SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

DATE: December 21, 2023 TIME: 9:00 A.M.

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

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

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

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

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

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

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

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

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV381190	Nayoung Lee vs Raul Arias et al	Conference: Trial Setting
2	21CV381901	PHYSICIANS SURGERY SERVICES, LP vs Shultz & Associates	Defendant Shultz & Associates Demurrer to First Amended Complaint is OVERRULED. Please scroll down to line 2 for full tentative ruling. Court to prepare formal order.
3	21CV389246	Cahalan Properties, LLC vs STTS Apartments, LLC et al	Continued by stipulation to January 11, 2024.
4	21CV392393	M.K. et al vs ROMAN CATHOLIC BISHOP OF SAN JOSE (DIOCESE) et al	Defendant's Demurrer to Second Amended Complaint is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Please scroll down to line 4 for full tentative ruling. Court to prepare formal order.
5	22CV399508	Bank Of America, N.A. vs Brenda Swindall	Case dismissed December 8, 2023.
6	22CV408665	QUOTE VELOCITY, LLC, a Delaware Limited Liability Company et al vs Hi.Q, Inc., a Delaware Corporation et al	The Individual Defendants' Demurrer is OVERRULED. Please scroll down to line 6 for full tentative ruling. Court to prepare formal order.
7	22CV408665	QUOTE VELOCITY, LLC, a Delaware Limited Liability Company et al vs Hi.Q, Inc., a Delaware Corporation et al	Amy S. Park and Enoch O. Ajayi, Counsel for Health IQ RE, Inc., motion to withdraw, pursuant to Code of Civil Procedure section 284, subd. (2), and California Rule of Court 3.1362 is GRANTED. Court to use order on file.
8	23CV414247	Srinivas Gulur vs Volkswagen Group of America, Inc.	Notice of conditional settlement filed September 19, 2023. Motion off calendar.
9	23CV421935	Michelle Santos vs Bohr Bhandal et al	Defendant Paramjit Kaur's Motion to Quash Subpoenaed Bank Records is DENIED. These records are likely to lead to the discovery of admissible evidence. Any privacy concerns can be addressed by having the documents produced pursuant to the Santa Clara County form protective order, which order the Court will enter in this case. Court to prepare formal order.

10	22CV397909	Jun Ma et al vs Good Samaritan Hospital et al	Defendant Edward Rustamzadeh, M.D.'s Motion for Summary Judgment is GRANTED. An amended notice of motion with this hearing date was served by electronic mail on August 23, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion. Further, Defendant submits an expert declaration opining that Defendant's employee met the standard of care. There is no counter declaration. Summary judgment is therefore appropriate. "When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Hanson v. Grode* (1999) 76 Cal. App. 4th 601, 607, citing *Munro v. Regents of University of California* (1989) 215 Cal. App. 3d 977, 984-985.) Court to prepare formal order.
11	22CV398490	Beverly Paulson et al vs Grace Baptist Church et al	Grace Solutions Motion for Summary Judgment is CONTINUED to March 19, 2024 at 9 a.m. in Department 6 to permit the already scheduled January depositions to go forward before a final ruling. Please scroll down to line 11 for a more fulsome tentative ruling and analysis. Court to prepare formal order.
12	21CV386619	Andrew Andre vs Dahl's Equipment Rentals, Inc.	Dahl's Equipment Rentals, Inc.'s Motion to Compel is GRANTED. An amended notice of motion with this hearing date was served by electronic mail on November 17, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion. Plaintiff failed to serve verified responses to Defendant's First Sets of Form Interrogatories, Requests for Production, and Requests for Admissions served on May 4, 2023, even after being granted numerous extensions. Although Plaintiff served unverified responses on September 29, 2023, that is tantamount to serving no responses at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.) Accordingly, Plaintiff is ordered to produce verified, code compliant responses to these discovery requests, without objections, and to pay $1,660.00 Defendant in sanctions within 20 days of service of the formal order. Court to prepare formal order.

13	21CV388697	LINDA DAVIDSON vs CAROL CLAUSEN-SHROFF	Plaintiff Linda Davidson's Motion to Compel Defendant Carol Lyn Clausen-Shorff's Further Responses to Special Interrogatories and for $3,700 in Sanctions is DENIED. Defendant did not waive her objections when serving objections without verifications. (Code Civ. Proc, § 2030.250 (a) ("The party to whom the interrogatories are directed shall sign the response under oath *unless the response contains only objections*." (emphasis added); *Blue Ridge Ins. Co. v. Superior Court* (1988) 202 Cal.App.3d 339, 345 ("objections are legal conclusions interposed by counsel, not factual assertions by a party, making their verification unnecessary"). And Defendant's privacy objection is well taken. The California Constitution creates "a zone of privacy" that protects against unwarranted compelled disclosure of private or personal information that extends to financial information and to the details of an individual's personal life. (Cal. Const. art I, § 1; see also, e.g., *Williams v. Superior Court* (2017) 3 Cal.5th 531, 552; *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 651-655.) Where a zone of privacy is impacted by a discovery request, the trial court must consider the purpose of the information sought, the effect that disclosure will have on the affected persons and parties, the nature of the objections urged by the party resisting disclosure, and the availability of alternative, less intrusive means for obtaining the requested information. (*SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal.App.4th 741, 754-755; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 26.) The more sensitive the personal information sought to be disclosed, the more substantial the showing of need required. (*SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal.App.4th 741, 755.) Plaintiff's claim is that Defendant worked with Decedent to divert *marital* assets. Plaintiff has access to the marital assets, including Decedent's financial activities, which is demonstrated by the exhibits submitted in support of Plaintiff's motion. Plaintiff does not explain how obtaining six years of Defendant's bank records would be more probative than the records she already has. Court to prepare formal order.
14	22CV398160	Roger Swanson et al vs Drew Parrish et al	Defendants' Shelly Parrish and Drew Parrish Motion to Compel Michelle Swanson Further Responses to Form Interrogatories, Special Interrogatories, and Demand for Inspection and Production and for Sanctions $860.00. An amended notice of motion with this hearing date was served by electronic mail on November 28, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion. Defendants served discovery on August 9, 2023, called Plaintiff's counsel on October 2, 11, and 26, 2023, and responses still have not been served. Accordingly, Michelle Swanson is ordered to produce verified, code compliant responses to these discovery requests and to pay $860.00 in sanctions within 20 days of service of this formal order. Court to prepare formal order,

15	22CV398160	Roger Swanson et al vs Drew Parrish et al	Defendants' Shelly Parrish and Drew Parrish Motion to Compel Roger Swanson Further Responses to Form Interrogatories, Special Interrogatories, and Demand for Inspection and Production and for Sanctions $860.00 is GRANTED. An amended notice of motion with this hearing date was served by electronic mail on November 28, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion. Defendants served discovery on August 9, 2023, called Plaintiff's counsel on October 2, 11, and 26, 2023, and responses still have not been served. Accordingly, Roger Swanson is ordered to produce verified, code compliant responses to these discovery requests and to pay $860.00 in sanctions within 20 days of service of this formal order. Court to prepare formal order,
16	23CV417189	DEVIN TRILLO et al vs HYUNDAI MOTOR AMERICA	Defendant Hyundai Motor America's Motion to Compel Arbitration and Stay is GRANTED. Please scroll down to line 16 for full tentative ruling. Court to prepare formal order.
17	20CV365780	10:07 Ventures, LLC vs FabExchange, Inc.	Plaintiff 10:07 Ventures LCC and Cross Defendant Jesse Singh's Motion for Trial Continuance is GRANTED. The parties are ordered to meet and confer regarding dates when trial counsel and try this case in 2024 and appear for a trial setting conference with those dates in hand on January 9, 2024 at 11 a.m. in Department 6.
18	22CV394602	SUZANA HOSIN vs TIMOTHY DAVIS et al	Motion off calendar.
19	22CV394602	SUZANA HOSIN vs TIMOTHY DAVIS et al	Motion off calendar.
20	22CV398606	Jeffrey Hull vs Courtney Hull	Colin W. Morrow's Motion to be relieved as counsel for Courtney Hull is GRANTED. Court to use form of order on file.

Calendar Line 2
Case Name: *PHYSICIANS SURGERY SERVICES, LP vs Shultz & Associates*
Case No.: 21CV381901

Before the Court is Defendant Shultz & Associates Demurrer to First Amended Complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff Physician Surgery Services, L.P. ("Physician Surgery") alleges while doing business as Advanced Surgery Services it entered a written agreement with Shultz & Associates ("Shultz") for architectural services relating to the construction of a surgery center located at 2039 Forest Avenue, San Jose, CA 95128 ("Surgery Center"). According to Physician Surgery, due to Shultz's negligence, the electrical system failed to meet the applicable standard and specification or to pass inspection until October 11, 2019, resulting in substantial costs, expenses, and lost profits. Physician Services also alleges: "Due to a typographical error, the contract misspelled 'Advanced Surgical Center" instead of the correct dba name 'Advanced Surgery Center' as the client on the contract." The contract is attached to the FAC as Exhibit A. Plaintiff filed this action on April 26, 2021 and filed the FAC on June 22, 2023, asserting breach of contract and general negligence.

II. Late Filed Papers

Plaintiff alleges Defendant's demurrer is untimely and concedes Plaintiff's opposition to the demurrer was late. The Court has discretion to consider late filed papers. (*Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168.) And, where a party provides a substantive response to a late filing, the party waives all defects in service. (*Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 10.) As of the drafting of the tentative ruling, the Court did not receive an objection from Defendant regarding the late opposition, which was still served seven days before the hearing (i.e., plenty of time for Defendant to review and submit a reply if desired), and Plaintiff submitted a substantive response to the demurrer. The Court will therefore consider this matter on the merits.

III. Legal Standard

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

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

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

Shultz demurs to each cause of action on the grounds that it fails to allege facts sufficient to constitute a cause of action (Code Civ. Proc. § 430.10(e)) because Shultz never entered a contract with Physicians Surgery and as to the second cause of action and "the entire complaint" on the grounds that Plaintiff failed to comply with Code of Civil Procedure section 411.35.

IV. Analysis

A. Code of Civil Procedure Section 411.35

Code of Civil Procedure section 411.35 requires "In every action . . . arising out of the professional negligence of a person holding a valid architect's certificate . . . A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring:

> That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited

> college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant was negligent or was not negligent in the performance of the applicable professional services.

(Code Civ. Proc. § 411.35.) "The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435." (Code Civ. Proc. § 411.35 (g).)

Shultz argues Plaintiff's June 2023 certificate is not compliant because Plaintiff consulted with "a non-party professional engineer who is licensed to practice and practices in the State of California" which is not in the same discipline as Shultz, a licensed architect.

Plaintiff's counsel first filed a declaration dated March 15, 2021, which declared under oath:

> I am counsel for the Plaintiff Advance Surgical Center in this action. I have reviewed the facts of the case and have consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in the State of California, in the same discipline as the defendant and who I am reasonably believe [sic] is knowledgeable in the relevant issues involved in this action, and that I have concluded on the basis of this review and consultation that there is reasonable and meritorious cause for filing of this action.

After meet and confer, Plaintiff's counsel filed a supplemental declaration on dated June 22, 2023, declaring under oath:

> I am counsel for Plaintiff Physician Surgery Services, LP in this action. I have reviewed the facts of the case and have consulted with and received an opinion on or before March 3, 2021 before the filing of the Complaint from a non-party professional engineer who is licensed to practice and practices in the State of California, in the same discipline as the defendant and who I am reasonably believe [sic] is knowledgeable in the relevant issues involved in this action. I have concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted rendered an opinion that Shultz & Associates was negligent in the performance of the professional service alleged in this action.

At this stage of the litigation, this certificate is sufficient. As explained in *Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates*:

> Architectural services and engineering services frequently overlap and may be rendered by a licensed architect or a registered engineer. (*Lehmann v. Dalis* (1953) 119 Cal. App. 2d 152, 154 [259 P.2d 727].) Business and Professions Code section 6737 provides that a licensed architect may perform many services that are considered as the practice of civil engineering. (46 Ops.Cal.Atty.Gen. 1, 3 (1965).) A structural engineer may perform architectural services but may not use the title "architect." (Bus. & Prof. Code, § 5537.1.) "'To the extent that architectural services and civil engineering services overlap, they may be rendered either by a licensed architect or by a registered civil engineer. . . . [P] . . .' To attempt to precisely define and delineate the practice of architecture as distinguished from the practice of engineering would be of doubtful assistance." (*Barondon Corp. v. Nakawatase* (1961) 196 Cal. App. 2d 392, 397 [16 Cal. Rptr. 472].)

(*Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates* (1996) 45 Cal. App. 4th 913, 916. Thus, the court of appeal in *Ponderosa Center* found the trial court did not abuse its discretion when it found that plaintiff's reliance on an engineer's opinion before filing a lawsuit against an architect complied with section 411.35.

B. Fictitious Business Name

Shultz argues Plaintiff fails to state a claim against it for breach of contract or negligence because it did not enter a contract with Physician Surgery or perform any services for Physician Surgery, therefore no contract could be breached or duty owed.

The Court agrees with Plaintiff that claims for breach of contract and negligence are sufficiently alleged. The FAC sufficiently alleges Physician Surgery does business as Advanced Surgery Center and that the reference to "Advanced Surgical Center" in the agreement attached and incorporated by reference in the FAC was a typographical error. Under *Ball v. Steadfast-BLK* (2001) 196 Cal. App. 4th 694, Plaintiff should be permitted to move forward on this FAC.

Accordingly, Shultz's demurrer is OVERRULED.

Calendar Line 4
Case Name: *M.K. et al. v. Roman Catholic Bishop of San Jose, et al.*
Case No.: 21CV392393

Before the Court is defendant California Friends of the Sacerdotal International Fraternity of Saint Pius X, Inc.'s ("St. Pius") and St. Aloysius Retreat House's ("St. Aloysius") (collectively, "Defendants") demur to plaintiff M.K.'s second amended complaint ("SAC").[1] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

V. Background

This action arises out of alleged sexual abuse suffered by Plaintiff when she was a student at St. Aloysius. (SAC, ¶ 28.) In 1997, when Plaintiff was four years old, she participated in school related and after-school activities at St. Aloysius. (SAC, ¶¶ 30.) Father Benedict Van Der Putten ("Van Der Putten") was a priest at St. Aloysius and he sexually abused and assaulted Plaintiff multiple times from 1997 to 1999, when Plaintiff was six years old. (*Ibid*.) Van Der Putten's inappropriate behavior included being physically touchy with the children in the presence of other workers, nuns, teachers, and parents. (SAC, ¶ 31.) Also, he picked Plaintiff up in the presence of employees during camp, gave her gifts, and openly isolated her during summer camp activities for one-on-one hikes. (*Ibid*.) St. Aloysius staff members left Plaintiff alone with Van Der Putten on multiple occasions and he sexually abused her while she was under his supervision, authority, and control. (SAC, ¶ 33.) No action was taken, no investigation was completed, and Van Der Putten continued to sexually abuse and assault Plaintiff. (SAC, ¶ 34.)

Plaintiff initiated this action on December 17, 2021, asserting (1) negligence and (2) negligent retention and supervision. On April 21, 2023, Plaintiff filed her FAC, asserting: (1) negligence against St. Aloysius; (2) negligence against St. Pius; (3) negligence against DOES 4 through 25; (4) negligent hiring, retention, and supervision against St. Aloysius; (5) negligent hiring, retention, and supervision against St. Pius; and (6) negligent hiring, retention, and supervision against DOES 4 through 25.

[1] St. Aloysius is the fictitious business name through which St. Pius operates.

On September 19, 2023, the Court issued its order sustaining Defendants' demurrers. On October 4, 2023, Plaintiff filed her SAC, asserting the same claims. On November 7, 2023, Defendants filed the instant motion, which Plaintiff opposes.

VI. Request for Judicial Notice

Defendants request judicial notice of:

(1) The Articles of Incorporation, filed on February 4, 1975 (Exhibit 1);

(2) The Grant Deed, recorded on August 15, 1991 (Exhibit 2);

(3) The Statement of Information, filed on January 3, 2023 (Exhibit 3); and

(4) The Fictitious Business Name Statement, recorded on September 15, 2019 (Exhibit 4).

The Court may take judicial notice of items one and four because they are official acts of the state. (See Evid. Code, § 452, subd. (c) & (h); see also *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1484, fn. 12 (taking judicial notice of articles of incorporation); see also *Jones v. Goodman* (2020) 57 Cal.App.5th 521, 528, fn. 6 (taking judicial notice of articles of incorporation from California Secretary of State's website); see also *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Assn. of Governments* (2008) 167 Cal.App.4th 1229, 1234, fn. 3 (taking judicial notice of articles of incorporation and fictitious business name statement); see also *Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1236, fn. 2 (taking judicial notice of articles of incorporation, stating that it was a proper subject of judicial notice).)

Item two is a proper item for judicial notice as the Court may take judicial notice of property records under Evidence Code section 452, subdivision (c) and (h). (See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved of on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 [stating that "a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon *the legal effect* of the recorded document, when that effect is clear from its face" (emphasis added)].)

The Court will take judicial notice of item three to the extent that the statement of information was filed with the state, but not for the truth of the matters asserted therein. (See Evid. Code, subd. (h).) Thus, Defendants' request for judicial notice is GRANTED.

VII. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

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

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

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

Defendants demur to the SAC on the ground that the first, second, fourth, and fifth causes of action fail to allege sufficient facts. (Code Civ. Proc., § 430.10, subd. (e).)

A. First and Second Causes of Action: Negligence

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.) The existence and scope of a duty of care is a question of law for the court even at the pleading stage. (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531.)

As a general rule, there is no duty to control the conduct of another or to warn those endangered by such conduct. (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 619 (*Regents*).) However, "[u]nder some circumstances, a defendant may have an affirmative duty to protect the plaintiff from harm at the hands of a third party, even though the risk of harm is not of the defendant's own making." (See *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 215 (*Brown*).)

In *Brown*, the California Supreme Court established a two-step inquiry to determine whether a defendant has a legal duty to take action to protect a plaintiff from injuries caused by a third party: "First, the court must determine whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect. Second, if so, the court must consult the facts described in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) to determine whether relevant policy considerations counsel limiting that duty. (*Brown, supra,* 11 Cal.5th at p. 209.)

1. Whether Defendants Had a Special Relationship with Plaintiff

A special relationship between the defendant and the victim is one that "gives the victim a right to expect" protection from the defendant, while a special relationship between the defendant and the dangerous third party is one that "entails an ability to control [the third party's] conduct." (*Regents, supra,* 4 Cal.5th at p. 619.) The "common features" of a special relationship include "an aspect of dependency in which one party relies to some degree on the other for protection" and the other party has "superior control over the means of protection." (*Id*. at pp. 620-621.)

"California courts have frequently recognized special relationships between children and their adult caregivers that give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties." (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1129 (*United States Youth Soccer*).) Courts have found special relationships between a church and a minor child where the child was dropped off at a church for catechism classes by the child's parents (*Doe v. Roman Catholic Archbishop of Los Angeles* (2021) 70 Cal.App.5th 657); a church and its campers where the church acted as a daycare provider (*Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 246); and a church and its minor members where the church assigned the child to perform field service, which was a church-sponsored activity, alone with an abusive member (*Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1217, 1235 [stating "[Plaintiff] was harmed during a church-sponsored activity, and defendants' control over that activity placed them in special relationships with [Defendant] and [Plaintiff] thus requiring them to take reasonable steps to prevent the harm from occurring."].)

"The existence of such a special relationship puts the defendant in a unique position to protect the plaintiff from injury. The law requires the defendant to use this position accordingly." (*Brown, supra*, 11 Cal.5th at p. 220.) Where there is a special relationship between the defendant and a minor, the obligation to provide protection and assistance may include a duty to protect the minor from third party abuse. (*Id*. at p. 220.)

Here, Van Der Putten was a priest that was employed, controlled, and/or supervised by each of the Defendants. (SAC, ¶ 4.) He acted as Defendants' agent, subject to their direction, control, and

supervision. (*Ibid*.) Thus, Defendants had the ability to control his conduct and there was a special relationship between Van Der Putten and Defendants. (*Regents, supra,* 4 Cal.5th at p. 619.)

Plaintiff was a student at St. Aloysius and she participated in Defendants' school-related and after-school activities. (SAC, ¶ 28-29.) Plaintiff was 4 years old when the alleged abuse started. (SAC, ¶ 30.) The acts of sexual abuse and assault occurred on the St. Aloysius premises. (SAC, ¶ 30.) While Plaintiff participated in the activities, Defendants had "superior control over the means of protection." (*Regents, supra,* 4 Cal.5th at pp. 620-621.) Defendants, through its teachers and priests, assumed responsibility for the safety of the students in their care. (*United States Youth Soccer, supra,* 8 Cal.App.5th at p. 1130.) Thus, there was a special relationship between Defendants and Plaintiff because of her participation in the school related and after-school activities. (*Regents, supra,* 4 Cal.5th at p. 625.)

2. The *Rowland* Factors

The second step in the *Brown* framework is to consult the *Rowland* factors to determine whether relevant policy considerations counsel limiting that duty. (*Brown, supra*, 11 Cal.5th at p. 209.) The *Rowland* factors are "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. (*Rowland, supra,* 69 Cal.2d at p. 113.)

"The *Rowland* factors fall into two categories. The first group involves foreseeability and the related concepts of certainty and the connection between plaintiff and defendant. The second embraces the public policy concerns of moral blame, preventing future harm, burden, and insurance availability. (*Regents, supra*, 4 Cal.5th at p. 629.) "The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care… is whether the injury in question was ***foreseeable***." (*Ibid*, emphasis in original.) "The duty analysis [under *Rowland*] is categorical, not case specific." (*Ibid.*)

Plaintiff alleges Van Der Putten was touchy with the children at the camp, he picked Plaintiff up and gave her gifts, and took her on one-on-one hikes. (SAC, ¶ 31.) Plaintiff further alleges that his "inappropriate behavior was well known." (SAC, ¶ 34.) However, knowledge of the foregoing is not the same as knowledge of the alleged abuse, which Defendants would have or should have known about if there had been any reports by Plaintiff or anyone else regarding the conduct or prior incidents involving Van Der Putten. Plaintiff's allegations are not sufficient to withstand demurrer. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1324 (*E-Fab*); see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [stating that a demurrer admits all properly pleaded allegations, but not contentions, deductions, or conclusions of fact or law].)

Moreover, Plaintiff still does not allege facts to show how it would have been reasonably foreseeable to Defendants that a minor would be sexually abused or assaulted by a priest at the time of the alleged abuse. Plaintiff's conclusory allegations seem to aver that Defendants should have foreseen this abuse solely because Van der Putten was a priest. (See, e.g., SAC, ¶¶ 37, 41-43.) Plaintiff does not allege complaints about the priest's conduct, reports of prior incidents, or procedures implemented regarding sexual abuse and assault. (*Compare Brown, supra,* 40 Cal.App.5th at pp. 1097-1098 [sexual molestation by coaches was reasonably foreseeable to the governing body, even though they had no knowledge of prior sexual misconduct by a specific coach because plaintiff alleged the governing body "regularly received complaints from athletes or their parents regarding improper sexual conduct by coaches" and it was aware "that female taekwondo athletes…were frequently victims of sexual molestation by their coaches]; see also *United States Youth Soccer, supra,* 8 Cal.App.5th at pp. 1132, 1135 [youth soccer association could reasonably foresee minors might be sexually abused by their coaches where the associations "were aware that sexual predators were drawn to their organization in order to exploit children and that there had been prior incidents of sexual abuse of children in their programs."].)

As noted in the Court's prior order, without such allegations, it is unclear how Defendants could have taken steps to decrease the risk of sexual assault and avert the harm. Therefore, the *Rowland* factors are not satisfied, and Plaintiff fails to allege sufficient facts to state this claim.

Thus, the demurrer to the first and second causes of action is SUSTAINED with 20 DAYS LEAVE TO AMEND.

B. Fourth and Fifth Causes of Action: Negligent Hiring, Retention, and Supervision

"California case law recognizes the theory that an ***employer*** can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee. Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 (emphasis added, internal citations omitted); see also CACI, No. 426.)

"'An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit.' 'Liability for negligent hiring … is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees.' Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.'" (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [internal citations omitted]; see also *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207.)

As the Court stated above, Plaintiff fails to allege sufficient facts establishing how Defendants knew or should have known that hiring Van Der Putten would create a particular risk of harm. Thus, the demurrer to the fourth and fifth causes of action is SUSTAINED with 20 days leave to amend.

Calendar Lines 6 & 7
Case Name: *Quote Velocity, LLC v. Hi Q, Inc., et al.*
Case No.: 22CV408665

Before the Court is Defendants' Guarav Suri, Munjal Shah, Vishal Parikh (collectively, "Individual Defendants") demurrer to plaintiff Quote Velocity, LLC's ("Quote Velocity") first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of alleged fraud and breach of contract. According to the FAC, Health IQ is a Medicare broker that uses the health records of an individual to find and recommend healthcare plans tailored to that individual's needs. (FAC, ¶ 31.) Health IQ operated as part of a common enterprise with its four subsidiaries: Health IQ Insurance Services Inc., Health IQ Administrative Services Inc., Health IQ RE Inc., and HIQ SPV Insurance Services (collectively, "Entity Defendants"). (FAC, ¶¶ 11-25, 31.) Individual Defendants were co-founders of Health IQ. (FAC, ¶ 63.) Shah was the CEO, Suri was the President, and Parikh was the CPO. (*Ibid*.)

April 6, 2022, Plaintiff and Health IQ entered a Lead Purchase Agreement (the "Agreement"), under which Plaintiff agreed to provide Health IQ leads to potential customers. (FAC, ¶ 32; Ex. 1.) Although Health IQ was the sole counterparty to the agreement, Plaintiff alleges Defendants are all alter egos and agents of one another. (FAC, ¶¶ 19, 21-24.)

From May 2021 to September 2022, Plaintiff invoiced the Entity Defendants and was timely paid. (FAC, ¶ 47.) In August 2022, the Entity Defendants began making increased requests for leads under the Agreement and agreed to pay Plaintiff higher rates for those leads. (FAC, ¶¶ 41, 50-61.) Around October 2022, Chris Treacy and Jacqueline Santos, Health IQ employees, assured Plaintiff that it would be paid for these leads. (FAC, ¶ 62.) One month later, in a meeting attended by mostly Health IQ executives, Shah, Health IQ's CEO, directed the attendees to request as many leads as possible because Health IQ would "not be here" by the time the invoices from them would become due, or that, by that time, Health IQ would not be paying its vendors. (FAC, ¶ 64.)

By December 2, 2022, payment for services rendered in October 2022 was due. (FAC, ¶ 68.) Upon inquiry and insistence by Plaintiff, Christopher Shirley, Health IQ's CFO, directed his team to make partial payment of $500,000.00 for the October services and stated, "[w]e anticipate being able to

pay the remainder on or about 12/13 when we start to receive commission for the AEP [Annual Enrollment Period] sales." (*Ibid*.) On December 5, 2022, Shirley confirmed the anticipated timing for payment. (FAC, ¶ 73.)

On December 7, 2022, the Entity Defendants began laying off hundreds of employees. (FAC, ¶ 75.) On December 9, 2022, Shah advised Plaintiff that, due to financial challenges, payment would not be forthcoming on December 13 as previously anticipated. (FAC, ¶ 78.) The Entity Defendants have not paid Plaintiff the remaining balance for the services and have not paid any subsequent invoices. (FAC, ¶¶ 81-82, 85.) Plaintiff alleges the Entity Defendants have been receiving funds from third-party insurance carriers required to be used for marketing purposes, such as paying vendors like Plaintiff, but instead, they diverted and transferred funds among themselves and to individual defendants to shield the funds from creditors. (FAC, ¶¶ 23-24, 86-88.)

Plaintiff initiated this action on December 22, 2022, and on June 2, 2023, filed its FAC, which asserts (1) breach of contract; (2) withholding stolen property; (3) negligent misrepresentation; (4) intentional misrepresentation; (5) fraud; (6) fraudulent transfer; (7) civil conspiracy; and (8) unjust enrichment. On September 28, 2023, the Court issued its order (the "Order") overruling the Entity Defendants demurrer to the FAC. On August 29, 2023, Individual Defendants filed the instant demurrer, which Plaintiff opposes.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only

the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Individual Defendants demur to each cause of action on the ground that it fails to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

A. Alter Ego Allegations

"To recover on an alter ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415 (*Leek*) [complaint alleging individual defendant was owner of all stock of defendant corporation and personally made all its business decisions was not sufficient for alter ego liability]; see *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 235 (*Rutherford Holdings*) [plaintiff sufficiently alleged unity of interest by alleging corporate entity was inadequately capitalized, failed to "abide by the formalities of corporate existence," and was dominated, controlled, and used by defendant as a "mere shell and conduit"].) "An allegation that a person owns all of the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity." (*Leek, supra,* 194 Cal.App.4th at p. 415, citing *Meadows v. Emett & Chandler* (1950) 99 Cal.App.2d 496, 499.)

In *Leek*, the court found the following allegations insufficient to support an allegation for alter ego liability:

> That the plaintiffs were employed by Auburn Honda and Jay Cooper; (2) that Auburn Honda is a corporation; (3) that "Defendant Cooper is the sole owner of AUBURN HONDA, owning all of its stock and making all of its business decisions personally"; and (4) that all defendants were "the agents, servants, and employees of their co-defendants, an in doing the things hereinafter alleged were acing within the scope and authority as

such agents, servants and employees and with the permission and consent of their co-defendants. All of said acts of each of the Defendants were authorized by or ratified by their co-defendants.

(*Leek, supra,* 194 Cal.App.4th at p. 415.)

The court found:

These allegations neither specifically alleged alter ego liability, nor alleged facts showing a unity of interest and inequitable result from treatment of the corporation as the sole actor. Furthermore, although plaintiffs alleged Cooper was the employer, the complaint contains no allegations that he should be held liable for the corporation's wrongdoing. The essence of the alter ego doctrine is not that the individual shareholder becomes the corporation, but that the individual shareholder is liable for the actions of the corporation. (*Mesler v. Bragg Management Co., supra,* 39 Cal.3d at p. 300.) For all other purposes, the separate corporation existence remains. (*Id*. at p. 301.)

(*Ibid*.)

In *Rutherford Holdings*, the court found these allegations sufficient to allege alter ego:

Rutherford alleged that Caswell dominated and controlled PDR; that a unity of interest and ownership existed between Caswell and PDR; that PDR was a mere shell and conduit for Caswell's affairs; that PDR was inadequately capitalized; that PDR failed to abide by the formalities of corporate existence; that Caswell used PDR assets as her own; and that recognizing the separate existence of PDR would promote injustice. These allegations mirror those held to pass muster in *First Wester Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d 910, 915-916. As in *First Western*, "[a]ssuming these facts can be proved, [Caswell]…may be liable…under the *alter ego* principle."

(*Id*. at p. 916.)

The *Rutherford Holdings* court went on to explain the plaintiff "was required to allege only 'ultimate rather than evidentiary facts'" [, and] "less particularity [of pleading] is required where the defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff. (*Rutherford Holdings, supra,* 223 Cal.App.4th at pp. 235-236.)

Here, Plaintiff alleges that each Defendant was the alter ego of the other Defendants, they operated as a single enterprise, thus, there was a unity of interest and ownership between Defendants such that any separateness between them ceased to exist in that each Defendant completely controlled, dominated, managed, and operated the other Defendants to suit their convenience. (FAC, ¶ 12.) Specifically, Plaintiff alleges that Individual Defendants and/or Health IQ:

(1) commingled the funds and assets of the Entity Defendants (FAC, ¶ 20);

(2) disregarded legal formalities and failed to maintain arm's length relationship among Entity Defendants (FAC, ¶¶ 19, 21);

(3) inadequately capitalized Entity Defendants (FAC, ¶ 13);

(4) used Entity Defendants as mere shells, instrumentalities, or conduits for themselves (*Ibid*);

(5) used the same offices or business locations and employed the same employees for the Entity Defendants (FAC, ¶¶ 3-7, 14-15);

(6) held themselves out as personally liable for the debts of the Entity Defendants (FAC, ¶¶ 18, 20);

(7) directed Entity Defendants to carry out the alleged conduct (FAC, ¶ 21); and

(8) manipulated assets and liabilities between the Entity Defendants (FAC, ¶¶ 23, 24.)

Plaintiff alleges Individual Defendants are the ultimate and/or beneficial owners of Health IQ, they directed Health IQ to commit fraudulent acts, and knowingly made actionable misrepresentations and/or omissions to Plaintiff. (FAC, ¶ 21.) Based on the foregoing, Plaintiff alleges treating the entities as separate would promote injustice. (FAC, ¶ 22.)

The Court finds Plaintiff sufficiently alleges alter ego liability at the pleading stage. Individual Defendants assert there is a heightened pleading standard but fail to provide authority in support. Thus, the demurrer cannot be sustained on this basis.

B. First Cause of Action: Breach of Contract

To allege a cause of action for breach of contract, a plaintiff must allege (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921 (*Bushell*).) To assert alter ego liability for a breach of contract, there are a few procedural vehicles

available to the party asserting alter ego liability: "[t]he first option is to sue the alter ego directly in an action for breach of contract… Another is to first obtain a judgement for breach of contract against the signatories to the contract, followed by a motion to amend the judgment to add the alter egos as defendants. Still another is, after obtaining a judgment against the signatories, to institute an independent action against the alter ego…. These different procedural vehicles, however, are identical in substance: in all three, the proof of alter ego is the same." (*MSY Trading Inc. v. Saleen Automotive, Inc.* (2020) 51 Cal.App.5th 395, 402-403.)

Plaintiff alleges the Agreement, that Health IQ breached the Agreement, it performed its obligations, and it was damaged by Health IQ's breach. (FAC, ¶¶ 93-97.) Plaintiff further alleges Defendants are liable under alter ego liability. (FAC, ¶ 99.) As the Court stated above, Plaintiff sufficiently alleges alter ego liability. Plaintiff alleges sufficient facts to state this claim against Individual Defendants. Thus, the demurrer to the first cause of action is OVERRULED.

C. Second Cause of Action: Violation of Penal Code section 496

Penal Code section 496 states:

> (a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.

(Pen. Code, § 496, subd. (a).)

The elements of this claim are: "(1) that the particular property was stolen, (2) that the accused received, concealed, or withheld it from the owner thereof, and (3) that the accused knew that the property was stolen. (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 213.) A violation of the statue requires some form of criminal intent. (*Siry Investment LP v. Farkenhondehpour* (2022) 13 Cal.5th 333, 361-362.) In general, statutory causes of action must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

As with the prior demurrer, Defendants rely on *People v. Ashley* (1954) 42 Cal.2d 246 (*Ashley*) to assert that Plaintiff fails to allege an intent to steal or deceive. However, the Court distinguished *Ashley* and explained, "the required intent, as argued by Entity Defendants is necessary to prove theft. However, on demurrer, the Court does not address whether Plaintiff can prove theft; only whether it is adequately alleged." (The Order, p. 9:11-22.)

Plaintiff alleges Defendants stole property belonging to it, in a manner constituting theft, which includes, Applications, Leads, and Billable Calls that Plaintiff provided to Defendants but was not paid for. (FAC, ¶ 104.) It further alleges Defendants knowingly received, concealed, and withheld the property. (FAC, ¶ 105.) Defendants received, had, and/or has possession of the stolen property. (FAC, ¶ 106.) Defendants knowingly induced Plaintiff to provide them with increased Applications, Leads, and Billable Calls, knowing it lacked the funds to pay for them. (FAC, ¶ 105.) It also alleges Suri, Shah, and Parikh individually received, had, and/or have possession of the property. (FAC, ¶ 108.) In the Order, the Court concluded the claim was sufficiently alleged. (The Order, p. 10:2-4.) As the Court stated above, Plaintiff sufficiently alleges alter ego liability. Thus, the demurrer to the second cause of action is OVERRULED.

D. Fraud Claims

"The elements of a negligent misrepresentation are '(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.' Negligent misrepresentation does not require knowledge of falsity, unlike a cause of action for fraud." (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252.)

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.) Each element in a fraud cause of action must be pleaded with specificity. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 645.)

In October 2022, Health IQ began to increase its requests for Applications, Leads, and Billable Calls and Health IQ employees Treacy and Santos assured Plaintiff that Health IQ would pay the agreed upon rate and represented they would "make sure [Plaintiff] gets paid first." (FAC, ¶ 62.) In late November 2022, during a meeting attended by Suri, Parikh, and other executives, Shah directed attendees to obtain "as many Applications, Leads, and Billable Calls from these vendors as possible because Health IQ would 'not be here' by the time the invoiced were due anyway, or at a minimum, would not be paying any of its vendors." (FAC, ¶¶ 63-64.) On December 2, 2022, Shirley directed his team to pay $500,000.00 toward the invoice, stating that the company would pay the remainder on or around December 13, 2022, once they received anticipated commissions. (FAC, ¶ 73.) On December 5, 2022, Shirley again confirmed their anticipated payment date and the company's ability to pay its invoice via an email to Plaintiff encouraging Plaintiff's continued performance. (FAC, ¶¶ 72-73.) Plaintiff justifiably relied on Shirley's assurances and continued to provide services, which resulted in damages to Plaintiff. (FAC, ¶¶ 117-119.)

In the Order, the Court found the allegations sufficient to state the fraud claims against the Entity Defendants. As stated above, Plaintiff alleges sufficient facts to support alter ego liability at this stage. Therefore, Plaintiff sufficiently alleges the fraud claims against Individual Defendants under alter ego liability. Thus, the demurrer to the third, fourth, and fifth causes of action is OVERRULED.

E. Sixth Cause of Action: Fraudulent Transfer

Claims for fraudulent transfer are governed by the California's Uniform Voidable Transfer Act ("UVTA"), Civil Code sections 3439 et seq., formerly known as the Uniform Fraudulent Transfer Act. The purpose of the UVTA is to prevent debtors from placing, beyond the reach of creditors, property that should be made available to satisfy a debt. (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071 (*Lo*).)

"A creditor may set aside a transfer as fraudulent under Civil Code section 3439.04 by showing actual fraud as defined in subdivision (a)(1) or by showing constructive fraud as defined in subdivision (a)(2)." (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 817 (*Chen*).) Actual fraud under the UVTA means that the transfer made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." (Civ. Code § 3439.04, subd. (a)(1).) Constructive fraud means the debtor made the transfer: "Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and

the debtor either: (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." (Civ. Code § 3439.04, subd. (a)(2).) The UVTA allows a judgment to be entered against (1) the first transferee of the fraudulently transferred asset, (2) the transfer beneficiary, and (3) any subsequent transferee other than a good faith transferee." (*Lo, supra*, 24 Cal.App.5th at p. 1071.)

Here, Plaintiff alleges Defendants have not made any payments towards the outstanding balance of $6,988,428.00. (FAC, ¶ 84.) It further alleges that Health IQ transferred revenues and assets among Defendants with the intent to hinder, delay, or defraud Plaintiff because they were made to an insider; Health IQ retained possession or control of the assets after the transfer; it had already been sued or threatened with suit at the time of the transfer; the value of the consideration received was not reasonably equivalent; and certain defendants were insolvent or became insolvent shortly after the transfer was made. (FAC, ¶¶ 148, 151.) It alleges Defendants diverted or caused to be diverted revenues and assets away from other Entity Defendants. (FAC, ¶ 149.) It alleges Health IQ diverted or caused assets to be diverted to Suri, Shah, and/or Parikh. (FAC, ¶ 150.)

Plaintiff alleges, in the alternative that Health IQ engaged in constructive fraud because it did not receive reasonably equivalent value in exchange for the transfer and it believed or reasonably should have believed that it would incur debts to Plaintiff beyond its ability to pay as they became due. (FAC, ¶ 152.) Additionally, Plaintiff's right to payment arose before the transfer of assets. (FAC, ¶ 153.) The Court found Plaintiff sufficiently alleged this claim against Entity Defendants. (Order, p. 14:18-19.) As the Court stated above, Plaintiff sufficiently alleges alter ego liability. Therefore, Plaintiff sufficiently alleges this claim against Individual Defendants. Thus, the demurrer to the sixth cause of action is OVERRULED.

F. Seventh Cause of Action: Civil Conspiracy

"Civil conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons, who although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration … it must be activated by the commission of an actual tort." (*Applied*

Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 510-511.) The elements of civil conspiracy are: (1) the formation of a group of two or more persons who agreed to a common plan or design to commit a tortious act; (2) a wrongful act committed pursuant to the agreement; and (3) resulting damages. (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 212.) The defendant in a conspiracy claim must also be capable of committing the target tort. (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 652; CACI 3600.)

Plaintiff sufficiently alleges this claim, and Plaintiff's target claims are sufficiently alleged. (FAC, ¶ 158, 160-164; above analysis.) Thus, the demurrer to the seventh cause of action is OVERRULED.

G. Eighth Cause of Action: Unjust Enrichment

The elements for unjust enrichment are the receipt of a benefit and the unjust retention of the benefit at the expense of another. (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593 (*Peterson*); *First Nationwide Savings v. Perry (*1992) 11 Cal.App.4th 1657, 1662 ["A person is enriched if the person receives a benefit at another's expense. Benefit means any type of advantage."].)

Here, Plaintiff alleges that Health IQ requested a benefit from Plaintiff, it accepted, Health IQ retained the benefit from Plaintiff, and it has not paid for the services. (FAC, ¶¶ 166- 169.) Plaintiff also alleges Defendants received revenues and assets from Health IQ, Plaintiff has not received a benefit in return, and it would be inequitable for Health IQ to retain the benefit it received from Plaintiff without paying fair value for it. (FAC, ¶¶ 148-150; 170-171.) Plaintiff sufficiently alleges alter ego liability, and this claim against Individual Defendants. Thus, the demurrer to the eighth cause of action is OVERRULED.

Calendar Line 11
Case Name: *Beverly Paulson, et.al. v. Grace Baptist Church, et.al*
Case No.: 22CV398490

Before the Court is Defendant Grace Solutions' motion for summary judgment against Plaintiff, James Quadee Chelley's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Undisputed Factual Background

This claim arises from a tragic stabbing incident that took place at Grace Solutions on November 22, 2020, in which Mr. Lopez is alleged to have injured three victims and killed two others. Grace Solutions provides emergency shelter for the unhoused throughout San Jose, CA. (Grace Solutions Reply to James Chelley's Opposition to Separate Statement of Undisputed Facts "RSSUF" Nos. 1 & 2.) In 2021, Grace Solutions entered into an agreement with Defendant GRACE BAPTIST CHURCH to utilize their space for Grace Solutions' emergency shelter for the unhoused. (RSSUF No. 3.)

At the time of the incident, Grace Solutions had seven employees, including Mr. Chelley, and a number of volunteers working at the program. (RSSUF No. 4.) Mr. Chelley has been an employee of Grace Solutions since February 5, 2020. (RSSUF No. 5.) At the time of the incident, Mr. Chelley was working in the course and scope of his employment at Grace Solutions. (RSSUF No. 7.) While working on the second floor, he heard loud screaming and yelling and went to the stairwell to investigate. From the stairwell, he could see a man lying down on the floor bleeding, along with another injured woman. Mr. Chelley went downstairs to help and proceeded to attempt mouth to mouth resuscitation on the man lying on the floor. (RSSUF No. 7). As he was doing so, Mr. Lopez reportedly stabbed Mr. Chelley in the back three times and continued to physically attack him. Mr. Chelley was able to flee the area and go to the "Women's Room" to assist women hiding from Mr. Lopez. Eventually, Chelley was able to escape from the subject premises. The police apprehended Mr. Lopez half a block from the church. (RSSUF No. 7.)

At the time of the incident, Grace Solutions had workers' compensation insurance through State Compensation Insurance Fund. (RSSUF No. 8.) On November 30, 2020, Grace Solutions received notification from the insurance company that Mr. Chelley filed a claim for workers' compensation. (RSSUF No. 8.) Grace Solutions provided the information requested for the claim, and then received an

additional notification on December 23, 2022, that Mr. Chelley had received temporary and permanent disability benefits through his workers' compensation claim. The letter also notified Grace Solutions that these benefits would be ending. (RSSUF No. 9.)

On June 14, 2023, Mr. Chelley filed the First Amended Complaint against his employer, Grace Solutions, alleging (1) negligence and (2) negligent hiring, supervision, and retention of unfit employees.

II. Legal Standard

A defendant moving for summary judgment has the initial burden to make prima facie showing there is no merit to a cause of action and that therefore the defendant is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (p)(2); *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) To satisfy this burden, the moving defendant must show that at least one of the elements of the cause of action has not been established by the plaintiff and cannot reasonably be established or must establish the elements of a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar, supra*, at p. 849; *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480 (*Jessen*).) If the moving defendant meets this burden, then the burden shifts to the plaintiff to show that there is at least one triable issue of material fact regarding the cause of action or as to the complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849; *Jessen, supra*, at p. 1484.)

Summary judgment is appropriate if there are no triable issues of material fact, and the moving party is entitled to judgment as a matter of law. (Code of Civ. Proc. § 437c, subds. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted; accord, *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) Courts are required to liberally construe the opposing party's evidence and resolve any doubts about the evidence in favor of that party. (*Regents of University of California v. Superior Court*, supra, 4 Cal.5th 607 at 618).

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

III. Evidentiary Objections

A. Defendant's Objections

Grace Solutions objects to the Declaration of Salim Khawaja's declaration as follows:

- paragraph 4- statement that Philip Mastrocola knew Mr. Lopez and allowed him to work at Grace Solutions is speculative;
- paragraph 5 – statement that Peggy Hogg is the board president of Defendant is false;
- paragraph 7 – declaration of Ruben Ramos, attached as exhibit 1, includes hearsay statements, lacks any relevance to Mr. Chelley's employment, and provides no value to the opposition;
- paragraph 8 – declaration of Maurice Coprich's, attached as Exhibit 2, includes hearsay statements, lacks any relevance to Mr. Chelley's employment, and provides no value to the opposition.

The Court rules as follows:

- Objection is sustained as to paragraph 4.
- Objection is sustained as to paragraph 5. Evidence shows that Penny Hogg is the president not Peggy Hogg.
- Objection is sustained as to declaration of Ruben Ramos. Mr. Ramos' description of witnessing various individuals under the influence and violent inside and outside of the shelter premises are not to Mr. Chelley's employment and worker's compensation claim. Mr. Ramos' only relevant statement is that in November of 2020 he spoke to Mr. Lopez, who was acting as a volunteer for the church, and appeared to be intoxicated or on drugs. However, Mr. Ramos' statement is speculative as to both intoxication and Mr. Lopez's status with Grace Solutions. Mr. Ramos'

statements also fail to provide evidentiary support for Plaintiff's argument that Grace Solutions employed Mr. Lopez, knew about his history of violence, and continued his employment irrespective of his history.

- Objection is sustained as to declaration of Mr. Coprich. Mr. Coprich's declaration that he has witnessed people being intoxicated and violent on or near the church's premises are not relevant. Mr. Coprich's only reference to Mr. Lopez is that he punched him just hours before the November 22, 2020 attacks while being near the church premises. These statements are not relevant to Mr. Chelley's employment or his worker's compensation claim, Mr. Lopez's status with Grace Solutions, or to whether Grace Solutions knew Mr. Lopez had a history of violence.

B. Plaintiff's Objections

"Plaintiff's Response and Objection and Opposition to Defendant's Separate Statement" contains no objections. Plaintiff states he is unable to admit or deny certain statements because he has not conducted discovery. These statements do not constitute objections upon which the Court can rule.

IV. Analysis

Grace Solutions argues it is entitled to summary judgment against Mr. Chelley because his claims are barred by the worker's compensation exclusivity provisions set forth in Labor Code §§ 3600 and 3602.

A. Worker's Compensation Exclusivity of Remedy

The Workers' Compensation Act ("the Act") is a comprehensive statutory scheme governing compensation given to California employees for injuries incurred in the course and scope of their employment. (*See's Candies, Inc. v. Superior Court* (2021) 73 Cal.App.5th 66, 76-77.) At the core of the Act is what is called the compensation bargain. (*Id.* at p. 77.) Under this bargain, the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability." (*Ibid.)* The employee, for his or her part, is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort. (*Ibid.)* Thus, the Act limits an employee's remedies against an employer for work-related injuries to those remedies provided by the statute itself. (*Ibid.)* The Act is also the exclusive remedy for the heirs and personal representatives of a

deceased employee who brings actions for wrongful death or a survival claim on behalf of decedent. (*Soil Engineering Construction v. Superior Court* (1982) 136 Cal.App.3d 329, 332.)

In determining whether exclusivity bars a cause of action against an employer, courts initially determine whether the alleged injury falls within the scope of the exclusive remedy provisions. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (*2001)* 24 Cal.4th 800, 811.) To be compensable and therefore covered by the exclusive remedy of the Act, an injury must "both arise out of the employment and occur in the course of employment." (Lab. Code, § 3600; *Cooper v. Workers' Comp. Appeals Bd.* (1985) 173 Cal.App.3d 44, 48.) If the conditions set forth in Section 3600 do not exist, the employee or his or her heir or personal representative may bring a civil action against the employer. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 971.)

Here, it is undisputed that at the time of the attacks, Mr. Chelley was an employee of Grace Solutions and was injured while acting within the scope of his employment. (RSSUF Nos. 4, 5, 7; Declaration of Phil Mastrocola ("Mastrocola Decl."), Ex. 1.) It is also undisputed that Mr. Chelley filed a claim for worker's compensation benefits, and Grace Solutions was notified of the claim on November 30, 2020. (RSSUF No. 8; Mastrocola Decl., Ex. 2.) Grace Solutions also submits unopposed evidence that Mr. Chelley received temporary and permanent disability benefits pursuant to his worker's compensation claim. (Mastrocola Decl., Exs. 3 & 4.)

On this record, Grace Solutions satisfies its burden to demonstrate that no triable issue of material fact exists. The burden thus shifts to Plaintiff to show that there is at least one triable issue of material fact regarding the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849; *Jessen, supra*, at p. 1484.)

Plaintiff argues (1) Mr. Lopez, the assailant, was a volunteer working for Grace Solutions at the time of the attacks, (2) Grace Solutions was aware or should have been aware of his history of violence, (3) Grace Solutions ratified Mr. Lopez's violent attacks through inaction, turning a blind eye toward his history of violence, and continued employment, and (4) this motion must be "denied" because additional discovery is needed. In support, Plaintiff cites *Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608 (*Herrick*). In *Herrick*, a supervisor assaulted another employee, and the court applied the exception to worker's compensation exclusivity set forth in Labor Code § 3602(b)(1), reasoning that

the manager knew the supervisor carried a gun on the premises in violation of employer's policy and his failure to take action was a ratification of the wrongful act. Plaintiff's application of the Labor Code section 3602(b)(1) and *Herrick* are inapposite.

Labor Code section 3602, subdivision (b), lists three exceptions to the exclusivity rule. The one pertinent here is: "Where the employee's injury or death is proximately caused by a willful physical assault by the employer." (Lab. Code, § 3602, subd. (b)(1).) Subdivision (c) makes explicit the converse of the exclusivity rule, i.e., that ordinary civil remedies apply to injuries falling outside the workers' compensation system: "In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted." (Lab. Code, § 3602, subd. (c).)

The exception under Subdivision (b)(1) as well as the holding in *Herrick* apply where there is a willful physical assault on an employee by another employee. Therefore, to benefit from this exception, Plaintiff must establish (1) Mr. Lopez was an employee of Grace Solutions, (2) Grace Solutions had knowledge of his violent history, and (3) Grace Solutions failed to take actions and continued to employ Mr. Lopez irrespective of his history.

To defeat summary judgment, Plaintiff is required to "make an independent showing by a proper declaration or by reference to a deposition or another discovery product that there is sufficient proof of the matters alleged to raise a triable question of fact if the moving party's evidence, standing alone, is sufficient to entitle the party to judgment. [Citations.]" (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 10-11; see also *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720 & fn. 7.) Plaintiff has not done that here. Mr. Coprich's and Mr. Ramos's declarations are comprised of speculative and irrelevant statements and inadmissible hearsay. Even if the Court were to accept those declarations, however, neither provides support or proof that (1) Mr. Lopez was an employee of Grace Solutions at the time of the attack, (2) Mr. Lopez had a history of violence, and (3) Grace Solutions had any knowledge of Mr. Lopez's alleged history of violence.

Therefore, the Court finds that Plaintiff has failed to meet his burden of showing at least one triable issue of material fact.

B. Timeliness of the Summary Judgment Motion

Code of Civil Procedure section 437c(h) provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." "An opposing party's declaration in support of a motion to continue the summary judgment hearing should show the following: (1) *Facts* establishing *a likelihood that controverting evidence may exist* and *why* the information sought is *essential* to opposing the motion; (2) The *specific reasons* why such evidence cannot be presented at the present time"; (3) An estimate of the *time* necessary to obtain such evidence"; and (4) The specific steps or procedures the opposing party intends to utilize to obtain such evidence." *(Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532 [emphases in original; internal quotations removed].)

Attorney Khawaja declares in support of Plaintiff's opposition:

- He was recently substituted into the case and while limited written discovery was conducted, no depositions were taken prior to his involvement.
- Written discovery is needed to obtain information about witnesses, past incidents, past assaults, security issues, Mr. Lopez, Defendant's employees, videos of this and past incidents, and policy and procedure documents.
- Plaintiff needs to propound subpoenas to the San Jose Police Department and other governmental agencies.
- Deposition of Plaintiff, Beverly Paulson, is scheduled for January 3, 2024.
- Plaintiff's deposition is scheduled for January 11, 2024.
- Deposition of Dennis Clover, Grace Baptist Church's representative, is scheduled for January 9, 2024.
- Deposition of Phillip Mastrocola, program director in charge of Grace Solution's day to day operation, is scheduled for January 10, 2024.
- Deposition of Peggy Hogg, Grace Solutions' board president is scheduled for January 30, 2024. Ms. Hogg signed the Facility Use Agreement with Grace Baptist Church and agreed on behalf of

Grace Solutions to provide 24/7 security. She has knowledge of Grace Solution's protocols and procedures that were in effect on November 22, 2020.

Mr. Khawaja's declaration fails to state facts showing what information or evidence Plaintiff is likely to obtain from the listed depositions, additional written discovery, subpoenas served on the unnamed government agencies and why such information is essential to Plaintiff's opposition. Additionally, Mr. Khawaja fails to state what written discovery is still needed and what subpoenas are to be issued to which government entities. While the Court can infer from the declaration the completion date of the listed depositions, the declaration fails to provide any estimated time necessary to conclude Plaintiff's needed written discovery and subpoenas.

Grace Solutions contends that Plaintiff's argument and need for additional discovery are disingenuous because (1) Mr. Khawaja would have received Plaintiff's entire file from the previous attorney in October of 2023, and would have had knowledge of what discovery had been completed or may have been needed, (2) despite his knowledge of this motion, Mr. Khawaja has done no discovery since his substitution in October 2023, (3) Grace Solutions has consistently raised Mr. Lopez's status as a "house guest" in its affirmative defenses and verified discovery responses, and (4) after receiving Plaintiff's opposition to its motion, Grace Solutions offered to continue the hearing date so that Plaintiff could complete the discovery he claimed was needed. But on December 12, 2023, Mr. Khawaja declined the offer of continuance believing that a lot more depositions and written discovery are needed. (Declaration of Sharon Hightower ISO Defendant's Reply to Opposition.)

The Court is perplexed as to why Plaintiff did not take Grace Solutions' offer to continue this motion to conduct discovery and now asks the Court to deny this motion because Plaintiff wants to conduct discovery. If the Court were to find that additional discovery was warranted, the proper procedure would be for the Court to continue the motion, not deny it. To continue the motion, Plaintiff needed to provide the Court with (1) the specific discovery needed, (2) the facts likely to be ascertained through that discovery to oppose this summary judgment motion, (3) and a timeframe within which such specific discovery could be completed. Plaintiff's declaration does not do that here; Plaintiff's declaration seems to waive its arms around and say "more!".

However, having studied the record and relevant case law, the issue on this motion is narrow: was Mr. Lopez an employee, and, if so, did Grace Solutions' ratify his known violent behavior. The relevant discovery for this narrow issue is Mr. Mastrocola's, Ms. Hogg's, and maybe Dennis Clover's depositions, all of which are already scheduled for January. Thus, to complete the record for this motion, which the Court is inclined to grant, the Court orders the following:

1. The hearing on this motion is continued to March 19, 2024 at 9 a.m. in Department 6.
2. Plaintiff may supplement his opposition papers with relevant deposition testimony from the January depositions on or before February 13, 2024.
3. Grace Solutions may supplement its reply papers by March 5, 2024.
4. The Court will issue a new tentative ruling on March 18, 2024 and conduct a hearing on March 19, 2024—the same date as the currently scheduled further case management conference.

Calendar Line 16
Case Name: *DEVIN TRILLO et al vs HYUNDAI MOTOR AMERICA*
Case No.: 23CV417189

Before the Court is Defendant Hyundai Motor America's ("HMA") Motion to Compel Arbitration and Stay. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a lemon law case. Plaintiffs purchased a 2022 Genesis GV70 (the "Vehicle") on June 20, 2022 from Genesis of Stevens Creek in Santa Clara. The Vehicle came with Hyundai Motor America's new vehicle limited warranty, which includes the following arbitration provision:

> **BINDING ARBITRATION FOR CALIFORNIA VEHICLES ONLY**
>
> **PLEASE READ THIS SECTION IN ITS ENTIRETY AS IT AFFECTS YOUR RIGHTS THIS SECTION DOES NOT PRECLUDE YOU FROM FIRST PURSUING ALTERNATIVE DISPUTE RESOLUTION THROUGH BBB AUTO LINE AS DESCRIBED IN THE "ALTERNATIVE DISPUTE RESOLUTION" PROVISION IN SECTION 3 OF THIS HANDBOOK.**
>
> If you purchased or leased your Gensis vehicle in the State of California, you and we, Genesis Motor America, each agree that any claim or disputes between us (including between you and any of our affiliated companies) related to or arising out of your vehicle purchase, advertising for the vehicle, use of your vehicle, the performance of the vehicle, and service relating to the vehicle, the vehicle warranty, including without limitation claims relate to false or misleading advertising, unfair competition, breach of contract or warranty, the failure to conform a vehicle to warranty, failure to repurchase or replace your vehicle, or claims for a refund or partial refund of your vehicle's purchase price (excluding personal injury claims), but excluding claims brought under the Magnuson-Moss Warranty Act, shall be resolved by binding arbitration at either your or our election, even if the claim is initially filed in a court of law. If either you or we elect to resolve our dispute via arbitration (as opposed to in a court of

law), such binding arbitration shall be administered by and through JAMS Mediation, Arbitration and ADR Services (JAMS) under its Streamlined Arbitration rules & Procedures, or the American Arbitration Association (AAA) under its Consumer Arbitration Rules.

We will pay all fees for any arbitration expect for the initial filing fee of $250 for JAMS or $200 for AAA. The arbitration will be held in the city or county of your residence. To learn more about arbitration, including the applicable rules and how to commence arbitration, please contact:

JAMS at www.jamsadr.org; 800-352-5267; or

AAA at www.adr.org; 800-778-7879

This agreement to arbitrate is intended to be broadly interpreted and to make all disputes and claims between us (including our affiliated companies) relating to or arising out of your vehicle purchase, use or performance of your vehicle, or the vehicle warranty subject to arbitration to the maximum extent permitted by law. The arbitrator (and not a court) shall decide all issues of interpretation, scope and application of this agreement.

In any arbitration, the arbitrator shall be bound by the terms of this agreement and shall follow the applicable law. The arbitrator shall not have the power to commit manifest errors of law, and any award rendered by the arbitrator that employs a manifest error of law may be vacated or corrected by a court of competent jurisdiction for such error. The arbitrator may only resolve disputes between you and us and may not consolidate claims without the consent of all parties. The arbitrator cannot hear class or representative claims or request for relief on behalf of others, or issue any award or remedy in arbitration against or on behalf of anyone who is not a named party to the arbitration, as permitted by law. In other words, you and we may bring claims against the other only in your or our individual capacity and not as a plaintiff or class member in any class or representative action to the maximum extent permitted y law. You and

we acknowledge and agree that, to the fullest extent permitted by law, we are each waiving the fight to participate as a plaintiff or class member in any purported class action lawsuit, class-wide arbitration ,private attorney general action, or any other representative proceeding. If a court or arbitrator decides that any part of this agreement to arbitrate cannot be enforced as to a particular claims for relief or remedy, then that claim or remedy (and only that claim or remedy) must be brought in court and must be stayed pending arbitration of the arbitrable claims and remedies. If a court or arbitrator decided that any part of this agreement cannot be enforced as to a particular request for injunctive relief, then that request for public injunctive relief (and only that request for public injunctive relief) must be brought in court and must be stayed pending arbitration of the arbitrable remedies. If arbitration is elected by either party, the parties collectively agree that they waive their right to a jury trial.

Notwithstanding the above, either you or we may file a lawsuit in small claims court for any claims that otherwise require binding arbitration, if the small claims court has jurisdiction. In addition, either you or we may invoke any JAMS Streamlined Arbitration Rules & Procedures or AAA Consumer Arbitration Rules that allow you or we to have small claims court decide any claims that otherwise require binding arbitration This agreement evidences a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Judgment upon any ward in arbitration may be entered in any court having jurisdiction.

IF YOU PURCHASED OR LEASED YOUR VEHICLE IN CALIFORNIA, YOUR WARRANTY IS MADE SUBJECT TO THE TERMS OF THIS BINDING ARBITRATION PROVISION. BY USING THE VEHICLE, OR REQUESTING OR ACCEPTING BENEFITS UNDER THIS WARRANTY, INCLUDING HAVING REPAIRS PERFORMED UNDER WARRANTY, YOU AGREE TO BE BOUND BY

THESE TERMS. IF YOU DO NOT AGREE WITH THESE TERMS, PLEASE CONTACT US AT OPT-OUT@GMAUSA.COM WITHIN THIRTY (30) DAYS OF YOUR PURCHASE OR LEASE TO OPT-OUT OF THIS ARBITRATION PROVISION.

Plaintiffs also entered a RISC with the dealership at the time they purchased the Vehicle. The RISC also contained an arbitration provision. There is no dispute that HMA is not a party to the RISC.

II. Legal Standard

In a motion to compel arbitration, the Court must determine "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." (*Bruni v. Didion* (2008) 160 Cal. App. 4th 1272, 1283 (citations omitted).) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]" (*Bruni,* 160 Cal. App. 4th at 1282 (citations omitted).)

Even if the Court finds the parties agreed to arbitrate, the agreement is unenforceable if it is unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Unconscionability consists of both procedural and substantive elements. The prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of the procedural unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. (*Armendariz,* 24 Cal.4th at 114.)

The procedural element tests the circumstances of contract negotiation and formation and focuses on "oppression" or "surprise" due to unequal bargaining power. (See *Armendariz,* 24 Cal.4th at 114.) "Oppression" occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form.

(*Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC* (2012) 55 Cal.4th 223, 247, citing *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179.)

HMA relies on both the Warranty Handbook and the RISC. The Court follows *Ford Motor Warranty Cases* (2023) 89 Cal. App. 5th 1324, *Montemayor v. Ford Motor Company* (June 26, 2023) 92 Cal.App.5th 958, *Kielar v. Superior Court of Placer County* (Aug. 16, 2023) C096773 and *Morgan v. Sundance* (2022) 142 S.Ct. 1708) and declines to find that HMA as a non-signatory to the RISC can enforce the arbitration provision on these facts.

However, the Court agrees with HMA that Plaintiffs are bound by the arbitration provision in the Warranty Handbook. Plaintiffs' complaint alleges violations of the warranties they allege they entered at the time of purchase and are contained in the same handbook as the arbitration provisions. The arbitration provision is set out in a separate section in the handbook, is clearly marked, not hidden, and not ambiguous. A purchaser reading through the Warranty Handbook to assess the scope of the warranties they were receiving at the time of purchase would as easily be able to find the arbitration provisions as the warranty for particular parts of their vehicle. The arbitration provision also has a procedure for purchasers to opt-out of the arbitration provision. Of course, the Court has no information as to what consumers are told if they opt out. On these facts, if there is procedural unconscionability, it is low. The Court also finds no substantive unconscionability. The terms of the arbitration provision are equally applied.

Accordingly, HMA's motion to compel arbitration is GRANTED. The case is stayed pending the outcome of the arbitration. The May 7, 2024 case management conference shall remain as set for the Court to hear from the parties regarding the status of the arbitration.