

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 6

Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: September 28, 2023 TIME: 9:00 A.M.

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

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

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

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Motion Reservation Phone number: 408-882-2430
When you can call: Monday to Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
<u>1</u>	23CV412271	Graham Godfrey vs Alberto Aldama	Defendant's Motion to Strike is GRANTED with 20 days leave to amend. Please scroll down to Line 1 to review full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
<u>2</u>	21CV380274	Dustin Herod vs Action Gypsum Supply West, LP et al	Matter resolved; motion for summary judgment off calendar. Hearing for dismissal after settlement set for January 18, 2024 at 10:00 a.m. in Department 6.
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<u>4</u>	22CV399041	Jane Doe vs The City of Sunnyvale et al	The City of Sunnyvale's Motion to Compel is GRANTED. The Court finds the City has established good cause for the Court to review these documents which are likely to lead to the discovery of admissible evidence. Discoverable materials are not necessarily admissible materials. The requested documents shall be made available for the Court's <i>in camera</i> inspection on October 24, 2023. The parties shall meet and confer and submit a form of protective order for the Court's approval on or before October 24, 2023, which protective order shall govern the production of any documents the Court orders produced. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) These orders shall be reflected in the minutes.
<u>5</u>	23CV414518	Ramiro Acevedo vs San Jose Auto Outlet Plus Trucks, Inc. et al	Plaintiff's Motion to Compel Arbitration with the AAA is GRANTED. An amended notice with this hearing date was served on Defendants by mail on August 24, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) The record is also clear that (a) the parties entered an arbitration agreement and (b) the arbitration is to be conducted by the AAA. Plaintiff requests reimbursement for fees and costs but does not provide any information regarding those fees and costs, so that request is DENIED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
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<u>7</u>	22CV393712	Illinois National Insurance Co. vs Accellion, Inc.	Accellion's Motion for Leave to File an Amended Cross-Complaint is GRANTED. Please scroll down to Line 7 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

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Calendar Line 1

Case Name: *Graham Godfrey v. Alberto C. Aldama, et al.*

Case No.: 23CV412271

Before the Court is defendant Alberto C. Aldama's motion to strike portions of plaintiff Graham Godfrey's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action arising out of a car collision. On August 7, 2021, Plaintiff was driving southbound on Route 85 when Defendant crashed into him. (FAC, ¶¶ 9, 13.) Defendant had consumed multiple beers and was intoxicated at the time of the accident when he rear-ended Plaintiff at a high rate of speed and totaled his vehicle. (FAC, ¶ 10-11, 13.) As a result, Plaintiff suffered severe personal injuries, which will result in some permanent disability. (FAC, ¶ 18.)

On March 1, 2023, Plaintiff initiated this action, asserting a claim for negligence. On May 25, 2023, he filed his FAC, which asserts a claim for negligence. On June 23, 2023, Defendant filed the instant motion, which Plaintiff opposes.

II. Defendant's Request for Judicial Notice

Defendant requests judicial notice of the Plaintiff's Complaint and Plaintiff's FAC is GRANTED. (See Evid. Code, § 452, subd. (d).)

III. Motion to Strike

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of

which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) “Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are ‘false’ or ‘sham.’” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

B. Analysis

Defendant seeks to strike Plaintiff’s prayer for punitive damages and the following portions of the FAC:

- (1) Paragraph 12, in its entirety;
- (2) Paragraph 13, in part, “Defendant was so intoxicated he rear-ended Plaintiff at a high rate of speed, and totaled Plaintiff’s vehicle”;
- (3) Paragraph 16, in its entirety;
- (4) Paragraph 17, in its entirety;
- (5) Paragraph 21, in its entirety.

“In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage stated, Civil Code section 3294. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. ‘Malice’ is defined in the statute as conduct ‘intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.’ ‘Oppression’ means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights. ‘Fraud’ is ‘an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.’” (*Turman, supra*, 191 Cal.App.4th at p. 63, internal citations omitted.)

“In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants’ conduct may adequately plead the evil motive requisite to recovery of punitive damages.” (*Monge v. Super. Ct.* (1986) 176 Cal.App.3d 503, 510.)

“Where nonintentional torts involve conduct performed without intent to harm, punitive damages may be assessed ‘when the conduct constitutes conscious disregard of the rights or safety or others.’ ‘[A] conscious disregard of the safety of others may [thus] constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.’ Consequently, to establish malice, ‘it is not sufficient to show only that the defendant’s conduct was negligent, grossly negligent, or even reckless.’” (*Bell v. Sharp Cabrillo Hosp.* (1989) 212 Cal.App.3d 1034, 1044 (*Bell*)).

The California Supreme Court addressed the issue of punitive damages in the context of drunk driving in *Taylor v. Superior Court* (1979) 24 Cal.3d 890 (*Taylor*), which involved a defendant who was intoxicated when he hit another car and injured the driver. (*Id.* at p. 893.) The allegations included defendant's other drunk driving accidents, arrests, and incidents. (*Ibid.*) Additionally, at the time of the accident, the defendant had just completed a period of probation for a drunk driving conviction. (*Ibid.*) The court found the allegations sufficient to support a claim for punitive damages because they supported knowledge and disregard of probable injury to others. (*Id.* at p. 900.) However, the *Taylor* Court did not hold that punitive damages are always appropriate in cases involving driving while intoxicated as it noted, "we have concluded that the act of operating a motor vehicle while intoxicated *may* constitute an act of 'malice' under [Section 3294] if performed *under circumstances* which disclose a conscious disregard of the probable dangerous consequences." (*Id.* at p. 892, emphasis added.)

The rationale in *Taylor* was discussed and interpreted in *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 88 (*Dawes*). In *Dawes*, the defendant drove at a high speed, while zigzagging through traffic, in the middle of the afternoon, and in locations of high pedestrian and vehicle traffic. (*Id.* at p. 88.) The appellate court found the circumstances constituted more than "ordinary driving while intoxicated." (*Id.* at p. 89.) It reasoned, "[t]he risk of injury to other from ordinary driving while intoxicated is certainly foreseeable, but it is not necessarily probable," and punitive damages may be warranted where the circumstances surrounding the defendant's decision to drive while intoxicated made the risk of harm to others probable. (*Ibid.*)

Based on *Taylor* and *Dawes*, it is clear not every collision involving intoxicated driving will support malice and oppression. Malicious and oppressive conduct in such a circumstance can be alleged where there are sufficient supporting facts pleaded which demonstrate that "the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." (*Taylor, supra*, 24 Cal.3d at p. 895-896.) Malice can be alleged expressly or implicitly through specific facts showing dangerous driving, such as driving at high speeds near pedestrians. (*Dawes, supra*, 111 Cal.App.3d at p. 90.)

Here, Plaintiff alleges Defendant consumed multiple beers and he was aware of his intoxication and inability to drive because his speech was slurred and his eyes were red and watery. (FAC, ¶¶ 11-12.) He further alleges Defendant was aware of the *probable dangerous consequences of driving* while intoxicated but he *consciously disregarded* the safety of motorists by driving his vehicle on a highway. (*Ibid.*, emphasis added.) Plaintiff also alleges Defendant was so intoxicated that he rear-ended Plaintiff at a high rate of speed and totaled his car. (FAC, ¶ 13.)

While the FAC contains the requisite language, it fails to allege sufficient *facts* to support the allegations of conscious disregard. Moreover, Plaintiff fails to allege circumstances which show Defendant's decision to drive while intoxicated made the risk of harm to other people probable. (See *Dawes, supra*, 111 Cal.App.3d at p. 89; *Taylor, supra*, 24 Cal.3d 890.) The fact that an accident occurred, and Defendant was intoxicated does not rise to the level of despicable conduct and malice necessary to support a claim for punitive damages. Thus, Defendant's motion to strike the prayer for punitive damages is GRANTED with 20 days leave to amend.

Defendant also seeks to strike paragraphs 12, 16, 17, and 21 in their entirety and a portion of paragraph 13.

Paragraphs 12 and 21 are used to allege a basis for punitive damages and the Court has granted the motion to strike punitive damages above. Thus, the motion is GRANTED with 20 days' leave to amend as to those paragraphs.

The remaining portions are relevant factual allegations to Plaintiff's claim. Thus, the motion is DENIED as to paragraphs 16, 17, and the portion of paragraph 13.

Calendar Line 7

Case Name: *Illinois National Insurance Co. vs Accellion, Inc.*

Case No.: 22CV393712

Before the Court is Defendant Accellion, Inc.’s Motion for Leave to File an Amended Cross-Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of a data breach. Plaintiff is an insurance company that issued a series of insurance policies to corporate insureds for coverage against cyber-related insurance risks. (Amended Complaint (“AC”), ¶ 2.) Defendant is a technology and software company that provides software for secure electronic file sharing and services to customers. (*Id.*, ¶ 5.) Defendant developed and sold licenses for a software called File Transfer Appliance (“FTA”), which it marketed as a secure method of transferring files. (*Id.*, ¶ 7.) Plaintiff insured Foley & Lardner LLP (“Foley”) which was one of Defendant’s FTA customers in December 2020 and January 2021. (*Id.*, ¶ 31.)

Beginning on December 16, 2020, and again on January 16, 2021 threat actors targeted the FTA as a means of committing an unauthorized access and threat of release of confidential information. (AC, ¶ 8.) Plaintiff alleges Foley suffered damages, including paying a significant ransom to the threat actors, for which Plaintiff reimbursed Foley. Plaintiff brought this action against Defendant to recover those payouts.

Defendant demurred to Plaintiff’s complaint, in part, on the ground that Plaintiff did not initially identify Foley as the underlying injured party. The Court (Hon. Christopher Rudy) overruled Defendant’s demurrer on that ground, finding:

Plaintiff is pursuing this claim as an assignee of Insured A and has properly pleaded as much. (See AC, ¶¶2, 60, 61 [“Plaintiff] reimbursed Insured A for its losses. Pursuant to the terms of Insured A’s insurance policy and assignment, [Plaintiff] is contractually, legally and equitably subrogated to Insured A’s rights against Accellion to recover for the amounts paid as a result of the breach of Accellion’s FTA, as well as to pursue any uninsured losses suffered by virtue of an assignment of such claims, if any.”].) “An insurer/subrogee paying for a loss has the right to pursue its insured’s rights and remedies against the third party causing the loss. (*Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799.) “In the action for subrogation the insurer as subrogee stands in the shoes of the insured/subrogor.” (*Id.*) Consequently, “the insurer has no greater rights than the insured would have, and for that reason is subject to the same defenses assertable against the insured/subrogor.” (*Id.*) Defendant cites no authority that would require Plaintiff to identify Insured A at this stage of the proceedings or compel the sustaining of the demurrer to the AC in the absence of it doing so. Thus, the Court will not sustain the demurrer on this basis.

Defendant filed a cross-complaint against Plaintiff for Foley's alleged breaches of the FTA End User License Agreement ("EULA"). Defendant alleged Foley breached the EULA because it failed to timely deploy critical updates and assigned the EULA to Illinois National without Accellion's prior written approval. (Cross-Complaint, ¶ 50.) Accellion pleaded that Illinois National, which purports to sit in the firm's shoes via an illegal assignment, was equally liable for breach of the EULA because it claimed to act under it. (*Id.*, ¶ 53.) The Court sustained Plaintiff's demurrer to the cross-complaint without leave to amend because Plaintiff was not a party to the EULA and there is no citable authority standing for the proposition that because Plaintiff "stands in the shoes" of Foley for purposes of subrogation, it can be sued *for damages* for breach of a contract it did not enter. What was assigned to Plaintiff by Foley and by operation of law were claims, not the entire EULA, including the responsibilities thereunder. In its final order, the Court noted: "There would be a different analysis if Accellion sought to bring claims against the unnamed law firm. And if the Parties are unable to reach a stipulation on this issue, the Court will objectively review a motion for leave from Accellion on this issue."

Defendant now seeks leave to file an amended cross-complaint that identifies Foley instead of Plaintiff as the cross-defendant. The proposed amended cross-complaint is virtually identical to the original cross-complaint except that it identifies Foley instead of the Plaintiff as the Cross-Defendant and omits Defendant's claim for breach of the EULA based on Foley's assignment of claims to Illinois National. Plaintiff opposes this motion.

II. Legal Standard and Analysis

"[T]he trial court has wide discretion in allowing the amendment of any pleading. (*Bedolla v. Logan & Frazer* (1975) 52 Cal. App. 3d 118, 135-136.) However, "the exercise of this discretion must be sound and reasonable and not arbitrary or capricious. (*Richter v. Adams*, 43 Cal.App.2d 184, 187; *Eckert v. Graham*, 131 Cal.App. 718, 721.) '[It] is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery v. Green*, 95 Cal. 630, 633; *Marr v. Rhodes*, 131 Cal. 267, 270.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (*Nelson v. Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton v. Bassett*, 158 Cal. 425, 427.)" (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). However, "even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial." (*Roemer v. Retail Credit Co.* (1975) 44 Cal. App. 3d 926, 939-940; see also *Moss Estate Co. v. Adler* (1953) 41 Cal. 2d 581, 585-587.)

Plaintiff does not claim prejudice here, nor could it. This case is in its early stages, and Foley and Defendant's claims against Foley have all been long known by all of the parties, including Foley. Plaintiff instead argues the claims are time barred and fail on other substantive grounds, and the Court should therefore deny leave to amend. At this stage of the proceedings, the Court declines Plaintiff's invitation.

Defendant's motion for leave to file an amended cross-complaint is GRANTED.

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Defendant seeks to strike Plaintiff’s prayer for punitive damages and the following portions of the FAC:

- (1) Paragraph 12, in its entirety;
- (2) Paragraph 13, in part, “Defendant was so intoxicated he rear-ended Plaintiff at a high rate of speed, and totaled Plaintiff’s vehicle”;
- (3) Paragraph 16, in its entirety;
- (4) Paragraph 17, in its entirety;
- (5) Paragraph 21, in its entirety.

“In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage stated, Civil Code section 3294. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. ‘Malice’ is defined in the statute as conduct ‘intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.’ ‘Oppression’ means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights. ‘Fraud’ is ‘an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.’” (*Turman, supra*, 191 Cal.App.4th at p. 63, internal citations omitted.)

“In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants’ conduct may adequately plead the evil motive requisite to recovery of punitive damages.” (*Monge v. Super. Ct.* (1986) 176 Cal.App.3d 503, 510.)

“Where nonintentional torts involve conduct performed without intent to harm, punitive damages may be assessed ‘when the conduct constitutes conscious disregard of the rights or safety of others.’ ‘[A] conscious disregard of the safety of others may [thus] constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.’ Consequently, to establish malice, ‘it is not sufficient to show only that the defendant’s conduct was negligent, grossly negligent, or even reckless.’” (*Bell v. Sharp Cabrillo Hosp.* (1989) 212 Cal.App.3d 1034, 1044 (*Bell*)).

The California Supreme Court addressed the issue of punitive damages in the context of drunk driving in *Taylor v. Superior Court* (1979) 24 Cal.3d 890 (*Taylor*), which involved a defendant who was intoxicated when he hit another car and injured the driver. (*Id.* at p. 893.) The allegations included defendant's other drunk driving accidents, arrests, and incidents. (*Ibid.*) Additionally, at the time of the accident, the defendant had just completed a period of probation for a drunk driving conviction. (*Ibid.*) The court found the allegations sufficient to support a claim for punitive damages because they supported knowledge and disregard of probable injury to others. (*Id.* at p. 900.) However, the *Taylor* Court did not hold that punitive damages are always appropriate in cases involving driving while intoxicated as it noted, "we have concluded that the act of operating a motor vehicle while intoxicated *may* constitute an act of 'malice' under [Section 3294] if performed *under circumstances* which disclose a conscious disregard of the probable dangerous consequences." (*Id.* at p. 892, emphasis added.)

The rationale in *Taylor* was discussed and interpreted in *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 88 (*Dawes*). In *Dawes*, the defendant drove at a high speed, while zigzagging through traffic, in the middle of the afternoon, and in locations of high pedestrian and vehicle traffic. (*Id.* at p. 88.) The appellate court found the circumstances constituted more than "ordinary driving while intoxicated." (*Id.* at p. 89.) It reasoned, "[t]he risk of injury to other from ordinary driving while intoxicated is certainly foreseeable, but it is not necessarily probable," and punitive damages may be warranted where the circumstances surrounding the defendant's decision to drive while intoxicated made the risk of harm to others probable. (*Ibid.*)

Based on *Taylor* and *Dawes*, it is clear not every collision involving intoxicated driving will support malice and oppression. Malicious and oppressive conduct in such a circumstance can be alleged where there are sufficient supporting facts pleaded which demonstrate that "the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." (*Taylor, supra*, 24 Cal.3d at p. 895-896.) Malice can be alleged expressly or implicitly through specific facts showing dangerous driving, such as driving at high speeds near pedestrians. (*Dawes, supra*, 111 Cal.App.3d at p. 90.)

Here, Plaintiff alleges Defendant consumed multiple beers and he was aware of his intoxication and inability to drive because his speech was slurred and his eyes were red and watery. (FAC, ¶¶ 11-12.) He further alleges Defendant was aware of the *probable dangerous consequences of driving* while intoxicated but he *consciously disregarded* the safety of motorists by driving his vehicle on a highway. (*Ibid.*, emphasis added.) Plaintiff also alleges Defendant was so intoxicated that he rear-ended Plaintiff at a high rate of speed and totaled his car. (FAC, ¶ 13.)

While the FAC contains the requisite language, it fails to allege sufficient *facts* to support the allegations of conscious disregard. Moreover, Plaintiff fails to allege circumstances which show Defendant's decision to drive while intoxicated made the risk of harm to other people probable. (See *Dawes, supra*, 111 Cal.App.3d at p. 89; *Taylor, supra*, 24 Cal.3d 890.) The fact that an accident occurred, and Defendant was intoxicated does not rise to the level of despicable conduct and malice necessary to support a claim for punitive damages. Thus, Defendant's motion to strike the prayer for punitive damages is GRANTED with 20 days leave to amend.

Defendant also seeks to strike paragraphs 12, 16, 17, and 21 in their entirety and a portion of paragraph 13.

Paragraphs 12 and 21 are used to allege a basis for punitive damages and the Court has granted the motion to strike punitive damages above. Thus, the motion is GRANTED with 20 days' leave to amend as to those paragraphs.

The remaining portions are relevant factual allegations to Plaintiff's claim. Thus, the motion is DENIED as to paragraphs 16, 17, and the portion of paragraph 13.

Calendar Line 7

Case Name: *Illinois National Insurance Co. vs Accellion, Inc.*

Case No.: 22CV393712

Before the Court is Defendant Accellion, Inc.’s Motion for Leave to File an Amended Cross-Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of a data breach. Plaintiff is an insurance company that issued a series of insurance policies to corporate insureds for coverage against cyber-related insurance risks. (Amended Complaint (“AC”), ¶ 2.) Defendant is a technology and software company that provides software for secure electronic file sharing and services to customers. (*Id.*, ¶ 5.) Defendant developed and sold licenses for a software called File Transfer Appliance (“FTA”), which it marketed as a secure method of transferring files. (*Id.*, ¶ 7.) Plaintiff insured Foley & Lardner LLP (“Foley”) which was one of Defendant’s FTA customers in December 2020 and January 2021. (*Id.*, ¶ 31.)

Beginning on December 16, 2020, and again on January 16, 2021 threat actors targeted the FTA as a means of committing an unauthorized access and threat of release of confidential information. (AC, ¶ 8.) Plaintiff alleges Foley suffered damages, including paying a significant ransom to the threat actors, for which Plaintiff reimbursed Foley. Plaintiff brought this action against Defendant to recover those payouts.

Defendant demurred to Plaintiff’s complaint, in part, on the ground that Plaintiff did not initially identify Foley as the underlying injured party. The Court (Hon. Christopher Rudy) overruled Defendant’s demurrer on that ground, finding:

Plaintiff is pursuing this claim as an assignee of Insured A and has properly pleaded as much. (See AC, ¶¶2, 60, 61 [“Plaintiff] reimbursed Insured A for its losses. Pursuant to the terms of Insured A’s insurance policy and assignment, [Plaintiff] is contractually, legally and equitably subrogated to Insured A’s rights against Accellion to recover for the amounts paid as a result of the breach of Accellion’s FTA, as well as to pursue any uninsured losses suffered by virtue of an assignment of such claims, if any.”].) “An insurer/subrogee paying for a loss has the right to pursue its insured’s rights and remedies against the third party causing the loss. (*Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799.) “In the action for subrogation the insurer as subrogee stands in the shoes of the insured/subrogor.” (*Id.*) Consequently, “the insurer has no greater rights than the insured would have, and for that reason is subject to the same defenses assertable against the insured/subrogor.” (*Id.*) Defendant cites no authority that would require Plaintiff to identify Insured A at this stage of the proceedings or compel the sustaining of the demurrer to the AC in the absence of it doing so. Thus, the Court will not sustain the demurrer on this basis.

Defendant filed a cross-complaint against Plaintiff for Foley's alleged breaches of the FTA End User License Agreement ("EULA"). Defendant alleged Foley breached the EULA because it failed to timely deploy critical updates and assigned the EULA to Illinois National without Accellion's prior written approval. (Cross-Complaint, ¶ 50.) Accellion pleaded that Illinois National, which purports to sit in the firm's shoes via an illegal assignment, was equally liable for breach of the EULA because it claimed to act under it. (*Id.*, ¶ 53.) The Court sustained Plaintiff's demurrer to the cross-complaint without leave to amend because Plaintiff was not a party to the EULA and there is no citable authority standing for the proposition that because Plaintiff "stands in the shoes" of Foley for purposes of subrogation, it can be sued *for damages* for breach of a contract it did not enter. What was assigned to Plaintiff by Foley and by operation of law were claims, not the entire EULA, including the responsibilities thereunder. In its final order, the Court noted: "There would be a different analysis if Accellion sought to bring claims against the unnamed law firm. And if the Parties are unable to reach a stipulation on this issue, the Court will objectively review a motion for leave from Accellion on this issue."

Defendant now seeks leave to file an amended cross-complaint that identifies Foley instead of Plaintiff as the cross-defendant. The proposed amended cross-complaint is virtually identical to the original cross-complaint except that it identifies Foley instead of the Plaintiff as the Cross-Defendant and omits Defendant's claim for breach of the EULA based on Foley's assignment of claims to Illinois National. Plaintiff opposes this motion.

II. Legal Standard and Analysis

"[T]he trial court has wide discretion in allowing the amendment of any pleading. (*Bedolla v. Logan & Frazer* (1975) 52 Cal. App. 3d 118, 135-136.) However, "the exercise of this discretion must be sound and reasonable and not arbitrary or capricious. (*Richter v. Adams*, 43 Cal.App.2d 184, 187; *Eckert v. Graham*, 131 Cal.App. 718, 721.) '[It] is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery v. Green*, 95 Cal. 630, 633; *Marr v. Rhodes*, 131 Cal. 267, 270.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (*Nelson v. Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton v. Bassett*, 158 Cal. 425, 427.)" (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). However, "even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial." (*Roemer v. Retail Credit Co.* (1975) 44 Cal. App. 3d 926, 939-940; see also *Moss Estate Co. v. Adler* (1953) 41 Cal. 2d 581, 585-587.)

Plaintiff does not claim prejudice here, nor could it. This case is in its early stages, and Foley and Defendant's claims against Foley have all been long known by all of the parties, including Foley. Plaintiff instead argues the claims are time barred and fail on other substantive grounds, and the Court should therefore deny leave to amend. At this stage of the proceedings, the Court declines Plaintiff's invitation.

Defendant's motion for leave to file an amended cross-complaint is GRANTED.