after the demo the job has to be walked, and just isn't safe without good balance. We also have lots of projects with walls and hillsides, especially during the winter, this would be really difficult. We can't hire measure techs at this time, it's just not something we do….. And we can't just have you hire someone, they wouldn't be covered under the insurance." (*Id*. at p. SMITH000088.) Plaintiff then responded "Thanks for understanding," and Peter Smith replied, "Totally. Don't want you in anything that would be unsafe." (*Id*. at p. SMITH000089.) Peter Smith then followed up, stating "[i]t's just not safe having you on job sites, and we can't bring in measure techs," and suggested that Plaintiff would be "first on our list for a position we don't have yet, but really should make… a person to make phone calls." (*Id*. at p. SMITH000090.) Plaintiff then responded: "Thanks, sounds good." (*Id*.) Plaintiff also submits his deposition testimony confirming that "walk[ing] around the job site" was needed to measure. (Pl.'s depo, p.81:17-19.) Plaintiff also submits his deposition testimony that states that he "didn't know well enough what Black Diamond does and doesn't do… [s]o if there's something that they didn't do, I'd have to bring in a helper." (*Id*. at p.93:4-6.) Plaintiff also submits his declaration in which he discusses his work history and his disability (Pl.'s decl., ¶¶ 4-8), his statement that he could perform the duties (*id*. at ¶¶ 9, 18), and the text messages between him and Peter Smith (*id*. at ¶ 10). Here, Plaintiff's submitted evidence does not demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons. Plaintiff's speculative belief that Defendant's proffered legitimate reason for not hiring him was wrong does not suggest a motive to discriminate illegally. (See *Featherstone*, *supra*, 10 Cal.App.5th at p.1159 (stating that "[t]he employee's "subjective beliefs in an employment discrimination

case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations"); see also *Choochagi v. Barracuda Networks, Inc.* (2020) 60 Cal.App.5th 444, 456 (Sixth District case, stating same), quoting *King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 433; see also *Foroudi v. The Aerospace Corp*. (2020) 57 Cal.App.5th 992, 1008 (stating same, also stating that "[t]he employee's evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, 'an actual causal link between prohibited motivation and termination'").)

Plaintiff also fails to demonstrate the existence of a triable issue of material fact by demonstrating that Defendant acted with discriminatory or retaliatory animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or retaliation or other unlawful action. For this separate and distinct basis, Defendant's motion for summary adjudication of the first cause of action is GRANTED.

Second cause of action for harassment based on age in violation of FEHA

"To establish a prima facie case of unlawful harassment under FEHA, a plaintiff must show "(1) [s]he was a member of a protected class; (2) [s]he was subjected to unwelcome … harassment; (3) the harassment was based on [the plaintiff's membership in an enumerated class]; (4) the harassment unreasonably interfered with h[er] work performance by creating an intimidating, hostile, or offensive work environment; and (5) [CSU] is liable for the harassment." (*Martin v. Board of Trustees of California State University* (2023) 97 Cal.App.5th 149, 170.)

Here, the arguments regarding the second cause of action for harassment based on age are largely identical. (See Def.'s memo, pp.20:12-26, 21:1-26, 22:1-10, see UMFs 1-43; see Pl.'s opposition, p.26:16-26.) In opposition, Plaintiff also cites to AMFs 49-53 (see Opposition, p.26:18-24, citing AMFs 49-53); however, this evidence again does not concern discrimination based on age. (See evidence cited by AMFs 49-53; see heading for AMFs 49-53 (stating "PLAINTIFF'S ISSUE 9: DEFENDANT, THROUGH PETER, REPEATEDLY SUBJECTED PLAINTIFF TO DEMEANING COMMENTS ABOUT HIS DISABILITY BASED SOLELY ON STEREOTYPES AND DEFENDANT FURTHER CONVEYED ITS BIAS AGAINST OLDER DISABLED EMPLOYEES BY TERMINATING PLAINTIFF BASED ON THOSE STEREOTYPED ASSUMPTIONS").)

Here, for identical reasons, Defendant meets its initial burden to demonstrate that Plaintiff cannot establish harassment based on age and also that Plaintiff's non-hiring was based upon a legitimate, nondiscriminatory reason. In opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact by producing substantial evidence that Defendant acted with discriminatory animus based on age, such that a reasonable trier of fact could conclude that Defendant harassed Plaintiff based on his age. Further, Plaintiff also fails to demonstrate the existence of a triable issue of material fact by demonstrating that Defendant acted with discriminatory or retaliatory animus, such that a reasonable trier of fact could conclude that Defendant harassed Plaintiff based on his age. Defendant's motion for summary adjudication of the second cause of action is GRANTED for each of these separate reasons.

Third cause of action for discrimination based on disability in violation of FEHA

Defendant argues that Plaintiff cannot meet his burden of proof because Plaintiff has no evidence that he suffered any adverse employment action based on disability, and that it had a legitimate, nondiscriminatory reason for not hiring Plaintiff in that Plaintiff stated that he needed a helper to perform the essential functions of the position offered to him.

Defendant meets its initial burden to demonstrate that Plaintiff cannot establish discrimination based on disability.

As with the prior causes of action, Defendant presents Plaintiff's deposition testimony. Here, relevant to the disability causes of action, Plaintiff actually states that he doesn't feel he has a disability:

> Q: Can you please describe your disability for me?
> A: I have arthritis in my hip. I've had it since 1985.
> Q: And the arthritis that you had in your hip, was that your only disability when you applied for employment with Black Diamond?
> A: Yes.
> Q: Okay. And are there any restrictions that you have due to the arthritis in your hip?
> A: No.
> Q: Okay. Since you testified that you don't have any restrictions due to the arthritis in your hip, why do you feel like that's a disability?
> A: I don't remember saying that it was a disability. I don't feel disabled at all. I can do anything anybody else can do. I can walk. And I've done it—I've walked four flights of stairs with Uber Eats. And I've done landscaping in my yard. I mean, I do all my own gardening. I don't feel like I have a disability. I hate a tool that I use once in a while, which is a cane or a walker. But I don't consider I'm disabled.

(Pl's depo, pp.83:12-25, 84:1-8.)

Here, this evidence is sufficient by itself to meet Defendant's burden to demonstrate that Plaintiff cannot establish discrimination based on disability as this evidences Plaintiff's belief that he is not a member of the asserted protected class—those with a disability.

Defendant also presents other portions of Plaintiff's deposition testimony in which he admits that he did not disclose that he was disabled or requested any accommodations for any purported disability. (See Pl.'s depo, p.50:21-23 (in response to "Did you disclose your disability in your employment application?" responding "No"; 51:16-25 (stating "I didn't ask for any accommodations or need any accommodations from the company to do the job well"), 52:1-25 (stating that "I didn't ask for any accommodations at all… [o]n the employment application it asks do you have accommodations you need to get this job, to do the job… [a]nd on my application[,] I put no… I didn't need any accommodations at all… that's the spot where you would say yes… [b]ut I said no… I didn't need any accommodations… I can do the whole job well without any accommodations… I have no accommodations ever"), 53:1-7 (in response to from September 1st of 2021 through October 31, 2021 did you request any sort of

workplace accommodations from Black Diamond?" responding "No… I didn't need them"), 76:19-22 (stating that Plaintiff did not disclose that he was disabled during job interviews), 77:1-18 (stating that Plaintiff did not disclose that he was disabled during job interviews), 123:23-25 (stating that Plaintiff "didn't need accommodation"), 125:16-20 (stating that "[t]here was no need for accommodation") 126:23-25 (stating that "was no need for accommodation"), 129:20-24 (stating "I didn't need accommodation").) Plaintiff also testified that he had no idea if Peter Smith or Roger Van Alst knew whether he was disabled. (*Id*. at pp.78:4-16.) Further, no one at Defendant made mention of his disability. (*Id*. at pp.108:3-20, 25, 109:1-3.) Plaintiff also testified that other than the single text message, no one from Black Diamond said or did anything that was either offensive, discriminatory, retaliatory or harassing or otherwise inappropriate to him. (*Id*. at pp.56:11-25, 57:1-23, 58:3-10 (also stating that "[t]hey were very warm and welcoming to me… [t]hey were anxious for me to get started"), 62:15-19 (stating that in the three to five times he interviewed with Peter Smith for employment, Peter Smith did not say anything that he found to be offensive), 69:10-25, 70:1-25, 71:1-3 (stating that Roger Van Alst did not engage any conduct that Plaintiff felt was offensive, discriminatory, harassing, retaliatory, inappropriate or otherwise unlawful), 71:4-25, 72:1-13 (stating that during job interview, HR did not engage any conduct that Plaintiff felt was offensive, discriminatory, harassing, retaliatory, inappropriate or otherwise unlawful), 72:14-25, 73:1-25, 74:1-12 (stating that no one at Defendant's office engaged in any conduct that was offensive, discriminatory, harassing, retaliatory, inappropriate or otherwise unlawful), 109:7-23 (also stating that "[t]he employees in the office were very congenial.. [w]illing to help, and take my help as well"), 62:20-25, 63:1-25 (stating that the text message where Peter Smith "said that he has two good legs and has a hard ttime doing the job… I always thought that was discriminatory… [j]ust the part where he said don't come training because of that"), 64:1-25 (stating that "[j]ust this one text where he said don't come to training… was discriminatory"), 67:6-25 (stating that "[t]he discrimination against me was when he said he didn't think I could do the job because he has two good legs and he has sometimes trouble doing the job… [t]hen he said I don't think you can do it with a walker or a cane… [t]o me, that was discrimination"), 68:1-25 (stating that Plaintiff does not recall any other harassment or retaliation), 123:23-25, 124: 1-25, 125:69:1-3 ("there was nothing that I did that he would retaliate against"), 110:9-25, 114:1-25 (stating "I feel that Peter discriminated against my disability… [in] the same text, where he said I don't think you can do the job so don't come to training"), 115:1-25 (again "refer[ring] to that same text… [w]here I felt he was discriminating against me because I had one bad leg"), 116:2-7 (stating that "[i]t's that one text"), 126:2-15 (stating that HR for Defendant neither said anything discriminatory nor harassing), 129:25, 130:1-24, 131:3-7 (stating that no one from Defendant said anything that was offensive, unlawful, inappropriate, discriminatory or harassing other than the one text message), 131:24-25, 132:1-22 (stating that of the six to eight times talking with Peter Smith, "[j]ust the one time where he said don't come to training… w[as] discriminatory… [or] harassing"), 136:17-25, 137:1-16, 140:5-12, 147:7-22 (discussing positive impressions of Peter Smith, Roger Van Alst, HR and other employees), 139:23-24, 140:1-4 (when asked if Peter Smith retaliated against Plaintiff, Plaintiff responded "not that I know of"), 150:17-25, 151:1-8 (stating that HR representative Jennifer Oh did not discriminate, harass or retaliate against Plaintiff).) Plaintiff never complained to Defendant about any discrimination, harassment or retaliation. (*Id*. at pp.148:15-25, 149:1 and 9-25, 150:1-16, 155:2-11.)

Defendant provides the text messages that Plaintiff believes demonstrates discrimination based on disability. The first text that notes that "[m]ost [of] the job sites we have are hard enough to walk on even for me and my two relatively good balanced legs." This

is Peter Smith's opinion of the difficulty of traversing the terrain prior to Plaintiff's disclosure of any purported disability. Plaintiff then responded that he "was a little shocked about the job sites [being] hard enough for 2 good legs" and disclosed that he "use[s] a walker because of a bad hip… [and] use[s] a cane when ever [he] can… [and] use[s] a helper to measure if the job site is on a hill, like the 2 golf courses [he] designed and built… [and t]he 2 soccer stadiums as well." Acknowledging the difficulty with regards to hilly terrain, Plaintiff continues that "San Francisco would be hard to get into back yards, but not in Santa Clara County homes… if you feel uncomfortable about me being in the field, I understand." Plaintiff then asked "Do you have a person that calls on the leads that don't sell right away, or were forgotten by the sales rep. Sometimes people are just waiting for a call back." Peter Smith responded that "Yeah, after demo the job has to be walked, and just isn't safe without good balance. We also have lots of projects with walls and hillsides, especially during the winter, this would be really difficult. We can't hire measure techs at this time, it's just not something we do…. And we can't just have you hire someone, they wouldn't be covered under our insurance. I think the phone sales would be the best fit. Let me talk to the boss about that. I'll call you later today." Plaintiff responded: "Thanks for understanding." Again emphasizing his concern regarding safety, Peter Smith responded: "Totally! Don't want you in anything that would be unsafe." Peter Smith thereafter responded: "Okay, so let's skip training for now. I talked to Roger, it wouldn't be until January February that we would be looking for a person to make phone calls, but I think you would be awesome at it. It's just not safe having you on job sites, and we can't bring in measure techs. So for now, no training…. but you are first on our list for a position we don't have yet but really should make! How's that sound?" Plaintiff responded: "Thanks, sounds good." As previously stated, these text messages do not demonstrate discrimination based on disability. Rather, it demonstrates that the parties agreed regarding the unsuitability of the position for Plaintiff due to safety concerns of an essential duty of the position.

While Government Code section 12940, subdivision (a) of the FEHA states that it is unlawful for an employer to refuse to hire or employ a person because of their physical disability, subdivision (a)(1) continues that "[t]his part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations." (Gov. Code § 12940, subd. (a)(1).) With regards to the provision of a reasonable accommodation, "[t]he interactive process of fashioning an appropriate accommodation lies primarily with the employee." (*King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 443.) "An employee cannot demand clairvoyance of his employer." (*Id*. (also stating that "[t]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it").) "It is an employee's responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee." (*Id*., quoting *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 266.) "It is an employee's responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee." (*Id*., quoting *Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1384.)

As previously stated, Plaintiff testified that he is not seeking any accommodations. "An employer also has no duty to accommodate an employee who denies she has a disability or denies a need for accommodation." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954.) Moreover, in these text messages, the only possible accommodation that Plaintiff suggested was a helper. In response, Peter Smith indicated that the hiring of an additional person or Plaintiff's hiring of an independent contractor to assist him would not be feasible, and the hiring of an additional worker to perform an employee's essential duty of the position is not a reasonable accommodation.[5] Plaintiff suggested a phone sales position; however, Defendant was not under any obligation to create such a position for Plaintiff.[6] (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766-767 (stating that "[i]f the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available… [a] reassignment, however, is not required if 'there is no vacant position for which the employee is qualified'… [t]he responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job'… [t]he employer is not required to create new positions").) Plaintiff was aware that such a position had not yet been created. (See Pl.'s depo, p.143:11-23.) Defendant meets its initial burden to demonstrate that Plaintiff cannot establish discrimination based on disability.

Defendant also again meets its burden to demonstrate that Plaintiff's non-hiring was based upon a legitimate, nondiscriminatory reason

Additionally, as with the first two causes of action, Defendant argues that the non-hiring of Plaintiff was based upon a legitimate, nondiscriminatory reason—that Plaintiff could not safely perform the essential duties of the position. In support of its argument Defendant presents the same evidence in support of its first two causes of action. For identical reasons, Defendant also meets its initial burden to demonstrate that Plaintiff was not hired for a legitimate, nondiscriminatory reason.

In opposition, Plaintiff contends that the *McDonnell Douglas* test does not apply because he has direct evidence of discrimination.

In opposition, Plaintiff contends that "there is direct evidence that Defendant knew that Plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and that Defendant terminated Plaintiff because of Plaintiff's disability… [t]hus, the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas* does not apply…." (Opposition, p.13:5-23, citing AMFs 15, 19, 21-23.)

Here, the evidence to which Plaintiff cites does not suggest any discrimination but rather reinforces that Peter Smith's concern was Plaintiff's ability to safely perform the essential duties of the position. (See evidence cited by AMFs 15, 19, 21-23.) Moreover, while the failure to hire is an adverse employment action, Plaintiff was not terminated from his

[5] This is true despite Plaintiff's expectation that he would be provided a helper. (See Pl.'s depo, p.97:21-25 (stating that "it was [Plaintiff's] expectation that if [he] needed a helper when performing work for Black Diamond, [he]'d be able to get one").)

[6] Likewise, this is true despite Plaintiff's belief that "Peter Smith should have created a position at Black Diamond and hired [him] for it." (Pl.'s depo, p.144:18-21.)

position as he was not hired by Defendant. Plaintiff is incorrect that he has direct evidence supporting any discrimination based on disability.

Plaintiff also cites to *Glynn v. Super. Ct. (Allergan, Inc.)* (2019) 42 Cal.App.5th 47, stating that "[e]vidence that an employer terminated an employee because of a mistaken but good faith belief that an employee was totally disabled and unable to work is direct evidence of discrimination sufficient to defeat a motion for summary adjudication—a lack of animus does not preclude liability for a disability discrimination claim." (Opposition, p.13:11-15.) However, *Glynn* is inapposite. In *Glynn*, *supra*, a sales representative was mistakenly put on long term disability which the benefits department employee mistakenly believed required the plaintiff employee's termination. (See *Glynn*, *supra*, 42 Cal.App.5th at p.51.) The plaintiff was categorized as totally disabled and unable to perform any job with or without reasonable accommodation. (*Id*. at p.54.) The *Glynn* court determined that the evidence that the employer terminated the plaintiff because it mistakenly believed he was totally disabled and unable to work constituted direct evidence of disability discrimination. (*Id*.) Unlike *Glynn*, however, Plaintiff here has not been terminated due to any belief of total disability and an inability to work in any position. Rather, Peter Smith believed, and Plaintiff acknowledged that he would have difficulty to safely perform an essential duty of the position for which he applied. *Glynn* does not stand for the proposition that the identification of an applicant's inability to perform the essential duties of his position in a safe manner is direct evidence of discrimination.

Plaintiff does not otherwise cite to other evidence suggesting discrimination based on disability. Accordingly, Plaintiff fails to demonstrate the existence of a triable issue of material fact as to whether he can establish discrimination based on disability, and the motion for summary adjudication of the third cause of action for discrimination based on disability in violation of FEHA is GRANTED on this basis.

<u>In opposition, Plaintiff also argues that there are triable issues of material fact as to whether Plaintiff could perform the essential duties of the position with or without accommodation, and whether Plaintiff could have performed the essential functions of another vacant position in the company with or without accommodation.</u>

In opposition, Plaintiff argues that there are triable issues of material fact as to whether Plaintiff could perform the essential duties of the position with or without accommodation, and whether Plaintiff could have performed the essential functions of another vacant position in the company with or without accommodation.

First, Plaintiff questions whether Defendant met their initial burden as to demonstrate that measuring and sketching the project for the development of the project as an essential duty of the offered position. However, Plaintiff conceded that the "job responsibilities [he] can think of for the position that [he] w[as] hired for with Black Diamond… [were to j]ust make sure that the drawings and the paperwork was completed and accurate, and got back to the office for the to set up a time to do the work… to measure… [which required] finding out what the customer wants to get done, and then measuring… the width and length what they wanted to get done… [d]o the math on it to get a price for them… [and] walk around the job site to measure." (Pl.'s depo, p.81:1-19.) The job posting indicates that the applicant must "Sketch & Measure projects for proposal development." (Becker decl., exh. B.) Peter Smith testified that supervising the installation and measuring accurately the entire site were essential duties for the position, and the project design specialist meets individually with the homeowner "walking

the property with the homeowner… really walk all aspects of the property, so if there's any kind of hills they're going to walk up and down those hills… [i]f there's… any concerns for the homeowner with their space, they're going to walk through that… their next step is going to be meeting with the foreman, so walking the job with the foreman before the job starts, walking around and taking a look at the property and then every day during construction… there's a very low percentage of our appointments that don't have some kind of a hill… the South Bay has a lot—has hills all the way around it." (Peter depo, pp.76:11-16, 90:5-15, 110:8-22, 112:2-12.) Van Alst also testifies that the duties and responsibilities of a project design specialist include "visiting with the client… they need to sketch and measure a jobsite… [s]o they are going to go on to said jobsite and measure from one portion of the property to the other, traverse up hills to measure for steps and/or walls… traverse into backyards that may or may not already be landscaped and then measure those areas." (Van Alst depo, pp.67:9-19.) Here, Defendant has testified as to what functions are essential, the written job description prepared before advertising or interviewing applicants for the job includes the function as essential, the deponents all agree that the function is the first step of any job, and the project design specialist is the individual who does the measuring and sketching of the project proposal so the consequences of not requiring the function for such a project design specialist would be heavy. Moreover, Plaintiff testified that he previously did these same functions at his prior workplace and that this was a function at the subject position. This evidences that the duty to sketch and measure, including walking the property, is indeed essential since this duty is limited to the project design specialist, and the position apparently exists for the performance of this function. (See Gov. Code § 12926, subds. (f)(1)-(2).) Plaintiff contends that "other employees could have easily performed the duty of measuring on hills," however, Plaintiff's evidence is speculative as there is no indication by admissible evidence that other employees go with the project design specialist on the initial site visit with the homeowner. Rather, Plaintiff relies on his "hope that other sales reps, we would all be as a team" (Pl.'s depo p.89:4-19, 97:1-19 (stating that "[w]hen I was in the office after being with HR, people there offered help"), and thus apparently surmises that other sales reps and other people in the office can visit prospective jobsites and be his helper or otherwise perform the essential function. However, this does not affect Defendant's burden in establishing the proffered essential functions of the position. Defendant met its initial burden as to the establishment of it being an essential function and not a marginal function of the position.

Second, Plaintiff argues that he could have performed his essential functions with accommodation. However, as previously indicated, Plaintiff admitted in his deposition that he did not need any accommodations. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 (stating that an unequivocal admission in his deposition precludes a statement in a declaration by the plaintiff to the contrary); see also *Whitmire v. Ingersoll-Rand Co*. (2010) 184 Cal.App.4th 1078, 1087 (stating same); see also *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954 (stating that "[a]n employer also has no duty to accommodate an employee who denies she has a disability or denies a need for accommodation").) Plaintiff agreed in the text messages that the function could be unsafe, acknowledging that it "would be hard to get into back yards" in certain areas, and that if Peter Smith "fe[lt] uncomfortable about me being in the field, I understand." After Peter Smith again indicated that "after demo the job has to be walked, and just isn't safe without good balance," Plaintiff stated "Thanks for understanding." Plaintiff fails to demonstrate through substantial evidence that he could perform the essential functions without accommodations. The accommodation that Plaintiff suggested—allowing him to hire a helper or requiring Defendant to hire a second employee or pull an employee from their duties to accompany Plaintiff to all jobsites—are not reasonable.

(See *King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 443 (stating that "[t]he interactive process of fashioning an appropriate accommodation lies primarily with the employee… [a]n employee cannot demand clairvoyance of his employer… [t]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it… [i]t is an employee's responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee").)

Plaintiff's suggestion that "Peter Smith should have created a position at Black Diamond and hired [him] for it" is not required of Defendant under the FEHA. (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766-767 (stating that "[i]f the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available… [a] reassignment, however, is not required if 'there is no vacant position for which the employee is qualified'… [t]he responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job'… [t]he employer is not required to create new positions").) In opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact as to whether Plaintiff could have performed the essential duties of the position with or without accommodation or performed the essential functions of another vacant position in the company with or without accommodation such that Defendant's proffered legitimate, nondiscriminatory reason for Plaintiff's non-hiring was untrue or a pretext for discrimination. For this additional reason, the motion for summary adjudication of the third cause of action for discrimination based on disability in violation of FEHA is GRANTED on this basis.

Fourth cause of action for harassment based on disability in violation of FEHA

"To establish a prima facie case of unlawful harassment under FEHA, a plaintiff must show "(1) [s]he was a member of a protected class; (2) [s]he was subjected to unwelcome … harassment; (3) the harassment was based on [the plaintiff's membership in an enumerated class]; (4) the harassment unreasonably interfered with h[er] work performance by creating an intimidating, hostile, or offensive work environment; and (5) [CSU] is liable for the harassment." (*Martin v. Board of Trustees of California State University* (2023) 97 Cal.App.5th 149, 170.)

Here, as stated above, the harassment cause of action is premised on one text message that, based on the evidence presented by parties, does not appear to be discriminatory based on disability. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment… [such that] the conduct has not actually altered the conditions of the victim's employment" do not constitute harassment under FEHA. (*Aguilar v. Avis Rent A Car System, Inc*. (1999) 21 Cal.4th 121, 130.) For this reason and the above reasoning regarding the prior causes of action, Defendant meets its initial burden to demonstrate that the fourth cause of action lacks merit.

In opposition, Plaintiff relies on arguments previously made and likewise fails to demonstrate a triable issue of material fact. Defendant's motion for summary adjudication of the fourth cause of action for harassment based on disability in violation of FEHA is GRANTED.

Fifth cause of action for failure to engage in the interactive process in violation of FEHA

Defendant argues that the fifth cause of action lacks merit because Plaintiff consistently stated that he did not need accommodations and also admitted that he engaged in a conversation with Defendant regarding possible accommodations. For reasons stated above, the Court agrees that Plaintiff has testified as such. (See Pl.'s depo, pp.51:16-18, 52:2-3, 52:14-17, 52:20-22, 53:1-7, 104:7-8, 125:17, UMFs 45, 46, 75,-79.) The text messages indicate that the parties did discuss potential accommodations; however, Defendant indicated that it could not hire an additional helper or a measuring tech for a single position, and Plaintiff could not hire his own helper as s/he would not be covered under Defendant's insurance. Defendant indicated that it would check with Van Alst regarding a not yet created position that Plaintiff suggested. Plaintiff thanked Peter Smith for understanding. Peter Smith indicated that Van Alst said that the uncreated position would not be something that they would consider until January or February but that it sounds like a position that it could use. Plaintiff thanked Peter Smith and said that it "sounds good." Defendant meets its initial burden to demonstrate that it engaged in the interactive process.

In opposition, Plaintiff argues that "Defendant's conduct did not rise to the level of good faith engagement in the interactive process… [because] Defendant did not analyze job functions to establish the essential and nonessential job tasks… work with Plaintiff to discover the precise limitations of Plaintiff's disability and the types of accommodations which would be most effective… [and] did not consider or analyze any of the commonly available tools of the trade that would have allowed Plaintiff to measure hilly terrain without traversing the hills themselves." (Opposition, p.21:4-25.) However, as previously indicated, "[t]he interactive process of fashioning an appropriate accommodation lies primarily with the employee." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 443. Here, Plaintiff testified that he never requested an accommodation. To the extent that Plaintiff had ideas or requests, Defendant addressed those requests and Plaintiff thanked Defendant for the handling of those ideas or requests and said that the last suggestion by Defendant "sound[ed] good." "An employee cannot demand clairvoyance of his employer." (*King*, *supra*, 152 Cal.App.4th at p.443.) Plaintiff fails to demonstrate the existence of a triable issue of material fact as to the fifth cause of action for failure to engage in the interactive process in violation of the FEHA. Defendant's motion for summary adjudication of the fifth cause of action for failure to engage in the interactive process in violation of the FEHA is GRANTED.

Sixth cause of action for failure to provide reasonable accommodation in violation of the FEHA

Defendant argues that it cannot be liable for a failure to reasonably accommodate Plaintiff since he repeatedly admitted at deposition that he never requested an accommodation. "An employer also has no duty to accommodate an employee who denies she has a disability or denies a need for accommodation." (*Prilliman v. United Air Lines, Inc*. (1997) 53 Cal.App.4th 935, 954.) Here, as stated above, Plaintiff has both denied that he is disabled and needs an accommodation. Defendant meets its initial burden on the sixth cause of action.

In opposition, Plaintiff argues that "to the extent that Plaintiff needed an accommodation to measure job sites on hills, there were a number of available recommendations that could have resulted in the successful performance of that duty, as

analyzed extensively above." (Opposition, p.23:17-26.) Citing *Prilliman*, *supra*, Plaintiff notes that "[e]mployers who are aware of an employee's disability have an affirmative duty to make reasonable accommodations for such disability, even when an employee has not requested any accommodation." (Opposition, p.22:18-23.) However, Plaintiff ignores *Prilliman*'s statement that no duty is owed to an employee who denies that they have a disability or a need for accommodation. As such, this argument is nonresponsive and unpersuasive. Plaintiff fails to demonstrate the existence of a triable issue of material fact as to the sixth cause of action for failure to provide reasonable accommodation in violation of FEHA. Defendant's motion for summary adjudication of the sixth cause of action for failure to provide reasonable accommodation in violation of the FEHA is GRANTED.

Seventh cause of action for retaliation in violation of FEHA

Here, Plaintiff repeatedly testified that Peter Smith, HR, Van Alst and anyone at Defendant did not retaliate against him. (See UMFs 113-116; see also *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 (stating that an unequivocal admission in his deposition precludes a statement in a declaration by the plaintiff to the contrary); see also *Whitmire v. Ingersoll-Rand Co*. (2010) 184 Cal.App.4th 1078, 1087 (stating same).) On this basis, Defendant meets its initial burden to establish the seventh cause of action for retaliation lacks merit.

Additionally, "in order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1042.) Plaintiff testified that he never complained to anyone at Black Diamond about anything despite understanding that if he wanted to make a complaint, he could register a complaint with HR or someone else. (See UMFs 108-112.) For this additional basis, Defendant meets its initial burden to establish the seventh cause of action for retaliation lacks merit as he did not engage in any protected activity.

In opposition, Plaintiff argues that he requested a reasonable accommodation and directly opposed Peter Smith's discriminatory and harassing comments to Plaintiff and opposed Defendant's discriminatory position that Plaintiff could not perform his job with or without a reasonable accommodation. (See Opposition, p.27:1-20.) Plaintiff ignores the argument that Plaintiff admitted that Defendant did not retaliate against him. Accordingly, Plaintiff fails to demonstrate a triable issue of material fact as to this basis for summary adjudication and Defendant's motion for summary adjudication of the seventh cause of action for retaliation based on disability in violation of the FEHA is GRANTED.

Eighth cause of action for wrongful termination in violation of public policy

Here, the arguments regarding wrongful termination are dependent on the prior causes of action. (See *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 (stating that "[u]nder California law, if an employer did not violate FEHA, the employee's claim for wrongful termination in violation of public policy necessarily fails").) Accordingly, for reasons stated above, Defendant meets its initial burden and Plaintiff fails to demonstrate the existence of a triable issue of material fact as to the eighth cause of

action for wrongful termination. Defendant's motion for summary adjudication of the eighth cause of action for wrongful termination is GRANTED.

Defendant's motion for summary judgment is GRANTED in its entirety.

The Court shall prepare the Order.

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Calendar line 4
Case Name: 20CV369211
Case No.: *Wessel et al. v. City of Cupertino et al.*

Factual and Procedural Background

This case arises out of a bike riding accident that occurred on July 14, 2019. Plaintiff David Wessel ("Wessel") was riding his bike after sunset when his tire hit a rolled curb causing him to fall and resulting in injuries, including a broken hand. On August 6, 2020, plaintiffs Wessel and Karen M. Platt ("Plaintiffs") filed their complaint against the City of Cupertino ("the City"), Santa Clara Valley Water District, Apple Inc. ("Apple"), and County of Santa Clara.

On May 6, 2024, Plaintiffs filed a motion to compel further discovery responses from the City. The City opposes the motion and Plaintiffs filed a reply.

Discovery Motions

Meet and Confer Efforts

A motion to compel further discovery responses must be accompanied by a meet and confer declaration pursuant to Code of Civil Procedure section 2016.040. (Code Civ. Proc., § 2033.290, subd. (b) [requests for admission]; Code Civ. Proc., § 2030.300, subd. (b)(1) [interrogatories].) Section 2016.040 requires a moving party to make a "reasonable and good faith attempt at an informal resolution of each issue presented by the motion." A determination of whether an attempt at informal resolution was adequate depends upon the particular circumstances and involves the exercise of discretion. (See *Obregon v. Superior Ct*. (1998) 67 Cal.App.4th 424, 431; see also *Stewart v. Colonial Western Agency, Inc*. (2001) 87 Cal.App.4th 1006, 1016 [meet and confer rule is designed to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order].)

Plaintiffs' counsel's declaration indicates that attempts were made to meet and confer but the parties were unable to come to an agreement. (Lamchick Decl., ¶¶ 6, 8.) Further, attached to the Lamchick Declaration are emails of counsel's attempt to meet and confer. (*Id.* at Ex. 6.) Thus, the Court finds the parties sufficiently met and conferred before the filing of the motion.

Request for Judicial Notice

In support of their motion to compel, Plaintiffs request judicial notice of the Google Maps-Google Street View of North Tantau Avenue in Cupertino from the intersection of North Tantau Avenue and Apple Park Way to the Calabazas Creek Bridge, from June 2019. The request is DENIED given that there is a dispute over the image between the parties and the City objects to Plaintiffs' request for judicial notice. (See Opposition, pp. 7-8, subd. (E).)

Procedural Issues

In its opposition, the City argues the Court should deny the motion to compel on the ground that it is procedurally improper given that Plaintiffs filed a single motion to compel

both Form Interrogatories and Requests for Admissions. (Opposition, subd. (A), relying on Gov. Code, § 70617.) Plaintiffs have properly filed a single motion to compel further responses to different categories of discovery. No part of Government Code section 70617 requires that Plaintiffs file two separate papers. The Court declines to deny the motion on this basis.

Motion to Compel Further Response to RFA

Plaintiffs move to compel a further response to RFA Nos. 65, 67, 68, 70, 71, 73, 74, 76, 77, 79, 80, 82, 83, 86, 87, 90, 91, 94, 95, 98, 99, 102, 103, 104, 105, 106, 107, 108.

If a party demanding a response to a request for admission deems that an answer to a particular request is evasive or incomplete, or an objection to a particular request is without merit or too general, that party may move for an order compelling a further response. (Code Civ. Proc., § 2033.290, subd. (a).) If a timely motion to compel a further response to a request for admission has been filed, the burden is on the responding party to justify any objections or failure to fully answer. (*Coy v. Superior Court of Contra Costa County* (1962) 58 Cal.2d 210, 220-221.)

The text of the RFAs is as follows:

RFA No. 65: Exhibit A is a photograph that shows North Tantau Avenue south of Apple Park Way.
RFA No. 67: Exhibit A shows North Tantau Avenue south of Apple Park Way as it appeared on July 14, 2019.
RFA No. 68: Exhibit B is a photograph that shows the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge.
RFA No. 70: Exhibit B shows the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge as it appeared on July 14, 2019.
RFA No. 71: Exhibit C is a photograph that shows a portion of the southbound bike lane on the Calabazas Creek Bridge.
RFA No. 73: Exhibit C shows a portion of the southbound bike lane on the Calabazas Creek Bridge as it appeared on July 14, 2019.
RFA No. 74: Exhibit D is a photograph that shows a portion of the southbound bike lane on the Calabazas Creek Bridge.
RFA No. 76: Exhibit D shows a portion of the southbound bike lane on the Calabazas Creek Bridge as it appeared on July 14, 2019.
RFA No. 77: Exhibit E is a photograph that shows a portion of the southbound bike lane on the Calabazas Creek Bridge.
RFA No. 79: Exhibit E shows a portion of the southbound bike lane on the Calabazas Creek Bridge as it appeared on July 14, 2019.
RFA No. 80: Exhibit F is a photograph that shows a portion of the southbound bike lane on the Calabazas Creek Bridge.
RFA No. 82: Exhibit F shows a portion of the southbound bike lane on the Calabazas Creek Bridge as it appeared on July 15, 2019.
RFA No. 83: Exhibit G is a photograph that shows the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge.
RFA No. 86: Exhibit G shows the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge as it appeared on July 14, 2019.

RFA No. 87: Exhibit H is a photograph that shows the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge.
RFA No. 90: Exhibit H shows the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge as it appeared on July 14, 2019.
RFA No. 91: Exhibit I is a photograph that shows a portion of the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge.
RFA No. 94: Exhibit I shows a portion of the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge as it appeared on July 14, 2019.
RFA No. 95: Exhibit J is a photograph that shows a portion of the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge.
RFA No. 98: Exhibit J shows a portion of the southbound bike lane on North Tantau Avenue immediately north of the Calabazas Creek Bridge as it appeared on July 14, 2019.
RFA No. 99: Exhibit K is a photograph that shows North Tantau Avenue south of Apple Park Way.
RFA No. 102: Exhibit K shows North Tantau Avenue south of Apple Park Way as it appeared on July 14, 2019.
RFA No. 103: Exhibit L is a Google Maps photograph taken in June of 2019 that shows the southbound bike lane on the Calabazas Creek Bridge on North Tantau Avenue.
RFA No. 104: The southbound bike lane on the Calabazas Creek Bridge on North Tantau Avenue appeared on July 14, 2019, just as it appears in the photograph that is Exhibit L.
RFA No. 105: Exhibit M is a Google Maps photograph taken in June of 2019 that shows the southbound bike lane on the Calabazas Creek Bridge on North Tantau Avenue.
RFA No. 106: The southbound bike lane on the Calabazas Creek Bridge on North Tantau Avenue appeared on July 14, 2019, just as it appears in the photograph that is Exhibit M.
RFA No. 107: Exhibit N is a Google Maps photograph taken in June of 2019 that shows the southbound bike lane on the Calabazas Creek Bridge on North Tantau Avenue.
RFA No. 108: The southbound bike lane on the Calabazas Creek Bridge on North Tantau Avenue appeared on July 14, 2019, just as it appears in the photograph that is Exhibit N.

In response to the RFAs, the City relies on the following (or similar) objections:

> Objection. Calls for speculation and expert opinion; vague and ambiguous, including, without limitation, as to the date, time, and other foundational identifiers of the photograph.
> Subject to and without waiving the objections:
> Admit only that responding party currently has no evidence to contend that the referenced exhibit does not depict that which propounding party proposes. A reasonable inquiry concerning further details of the matter in this particular request has been made, and the information known or readily obtainable by responding party is insufficient to enable responding party to admit such details, including the time of the photograph, the lighting, and that it depicts the proposed location as the location appeared to plaintiff before or during the subject incident or at any other time.

(See Plaintiffs' Separate Statement.)

The City also objects as follows:

> Objection. Calls for speculation and expert opinion; vague and ambiguous, including, without limitation, as to the term "portion" and the date, time, and

other foundational identifiers of the photograph. Not waiving the objections, a reasonable inquiry concerning the matter in this particular request has been made, and the information known or readily obtainable by responding party is insufficient to enable responding party to admit the matter.

(*Ibid*.)

Plaintiff argues the City's objections to Plaintiffs' RFAs are boilerplate, too general, and meritless and that the City's responses are evasive and incomplete. Plaintiffs additionally argue that the RFAs are meant to authenticate the photographs.

Pursuant to Code of Civil Procedure section 2033.010, a party may request an admission as to the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact. (Code Civ. Proc., § 2033.010.)

The requests for admissions involve Exhibits A-N. Exhibits A-N are unlabeled images and Google image screenshots that do not indicate when they were taken or where they were taken. Plaintiffs do not offer any witness testimony to indicate that images are what the Plaintiffs say they are or that the Google images are authentic. Plaintiffs cite no authority holding that a responding party is required to authenticate photographs it neither took nor obtained. (See *Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939 ["The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived"].)

The City objects on the grounds that any admission would call for speculation and that the RFAs are vague and ambiguous because they do not indicate when they were taken or other identifying factors. The Court finds that the City sufficiently justifies its objections to the requests. Further, without waiving these objections, in compliance with Code of Civil Procedure section 2033.220, subdivision (c), the City additionally responds that a reasonable inquiry was made and information obtainable to responding party is insufficient to enable it to admit the matter. The Court finds this response credible given that it is unclear where a majority of the images were taken. Thus, the City has sufficiently responded to the requests for admissions. (See *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 269 ["here after objecting to the entire request for admission, the [responding party's] admissions and/or denials provided complete responses to the requests, thus leaving nothing to address in a motion to compel."].)

Accordingly, the motion to compel further responses RFA Nos. 65, 67, 68, 70, 71, 73, 74, 76, 77, 79, 80, 82, 83, 86, 87, 90, 91, 94, 95, 98, 99, 102, 103, 104, 105, 106, 107, 108 is DENIED.

Motion to Compel Further Response to FI

Plaintiff moves to compel a further response to FI No. 17.1.

Legal Standard

A responding party must provide non-evasive answers to interrogatories that are "as complete and straightforward . . . to the extent possible," and, if after a reasonable and good faith effort to obtain the information they still cannot respond fully to an interrogatory, the

responding party must so state in its response. (Code Civ. Proc., § 2030.220.) If the responding party provides incomplete or evasive answers, or objections without merit, the propounding party's remedy is to seek a court order compelling a further response to the interrogatories. (Code Civ. Proc., § 2030.300.) If a timely motion to compel answers is filed, the burden is on the responding party to justify any objection or failure to fully answer the interrogatories. (See *Coy v. Superior Ct.* (1962) 58 Cal.2d 210, 220-221 (*Coy*).)

FI No. 17.1

FI No. 17.1 requests: Is your response to each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission: (a) state the number of the request; (b) state all facts upon which you base your response; (c) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and (d) identify all DOCUMENTS and other tangible things that support your response and state the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT or thing.

FI No. 17 addresses each of the RFA's at issue above. The City argues that it responded to the interrogatory with the information reasonably available to it and that, pursuant to Code of Civil Procedure section 2030.220, subdivision (c), it also states that it does not have the personal knowledge to respond fully to the FI but made a good faith effort to obtain that information. The City asserts that its initial response "provides the facts upon which the City based its responses to the requests for admission at issue in a straightforward, code-compliant manner" and that its further responses are also code-compliant. (Opposition, p. 3:9-23.) After reviewing the City's responses to each subdivision of FI No. 17.1, the Court finds the responses to be code compliant, particularly given the City's responses to the related RFAs. Thus, the motion to compel a further response to FI No. 17.1 is DENIED.

Sanctions

The Court shall impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to an interrogatory or request for admission, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Code Civ. Proc., §§ 2030.300, subd. (d), 2033.290, subd. (d).)

Plaintiffs have made a request for sanctions in the amount of $1,860 against the City and its counsel. Plaintiffs motion was unsuccessful and the request for sanctions is DENIED.

Similarly, the City made a request for sanctions. However, a code compliant request for monetary sanctions must include a declaration setting forth facts supporting the amount of an monetary sanctions sought, including an hourly rate and the number of hours used to prepare the motion or opposition. (Code Civ. Proc., § 2023.040.) Accordingly, the request is DENIED.

Conclusion

The motion to compel further responses to FI and RFAs is DENIED in its entirety. The City shall prepare the final Order.

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Calendar Line 5
Case Name: Rodriguez-Ortiz v. Greenwaste Recovery
Case No.: 20CV369903

Plaintiff moves to compel further responses to Requests for Admissions 32-38, 40-43, and 45-59 of Defendant Jose Ramirez. He claims that the many of the objections are not meritorious, that the answers were not verified, and that Defendant's response was untimely and should not be considered.

Timeliness

Defendant's opposition was due August 2, 2024 but was not filed until August 6, 2024. Defendant claims that the reason for the late response was "firm-wide technical issues." Dec. of Flynn, para. 2. Yet, as shown in the email provided by Plaintiff, Defendant admits that the technical issues did not begin until August 5, 2024, three days after the opposition was due. See Dec. of Nikfariam, Ex. B. Though the court would normally consider the opposition where there is no prejudice to the other side, here, because Defendant's excuse is not relevant to the timeliness of the opposition, the Court declines to consider the opposition.

Substance

Even had the opposition been considered, the Court finds that the objections to the Admissions are not meritorious. Defendant did not say in his deposition whether his truck hit the bike or whether the bike hit his truck. Rather he said: "I cannot say that I hit him or that he hit me" (see deposition testimony p74[7]). Defendant uses this lack of knowledge as his basis to object to a number of the requests as those requests presume that he contacted the bicycle. Defendant can admit or deny these questions and simply indicate that he does not admit to hitting the bicycle or that he does not know who hit whom. Some of the questions he clearly already answered in his deposition. For example, as to question 34 and 35 – whether the truck "was in motion when it contacted" Plaintiff or the bicycle. Defendant can answer that the truck was in motion, as already admitted ("I stopped immediately when I saw that the man had hit the truck." Depo. P76), and still deny that he contacted Plaintiff or the bicycle. This is true for many of the questions regarding the placement of the truck at the time of contact (see e.g. RFAs 40-44). This is true for questions whether he had about the right of way and whether he was backing up – Defendant has already admitted he was in reverse (Depo. P76). He can deny or clarify the aspect of the question regarding contact. Other questions do not assume facts not in evidence, and yet Defendant refuses to answer them. The court finds no basis for Defendant's objections to RFAs 45, 46, 53, 54 55, 56, 57, 58, 59.

The motion is GRANTED in its entirety. The Court orders Defendant to provide verified, code-compliant responses without objection within 15 days of receipt of the final order. In addition, because the Court finds that defendant was not substantially justified in opposing the motion, defendant is required to pay sanctions to Plaintiff's counsel in the amount of $1,935 (3.75 hours @ $500/hr + 60 filing fee) within 15 days of receipt of the final order. Plaintiff shall submit the final order.

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[7] Deposition is attached as Ex. 7 to Plaintiff's moving papers.

Calendar Line 6
Case Name: Athelas Inc v. Sumit Mahendru
Case No.: 23CV427403

Defendant moves for reconsideration of the Court's order denying his motion to compel arbitration and stay the proceedings. The basis for his motion is "the Court's misapprehension of the sufficiency of Defendant's initial motion in raising the existence of a related pending arbitration and Plaintiff's strategic decision to ignore and not respond to that issue." As Defendant acknowledges in his reconsideration motion, the only mention of the related arbitration was on page 2 of Defendant's motion where Defendant stated: "Plaintiff commenced this suit asserting claims against Defendant that unmistakably fall within the scope of the parties' arbitration agreement (and months after Defendant had already commenced an arbitration against Plaintiff)." Although Defendant did, therefore, mention that there was an arbitration between the parties, the arbitration action was not the basis for any of Defendant's arguments to compel arbitration of this action. A mere mention does not an argument make. The failure was not Plaintiff's for "ignoring" the issue, as Defendant appears to argue in the reconsideration motion. It was Defendant's for failing to actually argue it. If Defendant believed that the case should be sent to arbitration because the parties were already arbitrating a related dispute and risked inconsistent rulings, it was incumbent upon him to say so. He did not.

Moreover, a motion for reconsideration can only be granted based on "new or different facts, circumstances, or law." CCP § 1008. Here, there are no new facts. Defendant could have made such an argument in his original but failed to do so. The motion for reconsideration is denied.

Plaintiff shall submit the final order within 10 days of the hearing.

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Calendar Line 8
Case Name: Cavalry SPV I LLC v. O. Williams
Case No.: 2012-1-CV-220303

On January 14, 2013, Plaintiff obtained a judgment against Defendant Williams. On December 1, 2022, Plaintiff attempted to obtain a renewed judgment before the judgment expired on January 14, 2023. It was not until January 25, 2023, after the time to renew the judgment had passed, that the clerk's office rejected the application for renewal of judgment. It was rejected because the judgment amount in the application exceeded the actual judgment amount. Plaintiff moved to have the judgment renewed *nunc pro tunc* on August 2, 2023.

"The general rule is that 'courts have inherent power to enter judgments *nunc pro tunc* so as to relate back to the time when they should have been entered, but will do so only to avoid injustice.' A *nunc pro tunc* judgment is allowed for the purpose of preserving the rights of litigants and is to be granted or refused as justice may require in view of the circumstances of a particular case." *Young v. Gardner-Denver Co.* (1966) 244 Cal. App. 2d 915, 919 (citations omitted). Later courts have clarified that a *nunc pro tunc* order "'cannot be made for the purpose of declaring that something was done which was not done. Its only office is to cause the record to show something done which was actually done, but which, by misprision or neglect, was not at the time entered in the record.'" *City of Los Angeles v. Superior Court* (1968) 264 Cal. App. 2d 766, 771 ("*Los Angeles*").

In the case of *Rojas v. Cutsforth* (1998) 67 Cal. App. 4th 774, 778 cited by Plaintiff, the court found that the documents that were rejected by the clerk's office should never have been rejected in the first place, such that it was not necessary to have them filed *nunc pro tunc*. As such, it is not helpful in determining the standard for whether to grant a request for a *nunc pro tunc* filing. In this case, the clerk's office properly rejected the application to renew the judgment because the judgment amount was incorrect. The wrong judgment amount is not a technical or clerical error. It is a substantive error, as once the application is accepted, the judgment is renewed without any further action by either party or the court.

Because the application to renew the judgment was properly rejected for stating the wrong amount, and was not filed due to this actual error,[8] rather than misprision or neglect, filing it *nunc pro tunc* is not appropriate. But even just considering the equities, the motion should be denied. One could argue that the equities lie with the creditor, since the creditor timely moved to renew the judgment and the clerk's office took so long to reject the application that the creditor then was not able to fix its mistake in time. But after learning of the rejection, Plaintiff took eight months before moving to renew the judgment *nunc pro tunc*. Plaintiff gives no reason for this delay and this delay changes the equities in the case. No longer can the failure to timely renew the judgment be placed on the clerk's office delay. Even after learning of that the application was rejected, Plaintiff waited eight months to do anything about it. Given this, the court can hardly find that Plaintiff in effect filed to renew the judgment on December 1, 2022. With this information, it seems entirely possible that even had Plaintiff learned of its mistake before the January 14, 2023 deadline, it may not have corrected its

[8] Plaintiff tries to make it seem as though it is the clerk's office fault that it had the wrong judgment, by showing an endorsed filed-stamped copy, but that is not sufficient to prove that the clerk's office did not also provide plaintiff a copy of the corrected judgment once the corrected judgment was filed.

application for renewed judgment in time. Plaintiff cannot benefit from the clerk's office delay in rejecting its initial application when in then took eight months to move for corrective action.

The motion to renew the judgment *nunc pro tunc* is DENIED.

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