SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Maida Jacobo, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: October 31, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV358852	LSI Corporation, A Delaware corporation et al vs Kiran Gunnam et al	**Motion for Summary Judgment/Adjudication** Scroll down to LINE 1 for Tentative Ruling.
LINE 2	23CV425715	Rita Gutierrez vs General Motors LLC et al	**Motion to Compel (Form Interrogatories)** The parties met and conferred pursuant to this Court's order and they report that Defendant has agreed to supplement all items in dispute. Defendant's verified, code-compliant, further responses to Form Interrogatory Nos. 1.1, 12.1, 15.1, 17.1, 50.1 and 50.6 shall be served by December 2, 2024. The parties have also agreed to enter into a Protective Order. This shall be the order of the Court. If there are any issues of non-compliance or insufficient responses, a new motion will need to be filed. Moving party to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 3	23CV425715	Rita Gutierrez vs General Motors LLC et al	**Motion to Compel (Requests for Admission)** The parties met and conferred pursuant to this Court's order and they report that Defendant agreed to supplement all items in dispute. Defendant shall serve verified, code-compliant, further responses to Requests for Admission Nos. 1-7, 12, 14, 16-18, 22-26, 28-30, 37-38 and 41-46 by December 2, 2024. The parties have also agreed to enter into a Protective Order. This shall be the order of the Court. If there are any issues of non-compliance or insufficient responses, a new motion will need to be filed. Moving party to prepare formal order.
LINE 4	23CV425715	Rita Gutierrez vs General Motors LLC et al	**Motion to Compel (Requests for Production of Documents)** The parties met and conferred pursuant to this Court's order and they report that Defendant agreed to supplement all items in dispute. Defendant shall serve verified, code-compliant, further responses and responsive documents to Requests for Production of Documents Nos. 1-38 by December 2, 2024. The parties have also agreed to enter into a Protective Order. This shall be the order of the Court. If there are any issues of non-compliance or insufficient responses, a new motion will need to be filed. Moving party to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	23CV425715	Rita Gutierrez vs General Motors LLC et al	**Motion to Compel (Special Interrogatories)** The parties met and conferred pursuant to this Court's order and they report that Defendant agreed to supplement all items in dispute. Defendant shall serve verified, code-compliant, further responses to Special Interrogatory Nos. 21, 31, 40, 41 and 42 by December 2, 2024. The parties have also agreed to enter into a Protective Order. This shall be the order of the Court. If there are any issues of non-compliance or insufficient responses, a new motion will need to be filed. Moving party to prepare formal order.
LINE 6	16CV297475	Nationwide Mutual Insurance Company et al vs George Gullicksen et al	**Motion for Leave to File Cross-Complaint and Reopen Discovery** Scroll down to LINE 6 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	18CV336139	Primitivo Medina vs David Villatoro et al	**Motion to Set Lien Amount** Lien Claimant Wesco Insurance Company's motion for an order setting the amount of the lien for workers' compensation benefits paid to and on behalf of Plaintiff Primitivo Parra-Medina (Labor Code 3850 et seq.). The motion is opposed by Plaintiff. Pursuant to this Court's order, Plaintiff filed a declaration describing the reasonableness of his attorney's fees and costs, and an offer of proof regarding the uncovered medical bills that Plaintiff claims total $535,569.77. The parties were also ordered to meet and confer and provide supplemental briefing, if necessary. The parties met and conferred on October 15, 2024. Plaintiff's counsel clarified a question on her firm's costs. Wesco does not dispute the supported claim of attorneys' fees at 40% and litigation costs of $7,461.47. However, Wesco does dispute the $535,569.77 in medical bills as it is unclear why such substantial medical bills were incurred outside of the workers' compensation claim and why they were necessary to treat the same claimed injury. Plaintiff's counsel confirmed that the bills have not yet been finalized or paid and they will likely be compromised at some unknown lower amount. As the medical bills are not "actual" amounts *as they may be reduced* and there appears to be uncertainty as to *why* they were incurred, the Court is unable to set the lien amount and the motion is DENIED, WITHOUT PREJUDICE. A renewed motion may be filed, if the exact amounts of the bills and the nature of the treatment outside of the worker's compensation claim are determined and provided. Moving party to prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	20CV373032	BONNIE NIESEN et al vs INTUITIVE SURGICAL, INC., et al	**Motion for Sanctions (Spoliation)** Scroll down to LINE 8 for Tentative Ruling.
LINE 9	2014-1-CV-260201	State Farm Mututal Automobile Ins. Co. vs T. Gallo	**Motion to Set Aside Default/Judgment** Scroll down to LINE 9 for Tentative Ruling.

- oo0oo -

Calendar Line 1
Case Name: *LSI Corporation v. Kiran Kumar Gunnam, et al.*
Case No.: 19CV358852

Before the Court is defendant's motion for summary judgment, or in the alternative, summary adjudication against plaintiff's [first amended] complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

In or around January 21, 2008, defendant Kiran Kumar Gunnam ("Gunnam") commenced employment with plaintiff LSI Corporation ("LSI"). (First Amended Complaint ("FAC"), ¶10.) Prior to his employment with plaintiff LSI, defendant Gunnam was a student/ employee of Texas A&M University ("TAMU") and his Ph.D. work generated confidential information concerning LDPC decoder architectures, including source code and unpublished patent applications. (*Id.*)

As consideration for his employment with plaintiff LSI, defendant Gunnam executed an Employee Invention and Confidential Information Agreement ("EICI Agreement") on or around January 21, 2008. (FAC, ¶11.)

During the course of his employment, defendant Gunnam had access to a document management system maintained by plaintiff LSI to store documents ("TWiki Server"). (FAC, ¶16.) The TWiki Server stored documents that were within the scope of defendant Gunnam's employment as well as documents unrelated to defendant Gunnam's employment. (FAC, ¶17.) Defendant Gunnam was able to access the TWiki Server with a unique user ID specific to him. (FAC, ¶18.) During his employment with plaintiff LSI, defendant Gunnam routinely accessed, viewed, modified, downloaded and uploaded documents on the TWiki Server. (FAC, ¶19.) For example, on or around June 19, 2010, defendant Gunnam uploaded a document to the TWiki Server entitled, "McLarenClientServerDesignGuide_2009_09_16.doc." ("McLaren Design Guide"). (*Id.*)

On or around December 10, 2010, plaintiff LSI concluded a three-month investigation into defendant Gunnam's unauthorized publication of an article containing plaintiff LSI confidential information. (FAC, ¶20.) Plaintiff LSI informed defendant Gunnam that the unauthorized publication violated his responsibilities as an employee and "may have created a

competitive disadvantage to LSI since it contains LSI proprietary information." (*Id.*) Plaintiff LSI emphasized that defendant Gunnam's misconduct was a serious violation and issued a formal reprimand. (*Id.*)

During the course of the investigation, plaintiff LSI blocked defendant Gunnam's access to its internal network, including but not limited to the TWiki Server. (FAC, ¶21.) On January 4, 2011, unaware of the block, defendant Gunnam repeatedly attempted to access the server. (*Id.*)

On January 13, 2011, defendant Gunnam emailed his superior taking responsibility for the unauthorized publication, apologizing, and executing a formal acknowledgment of his wrongdoing. (FAC, ¶22.) In light of defendant Gunnam's apparent contrition, plaintiff LSI restored defendant Gunnam's access to the network on January 15, 2011 and later restored defendant Gunnam's access to the TWiki Server. (*Id.*)

In early March 2011, defendant Gunnam gave plaintiff LSI notice of his intent to resign his employment effective March 18, 2011. (FAC, ¶23.) Also in early March 2011, defendant Gunnam again accessed the TWiki Server to view technical documents related to plaintiff LSI's McLaren and Spyder architectures and technical features contained therein. (FAC, ¶24.) When defendant Gunnam accessed the TWiki Server during his last few months of employment, he downloaded plaintiff LSI's confidential material and retained that material following the conclusion of his employment in violation of the EICI Agreement. (FAC, ¶25.) Defendant Gunnam resigned his employment with plaintiff LSI effective March 18, 2011. (FAC, ¶26.) Despite being bound by the EICI Agreement during and after his employment with plaintiff LSI, defendant Gunnam breached his obligations under the EICI Agreement. (FAC, ¶27.)

On December 12, 2018, TexasLDPC Inc. ("TexasLDPC") filed a complaint against Broadcom Inc. ("Broadcom") in the United States District Court for the District of Delaware ("Delaware Action"). (FAC, ¶28.) In its complaint, TexasLDPC alleges LSI and its parent company, Broadcom, have sold products that infringe patents and copyrights licensed by TexasLDPC from TAMU. (*Id.*) Defendant Gunnam is listed as an inventor on the face of the asserted TAMU patents and is the author of the purported copyrighted source code that

Broadcom and LSI are accused of infringing. (*Id.*) Defendant Gunnam was involved in the development of LSI's LDPC decoder architectures that TexasLDPC asserts infringe TAMU's patents and copyrights. (FAC, ¶29.)

TexasLDPC's lawsuit against LSI and Broadcom relies heavily on confidential technical documents alleged to describe the McLaren read channel architecture that are included in the two compilations that were later published without LSI's authorization on Scribd.com ("Scribd"). (FAC, ¶30.) But for defendant Gunnam's breaches of the EICI Agreement, TexasLDPC would not have been able to bring its action against LSI and Broadcom for infringement of TAMU's patents. (*Id.*)

Defendant Gunnam's wife, Annapurna Yarlagadda ("Yarlagadda"), is the CEO, CFO, and Secretary of TexasLDPC and held these roles prior to and at the time TexasLDPC's complaint was filed in December 2018. (FAC, ¶¶3 and 31.) TexasLDPC's pleadings disclosed and relied upon LSI's confidential and proprietary information prepared by defendant Gunnam and other employees in connection with their work for LSI in relation to the design and development of semiconductor products, including reproductions of several internal LSI documents. (FAC, ¶32.) TexasLDPC's pleadings also included a link to confidential and proprietary LSI internal presentations and documents that were published without LSI's permission on Scribd. (FAC, ¶33.) In addition, other confidential and proprietary LSI documents were published without LSI's permission on Scribd. (FAC, ¶34.) The Scribd links were created on the same date by the same person. (FAC, ¶35.) On information and belief, defendant Gunnam provided, directly or indirectly, LSI's confidential and proprietary information published on Scribd. (FAC, ¶46.)

Defendant Gunnam authored or otherwise had access to the confidential and proprietary information improperly used and disclosed in the TexasLDPC complaints. (FAC, ¶¶36 – 38.) After leaving plaintiff LSI, defendant Gunnam improperly kept copies of emails and other documentation that contained confidential technical information and internal discussions with management and in-house counsel as to whether LSI should license TAMU's technology (at Gunnam's urging). (FAC, ¶39.) Later, defendant Gunnam gave those emails to TexasLDPC's counsel to assist in suing LSI on behalf of TexasLDPC. (*Id.*)

Defendant Gunnam forwarded confidential patent applications filed by TAMU to various individuals at LSI in May 2008. (FAC, ¶40.) In January 2009, defendant Gunnam placed confidential source code that purportedly came from TAMU into an LSI directory to which he controlled access. (*Id.*) This confidential TAMU source code was later copyrighted and is now being asserted as the basis of copyright infringement. (*Id.*) Defendant Gunnam encouraged others to access this material. (*Id.*)

In order to encourage TAMU to pursue patent protection for his Ph.D. work and to assist TAMU in licensing the work to plaintiff LSI, defendant Gunnam disclosed plaintiff LSI's confidential information to TAMU. (FAC, ¶41.)

Defendant Gunnam disclosed confidential information concerning his work on LDPC decoders for plaintiff LSI to a competitor, Marvell Semiconductor, his prior employer, thus jeopardizing plaintiff LSI's future competitiveness. (FAC, ¶42.)

Plaintiff LSI did not authorize the use or dissemination of the confidential and proprietary information disclosed in TexasLDPC's complaints, published on www.scribd.com, disclosed to TAMU, or disclosed to an LSI competitor. (FAC, ¶43.)

On November 18, 2019, plaintiff LSI filed a complaint against defendants Gunnam and Yarlagadda asserting causes of action for:

(1) Breach of Contract [versus Gunnam]

(2) Breach of Covenant of Good Faith and Fair Dealing [against Gunnam]

(3) Intentional Interference with Contract [against Yarlagadda]

(4) Inducement to Breach Contract [against Yarlagadda]

On January 23, 2020, defendants Gunnam and Yarlagadda filed a demurrer to plaintiff LSI's complaint and a special motion to strike plaintiff LSI's complaint pursuant to Code of Civil Procedure section 425.16.

On October 14, 2021, the court issued an order granting defendant Gunnam's special motion to strike the first and second causes of action and denying defendant Yarlagadda's special motion to strike the third and fourth causes of action. The court deemed defendant Gunnam's demurrer to the first and second causes of action moot and overruled defendant Yarlagadda's demurrer to the third and fourth causes of action.

On May 22, 2023, the Sixth District Court of Appeal reversed the court's October 14, 2021 ruling and directed this court to enter a new order denying defendant Gunnam's special motion to strike and granting defendant Yarlagadda's special motion to strike.

On July 25, 2023, remittitur issued and this court resumed jurisdiction.

On September 12, 2023, plaintiff LSI filed a motion for leave to amend its complaint. On December 8, 2023, the court granted plaintiff LSI's motion for leave to amend the complaint.

On December 18, 2023, plaintiff LSI filed the operative FAC which now asserts causes of action against defendant Gunnam for:

(1) Breach of Contract

(2) Promissory Fraud

On January 8, 2024, defendant Gunnam filed an answer to plaintiff LSI's FAC and also filed a demurrer to plaintiff LSI's FAC.

On March 7, 2024, in a minute order, the court overruled defendant Gunnam's demurrer to plaintiff LSI's FAC.

On July 24, 2024, defendant Gunnam filed the motion now before the court, a motion for summary judgment/ adjudication of plaintiff LSI's FAC.

II. DEFENDANT GUNNAM'S MOTION FOR SUMMARY JUDGMENT/ ADJUDICATION IS DENIED.

A. BREACH OF CONTRACT.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

The first cause of action of plaintiff LSI's FAC alleges, among other things, that defendant Gunnam "breached [his] obligations under the [EICI Agreement] by using and/or disclosing … LSI's confidential and proprietary information without LSI's authorization." (FAC, ¶53.) More specifically, "the confidential and proprietary information used and disclosed on … [Scribd] was retained and/or disclosed by [defendant] Gunnam in breach of his

obligations under the EICI Agreement." (FAC, ¶44.) Plaintiff LSI alleges the "confidential and proprietary information disclosed and relied on in TexasLDPC's complaints and published on [Scribd] was provided directly or indirectly by [defendant] Gunnam." (FAC, ¶46.)

1. **BREACH – USE AND DISCLOSURE.**

In moving for summary adjudication of plaintiff LSI's first cause of action, defendant Gunnam begins by asserting that he is not in breach of the EICI Agreement because he did not have any involvement with the use and/or disclosure, i.e., posting to Scribd, of plaintiff LSI's purportedly confidential and proprietary information. Although not set forth in his separate statement, defendant Gunnam proffers his own declaration in which he denies "retain[ing] any of the Scribd Documents, in whole or in part, when [he] left [ ] employment with LSI in 2011" and denies "hav[ing] possession of any of the Scribd Documents" and denies "that [he] had any role in placing the Scribd Documents on the scribd.com website."[1]

> a moving defendant need not support his motion with affirmative evidence negating an essential element of the responding party's case. Instead, the moving defendant may (through factually vague discovery responses or otherwise) point to the absence of evidence to support the plaintiff's case. When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact.

(*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482.)[2]

Here, defendant Gunnam has affirmatively negated the element of breach with his declaration above. Defendant Gunnam has met his initial burden with this evidence. Although defendant Gunnam asserts plaintiff LSI "has no evidence of any involvement by Dr. Gunnam whatsoever," defendant Gunnam goes further by proffering other circumstantial evidence to suggest that he did not post any documents to Scribd and/or had no other involvement with the posting on Scribd.[3]

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[1] See Exh. 36 to the Declaration of David M. Hoffman in Support of Defendants' Motion for Summary Judgment ("Declaration Hoffman").

[2] See also *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590—"a moving defendant may rely on factually devoid discovery responses to shift the burden of proof."

[3] See Separate Statement in Support of Defendant's Motion for Summary Judgment ("Gunnam SS"), Fact Nos. 4 – 17.

In opposition, plaintiff LSI contends the Sixth District Court of Appeal, in overturning this court's ruling on defendant Gunnam's special motion to strike, already made a determination that "LSI has satisfied its burden to demonstrate a prima facie case, with reasonable inferences from admissible evidence, that Gunnam posted the scribd documents. LSI's evidence shows that the scribd documents included its confidential information that Gunnam both authored and had access to; that Gunnam had breached confidentiality agreements in other instances; that Gunnam had the motive to post the documents on scribd; and that one of his wife's employees searched for and found the scribd documents just days after they were posted. … This evidence supports reasonable inferences that Gunnam had access to and retained the confidential scribd documents."[4] According to plaintiff LSI, the appellate ruling operates as "law of the case."

> Under the law of the case doctrine, when an appellate court " 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal ….' " (*Kowis v. Howard* (1992) 3 Cal.4th 888, 893 [12 Cal. Rptr. 2d 728, 838 P.2d 250].) Absent an applicable exception, the doctrine "requir[es] both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong." (*Estate of Baird* (1924) 193 Cal. 225, 234 [223 P. 974].) As its name suggests, the doctrine applies only to an appellate court's decision on a question of law; it does not apply to questions of fact. (*Id.* at pp. 234–239.)

(*People v. Barragan* (2004) 32 Cal.4th 236, 246.)

But, "when "the facts are not disputed, the effect or legal significance of those facts is a question of law … . (*Aghaian v. Minassian* (2021) 64 Cal.App.5th 603, 612.) In considering a special motion to strike,

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[4] *LSI Corp. v. Gunnam* (May 22, 2023, Nos. H049521, H049523) ___Cal.App.5th___ [2023 Cal. App. Unpub. LEXIS 2969, at *46 - *48].

> The court must determine whether the plaintiff has shown, by admissible evidence, a probability of prevailing on the merits. (§ 425.16, subd. (b).) If the plaintiff cannot make that showing, the court must strike the claim. (*Bonni*, *supra*, at p. 1009.)
>
> This second prong of the anti-SLAPP analysis has been described as a "'summary-judgment-like procedure.'" (*Baral*, *supra*, 1 Cal.5th at p. 384.) "***The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true***, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Id.* at pp. 384-385.)

(*LSI Corp. v. Gunnam* (May 22, 2023, Nos. H049521, H049523) ___Cal.App.5th___ [2023 Cal. App. Unpub. LEXIS 2969, at *36-37]; emphasis added.)

The Sixth District Court of Appeal looked at plaintiff LSI's evidence irrespective of any factual dispute by defendant and made a determination that plaintiff LSI made a sufficient factual showing to establish a breach by defendant Gunnam.

It is not entirely clear from the authorities cited by plaintiff LSI whether law of the case should apply here on summary judgment/ adjudication where the issue for this court to decide is not quite the same as on a special motion to strike; on summary judgment/ adjudication, the court must decide whether plaintiff LSI's evidence is sufficient "to show that a triable issue of one or more material facts exists." (Code Civ. Proc., §437c, subd. (p)(2).)

To be safe, plaintiff LSI proffers the same evidence now that it previously proffered to overcome defendant Gunnam's special motion to strike.[5] It is this court's opinion that plaintiff LSI's evidence presents a triable issue of material fact with regard to whether defendant

[5] See page 11, line 13 to page 13, line 3 of Plaintiff's Amended Opposition to Defendant's Motion for Summary Judgment, or in the Alternative, Summary Adjudication citing, *inter alia*, Statement of Disputed Material Fact ("SDMF"), Fact Nos. 112, 113, 122, 114, 93, 54 – 60, 61 – 62, 63 – 66, 70 – 73, and Declaration of Makenna Miller, Exh. 30.

Gunnam breached the EICI Agreement. In anticipation that plaintiff LSI would rely upon the same circumstantial evidence, defendant Gunnam cites *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 857 (*Aguilar*) where the Court acknowledged that a plaintiff "must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows." However, "even though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference could show or imply to a reasonable trier of fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 856.) Defendant Gunnam contends the same rule applies here where there is no direct evidence that he used and/or disclosed confidential and proprietary information or that he posted such information to Scribd and plaintiff can rely only on circumstantial evidence.

> if the court determines that any evidence or inference presented or drawn by the plaintiff indeed shows or implies [a breach of the EICI Agreement] *more likely than* [not], it must then deny the defendants' motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff. Under such circumstances, the [breach] issue is triable--that is, it must be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, and may not be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff.
>
> But if the court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply [breach of the EICI Agreement] *only as likely as* [not] or *even less likely*, it must then grant the defendants' motion for summary judgment, even apart from any evidence presented by the defendants or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff. [Footnote omitted.] Under such circumstances, the [breach] issue is not triable--that is, it may not be submitted to a trier of fact for determination in favor of either the plaintiff or the

> defendants, but must be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff.

(*Id.* at pp. 856-857; see also p. 857, fn. 27—"when the evidence is in equipoise on a matter that a party must establish by a preponderance of the evidence, summary judgment will be granted against that party.")

In reviewing plaintiff LSI's circumstantial evidence concerning defendant Gunnam's breach of the EICI Agreement, the court does not reach the conclusion that the reasonable inference(s) to be drawn therefrom is/ are only as likely or even less likely than not to show or imply a breach. Rather, the reasonable inference(s) to be drawn from plaintiff LSI's evidence (that defendant Gunnam posted plaintiff LSI's confidential and proprietary information to Scribd) is/ are in conflict with the reasonable inference(s) to be drawn from defendant Gunnam's evidence (that defendant Gunnam did NOT post plaintiff LSI's confidential and proprietary information to Scribd). In such a situation, the court finds the existence of a triable issue of material fact.

2. **BREACH – CONFIDENTIAL AND PROPRIETARY INFORMATION.**

Plaintiff LSI's FAC alleges the relevant portion of the EICI Agreement is Section 1 wherein defendant Gunnam agreed to the following:

> Except as authorized by the Company in writing, I agree to keep confidential and not to disclose, or make any use of, either during or subsequent to my employment, **all inventions, trade secrets, proprietary or confidential information, works of authorship or proprietary matter** that relate to the actual or demonstrably anticipated business, research, development, product, services, devices, or activity of the Company…

(FAC, ¶12; emphasis added.)

As a secondary argument, defendant Gunnam apparently challenges whether the documents posted to Scribd were even confidential because the EICI Agreement prohibits the disclosure and/ or use of "confidential information," among other things. "An employer cannot establish a claim for breach of a nondisclosure agreement unless it is prepared to prove, and

does prove, that the defendant disclosed actual confidential information." (*Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623, 647.)

However, defendant Gunnam does not carry his burden on this issue of breach by proffering evidence that plaintiff LSI publishes documents (other than the documents posted to Scribd) marked "LSI Confidential" in public SEC filings.[6] Nor does defendant Gunnam carry his burden by referring to a written ruling on a Motion to Seal Complaints in the Delaware Action.[7] There, the court denied LSI's motion to seal complaints finding the documents posted on Scribd are "no longer confidential" since appearing "online at least since July 2018." Defendant Gunnam also adds that plaintiff LSI was aware the documents were posted on Scribd as early as April 2018.[8] However, whether such documents subsequently lost their confidentiality does not address whether the documents were confidential in the first instance nor does the ruling establish whether the information held confidential status when defendant Gunnam first used and disclosed it, i.e., at the time of the breach.

The court need not address the balance of defendant Gunnam's arguments concerning other purported breaches of the EICI Agreement since they would not completely dispose of the first cause of action. "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., §437c, subd. (f)(1).) "The purpose of the enactment of Code of Civil Procedure section 437c, subdivision (f) was to stop the practice of piecemeal adjudication of facts that did not completely dispose of a substantive area." (*Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97.)

For the reasons discussed above, defendant Gunnam's motion for summary judgment is DENIED. Defendant Gunnam's alternative motion for summary adjudication of the first cause of action [breach of contract] of plaintiff LSI's FAC is DENIED.

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[6] See Gunnam's SS, Fact No. 24.
[7] See Exh. 48 to the Declaration Hoffman.
[8] See Gunnam's SS, Fact No. 22.

B. **PROMISSORY FRAUD.**

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*); see also CACI, No. 1900.)

"'Promissory fraud' is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973 – 974; see also CACI, No. 1902.)

Plaintiff LSI's second cause of action alleges, in relevant part, "By entering into the EICI Agreement, defendant Gunnam … made promises to LSI … that [he] would not use and/or disclose, and/or cause others to use and/or disclose, LSI's confidential and proprietary information without LSI's authorization and would not disclose to LSI, nor induce LSI to receive or use, any confidential information belonging to, or designated as confidential by, any of his previous employers or by any other person." (FAC, ¶57.) "Defendant Gunnam … did not intend to perform these promises when [he] made them." (FAC, ¶58.)

1. **STATUTE OF LIMITATIONS.**

In moving for summary adjudication of this promissory fraud cause of action, defendant Gunnam argues first that the claim is barred by the statute of limitations. The limitations period for a claim predicated on fraud is three years from the date of "the discovery, by the aggrieved party, of the facts constituting the fraud." (Code Civ. Proc., § 338, subd. (d); see *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 734.) According to defendant Gunnam, plaintiff LSI was, by its own allegations, aware that defendant Gunnam had not kept his promises (i.e., defendant's promises were false) as early as 2010 because plaintiff LSI itself alleged that, "on or around December 29, 2010, LSI concluded a three-month investigation into

Gunnam's unauthorized publication of an article containing LSI confidential information. LSI informed Gunnam that the unauthorized publication violated his responsibilities as an employee." (FAC, ¶20.) Defendant Gunnam contends that since plaintiff LSI knew or should have known that defendant Gunnam's promises were fraudulent by 2010, plaintiff LSI had until 2013 to assert a claim for promissory fraud but since it did not do so until the filing of the FAC on December 18, 2023, plaintiff LSI's claim for promissory fraud is barred.

In opposition, plaintiff LSI argues the cause of action did not accrue until it sustained actual damages which plaintiff LSI asserts occurred "at the point TexasLDPC filed its action against LSI using confidential LSI documents and information provided to it by Dr. Gunnam." Although this assertion is consistent with plaintiff LSI's allegation at paragraph 62 of the FAC that it was harmed and suffered damage by "incurring attorneys' fees and costs to defend itself against TexasLDPC's claims of patent and copyright infringement," the court is not persuaded that this is the only or first injury suffered as a result of the alleged promissory fraud. Defendant Gunnam entered into the EICI Agreement in conjunction with his employment at plaintiff LSI and, by reasonable inference, plaintiff LSI hired defendant Gunnam in reliance upon his premises and would not have hired him without his consent to the EICI Agreement. Thus, plaintiff LSI would have sustained damages in hiring and paying an employee[9] who failed to keep his promises concerning confidentiality, long before incurring injury in defending a lawsuit arising from a breach of said promises concerning confidentiality.

Although not well articulated, the court understands plaintiff LSI to argue additionally in opposition that defendant Gunnam is equitably estopped from asserting the statute of limitations because after plaintiff LSI learned of defendant Gunnam's initial transgression of the EICI Agreement following the referenced investigation in 2010, defendant Gunnam provided LSI with further assurance by indicating to plaintiff LSI that he "will not comment on IP issues any more."[10]

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[9] Plaintiff LSI alleges defendant Gunnam commenced employment and entered into the EICI Agreement on or about January 21, 2008. (See FAC, ¶¶10 – 11.) Plaintiff LSI alleges defendant Gunnam resigned his employment effective March 18, 2011. (See FAC, ¶23.)

[10] See Plaintiff's Amended Response to Defendant's Separate Statement in Support of Motion for Summary Judgment, Statement of Additional Genuine Disputed Material Facts Demonstrating Dr. Gunnam is not Entitled to Summary Judgment or Summary Adjudication ("LSI AMF"), Fact No. 119.

> Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. Its application is wholly independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. Thus, because equitable estoppel operates directly on the defendant without abrogating the running of the limitations period as provided by statute, it might apply no matter how unequivocally the applicable limitations period is expressed.

(*Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 847-848; citation and punctuation omitted.)

In *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43, the court wrote, "A defendant will be estopped to invoke the statute of limitations where there has been 'some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action.' It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. ***'Whether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law."***" (Emphasis added.)

Plaintiff LSI's FAC alludes to equitable estoppel at paragraph 22 where it is alleged that "Gunnam emailed his superior, taking responsibility for the unauthorized publication and the damage he caused LSI … [and] promise[d] that [he] will not engage in such activities from now on" which plaintiff LSI relied upon by "restor[ing Gunnam's] access to the network [and later to TWIKI]." Thus, even if the cause of action for promissory fraud accrued in 2010 as

defendant Gunnam asserts, a triable issue of material fact exists with regard to whether equitable estoppel applies.

2. **INTENT.**

As an alternative basis for summary adjudication of plaintiff LSI's promissory fraud cause of action, defendant Gunnam contends LSI has not alleged and cannot establish with any evidence that defendant Gunnam had a pre-contract intent not to live up to the promises he made in the EICI Agreement. In *Tarmann v. State Farm Mutual Automobile Ins. Co.* (1991) 2 Cal.App.4th 153, 159, the court explained, "To maintain an action for deceit based on a false promise, one must specifically allege and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing."

"Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 482.) Something more than nonperformance is required to prove the defendant's intent not to perform his promises. "A promise of future conduct is actionable as fraud only if made without a present intent to perform. (Civ. Code, §1710, subd. 4; [Citation omitted.]) " 'A declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud. [Citation.]' " [Citation omitted.] Moreover, " 'something more than nonperformance is required to prove the defendant's intent not to perform his promise.' [Citations.] ... [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury." (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481.)

To meet its initial burden on the issue of intent, defendant Gunnam proffers evidence to assert that is implausible for plaintiff LSI to even suggest defendant Gunnam lacked intent to perform the EICI Agreement. Defendant Gunnam contends this is so because the patents that

would become the subject of the Delaware Action in 2018 did not exist in 2008.[11] Texas LDPC, the company that filed the Delaware Action in 2018, did not exist in 2008.[12] Defendant Gunnam essentially poses the rhetorical question, "How could he have intended such an elaborate scheme in 2008 when the pieces were not yet in place?"

However, defendant Gunnam mis-frames the issue. The FAC alleges only that defendant Gunnam "did not intend to perform these promises, i.e., [he] would not use and/or disclose, and/or cause others to use and/or disclose, LSI's confidential and proprietary information without LSI's authorization and would not disclose to LSI, nor induce LSI to receive or use, any confidential information belonging to, or designated as confidential by, any of his previous employers or by any other person." (FAC, ¶¶57 – 58.) Plaintiff LSI need not show that defendant Gunnam had such a detailed long range plan/ scheme in place in 2008.

Even if this evidence and argument were sufficient for defendant Gunnam to meet his initial burden on the issue of fraudulent intent, plaintiff LSI proffers evidence in opposition which presents a triable issue. Specifically, plaintiff LSI proffers evidence that defendant Gunnam disclosed TAMU confidential information to Marvell, defendant Gunnam's employer immediately prior to employment with plaintiff LSI, and did so a second time the day after being warned and despite Gunnam's promise to "make sure that our discussion remain confidential."[13] "Where fraud is charged, evidence of other fraudulent representations of like character by the same parties at or near the same time is admissible to prove intent." (*Borse v. Superior Court* (1970) 7 Cal.App.3d 286, 289.)

Consequently, defendant Gunnam's alternative motion for summary adjudication of the second cause of action [promissory fraud] of plaintiff LSI's FAC is DENIED.

The Court will prepare the formal order.

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[11] See Gunnam SS, Fact No. 32.
[12] See Gunnam SS, Fact No. 33.
[13] See LSI AMF, Fact Nos. 48, 63, and 123.

Calendar Line 6
Case Name: *Nationwide Mutual Insurance Company et al vs George Gullicksen et al*
Case No.: 16CV297475

Before the Court is Defendants Glen Gilbert (dba Able Septic) and SBV Concrete, Inc.'s (dba Valley Concrete) motion for leave to file a cross-complaint and to reopen discovery. The motion is made pursuant to Code of Civil Procedure sections 428.50 and 2024.050, on the ground that the Plaintiff, Nationwide Mutual Insurance Company is "wrongfully using protected and privileged information to harm its Insureds [Defendants] and has otherwise engaged in bad faith insurance practices".

In support of their motion, Defendants claim that Plaintiff gained access to protected and privileged information solely by virtue of its fiduciary duties and tripartite privileged relationship in an underlying action and that Plaintiff continues to fail to abide by the contractual and extracontractual obligations it owes to its insureds (Defendants) in connection with the underlying action (*County of Santa Clara v. Gullicksen, et al*, Santa Clara County Case No. 1-09-9 CV141882, filed May 6, 2009). Defendants seek leave to file a cross-complaint against Plaintiff for breach of the implied covenant of good faith and fair dealing and to reopen limited discovery so Defendants may adequately prepare and prosecute their crossclaim. Defendants state that if leave to file the cross-complaint in this action is not granted, they will file a new lawsuit. Defendants argue that they have "become apprised" that Plaintiff is deliberately exposing protected and privileged information it obtained during its ongoing fiduciary and tripartite privileged relationship with Defendants and paint this information as being "recently learned".

Plaintiff opposes the motion, arguing, *inter alia*, that the motion should be denied as there has been undue delay that is prejudicial to it. Plaintiff presents important facts, some of which presumably Defendants are aware of, but chose to omit from their briefing: the current trial date is just over a month away (set for December 2, 2024), the five-year deadline to bring the case to trial pursuant to Code Civ. Proc., §583.010 is just over two months away (the statute runs on January 6, 2025), and Defendants were aware of the issues they present in support of this motion were known at least ten months ago, if not earlier, and Defendants have threatened such a filing since January 8, 2024. Further, given the limited time remaining before trial and the looming five-year statute, no time remains to conduct the discovery Defendants now seek, if the motion is granted. Plaintiff also argues that if Defendants had filed this motion when they originally threatened to do so (in January 2024), there would have been ample time to allow for the necessary motion practice and discovery.

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading." (Code of Civil Procedure, section 473 subd. (a)(1).) Judicial policy favors the liberal exercise of discretion to permit amendment of the pleadings so as to resolve all disputed matters between the parties in the same lawsuit. The California Supreme Court has held that under Code of Civil Procedure section 473 there is a "strong policy in favor of liberal allowance of amendments." (See *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 297.) The cases have established a policy of great liberality in allowing such amendments at any stage of the proceeding.

If the delay in seeking the amendment has not misled or prejudiced the other side, the liberal policy of allowing amendments prevails and it is an abuse of discretion to deny leave to amend. (See *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.)

The court's discretion is typically exercised liberally so as not to deprive a party of the right to assert a meritorious cause of action or a meritorious defense. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) This liberal policy of permitting amendments, however, is not without limitation or qualification. A proposed amendment should be timely made and should not be permitted where it will prejudice the opposing party (*Id*. at p. 530), or where other factors preclude a proposed amendment or otherwise render an amendment impermissible.

Leave to amend a pleading has been denied when the requested amendment was untimely or was prejudicial to the opposing party. (*Bank of America Nat. Trust & Savings Ass'n v. Goldstein* (1938) 25 Cal.App.2d 37, 46-47.) "Prejudice exists where the proposed amendment would require delaying the trial, resulting in added costs of preparation and increased discovery burdens." (*Miles v. City of Los Angeles* (2020) 56 Ca1.App.5th 728, 739).

Trial in this matter is set for December 2, 2024. The five-year statute runs on January 6, 2025. Although Defendants have adequately described the amendments they propose, their motion is lacking in all other respects. Plaintiff has amply demonstrated undue delay by Defendants, resulting prejudice to Plaintiff if the motion is granted, and, given the five-year statute, an amendment is simply not feasible for the filing of a responsive pleading and to conduct discovery. Further, as Defendants acknowledge, a new action can be filed by them with the claims they wish to bring. The motion of Defendants for leave to file a cross-complaint and reopen discovery is DENIED.

Plaintiff is instructed to prepare the formal Order.

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Calendar Line 8
Case Name: *Bonnie Niesen et al vs Intuitive Surgical, Inc., et al*
Case No.: 20CV373032

Before the Court is Plaintiffs Bonnie and Travis Niesen's motion for sanctions against Defendant Intuitive Surgical, Inc. for spoliation of evidence, pursuant to Code of Civil Procedure section 1005(b) and Rules of Court, Rules 3.1300 and 3.1200 et. seq. In support of their motion, Plaintiffs argue that Defendant failed for over two years to implement any legal hold and intentionally destroyed the da Vinci surgical robot (Serial No. SH0060) and its component parts that were used in Plaintiff Bonnie Niesen's November 7, 2018, surgery. Plaintiffs argue that as a result they cannot evaluate, compare, examine, or test these components to independently determine the cause of their failures and have been prejudiced.

Plaintiff Bonnie Niesen's surgery took place on November 7, 2018. Defendant manufactures the da Vinci® Surgical System, a robotic surgical system that surgeons use to perform minimally invasive surgery. Plaintiff's counsel contacted Defendant's counsel on July 23, 2019, to let him know about the case and counsel met on August 6, 2019. Plaintiffs' complaint, that alleged defects with Defendant's "stapler products," was filed on November 3, 2020. Intuitive issued a litigation document retention notice on February 10, 2021.

Plaintiffs claim, *inter alia*, that Defendants knew of defects in System SH0060 prior to Plaintiff Bonnie Niesen's November 7, 2018 surgery, that there were multiple issues during surgery, components were removed, tested and installed in different systems, the stapler was tested, failed and then destroyed, System SH0060 was "de-installed" on December 19, 2019, Defendants lost the ERBE in April 2020, the original ICB was tested and installed in a third system in Belgium on February 12, 2021, the patient side cart was destroyed in June 2022, Defendants failed to produce certain cables and a vessel sealer and cannot locate the relevant energy activation cables connecting the ERBE, ICB, and EndoWrist instruments. Plaintiffs further claim that the various destructions were intentional as Defendants failed to adhere to their own device retention policy. Plaintiffs assert that Code Civ. Proc., § 2023.030 authorizes various sanctions for discovery abuses, such as spoliation of evidence, including issuing terminating, issue and/or evidentiary sanctions, and that such a sanction must be imposed as Plaintiffs have been severely prejudiced.

In opposition Defendants argue that the statute relied upon by Plaintiffs allows sanctions only for "misuse of the discovery process," such as violations of a discovery order, which Defendant has not done. Defendants also argue that any destruction was not willful, as Plaintiffs have litigated this case for five years but have never identified a "defective" feature or function of the stapler design, that it disposed of the stapler at issue pursuant to its written policy and in the ordinary course of business years before it knew of any probable litigation by the Niesen Plaintiffs.

Defendants also state that Plaintiffs only recently served Intuitive with broad discovery requests about *other* components of the da Vinci Si surgical system used in Plaintiff Bonnie Niesen's procedure. Defendant responded that these components had already been scrapped or reused before it knew of probable litigation or of their relevance, pursuant to written policy and in the ordinary course of business. Defendants argue that it cannot be sanctioned for spoiling material that it had no duty to preserve. Defendants request that the Court deny the motion and award sanctions to Defendant for the time and expense incurred in responding to it.

Defendant's instruments were used in Plaintiff's surgery by Dr. Pickham, including an EndoWrist 45 surgical stapler and that the instruments were used with an Intuitive Si surgical system, serial number SH0060. A third-party (Covidien) stapler was also used as the use of different kinds of staplers were required for the surgery: Defendant's stapler was used to transect the rectum below the tumor and a Covidien circular stapler was used after the rectal transection to develop the anastomosis.

Defendants argue that after the surgery, it decommissioned or repurposed various instruments and components of the system. Each of those instruments and components was repurposed or decommissioned in the ordinary course of business, in accordance with its internal policies and procedures, and before litigation was probable or before Defendant knew of their alleged relevance. Defendant claims that it did not know that Plaintiff Bonnie Niesen suffered an injury until Plaintiffs' counsel contacted Defendant's counsel on July 23, 2019, the complaint was filed in November 2020 and from that first contact through the filing of the complaint and beyond, Plaintiffs' counsel focused solely on the Intuitive *stapler* used in Plaintiff's Bonnie Niesen's surgery – it was not until 2023 that Plaintiffs' counsel *first* raised any issues with *other* components such as the PSC. Plaintiffs produced medical records that allowed Defendant to confirm that the stapler used in Plaintiff's surgery was an EndoWrist 45 stapler for the da Vinci Si – according to Defendant, the stapler had never been subject to a recall or other field action.

On February 20, 2024, five and one-half years after the surgery, Plaintiffs served a first demand for an inspection of the system. Intuitive timely objected and responded to Plaintiffs' request. Plaintiffs did not bring any motion to compel or take issue with Defendant's responses.

Defendant submits that any duty to preserve arose at the earliest on July 23, 2019, when Plaintiffs' counsel first contacted its outside counsel about this matter, that Plaintiffs accuse Defendants of "destroy[ing]" the staplers used in the surgery, whilst admitting that those staplers were tested and scrapped in December 2018, before Defendants were advised of Plaintiffs claim. Likewise, the removal and reuse of the ICB and ERBE were both first reused in different systems in December 2018. Further, up until 2023, Plaintiffs' focus was only on the *staplers* and Defendant was not on notice of the relevance of the component parts – it did not know that the system's component parts might be relevant when they were scrapped or repurposed. Plaintiffs had requested information about the staplers used in the surgery and asserted that they had been recalled. They had not mentioned component parts such as the ICB, ERBE, PSC or vessel sealer until July 2023.

The Discovery Act authorizes a range of penalties for conduct that constitutes a misuse of the discovery process. (*Aghaian v. Minassian* (2021) 64 Cal.App.5th 603, 618). A variety of sanctions can be imposed against anyone that is misusing the discovery process. Misuse of the discovery process includes spoliation of evidence (*Sabetian v. Exxon Mobil Corp*. (2020) 57 Cal.App.5th 1054.) A terminating sanction is proper for spoliation of evidence (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223-1225).

Defendant was unaware that Plaintiff Bonnie Niesen suffered an injury until Plaintiffs' counsel contacted Defendant's counsel on July 23, 2019. Thus, any obligation to preserve would be in effect *after* that first notification – and then only with respect to the nature of the claims being made by Plaintiffs – the staplers. Based on the record before the Court, there is no

reason to conclude that Defendant would have anticipated litigation earlier, particularly based on the surgeon's testimony.

The record before the Court evidences that the staplers used in the surgery were tested and scrapped in December 2018, before Defendant became aware of Plaintiffs' claim. Further, from the November 2020 filing of the complaint until July 2023, Plaintiffs' counsel focused solely on Defendant's *stapler* used in Plaintiff's Bonnie Niesen's surgery—the complaint *only* identifies issues with the stapler. Two different manufacturers' staplers were used in Plaintiff Bonnie Niesen's surgery—Defendant and Covidien. It was not until 2023 that Plaintiffs' counsel *first* raised any possible issues with *other* components. Prior to that notification, other components such as the ICB, ERBE, PSC and vessel sealer were destroyed or re-deployed in the ordinary course of business and in accordance with Defendant's policies in effect (some in December 2018). Plaintiffs have also not shown prejudice or addressed if any circumstantial evidence would be insufficient to show a design defect. (*Hughes Tool Co. v. Max Hinrichs Seed Co*. (1980) 112 Cal.App.3d 194, 201.) The record before the Court also fails to show that Defendant's actions were willful to justify any of the sanctions requested. A such Plaintiffs' motion is DENIED. Defendant's request for monetary sanctions is also DENIED.

Responding party to prepare formal order.

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Calendar Line 9
Case Name: *State Farm Mutual Automobile Ins. Co. vs T. Gallo*
Case No.: 2014-1-CV-260201

Before the Court is Defendant Tomas Melendrez Gallo's motion to vacate and set aside the Renewal of Judgment entered against him, pursuant to Code of Civil Procedure sections 683.170(a) and (b) and *Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal. App. 4th 195, on the grounds that Plaintiff never served Defendant with the Summons and Complaint in the underlying action and Defendant had a Default and Default Judgment entered against him without due process of law and without obtaining requisite personal jurisdiction over Defendant.

Plaintiff argues that on February 6, 2014, Plaintiff State Farm Mutual Automobile Ins. Co. filed the underlying action against Defendant. On March 5, 2014, Plaintiff filed a Proof of Service of Summons with the Court that alleged substituted service of the Summons and Complaint on a "John Doe" at 8760 Center Parkway, Apt G242, Elk Grove, California 95758, on February 17, 2014. The Court then entered Default against Defendant on April 10, 2014, and Default Judgment against Defendant on September 29, 2014.

On June 6, 2024, Plaintiff filed its Application for Renewal of Judgment, and the court entered judgment on the Application for Renewal of Judgment. Plaintiff argues that the proof of service of summons of the underlying complaint is false and fraudulent as Defendant has no association of any kind with the address stated on the substituted service, 8760 Center Parkway, Apt G242, Elk Grove, California, he has never lived in the city of Elk Grove or the county of Sacramento. Defendant further declares that since the age of 15 in 2005, he has lived, resided, and received mail at 2259 Glen Way, East Palo Alto, CA 94303 and did not receive a copy of the summons and complaint against him either through personal delivery or the mail. Defendant argues that such defective service of process is a defense which may be raised on a Motion to Vacate Renewal of a Judgment. (*Fidelity Creditor Service, Inc. v. Browne* (2001) 89 20 Cal.App.4th 195, 203. In opposition Plaintiff argues that service was proper and that this motion is untimely.

Code of Civil Procedure section 683.170 (b) provides that a party may bring a motion to vacate renewal of judgment "[n]ot later than 60 days after service of the notice of renewal [of the judgment]". On June 24, 2024, Plaintiff served Defendant with Notice of Renewal of Judgment. Whilst Code of Civil Procedure section 663a for setting aside a judgment specifically dictates that 5 days should not be added for mailing (Code of Civil Procedure section 663a (c)), Code of Civil Procedure section 683.170 (a) under which this motion is brought, makes no such limitation. As the Notice of Renewal of Judgment was mailed on June 24, 2024, Defendant's motion is timely as it was filed "within 60 days of service" of the notice, on the 65th day on August 28, 2024 (adding 5 days for mailing).

Based on the record before the Court, good cause appearing, the motion is GRANTED and the Renewal of Judgment filed June 6, 2024, is SET ASIDE. *(Fidelity Creditor Service, Inc. v. Browne* (2001) 89 20 Cal.App.4th 195, 203; Code of Civil Procedure sections 683.170(a) and (b)).

Moving party to prepare formal order.

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