SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: September 26, 2023 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.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV389470	Rachael Goldberg v. West Valley-Mission Community College District	OFF CALENDAR
LINE 2	21CV389470	Rachael Goldberg v. West Valley-Mission Community College District	OFF CALENDAR
LINE 3	22CV403330	Mark Hacker v. Encore Industries et al.	Click on LINE 3 or scroll down for ruling.
LINE 4	20CV371761	Sharif Razzaqui et al. v. Leland Stanford University et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	21CV392859	Francisco Valencia Sanchez v. General Motors, LLC	Click on LINE 5 or scroll down for ruling.
LINE 6	20CV362267	Kim Neff v. City of Palo Alto	OFF CALENDAR
LINE 7	20CV366437	William Sump et al. v. Nathaniel Ready et al.	OFF CALENDAR
LINE 8	22CV397314	Xinxing Ren v. We Party, Inc. et al.	Click on LINE 8 or scroll down for ruling in lines 8-9.
LINE 9	22CV397314	Xinxing Ren v. We Party, Inc. et al.	Click on LINE 8 or scroll down for ruling in lines 8-9.
LINE 10	22CV401201	City of San Jose v. Dave Brough	Petition regarding disposition of weapons: this matter has been continued multiple times, but the court still has not received any more information pertaining to respondent's opposition. Parties to appear.

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Calendar Line 3
Case Name: *Mark Hacker v. Encore Industries et al.*
Case No.: 22CV403330

I. BACKGROUND

This is an action concerning the alleged involuntary dissolution of Encore Industries ("Encore"), brought by Plaintiff Mark Hacker ("Hacker") against Defendants Encore, Gary N. Vogel ("Vogel"), and Does 1-50 (collectively, "Defendants")

A. Procedural History

Hacker filed his original complaint on August 18, 2022, alleging the following causes of action against the Defendants:

1. Involuntary Dissolution of Corporation (against Encore only);
2. Breach of Fiduciary Duty (against Vogel only); and
3. Declaratory Relief (against all Defendants).

On March 27, 2023, the court heard Encore's demurrer to the complaint. The court overruled the demurrer to the second cause of action and sustained the demurrer to the third cause of action (based on application of the business judgment rule), with 10 days' leave to amend. In addition, the court denied Vogel's joinder to the demurrer as both procedurally and substantively defective.

Hacker filed a verified first amended complaint on April 12, 2023, alleging the same causes of action. Encore then answered the complaint, and Vogel now brings this demurrer to the second and third causes of action on the ground that they fail to allege sufficient facts. (Code Civ. Proc., § 430.10, subd. (e).)

B. Facts

Encore was incorporated in 1997. Until 2010, Vogel served as its CEO and President. (FAC, ¶ 8.) Hacker joined Encore in 2009 and succeeded Vogel as CEO and President upon Vogel's retirement in 2010. (*Id*. at ¶ 9.) In 2010, Hacker, Vogel, and Encore's Chief Financial Officer, Dan Potter, agreed that Hacker would acquire an ownership interest, reorganize the company to increase its value, and ultimately sell the company in ten years. (*Id*. at ¶ 10.)

In 2016, Hacker stepped down as CEO and President, while remaining as head of sales and marketing, leaving Vogel to re-assume a more active role in the company. (FAC at ¶ 14.) Despite receiving multiple offers to purchase Encore, Vogel rejected the offers and stated that he would prefer to shut down the company. (*Id*. at ¶ 17.) The complaint alleges that since taking a more active role in 2016, Vogel has increased Encore's expenses, created a toxic work environment, and withheld Encore Industries' financial information and meeting minutes. (*Id*. at ¶¶ 18-21.)

II. THRESHOLD ISSUES

A. Code of Civil Procedure Section 430.41, Subdivision (b)

Hacker contends the demurrer is improper because Vogel had the opportunity to raise these issues in the demurrer to the original complaint and failed to do so in contravention of Code of Civil Procedure section 430.41, subdivision (b).

"A party demurring to a pleading that has been amended after a demurrer to an earlier version of the pleading was sustained shall not demur to any portion of the amended complaint, cross-complaint, or answer on grounds that could have been raised by demurrer to the earlier version of the complaint, cross-complaint, or answer." (Code Civ. Proc., § 430.41, subd. (b).)

Although the plain language of this statutory excerpt appears to preclude Vogel from bringing the present demurrer—as the arguments he raises here "could have been raised by demurrer to the earlier version of the complaint"—the court is not aware of any case law that directly the addresses the somewhat unusual situation presented by this case: where a previous demurrer was brought by one defendant, the demurrer was sustained with leave to amend, and then a *different* defendant brings a second demurrer on different grounds. The court is aware of the principle that if a prior demurrer is *overruled*, an amended complaint opens the door to a demurrer on any grounds, even previously rejected grounds. (*Carlton v. Dr. Pepper Snapple Group, Inc.* (2014) 228, Cal.App.4th 1200, 1211.) This suggests that the amended complaint may have "opened the door" to a demurrer from a previously non-demurring defendant (even though Vogel did *try*, but failed, to demur last time).

In this case, because the present demurrer goes to the sufficiency of the pleading and whether Hacker can state a cause of action, and because Vogel could conceivably raise the argument through a different procedural vehicle (*e.g.*, a motion for judgment on the pleadings, motion to strike, or motion for summary adjudication), judicial economy would be served by consideration of the arguments on their merits. Therefore, the court addresses the demurrer on the merits.

B. Request for Judicial Notice

The court GRANTS Vogel's request for judicial notice of this court's March 27, 2023 order. (Evid. Code, § 452, subd. (d); see also *People v. Franklin* (2016) 63 Cal.4th 261, 280 ["'A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.'"].)

III. LEGAL STANDARD

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Allegations are not accepted as true on demurrer if they contradict facts judicially noticed. (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474.)

Where a demurrer is to an amended complaint, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making

contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034 (internal quotations omitted.)

"[A] demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy." (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047; see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 [holding a demurrer does not lie to part of a cause of action].)

IV. ANALYSIS

A. Breach of Fiduciary Duty

Hacker alleges that Vogel breached his fiduciary duty to Hacker by causing Encore to issue a Schedule K-1, making Hacker incur tax liability, while simultaneously refusing to allow Encore to make a distribution of Hacker's share of net income. In addition, Hacker alleges that Vogel breached his fiduciary duty by retaining for himself money that was obtained from Encore's sale of recycled metal. (FAC, ¶¶ 35-36.) Vogel now contends that the breach of fiduciary duty claim is improper because: (1) Hacker does not have standing to sue on behalf of Encore for Vogel's alleged retention of recycling money; (2) Vogel did not owe Hacker a fiduciary duty to declare or pay shareholder distributions; and (3) Hacker fails to allege causation sufficiently.[1]

The court OVERRULES Vogel's demurrer to the second cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

1. Retention of Encore's "Recycling Money"

Vogel insists that because Hacker failed to comply with the derivative claim pleading requirements of Corporations Code section 800, subdivision (b), only Encore has standing to bring a breach of fiduciary duty claim for the alleged retention of recycling money belonging to the corporation. In opposition, Hacker argues that as the minority shareholder of a closely held corporation, he may nevertheless bring a breach of fiduciary duty claim directly against Vogel, the majority shareholder.

California law generally holds that not only corporate officers and directors, but also majority shareholders, owe fiduciary duties to both the corporation and its minority shareholders. (See, e.g., *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 110-111 ("*Jones*"); *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1178.)

"In determining whether an individual action as opposed to a derivative action lies, a court looks at 'the gravamen of the wrong alleged in the pleadings.'" (*Holistic Supplements, LLC v. Stark* (2021) 61 Cal.App.5th 530, 542 [quoting *PacLink Communications Internat., Inc.*

[1] Vogel also maintains that the FAC fails to name Encore, an indispensable party to the derivative claim. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 ["When a derivative suit is brought to litigate the rights of the corporation, the corporation is an indispensable party and must be joined as a nominal defendant."]) To the extent that Vogel intended to demur on the ground of Code of Civil Procedure section 430.10, subdivision (d) (defect or misjoinder of parties), Vogel's failure to identify this argument in the notice of demurrer and within his memorandum of points and authorities is fatal. (Cal. Rules of Court, rule 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

v. Superior Court (2001) 90 Cal.App.4th 958, 965].) "Thus, 'the action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.'" (Jones, *supra*, 1 Cal.3d at p. 106 [quoting *Gagnon Co., Inc.* v. *Nevada Desert Inn, Inc.* 45 Cal.2d 448, 453.)

As noted in this court's March 27, 2023 order, an exception to the general rule applies to closely held corporations such as Encore, where there are only two shareholders:

> In [*Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1257-1260 (*Jara*)], Miguel Jara, Sr. ("Jara, Sr."), a minority shareholder of Suprema Meats, Inc. ("Suprema") sued the corporation and the two other shareholders: his son, Miguel Jara, Jr. ("Jara, Jr.") and Gonzalo Rodriguez ("Rodriguez"). In his second cause of action, Jara, Sr. alleged that Jara, Jr. and Rodriguez, as majority shareholders, breached a fiduciary duty to him by paying themselves excessive compensation and denying him a fair share of the corporate profits. The *Jara* Court held that it would be proper to allow direct action in closely held corporations with only a few shareholders, because harmful acts by one shareholder may directly impact the other shareholders.

(March 27, 2023 Order at p. 10:10-18.)

While Vogel contends that "[Hacker's] claim to some pro rata share of the recycling money is necessarily 'incidental' to the harm to the corporation," the FAC alleges that Encore is a closely held corporation analogous to the corporation in *Jara* and that as the majority shareholder of Encore, Vogel owed a fiduciary duty of care, loyalty, and good faith directly to Encore's minority shareholder (*i.e.*, Hacker). (FAC, ¶ 28.) Although it is true that the recycling money allegation essentially alleges a harm to the corporation itself, there were only two shareholders in this particular corporation, with the majority shareholder allegedly improperly retaining money that would otherwise have belonged to both him and the only other shareholder. (*Id.* at ¶¶ 6-7, 28.) Thus, the recycling money claim here is functionally indistinguishable from the excessive compensation claim that was at issue in *Jara*. Under the principles set forth in that case, Hacker may allege a direct action against Vogel for a breach of fiduciary duty, based on the retention of the recycling money, and Vogel's "standing" argument is unavailing.

Moreover, even if the court agreed with Vogel that the recycling money claim could only be brought as a derivative claim, it would not be the basis for a demurrer, as it only disposes of a part of the second cause of action. (*PH II, Inc., supra*, 33 Cal.App.4th at p. 1682.) For the reasons discussed below, the court concludes that Hacker has sufficiently pled the other portions of the second cause of action.

2. Failure to Declare or Pay Shareholder Dividends

Vogel demurs to the second cause of action on the ground that neither he nor the board of Encore had a duty to declare a dividend or cause Encore to pay a dividend. Again, this argument is dependent on the court finding that Vogel's alleged fiduciary duties are only as to the company itself, rather than as to Hacker as the sole minority shareholder of the company.

The second cause of action explicitly alleges that it is being brought in Hacker's capacity as the minority shareholder against the sole majority shareholder. (FAC, ¶ 29.) This is more than sufficient under the law. A minority shareholder has standing to bring suit in his individual capacity against a majority shareholder, alleging a breach of fiduciary duty that deprives the minority shareholder of a proportionate share of the corporation's value. (See *Jara, supra,* 121 Cal.App.4th at p. 1255 [citing *Smith v. Tele-Communication, Inc.* (1982) 134 Cal.App.3d 338].)

Vogel contends that because the alleged violations (*i.e.*, refusal to hold board meetings, refusal to pay dividends to shareholders, issuance of a Schedule K-1) affected all shareholders equally, the FAC does not sufficiently allege a breach of fiduciary duty claim. Central to Vogel's argument is the proposition that a breach of fiduciary duty occurs only when a majority shareholder acts in a manner that results in *disparate treatment* between the majority and minority shareholders.[2] But *Jones* specifically held that "[m]ajority shareholders may not use their power to control corporate activities to benefit themselves alone *or* in a manner detrimental to the minority." (*Jones, supra,* 1 Cal.3d at p. 108 [emphasis added].) The FAC alleges that Vogel "intended, by inflicting on [Hacker] a tax obligation with no cash to pay, to render [Hacker] incapable of further asserting his shareholder and director rights and force him into a position of having to sell his interest in the company to Mr. Vogel or ENCORE INDUSTRIES for a fraction of its value." (FAC, ¶ 29.) This is a sufficient allegation of conduct by the majority shareholder that was detrimental to the minority shareholder. Moreover, the complaint does contain at least a suggestion of disparate treatment in that when Vogel allegedly distributed the profits "to the employees and not the shareholders" of Encore (FAC, ¶ 26), that presumably included himself, given that he was the President of Encore.

Furthermore, contrary to Vogel's assertions, the FAC's allegation that Vogel "refused to have a board meeting [and] refused to discuss distributions" ((FAC, ¶¶ 21, 26, 28) means that Vogel directly interfered with the shareholder distributions process under Corporations Code section 307, subdivision (a)(8). This is a sufficient allegation of proximate cause.

3. Schedule K-1 Issuance

Vogel argues that he cannot be liable for the issuance of the Schedule K-1 as a matter of law, because the company, Encore, was legally obligated to issue that tax form. (Demurrer, p. 9:18-19.) Vogel further contends that regardless of whether he directed Encore to issue the Schedule K-1, the determination by Encore's tax accountant would still have triggered Hacker's obligation to report income on his own 2021 tax returns. (*Id*. at p. 10:10-14.)

The court agrees with Hacker, however, that this is an unduly narrow interpretation of the FAC, framing the issuance of the Schedule K-1 as an isolated act. Hacker maintains that issuance of the Schedule K-1 *in combination with* Vogel's refusal to arrange a board meeting to discuss distributions and consequent interference with Encore's payment of a dividend to Hacker (making him unable to pay the incurred tax liability and thereby pressuring him to sell his shares to Vogel at a reduced price) is what lies at the heart of the breach of fiduciary duty claim in the second cause of action. (Opposition, p. 10:22-28.)

[2] Vogel cites *Jones, supra*, 1 Cal.3d 93, but only generally; he neglects to provide a specific pin cite to support this proposition.

Even if the allegations regarding the Schedule K-1 are insufficient to stand alone, they (again) represent only a portion of the claim, and a demurrer does not lie to part of a cause of action. (*PH II, Inc., supra,* 33 Cal.App.4th at p. 1682.)

B. Declaratory Relief

Vogel argues that a demurrer to the third cause of action is proper because the FAC fails to allege an actual and present controversy between Vogel and Hacker regarding Encore's prior issuance of a K-1 and failure to pay shareholder distributions to Hacker. The court SUSTAINS Vogel's demurrer to the third cause of action, because the court agrees that the FAC fails to allege an actual, present controversy as to *him* (as opposed to *Encore*), and instead seeks to redress past wrongs allegedly committed by him. (*Monterey Coastkeeper v. California Regional Water Quality Control Bd., etc.* (2022) 76 Cal.App.5th 1, 13 ["In essence, declaratory relief operates to declare future rights, not to address past wrongs."]) Thus, "[a] party seeking declaratory relief must show a very significant possibility of future harm. (*Ibid.* [citing *Coral Construction, Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 17].) To state a claim for declaratory relief, a plaintiff must allege that there is "an '*actual controversy* relating to the legal rights and duties of the respective parties,' not an abstract or academic dispute." (*Centex Homes v. St. Paul Fire and Marine Insurance Co.* (2015) 237 Cal.App.4th 23, 29 (emphasis in original) [quoting *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 746-47] As Vogel points out here, "[i]f a dividend is required to be paid, the Court could only order Encore to pay it, since a dividend is, by definition, a distribution from a corporation to the shareholders . . . . Similarly, if the K-1 issued to Plaintiff is erroneous, Encore is the only party this Court could order to amend that document . . . ." (Reply at p. 10:11-15.)

For these reasons, even though the court has found an actual, present controversy between Hacker and Encore that is subject to a declaratory relief cause of action, it struggles to discern one as between Hacker and Vogel. The court sustains Vogel's demurrer to the third cause of action *with 10 days' leave to amend.*

The court reminds Hacker that when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not add entirely new causes of action. (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. Absent prior leave of court an amended complaint raising entirely new and different causes of action may be subject to a motion to strike. (See *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1023.)

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Calendar Line 4
Case Name: *Sharif Razzaqui et al. v. Leland Stanford University et al.*
Case No.: 20CV371761

I. BACKGROUND

This action arises from a pedestrian-automobile collision between plaintiff Sharif Razzaqui, who was the pedestrian, and defendant Bang Ngo, who was driving a vehicle for Stanford Health Care, on June 22, 2020 in Palo Alto, California. The collision occurred near the patient loading and unloading area in front of the Stanford Neuroscience Health Center, which is owned by defendant Board of Trustees of the Leland Stanford Junior University and operated by defendant Stanford Health Care.

The complaint, filed on October 5, 2020 by Sharif and Marghuba Razzaqui (collectively, "Plaintiffs"),[3] is a form complaint stating two causes of action—motor vehicle negligence and premises liability—against several named defendants and various Doe defendants. The first cause of action for negligence is alleged against all defendants, including the various Does. The narrative portion of the attachment for the first cause of action states, in relevant part: "Bang Zuan Ngo was careless in his attention, perception, knowledge, memory, skill, safety judgment and otherwise negligent in the operation of a motor vehicle. Said negligence legally caused said vehicle to run over Sharif Razzaqui." The first cause of action also alleges (through check boxes) that Does 1-5 and 1-20 employed the operator of the motor vehicle, owned and entrusted the motor vehicle, and were agents of all other defendants.

The second cause of action for premises liability is also alleged against all defendants, including the various Does. The narrative portion of the attachment for the second cause of action states: "Sharif Razzaqui had exited the Stanford University medical building and was crossing the street in front of that building when he was run over by a motor vehicle operated by Bang Ngo. Said street and the surrounding area were in a recognizable and unreasonably dangerous condition as a result of the design, construction, inspection, modification, failure to warn, failure to instruct and failure to otherwise take reasonable steps to protect plaintiff." The second cause of action also alleges that "Does 1-20 were negligent in the design, construction, inspection, possession, maintenance, failure to warn, failure to instruct and guide and failure to otherwise protect persons exiting and entering the medical building at said premises." The second cause of action does not specifically allege what the dangerous condition or conditions of the property were or how any condition(s) caused the accident.

On January 13, 2022, Plaintiffs filed a Doe amendment substituting Securitas Security Services USA, Inc. ("Securitas") for "Doe 1" in the complaint. Securitas demurred to the complaint, and in an order dated July 26, 2022, this court (Judge Kirwan) sustained Securitas's demurrer to the first cause of action without leave to amend and to the second cause of action with leave to amend.[4] Among other things, the court's order stated that the complaint "currently fails to adequately allege what the alleged dangerous condition or conditions are." (July 26, 2022 Order at p. 6:16-17.) Rather than amend the second cause of action, Plaintiffs dismissed Securitas. After the court (the undersigned) granted Plaintiffs' motion for a

[3] At times, the court refers to Plaintiffs as either "Mr. Razzaqui" or "Mrs. Razzaqui" for purposes of clarity.
[4] The court takes judicial notice of the July 26, 2022 order on its own motion pursuant to Evidence Code section 452, subdivision (d).

preferential trial setting under Code of Civil Procedure section 36 (over defendants' objection), the case is now set for trial on October 16, 2023.

Currently before the court is a motion for summary adjudication as to the second cause of action for premises liability, brought by defendants Stanford Health Care and The Board of Trustees of the Leland Stanford Junior University (collectively, the "Stanford Defendants"). The motion was filed on June 30, 2023 and originally set for hearing by the court clerk's office on November 9, 2023. Because of the preferential trial setting, however, the Stanford Defendants requested that the motion hearing date be advanced, and the court granted that request, rescheduling the hearing to the last reasonable date before trial (September 26, 2023, which is just 20 days before trial). The court informed the parties that any opposition to the motion would be due on September 12, 2023 and any reply would be due on September 20, 2023. Plaintiffs filed an opposition brief on September 12 but then filed additional opposition papers after that date (discussed below).

II. THE PRESENT MOTION

A. General Standards for Summary Judgment/Adjudication

A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Automobile Association* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].) Summary adjudication of general "issues" or facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

The pleadings limit the issues presented for summary judgment/adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 73 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion."].) The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise additional theories of liability. '[S]ummary judgment cannot be denied on a ground not raised by the pleadings. [Citations.]'" (*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 290 (*Nativi*), internal citation omitted; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["A party may not oppose a summary judgment

motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings"].) The burden of a defendant moving for summary judgment only requires that it negate a plaintiff's theories of liability as alleged in the complaint. A moving party need not "'refute liability on some theoretical possibility not included in the pleadings.'" (*County of Santa Clara v. Atlantic Richfield Co*. (2006) 137 Cal.App.4th 292, 332-333 [quoting *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342].)

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action . . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder 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 850.) "A party """cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]" [Citation.]' [Citation.]" (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1379; see also *McHenry v. Asylum Entertainment Delaware, LLC* (2020) 46 Cal.App.5th 469, 479 [because speculation is not evidence, speculation cannot create a triable issue of material fact].)

B. General Standards for Premises Liability

"Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-Cinema, Inc*. (1999) 72 Cal.App.4th 1403, 1406.) "Premises liability is a form of negligence . . . and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611, 1619; see also CACI 1001 (2020 rev.) ["A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others."].)

There is also a separate notice requirement: "An owner is liable for harm caused by a dangerous condition, of which the owner had actual or constructive knowledge. An injured plaintiff *has the burden of showing that the owner had notice of the defect in sufficient time to correct it*, but failed to take reasonable steps to do so." (*Howard v. Omni Hotels Management Corp*. (2012) 203 Cal.App.4th 403, 431 (*Howard*), citations omitted, emphasis added.) "Although no two accidents happen in the same way, to be admissible for showing notice to a landowner of a dangerous condition, evidence of another similar accident must have occurred under substantially the same circumstances." (*Id*. at p. 432.)

"An owner of real property is 'not the insurer of [a] visitor's personal safety . . .' However, an owner is responsible 'for an injury occasioned to another by [the owner's] want of ordinary care or skill in the management of his or her property . . . . ' Accordingly, landowners are required 'to maintain land in their possession and control in a reasonably safe condition,' and to use due care to eliminate dangerous conditions on their property." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943-944, internal citations and quotations omitted.) "The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156.)

With regard to a property owner's obligations, "if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." (*Krongos v. Pacific Gas & Electric Co*. (1992) 7 Cal.App.4th 387, 393 (*Krongos*).) The determination as to whether a particular danger is open and obvious rests upon an objective standard. (*Bunch v. Hoffinger Industries, Inc*. (2004) 123 Cal.App.4th 1278, 1295–98.) Thus, the inquiry is whether the dangerous condition is obvious to a reasonable person, not the plaintiff in particular. (*Ibid*.; see also *Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 126–27 ["Any reasonable person would know that standing within a few feet of a high speed freight train is dangerous."]; *Miller v. Pacific Constructors* (1945) 68 Cal.App.2d 529, 540.)

C. The Stanford Defendants' Grounds for Summary Adjudication

The Stanford Defendants argue that the second cause of action cannot proceed to trial against them because: (1) there is no evidence that they allowed a dangerous condition to exist in the parking lot where the accident occurred or failed to take reasonable steps to secure the property; (2) there is no evidence that any condition of the property itself caused the accident; (3) there was no actual or constructive notice of any dangerous condition in the parking lot; and (4) at least as to defendant Board of Trustees, it "is an owner out of possession." (Notice of Motion and Motion at p. 2:1-11.) The Stanford Defendants have submitted the required separate statement of undisputed material facts, which includes each of the grounds stated in the notice of motion.

According to the Stanford Defendants, Mr. Razzaqui testified at his deposition that he was familiar with the parking lot, the nearby crosswalks, and their purpose. He had used the crosswalks before, but on the day of the accident, he chose to walk into the street because it was more convenient to do so. Ngo's vehicle then struck him. The Stanford Defendants argue that the risk of being struck by a motor vehicle while attempting to walk across the passenger loading and unloading zone in front of the Stanford Neuroscience Health Center, was "an open and obvious danger, that in and of itself provided warning to Sharif." Defendants contend that they "were under no additional duty to warn Sharif": "that cars drove" in this area, "that he could be struck by a car while walking in the street in the direction of oncoming traffic," or "that a crosswalk was only a few steps from the exit from the building, which he could (and has used before) use [sic] to safely cross the street." (MPA at p. 8:9-13). They also note that Plaintiffs have "failed to allege any specific characteristic of the property which caused or contributed to the incident. Plaintiffs simply argue in the discovery responses that there were no signs directing Mr. Razzaqui to use the clearly marked and designated crosswalk which is located only a few feet away from the entrance/exit of the Neuroscience Building." (*Id.* at p.

8:26-28.) Defendants further argue that there is no evidence that they had actual or constructive notice of any dangerous condition in the parking lot and that the Board of Trustees of Stanford University should not be separately liable because they rented the property to Stanford Health Care, which assumed all responsibility to maintain the property. (*Id*. at pp. 12:19-15:11 & 15:12-18:7). Defendants assert that prior to the June 2020 accident in this case, there had never been any instance of a car hitting a pedestrian at the Stanford Neuroscience Health Center.

The summary adjudication motion is supported by four declarations. The first, from counsel Adam Stoddard, authenticates Exhibits B-H in the Stanford Defendants' packet of supporting evidence. Exhibits B, C, and E are copies of the Complaint and the answers filed by the two Stanford Defendants. Exhibit D is a copy of Sharif Razzaqui's verified responses to special interrogatories propounded by Stanford Health Care. In his answers to "state all facts" interrogatories regarding premises liability (Nos. 6-14), Mr. Razzaqui states that there were no signs or other communications warning him not to walk into traffic, that there were no traffic control features for cars moving "in Mr. Ngo's direction," that there were "several posts with rope like attachments" forming a barrier at the end of the sidewalk "near the accident location," and that "part of the parking provided is located so that at some point persons exiting the building have to cross the subject street to get to their vehicle."

Exhibit F attaches excerpts from Mr. Razzaqui's November 15, 2022 deposition. Mr. Razzaqui testified that he and his wife had been to the Stanford Neuroscience Health Center's parking lot 40-50 times before the date of the accident; that he would usually drop his wife off at the loading and unloading zone in front of the building and then park his car; that he was aware of the crosswalks in the parking lot; that he did not use them on the day of the accident because they did not lead to his car and it was more convenient to walk in the street; and that "everybody else" did it that way. He also testified that there was "nothing" preventing him from using the crosswalks on the date of the accident. Exhibit G consists of excerpts from the deposition of defendant Bang Ngo. He testified that he was working for Stanford Health Care on the day of the accident and estimated that he was driving at 5 miles per hour at the time of the accident. Exhibit H is a copy of the Palo Alto Police Department's report of the accident (which is usually inadmissible under Vehicle Code section 20013).

The second declaration is from Richard Haygood, P.E., a civil engineer and traffic engineer hired by the Stanford Defendants to provide expert opinions. A copy of Haygood's CV is submitted as Exhibit A. Haygood opines that "the parking lot was ***not*** in an unreasonably dangerous condition, nor did the parking lot itself cause or contribute to Mr. Ngo (the driver of the vehicle) running over Plaintiff, Sharif Razzaqui, with his vehicle. Furthermore, it is my opinion that the inclusion of additional signs or warnings was not merited according to accepted standards for parking lots, and it would be pure speculation that such devices would have prevented the accident." (Haygood Decl., ¶ 5; emphasis in original.) Haygood further opines "that, more likely than not, the collision could have been avoided had Sharif walked the designated path of travel leaving the building (walked to the right and used the designated sidewalk). In this regard, had Sharif taken the time to walk to the right out of the exit of the building and toward the crosswalk, Bang Ngo's vehicle would have likely passed Sharif before he even made it to the crosswalk." (*Id.* at ¶ 7.) He also states that "Stanford Health Care complies with their duty by providing a safe designated path of travel for pedestrians coming from and going to the building . . . . [A] sign at the entrance or exit to the building directing pedestrians to the location of the sidewalk is unnecessary and very likely

would not have made a difference for this accident . . . . It would be pure speculation that had a sign been posted, Sharif would have taken the time to read the sign. It would be even more speculative [to assert] that if Sharif read the sign, he would have conformed to its message, and not walked in the street, and instead used the crosswalk . . . . Sharif, with the understanding that cars drive in the parking lot, and the understanding that cars would be traveling in the direction he was walking back toward his car, and the fact that he was aware of and had used the crosswalk prior to the accident, ignored these open and obvious conditions and made a conscious decision to walk in the street." (*Id.* at ¶¶ 7.1, 7.2.)

The third declaration is from Thomas Roussin, Director of Security for Stanford Health Care. He states that any reported accident between a pedestrian and car in the parking lot of the Neuroscience Health Center would have generated an incident report. After conducting a search of Stanford Health Care's computer database, the only incident report he found was for the accident between Sharif Razzaqui and Bang Ngo.

The fourth declaration is from Jason Francis, the Executive Director of the "Neuroscience Service Line" for Stanford Health Care. He states in the lone substantive paragraph that he "was asked to pull census data for the clinic so that an estimate could be generated that identifies an approximate number of patients visiting the building prior to June of 2020. Based on the date, there were 434,614 patient encounters between 2016 and May of 2020 (just before the June 2020 accident). These figures do not include friends, family members, staff, security, or any other people visiting the building."

D. Plaintiffs' Failure to Comply with Statutory Requirements

The 139-page opposition document filed by Plaintiffs on September 12, 2023—the only timely document filed—did not include an opposing separate statement. This was a material omission. "Code of Civil Procedure section 437c, subdivision (b)(3) requires that an opposition to a motion for summary judgment shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." (*Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co*. (2009) 170 Cal.App.4th 554, 568, internal citations omitted.)

"The requirement of a separate statement from the moving party and a responding statement from the party opposing summary judgment serves two functions: to give the parties notice of the material facts at issue in the motion and to permit the trial court to focus on whether those facts are truly undisputed." (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co*. (2005) 133 Cal.App.4th 1197, 1210.) "Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for SAI and summary judgment to determine quickly and efficiently whether material facts are disputed . . . . It is no answer to say that the facts set out in the supporting evidence or memoranda of points and authorities are sufficient." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335.)

On the afternoon of September 18, 2023, six days after the opposition was due and two days before the Stanford Defendants' reply was due, Plaintiffs filed several documents without leave of court, including a responding separate statement. "A trial court has broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a *prior* court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765, emphasis added.) Code of Civil Procedure section 437c(b)(2) "forbids the filing of any opposition papers less than 14 days prior to the scheduled hearing, and case law has been strict in requiring good cause to be shown before late filed [opposition] papers will be accepted" in a summary judgment proceeding. (*Hobson v. Raychem Corp*. (1999) 73 Cal.App.4th 614, 625, disapproved on another point in *Colmenares v. Braemar Country Club, Inc*. (2003) 29 Cal.4th 1019, 1031, fn. 6.) The Court of Appeal in *Bozzi* also noted that where the moving parties "followed all the rules" they "were entitled to expect the trial court to enforce them," and because the "[opposing party] did not invoke any of the available procedures to obtain a court order permitting [them] to file late papers," the Court of Appeal could not "find any reason to conclude [that] the trial court abused its discretion" in refusing to consider the late opposition. (*Bozzi*, *supra*, 186 Cal.App.4th at p. 765.)

On September 19, 2023, Plaintiffs filed an ex parte application for permission to file a second declaration from Dr. Anthony Andre. The court granted the request to allow the filing of Andre's second declaration, and it will also exercise its discretion to consider the late-filed opposing separate statement.[5] The court will not consider any of the other late-filed "supplemental" exhibits, including the "supplemental" declaration of Plaintiffs' counsel (Exhibit 7) and the late-filed evidentiary objections.[6] Even with the advanced hearing date for the summary adjudication motion, Plaintiffs had more than two months to prepare opposition papers, and they provide no explanation here for failing to seek permission to submit late papers *before* September 12, 2023. (They also provide no explanation whatsoever for the late-filed supplemental exhibits, other than Andre's late declaration.) It is particularly unfair to the Stanford Defendants to have these papers, without advance notice, just two days before the reply brief was due.

E. Plaintiffs' Opposition and Evidence

Plaintiffs' opposition brief sets forth the underlying facts of the accident, and it addresses *some* of the elements of premises liability (for example, it does not address the notice requirement). It argues that "Plaintiffs' human factors expert believes that the accident area is unreasonably dangerous for pedestrian traffic[.] The failure to provide direct access to and from the parking lot, the failure to prohibit access to the route taken by plaintiff, failure to direct plaintiff to turn right and 'take the long way home' breach[ed] the duty owed to pedestrians to maintain the premises . . . in a reasonably safe condition." (Opposition at p. 4:5-9.) It also argues that "plaintiffs['] roadway design experts believe there should have been a cross walk in front of the building entrance that led across the street," and claims that "[i]f

[5] In its September 20, 2023 order, the court also permitted defendants to file "a supplemental reply of three pages or less to the late declaration of Dr. Andre by September 22."

[6] In addition to being untimely under section 437c(b)(2), the objections are also untimely under rule 3.1354(a) of the California Rules of Court, which provides: "Unless otherwise excused by the Court on a showing of good cause, all written objections to evidence in support of or in opposition to a motion for summary judgment must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed."

there were a crosswalk as described [above] plaintiff would have used the same." (Opposition at p. 5:2-9.)

Plaintiffs submit five declarations with the opposition that was timely filed on September 12. The first, a declaration from Plaintiffs' counsel Richard Staskus, attempts to offer personal testimony regarding the layout of the subject parking lot and attempts to authenticate several stills from defendants' surveillance video of the accident (Exhibits 1A-1V).

The second declaration is from Sharif Razzaqui. The court disregards any statements in this declaration that conflict with his deposition testimony. In his deposition, Mr. Razzaqui testified that nothing prevented him from using the crosswalks on the "right" side of the health center on the day of the accident and that instead of doing so, he walked directly to his car (on the left side) because it was more convenient. In his declaration, however, he states that if certain poles and wires had not been present directly in front of the Neuroscience Health Center, blocking his path, he would have walked "across the traffic lane and up the sidewalk to my vehicle" (¶ 7) rather than the direct and "more convenient" route that he actually took through the dropoff/pickup area and parking lot on June 22, 2020. This revisionist history is impermissible under *Ahn v. Kumho Tire* (2014) 223 Cal.App.4th 133, 144. In addition, because it appears to be based on subsequent remedial measures that were taken by Stanford—a "sidewalk [that was] installed after the accident" (¶ 7)—it is also inadmissible under Evidence Code section 1151.[7]

The third declaration is from Mohammad Atarod, Ph.D., P.E., one of Plaintiffs' experts, who opines (at ¶ 8) that "[i]f there had been a crosswalk providing direct access to and from the parking lot and Neuroscience Building, as the one installed after the collision, and Mr. Razzaqui used that crosswalk, with the vehicle and pedestrian speeds remaining the same, there would have been no collision." Atarod does not opine that there was any dangerous condition at the subject property, or that the Stanford Defendants had any actual or constructive notice of such a condition. In addition, Atarod discusses subsequent remedial measures taken by Stanford in his declaration (also noted in Mr. Razzaqui's declaration above), which is inadmissible under Evidence Code section 1151.

The fourth declaration is from Dale Dunlap, P.E., who states (in ¶ 7) that he was retained to "provide opinions . . . with respect to the accessibility standards that are set forth in the applicable Americans with Disabilities Act standards and the California Building Code." Plaintiffs' complaint cannot reasonably be construed as alleging any violation of either the ADA or the California Building Code, and so the relevance of this declaration is entirely unclear.

The fifth declaration is the initial declaration from Anthony Andre, Ph.D., CPE. This declaration explains that Andre was "diagnosed with Covid" for the past six days and "will be unavailable and out of work for another week." He states that he is "unable to assist in the

[7] Moreover, it is contradicted by Andre's second declaration, which states that even with the installation of these remedial measures, other patients walking to and from the health center typically take the route that Mr. Razzaqui actually took, rather than the one he now claims he would have taken. (Second Declaration of Anthony Andre at p. 6.)

preparation of plaintiffs' opposition to defendants' motion for summary adjudication during this time."

The sixth declaration in support of the opposition, the late-filed second declaration from Andre that the court has agreed to consider, opines that Mr. Razzaqui's path after exiting the neuroscience building on the day of the accident "was reasonable and foreseeable" and that the design of the parking lot is "dangerous, providing little or no preview of the pedestrian crossing area prior to the sharp turn required to reach the building entrance." (Declaration at p. 9)[8] He also states that, had drivers "been instructed to yield or stop" or "been warned of the presence of pedestrians through signs and indicators (flashing lights)," the accident would not have happened. Andre does not make any statements regarding actual or constructive notice of any dangerous condition.

F. Analysis

The court GRANTS the Stanford Defendants' motion for summary adjudication as to the second cause of action for premises liability. The Stanford Defendants' evidence is sufficient to meet their initial burden to establish both that no dangerous condition existed in the subject parking lot and that they had no actual or constructive knowledge of any claimed dangerous condition. Their evidence (the Declaration of Richard Haygood) is also sufficient to establish that the accident was caused by an open and obvious condition—*i.e.*, motor vehicle traffic moving through the patient dropoff/pickup area in front of the Stanford Neuroscience Health Center. The motion also points out, as Judge Kirwan did previously, that the complaint fails to identify the claimed dangerous condition or allege how the condition or conditions caused the accident.

When the burden shifts to Plaintiffs, they are unable to raise triable issues of material fact. The opposition fails to address actual or constructive notice at all, which is the Plaintiffs' burden to prove, separate from the existence of a dangerous condition. (See *Howard*, *supra*.) As this is a required element that Plaintiffs *must* establish, the failure to address it at all is, by itself, a basis to grant the motion.

Plaintiffs' opposition and evidence also do not directly respond to Defendants' contention and evidence that the cause of the accident was an open and obvious condition—*i.e.*, traffic moving through the patient dropoff/pickup area—as to which Defendants would not have had a duty to warn or to remedy as a matter of law. (See *Krongos*, *supra*, 7 Cal.App.4th at p. 393.) Andre's second declaration does not address this at all. Instead, he merely speculates that *further* signage could potentially have prevented this accident from occurring, even though the Razzaquis acknowledge that they had already been to the health center "40-50" times before and were already well aware of the crosswalks to the "right" of the building exit. The court finds that this opinion by Andre is conclusory and conjectural and therefore must be disregarded. (*Borger v. Department of Motor Vehicles* (2011) 192 Cal.App.4th 1118, 1122.) The notion that an additional sign advising Mr. Razzaqui to take a longer, safer, but less convenient route from the health center to his car would actually have changed his behavior is sheer speculation, and it is not the proper subject of expert testimony.

[8] Andre's second declaration does not include any paragraph or line numbers.

Finally, as to the existence of a dangerous condition and causation of injury, the court notes that a summary judgment or adjudication cannot be denied on grounds not raised by the pleadings. (*Bostrim v. County of San Bernardino* (1995) 35 Cal App 4th 1654, 1663-1664.) As the Stanford Defendants point out, the operative complaint does not actually identify the alleged dangerous condition of the subject property or explain how it caused the accident. The declarations submitted by Plaintiffs either fail to state that any dangerous condition existed on the property, or they attempt to introduce issues that are not alleged in the complaint: for example, the notion that the absence of an *additional crosswalk* a bit closer to the center of the building—but still not on the path that Mr. Razzaqui actually took—is what made the area dangerous. This idea is not fairly raised by the complaint. Again, "'summary judgment cannot be denied on a ground not raised by the pleadings. [Citations.]'" (*Nativi, supra*, 223 Cal.App.4th at 290; *Jacobs, supra*, 14 Cal.App.5th at p. 444 ["A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion."].) Plaintiffs have been on notice since at least July 26, 2022 that the second cause of action does not identify what the dangerous condition or conditions are or explain how any condition or conditions caused Mr. Razzaqui's injury.

To the extent that the complaint's allegation of a "failure to warn" or "failure to instruct" sufficiently encompasses the opinions in Plaintiffs' experts' declarations that the dangerous condition was in fact the absence of *additional signage* directing patients not to walk directly to their cars but instead to walk to the pre-existing crosswalks to the "right" of the building exit, the court still finds these opinions to be based on conjecture rather than actual facts. These opinions are contradicted by Mr. Razzaqui's own deposition testimony that he was well aware of the crosswalks and deliberately chose not to use the crosswalks because they were less direct and convenient for his path to his car.[9] For this reason, the court finds the bare conclusions in the expert declarations regarding additional signage—offered as an expert opinions—to be completely speculative and insufficient to create a triable issue of material fact.

In short, the court grants the motion primarily on the ground that there is no material factual dispute that the Stanford Defendants had no actual or constructive notice of any purported dangerous condition, and secondarily on the ground that Plaintiffs have failed to show a material factual issue as to the existence of a dangerous condition. It is therefore unnecessary for the court to address the additional issue raised by the Stanford Defendants as to whether the Board of Trustees was "an owner out of possession."

G. The Stanford Defendants' Evidentiary Objections

With their reply, the Stanford Defendants have submitted objections to several of the materials submitted by Plaintiffs. To the extent that the Stanford Defendants object to material that the court has already stated that it has not considered (all late-filed material other than the second declaration from Andre and the opposing separate statement), it is not necessary for the court to rule on those objections. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems

[9] Indeed, they are also contradicted by Andre's second declaration, in which he observes that even with the introduction of subsequent remedial measures, pedestrians continue to take a direct route to their cars.

material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (CCP § 437c(q).)

To the extent that the Stanford Defendants object to material submitted with Plaintiffs' timely opposition, the court rules as follows:[10] Defendants' objection to portions of the Staskus Declaration is overruled. Defendants' objection to portions of paragraphs 4 and 7 of the Sharif Razzaqui Declaration is sustained (for the reasons stated above). As for Defendants' seven objections to the declaration of Mohammad Atarod, Ph.D., P.E., objections 1-6 are overruled and objection 7 is sustained (again, for the reasons stated above). Regarding Defendants' two objections to the declaration of Dale Dunlap, P.E., objection 1 is sustained and objection 2 is overruled. The court also overrules Defendants' objection to the entirety of the first declaration from Andre.

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[10] The court notes that Defendants' objections are not all consecutively numbered, as required by rule 3.1354(b) of the Rules of Court.

Calendar Line 5
Case Name: *Francisco Valencia Sanchez v. General Motors, LLC*
Case No.: 21CV392859

Plaintiff Francisco Sanchez moves to compel the deposition of defendant General Motors, LLC ("GM")—specifically, Categories 1-4, 7, and 10 from its April 11, 2022 notice of deposition. GM responds that it has been willing to produce a person-most-qualified ("PMQ") to testify as to these categories for the better part of a year. Yet, the parties have been unable to agree upon time and place for completing the deposition.

The court finds the parties' briefing on this motion to be singularly unhelpful, with the parties mainly talking past each other and failing to explain clearly to the court exactly what remains to be resolved between the parties. For example, neither side's briefing actually addresses the language of Categories 1-4, 7, and 10. The lack of clarity may have been ameliorated with a separate statement, but as GM points out, Sanchez failed to include a separate statement with his motion, which is *required* here by the rules of court.[11] In addition, although GM claims that it agreed to produce a witness, it fails to explain why it did not respond to Sanchez's counsel's emails of December 12, December 28, January 4, and February 23 regarding a date for the deposition. The court finds that both sides failed to engage in good-faith meet-and-confer efforts. Instead, both sides apparently went through the motions of sending minimal meet-and-confer correspondence without making any meaningful attempt to resolve their differences.

Having now reviewed Categories 1-4, 7, and 10, the court is even more puzzled by the parties' apparent impasse, because these categories are entirely generic and non-controversial. No. 1 focuses on the service and warranty history for the "subject vehicle" (Sanchez's 2017 Chevrolet Silverado 1500). No. 2 focuses on communications between GM and Sanchez. No. 3 focuses on communications between GM and anyone else regarding the "subject vehicle." No. 4 focuses on service advisory notices, technical service bulletins, recalls, defect investigations, and other repair documents "relating to" the "subject vehicle." No. 7 focuses on GM's alleged refusal to repurchase the subject vehicle "promptly." No. 10 focuses on the terms of the owner's manual, maintenance schedules, and warranties "as they relate to" powertrain defects.

The one area that appears to be in dispute—although it is not very clear from the parties' generic briefs—arises from Category No. 4's identification of "recalls" and "defect investigations" "relating to" the "subject vehicle." Sanchez argues that if GM issued recalls and conducted internal investigations concerning powertrain defects in the Silverado 1500 vehicle, then that is relevant to whether GM acted "willfully" under the Song-Beverly Act. GM argues that any investigations or "data concerning other consumers or their vehicles is irrelevant." The court concludes that to the extent that there were recalls or internal investigations regarding powertrain defects in the Silverado 1500, then plaintiff may inquire into those recalls and investigations at a PMQ deposition, even if it involves "other consumers or their vehicles." That information is discoverable. But any recalls or investigations relating to powertrain defects in *other* GM models (not the Silverado 1500), or any recalls or

[11] The court disagrees with Sanchez's contorted five-paragraph argument in his reply brief that Rule 3.1345 of the California Rules of Court somehow does not apply. (Reply at pp. 4:8-5:21.)

investigations relating to *other* defects (not powertrain defects) in the Silverado 1500 are outside the scope of discoverable information.

With the foregoing caveats, the court GRANTS in part and DENIES in part Sanchez's motion to compel. The court orders that the deposition proceed for Categories 1-4, 7, and 10 of the deposition notice within 30 days of the date of this order, unless the parties explicitly agree otherwise.

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Calendar Lines 8-9
Case Name: *Xinxing Ren v. We Party, Inc. et al.*
Case No.: 22CV397314 (lead case, consolidated with Case No. 22CV402387)

I. BACKGROUND

A. Procedural History Before May 9, 2023

The following recitation of the early procedural history of the case is derived in large part from the court's May 9, 2023 order:

This is a dispute over the ownership of a restaurant, brought by plaintiffs Xinxing Ren ("Ren") and Zhiming Zhou ("Zhou") against defendants Anjiang Wu ("Wu"), Baiyu Hu ("Hu"), Yinghai Li ("Li"), and We Party, Inc. ("We Party").

Ren filed her original complaint on April 26, 2022 (Case No. 22CV397314), while she was represented by counsel. That complaint stated claims for: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Promissory Estoppel; (4) Fraud; (5) Unfair Business Practice; (6) Unjust Enrichment; (7) Money Paid; (8) Accounting; and (9) Conspiracy. She alleged that defendants Wu, Hu, and Li were all the alter egos of We Party.

We Party brought a demurrer to Ren's complaint, as well as a motion to strike the complaint's request for punitive damages. Ren, now self-represented, opposed both motions and separately filed a motion for leave to file a first amended complaint ("FAC"). This court (Judge Kirwan) heard the demurrer and motion to strike on September 8, 2022. At that hearing, the court adopted its uncontested tentative ruling, sustaining the demurrer with leave to file the proposed FAC and denying the motion to strike as moot in light of the demurrer ruling. A formal order to that effect was issued on September 12, 2022.[12]

On August 25, 2022, Zhou, also self-represented, filed a complaint against Wu, Hu, Li, and We Party, alleging the same causes of action as Ren as well as a tenth cause of action for "Unpaid Wages." (Case No. 22CV402387.) Zhou's allegations in many respects duplicated Ren's, with much of the same text apparently cut and pasted from one pleading into the other.

On September 29, 2022 Wu, Hu, Li, and We Party filed and served a cross-complaint against both Ren and Zhou. The cross-complaint states claims for: (1) Declarative Relief; (2) Breach of Contract; (3) Breach of Good Faith Covenant; (4) Breach of Fiduciary Duty; and (5) Accounting. The proof of service indicates that the cross-complaint was served on Ren via electronic service and first-class mail on September 27, 2022. Ren filed an answer to the cross-complaint on November 2, 2022.[13]

After Ren requested and received an extension of time, she filed her FAC on November 3, 2022, adding a tenth cause of action for "Failure to Pay Wages."

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[12] The court, on its own motion, takes judicial notice of the September 12, 2022 order pursuant to Evidence Code section 452, subdivision (d).

[13] The court, on its own motion, also takes judicial notice of the cross-complaint, the attached proof of service, the additional proof of service filed on November 15, 2022, and Ren's answer to the cross-complaint, pursuant to Evidence Code section 452, subdivision (d).

B. Procedural History After May 9, 2023

On May 9, 2023, this court (the undersigned) heard two motions. The first was a motion by defendants to consolidate Case Nos. 22CV397314 and 22CV402387, opposed by Ren. The second was a motion by Ren to strike the cross-complaint, opposed by defendants. Zhou did not join or file any response to either motion.

After the hearing, the court adopted its tentative rulings, with some modifications. The court's order granted the motion to consolidate, highlighting the "enormous amount of overlap between Ren and Zhou's complaints, as well as the commonality presented by a single cross-complaint against both Ren and Zhou." The court also found that consolidation would not prejudice any party. The order denied Ren's motion to strike as "exceedingly untimely," observing that it was filed "more than three months too late." The court further noted that at least one motion for relief from entry of default had already been filed (by defendant Wu) and that the court "routinely grants such motions under section 473(b) of the Code if Civil Procedure, particularly when they are caused by understandable confusion with the clerk's office."[14]

Subsequently, the court (the undersigned) heard and denied a motion by Ren to disqualify defense counsel on May 23, 2023. The court (Judge Geffon) then heard and denied a similar motion by Zhou to disqualify defense counsel on June 6, 2023, with a formal order dated June 7, 2023. That June 7 order also overruled Zhou's demurrer to defendants' amended answer. On June 15, 2023, the court (the undersigned) denied as moot a motion by Zhou to strike defendants' original answer. Finally, the court (Judge Alloggiamento) heard and granted a motion by Wu to set aside entry of default as to him on June 29, 2023.

Currently before the court are two motions. The first is a motion for reconsideration of the court's May 9, 2023 order, filed by Zhou on May 19, 2023. Defendants oppose. The second is a motion for relief from default by defendants We Party, Hu, and Li, filed on May 31, 2023. Ren opposes the second motion.

II. ZHOU'S MOTION FOR RECONSIDERATION

As noted above, plaintiff/cross-defendant Zhou is self-represented, which is sometimes referred to as proceeding in propria persona. "[W]hen a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney." (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267, internal citations omitted; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."])

A. General Legal Authority

Code of Civil Procedure section 1008 represents the California Legislature's attempt to regulate what the Supreme Court has referred to as "repetitive motions." (See *Standard*

[14] The court also takes judicial notice of the May 9, 2023 order on its own motion pursuant to Evidence Code section 452, subdivision (d).

Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal.App.4th 868, 885 [disapproved on other grounds in *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830].) Section 1008, subdivision (a), states that a motion for reconsideration may be brought by "any party affected by" a prior order. The statute requires that any such motion be (1) filed within 10 days after service upon the party of written notice of the entry of the order of which reconsideration is sought, (2) supported by new or different facts, circumstances or law, and (3) accompanied by an affidavit detailing the circumstances of the first motion, and the respects in which the new motion differs from it. Reconsideration cannot be granted based on claims that the court misinterpreted the law in the prior ruling; such arguments are not "new" or "different" matter. (See *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500.)

A motion for reconsideration must be accompanied by a declaration from the moving party stating: 1) what application was made before; 2) when and before what judge the application was made; 3) what order or decision was made; and 4) what new or different facts, circumstances or law are claimed to be shown. (Code Civ. Proc., § 1008, subd. (a); *Branner v. Regents of Univ. of Calif.* (2009) 175 Cal.App.4th 1043, 1048 [motion filed without supporting affidavit is invalid].)

Reconsideration is properly restricted to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not offering it earlier. The burden under section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (*New York Times Co. v. Sup. Ct. (Wall St. Network, Ltd.)* (2005) 135 Cal.App.4th 206, 212-213.) A party seeking reconsideration of a prior order based on "new or different facts, circumstances or law" must provide a satisfactory explanation for failing to present the information at the first hearing; i.e., a showing of reasonable diligence. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 689-690. *California Correctional Peace Officers Ass'n v. Virga* (2010)181 Cal.App.4th 30, 47, fn. 15 [collecting cases].)

B. Timeliness

As noted above, a motion for reconsideration must be filed within 10 days of service of "notice of entry" of the order sought to be reconsidered. Here, the court's formal order granting consolidation and denying Ren's motion to strike was issued on May 9, 2023. Zhou filed her motion on May 19, 2023, making it timely. Additionally, because the court's file does not contain any "notice of entry" of the May 9, 2023 order, the 10-day time limit is not applicable. (See *Novak v. Fay* (2015) 236 Cal.App.4th 329, 335-336 [10-day time limit did not apply where no notice of entry of order served].)

C. Analysis

Although the motion is timely, the court DENIES it, as follows.

First, Zhou's declaration in support of the motion does not satisfy the requirements of Code of Civil Procedure section 1008, subdivision (a). It does not describe the prior application or decision, or describe any new or different facts, circumstances, or law. It simply authenticates three attached exhibits (Exhibits A-C). These documents all predate the May 9,

2023 hearing, and they all could have been submitted by Zhou if she had filed any joinder or response to either motion before that date. These documents do not establish "new" or "different" facts under subdivision (a).

Second, Zhou's supporting memorandum of points and authorities is also insufficient to establish that any aspect of the May 9, 2023 order should be reconsidered. Regarding the denial of Ren's motion to strike, Zhou generally disagrees with the court's factual determinations and "objects" to the conclusion that Ren's motion was untimely. (See MPA at pp. 1:23-5:4 generally.) In addition to the failure to establish reasonable diligence, this argument is not a basis for reconsideration. "Since in almost all instances, the losing party will believe that the trial court's 'different' interpretation of the law or facts was erroneous,'" the assertion that the court misapplied facts or law when ruling on a prior motion is insufficient to support a motion for reconsideration. (*Gilberd v. AC Transit*, *supra*, 32 Cal.App.4th, at p. 1500; See also *New York Times Co.*, *supra*, 135 Cal.App.4th at p. 213.)

As for the order consolidating the two cases, Zhou states that the motion to consolidate was "lacking in reasonableness and compliance." (MPA at pp. 5:6-10:10.) This also amounts to a claim that the court misapplied facts or law in granting defendants' motion and is not a basis for reconsideration. Zhou's memorandum largely re-argues points that were already made in Ren's original opposition to the motion to consolidate. To the extent that Zhou also claims that she was deprived of the right to oppose the motion to consolidate, the court notes that she did not contest either of the motions that were heard on May 9, 2023, despite having received notice of the motions by email.[15] Further, a lack of a chance for oral argument is "clearly collateral to the merits" and not a proper ground for reconsideration. (See *Garcia v. Hejmadi*, *supra*, 58 Cal.App.4th at p. 690.)

III. DEFENDANTS' MOTION FOR RELIEF FROM DEFAULT

As noted in both the May 9, 2023 order and in Judge Alloggiamento's June 29, 2023 minute order on Wu's motion for relief from default, the court "may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 473, subd. (b).) "The trial court has discretion under section 473(b) on a showing of mistake, inadvertence, surprise, or excusable neglect to grant relief from a judgment, dismissal or other order based on its evaluation of the nature of the mistake or error alleged and the justification proffered for the conduct that occurred." (*Austin v. Los Angeles Unified School Dist*. (2016) 244 Cal.App.4th 918, 928.) "The general underlying purpose of section 473(b) is to promote the determination of actions on their merits." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.)

The granting of timely motions for relief from default under section 473(b) is fairly routine. "Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations 'very slight evidence will be required to justify a court in setting aside the default.' [Citations.] [¶] Moreover, 'because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default.' [Citation.] An order denying a motion for relief under

[15] The proof of service indicates service by email, and Zhou apparently takes issue with the fact that she never agreed to electronic service and never received the hard-copy documents by mail. (MPA at p. 6:5-20.)

section 473 is therefore 'scrutinized more carefully than an order permitting trial on the merits. [Citation.]'" (*Murray & Murray v. Raissi Real Estate Develop., LLC* (2015) 233 Cal.App.4th 379, 385.)

Having reviewed defendants' motion and the supporting declaration from counsel, the court finds that setting aside the January 3, 2023 default entered against the moving defendants (We Party, Hu, and Li) is proper, and it therefore GRANTS the motion for relief from default.

The moving defendants have demonstrated that the entry of default against them may have been caused at least in part by inadvertent errors and/or mistakes and delays in the clerk's office in processing documents submitted for e-filing, in comparison to documents submitted for filing in person, as well as errors and/or delays in processing fees. The resulting confusion presents good cause for granting this motion. In addition, the opposition to the motion submitted by Ren fails to show that granting the motion will result in any prejudice to the plaintiffs.

In short, the court DENIES the motion for reconsideration and GRANTS the motion for relief from default.

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