SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

DATE: October 08, 2024 TIME: 9:00 A.M.

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

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

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. 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. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

FOR COURT REPORTERS: The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

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.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV348624	Long Gao et al vs Bethany Liou et al	**Order of Examination** No Proof of service on file for the Debtor's appearance at the October 8, 2024 OEX. If there is no appearance, the matter will be ordered OFF CALENDAR. At the July 25, 2024 hearing, an Order to Show Cause for Failure to Appear by Defendant Bethany Liou's attorney was also set on 10/8/24 at 10:00 a.m. in Department 18b, where the Court may issue a Bench Warrant in the amount of $50,000 if there is no appearance by Defendant Bethany Liou.
LINE 2	24CV434643	JULIANMORE, LLC et al vs Jing Yang	**Demurrer** Defendant Jing Yang demurs to Plaintiffs Julianmore, LLC. and Hagajing LLC. Complaint. A notice of motion with the hearing date and time was electronically served on July 17, 2024 (Proof of Service filed, July 17, 2024). Any opposition was due on September 24, 2024. Plaintiffs failed to oppose the motion. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct*. (1997) 58 Cal.App.4th 1403, 1410.) Good cause appearing, Defendant's demurrer is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND. Moving party to prepare the formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 3	24CV438506	GIOVANNI ROSALES vs CAMPBELL UNION HIGH SCHOOL DISTRICT et al	**Demurrer** Scroll down to LINE 3 for Tentative Ruling.
LINE 4	23CV416339	Cathay Bank vs RPRO152N3, LLC, et al	**Motion for Summary Judgment/ Adjudication** Scroll down to LINE 4 for Tentative Ruling.
LINE 5	23CV410795	Stacey Belew vs Luigi Digrande et al	**Motion to Compel (Request for Production of Documents)** The Court on its own motion CONTINUES this motion to November 7, 2024 at 9 a.m. in Department 18b.
LINE 6	23CV410795	Stacey Belew vs Luigi Digrande et al	**Motion to Compel (Form Interrogatories)** This motion was CONTINUED to November 7, 2024 at 9 a.m. in Department 18b at the request of the parties and by Order signed October 2, 2024.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	23CV414246	Juanita McFerrin et al vs Valerie Barrientos et al	**Motion to Compel (Request for Production of Documents)** Defendant Valerie Barrientos' motion to compel responses to her request for production of documents, monetary sanctions of $237, terminating sanctions and dismissal of this action against Plaintiff Juanita McFerrin. No opposition to this motion was filed by Plaintiff. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Plaintiff should have served a response within 30 days of service of the document request or on any extension but failed to do so. (Code Civ. Proc., §2031.300(b)). No responses were timely served, thus all objections, including that of privilege, have been waived. (Code Civ. Proc. §2031.300(a)). Moving party meets her burden of proof. Good cause appearing, the Motion is GRANTED in part. The request for sanctions is also GRANTED in the amount of $237. Plaintiff shall serve verified, code-compliant responses to the subject discovery, without objections, and the sanctions shall be paid within 20 days of service of this order. Defendant's requests for terminating sanctions and dismissal of this action are DENIED as neither are warranted at this time. Moving party shall prepare a formal order

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	19CV353339	LOUIS ZEMEL et al vs Ford Motor Company et al	**Motion for Attorney's Fees** Plaintiffs' motion for attorney's fees of $88,677.04 (includes fees of 55,881.50, a 1.35 multiplier ($19,558.53), and costs and expenses of $9,737.10 against Defendant pursuant to Civil Code § 1794(d) and as the prevailing party to a 998 Offer. Defendant opposes the motion. The Court has thoroughly and carefully reviewed **all 569 pages** of this motion's briefing **(most were unnecessary),** including the time entries, and the arguments presented regarding the hourly rates. The Court has discretion to reduce attorney fee awards. (*Mikaeilpoor v. BMW of North America, LLC* (2020) 48 Cal.App.5th 240). Every lemon law case is different, but in this case the Court does not see any unique issues or extraordinary motions and deems the time charged for standard discovery and the litigation of this case to be excessive, the hourly rates elevated and the case poorly managed (19 timekeepers is excessive). The Court determines that (1) the fees incurred are unreasonable and excessive – the award requested is reduced to account for overbilling, lack of accounting for using form template discovery and pleadings and litigation/staffing inefficiencies; (2) the requested hourly rates are reduced for this standard lemon law case. (*Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 152) and (3) no fees are permitted for administrative tasks or time for a reply to this motion. Plaintiffs' request for a multiplier on its fees is also DENIED as unwarranted. Plaintiff's motion for attorney's fees is GRANTED in the amount of $34,335 and costs of $2,838.10. Moving party to prepare the order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	23CV421040	Kristina Lopez vs Francisco Ramirez et al	**Motion to Withdraw as Attorney** Motion of Attorney Lauren Landau and Downtown La Law Group to be relieved as counsel for Plaintiff Kristina Lopez. Notice of hearing was given to Plaintiff Lopez by mail and certified mail service on July 26, 2024, at her last known address. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. The failure to oppose a motion leads to the presumption that Plaintiff client has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving parties have met their burden of proof. Good cause appearing, the motion is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court. Moving parties to prepare the formal order after hearing, which shall include notification of the Case Management Conference set for December 17, 2024 at 10 a.m. in Department 18b.

- oo0oo -

Calendar Line 3
Case Name: *Rosales v. Campbell Union High School District, et al.*
Case No.: 24CV438506

Before the Court is Defendants Campbell Union High School District, Eric Wasinger, Robert Bravo, and Meredyth Hudon's Demurrer to Plaintiff Giovanni Rosales' Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

Plaintiff Giovanni Rosales ("Plaintiff") was employed by Campbell Union High School District ("Defendant CUHSD") on May 1, 2023. (Complaint at ¶ 8.) He was supervised by Eric Wasinger ("Defendant Wasinger"), Vice President of Facilities; Robert Bravo ("Defendant Bravo"), Superintendent; and Meredyth Hudson, Chief of Business Officer ("Defendant Hudson") (collectively "Individual Defendants"). (Complaint at ¶ 9.) Plaintiff worked with a construction management team including Trevor Milligans ("Milligans"), Dale Groggins ("Groggins"), and Bridgette Biggins ("Biggins"). (*Ibid.*)

Plaintiff alleges that. in July 2023, he noted that the construction team, including Defendant Wasinger, Milligans, and Biggins, had used CUHSD vehicles for their personal commutes and CUHSD equipment and services for their own personal home renovation projects. (Complaint at ¶ 10.) Plaintiff alleges that he reported the personal use of CUHSD resources to Defendant Wasinger, his direct supervisor. (*Id.* at ¶ 11.) Plaintiff alleges that Mr. Wasinger informed Plaintiff that he had personal relationships with the two top general contractors and that they would do favors for him and his construction team since they were awarded with the majority of the construction/maintenance bids. (*Ibid.*) Plaintiff further alleges "Mr. Wasinger personally joined some of these contractors on vacation and was involved in the hiring and firing of some of their personnel. They also meet for dinner on a regular basis to review contracts and bids." (*Ibid.*)

Plaintiff alleges that in late July or August 2023, he asked Defendant Wasinger about taking his work vehicle home, to which, Defendant Wasinger responded with "shut up" and told Plaintiff to stop asking questions since he was still on employment probation. (Complaint at ¶ 12.) Around the same time, Plaintiff inquired about purchasing an ice machine for his maintenance, operations, and landscaping team because of the high temperatures they

experienced while working and to prevent workplace injuries. (*Id.* at ¶ 13.) Plaintiff alleges that his request was denied and that he was met with remarks including " 'you're making your team soft' " and " 'it must be because you're from San Francisco.' " (*Ibid.*)

Plaintiff further alleges that Defendant Wasinger joked that the last person in Plaintiff's position was fired. (Complaint at ¶ 13.) The Complaint also alleges that "[i]n August 2023, the construction management team sent other DISTRICT personnel to verbally taunt Mr. ROSALES for their entertainment purposes." (*Id.* at ¶ 14.) Around the same time, Plaintiff found vendor/contractor bid proposals from Defendant Wasinger that did not follow the procurement process. (*Ibid.*)

Plaintiff filed two whistleblowing complaints with the County of Santa Clara on August 23, 2023 and August 29, 2023 alleging the use of public funds for personal use. (Complaint at ¶ 15.) The complaints were based on Plaintiff's belief that the misuse of funds constituted a violation of local, state, and federal laws. (*Ibid.*)

Thereafter, Plaintiff alleges that after returning from vacation in early September 2023, his job duties had changed and he was excluded from any supervisory or managerial responsibilities. (Complaint at ¶ 16.) "For example, he was not permitted to attend meetings and Mr. Wasinger began to direct his team even with Mr. ROSALES present." (*Ibid.*) Plaintiff alleges that around this time, Defendants Bravo and Hudson were aware of his whistleblower complaints and had a meeting to discuss one of the pool services bids that Plaintiff had reported alongside his complaints. (Complaint at ¶ 17.) Plaintiff alleges that the day after the meeting, Defendant Wasinger called Plaintiff's secretary and stated that they needed to fix bids and hid documents as a result of Plaintiff's complaints. (*Ibid.*)

Plaintiff alleges he experienced retaliatory conduct in the form of being removed from meetings and trainings and no longer receiving communications from Defendant Wasinger "including texts, in-person meetings, or one-on-one meetings." (Complaint at ¶ 18.) Plaintiff alleges that he also received notifications on his work computer informing him that his files were being removed or deleted. (*Ibid.*) "On October 2, 2023, Mr. ROSALES was excluded from job duties concerning maintenance issues at one of the high schools." (*Ibid.*)

The Complaint alleges that Plaintiff was placed on a Performance Improvement Plan on October 10, 2023 for pretextual reasons. (Complaint at ¶ 19.) As a result, Plaintiff went on medical leave between October 10, 2023 and February 26, 2024. (*Id.* at ¶ 20.) Plaintiff alleges that upon returning from medical leave, he continued to experience hostility and retaliatory conduct. (*Id.* at ¶ 21.) "For example, Ms. Hudson yelled at him, and referred to Mr. ROSALES having an 'end date.'" (*Ibid.*)

Plaintiff's employment contract was terminated on March 14, 2024. (Complaint at ¶ 22.) Plaintiff alleges that the employee who previously served in the same position was also terminated under similar circumstances as he had also reported Defendants Bravo, Hudson, and Wasinger for the improper use of funds, and was terminated thereafter. (Complaint at ¶ 23.)

Plaintiff filed his Complaint on May 6, 2024 and alleges three causes of action for (1) violation of Labor Code sections 98.6 and 232.5 against CUHSD; (2) violation of Labor Code section 98.6 and 1102.5 against all Defendants; and (3) violation of Labor Code section 6310 and 6311 against all Defendants. Defendants filed their Demurrer on July 23, 2024. Plaintiff filed his opposition on September 23, 2024. Defendants filed their Reply on September 26, 2024. The Court considers the parties' arguments raised therein.

II. Discussion

a. Procedural Matters

i. *Timeliness*

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).) Even if a demurrer is untimely filed, the Court has discretion to hear the demurrer so long as its action ". . . 'does not affect the substantial rights of the parties.' [Citations.]" (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.)

The Notices of Acknowledgement filed on August 13, 2024 as to all Defendants indicate that the Complaint was received on June 11, 2024. Per the Clerk's Rejection Letter, Defendants attempted to file their Demurrer on or around July 8, 2024, but did not reserve a hearing date. Defendants again attempted to file their Demurrer on or around July 18, 2024.

Defendants successfully filed their Demurrer on July 23, 2024. Even if Defendants' Demurrer is untimely, Plaintiff has not raised it as an issue, and it does not affect the substantial right of the parties. Thus, the Court may consider Defendants' Demurrer.

ii. *Meet and Confer*

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code Civ. Proc. § 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (Code Civ. Proc. § 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (Code Civ. Proc. § 430.41, subd. (a)(4).)

Counsel for Defendants indicates that on June 11, 2024, he sent a meet and confer letter to Plaintiff's counsel addressing the legal insufficiencies in the Complaint. (Declaration of Mark E. Davis ["Davis Decl."] at ¶ 3, Ex. A.) Counsel for Plaintiff responded on June 18, 2024 addressing his position and the relevant legal authorities. (Davis Decl. at ¶ 4, Ex. B.) Counsel for Defendants sent another meet and confer letter further providing his position and legal authority on demurrer. (Davis Decl. at ¶ 5, Ex. C.) Counsel for both parties telephonically met and conferred with respect to their positions on demurrer on June 24, 2024, but were able to reach an agreement on the issues presented herein. (Davis Decl. at ¶ 6.) The Court concludes that the parties have sufficiently met and conferred, and any further efforts to meet and confer would prove futile.

b. Legal Standard

A demurrer must distinctly specify the grounds upon which a pleading is objected to; a demurrer lacking such specification may be disregarded. (Code Civ. Proc., § 430.60.) Defendants object to the Complaint pursuant to Code of Civil Procedure section 430.10, subdivision (e).

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

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

c. Analysis

i. *Whether a Private Right of Action Exists as to the First Cause of Action for a Violation of Labor Code section 232.5 against Defendant CUHSD*

Plaintiff's first cause of action is premised upon Labor Code section 232.5, subdivision (c)[1] which states, "No employer may . . . discharge, formally discipline, or otherwise discriminate against an employee who discloses information about the employer's working conditions." Defendant argues the first cause of action for violation of Labor Code section 232.5 fails as a matter of law because it does not provide for a private right of action. (Demurrer at p. 6:3-6.)

[1] All further undesignated statutory references are to the California Labor Code.

"Adoption of a regulatory statute does not automatically create a private right to sue for damages resulting from violations of the statute. Such a private right of action exists only if the language of the statute or its legislative history clearly indicates the Legislature intended to create such a right to sue for damages." (*Vikco Ins. Services, Inc. v. Ohio Indem. Co.* (1999) 70 Cal.App.4th 55, 62.) That intent need not necessarily be expressed explicitly but if not, it must be strongly implied. (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850.)

"The question of whether a regulatory statute creates a private right of action depends on legislative intent. [Citations.] In determining legislative intent, '[w]e first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context. [Citations.] These canons generally preclude judicial construction that renders part of the statute "meaningless or inoperative." ' " [Citation.] (*Thornburg v. El Centro Regional Medical Center* (2006) 143 Cal.App.4th 198, 204; see also *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597 ["A statute may contain ' "clear, understandable, unmistakable terms," ' which strongly and directly indicate that the Legislature intended to create a private cause of action. [Citation.] For instance, the statute may expressly state that a person has or is liable for a cause of action for a particular violation. [Citations.] Or, more commonly, a statute may refer to a remedy or means of enforcing its substantive provisions, i.e., by way of an action. [Citations.] If, however, a statute does not contain such obvious language, resort to its legislative history is next in order. [Citation.]"].)

The language of the statute does not expressly state or strongly imply that a private right of action is created under Labor Code section 232.5. Rather, the statute merely proscribes an employer from preventing an employee from disclosing his or her working conditions. The statute does not contain obvious language pertaining to liability or enforcement. There is no body of case law recognizing a private right of action under this statute. Section 232.5 has been relied upon as a stand-alone cause of action in only two federal cases, where neither case addressed whether section 232.5 created a private right of action because the claims were not

permitted to continue. (*United States ex rel. Lupo v. Quality Assurance Services, Inc.* (S.D. Cal. 2017) 242 F.Supp.3d 1020, 1030-31 [filing a false report was not a "working condition" because no one ever asked the plaintiff to file a false report]; *Day v. Sears Holdings Corp.* (C.D. Cal. 2013) 930 F.Supp.2d 1146, 1193 [activities of co-workers at an off-site, after-work event were not "working conditions"].) Since there is no indication from the Legislature or Court of Appeal that section 232.5 creates a private right of action, Plaintiff cannot pursue this claim. However, the inquiry on demurrer with respect to the first cause of action does not end here as a demurrer does not lie to a portion of a cause of action, and the Court must proceed to consider whether a private right of action exists as to a violation of Labor Code section 98.6. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.)

ii. *Whether a Private Right of Action Exists as to the First Cause of Action for a Violation of Labor Code section 98.6 against Defendant CUHSD*

Plaintiff's first cause of action is also premised on Labor Code section 98.6. Defendants contend that section 98.6 is derivative of section 232.5, and therefore, it also fails. (Demurrer at p. 6:7-13.) Plaintiff clarifies in Opposition that his first cause of action is premised on a violation of section 232.5, with enforcement under section 98.6. (Opposition at p. 9:16-17.)

Labor Code section 98.6 does not expressly create a private right of action, but instead establishes an administrative process by which the Labor Commissioner may prohibit an employer from discharging or discriminating against an employee for filing a complaint or engaging in specific conduct delineated by the statute. (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 77 ["Further, we hold section 96, subdivision (k), provides only procedure under which the Labor Commissioner shall exercise jurisdiction rather than independent public policy creating a private right of action. Finally, we find the Legislature did not intend section 98.6 to establish public policy against terminations for conduct not protected under the Labor Code."].) Courts have suggested that the "requirement of exhaustion of administrative remedies implies that such a right [to sue] exists." (*Fenters v. Yosemite Chevron* (E.D. Cal. July 17, 2006) No. CV-F-05-1630 OWW/DLB, 2006 U.S. Dist. LEXIS

53450, at *73.)[2] However, a claim need not be filed with the Labor Commissioner prior to asserting a claim under section 98.6. (*Gwin v. Target Corp.* (N.D. Cal. Sept. 27, 2013) No. 12-05995 JCS, 2013 U.S. Dist. LEXIS 139891, at *37 [citing *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, 331-332].)

Defendants do not argue that Plaintiff does not have a private right of action under Labor Code section 98.6 independent and for the enforcement of section 232.5, or that this claim is insufficiently stated against Defendant CUHSD. However, while it is unclear whether Plaintiff's whistleblower complaints were directed to the Labor Commissioner, specifically, the above authorities indicate that he may independently maintain a private right of action against Defendant CUHSD for the enforcement of section 232.5. (See Complaint at ¶ 15.) Although Defendant CUHSD does not challenge the sufficiency of this claim, the Court agrees with Plaintiff that the Complaint nonetheless states that he was retaliated against after filing the whistleblower complaints and was eventually terminated. (Opposition at p. 10:1-9, Complaint at ¶¶ 16-23.) Thus, Plaintiff may maintain a private right of action against Defendant CUHSD under Labor Code section 98.6.

Accordingly, the Demurrer to the first cause of action on the ground of failure to state facts sufficient to constitute a cause of action as to Defendant CUHSD is OVERRULED because a private right of action exists at least with respect to Labor Code section 98.6 for the enforcement of section 232.5.

iii. *Whether Labor Code sections 1102.5, 98.6, 6310, and 6311 under the Second and Third Causes of Action Provide for Individual Liability as to Defendants Wasinger, Bravo, and Hudson*

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[2] The court may cite to unpublished federal decisions. "We note that although an unpublished California case opinion may not be cited or relied upon (Cal. Rules of Court, rule 8.1115), citing unpublished opinions from other jurisdictions for their persuasive value does not violate this rule." (*Central Laborer's Pension Fund v. McAfee, Inc.* (2017) 17 Cal.App.5th 292, 319, fn. 9citing *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 [holding the same]; *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077 [explaining that opinions from other jurisdictions—some which have different publication criteria than California—can be cited without regard to their publication status, and may be regarded as persuasive)]; see also *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 787, fn. 6 [stating that predecessor to Rules of Court, rule 8.1115 does not prohibit citing unpublished federal cases].)

Defendants argue Labor Code sections 1102.5, 98.6, 6310, and 6311 all preclude individual liability, and therefore, fail as a matter of law. (Demurrer at pp. 4:6-6:1.) The Court notes that there are no published and well-established authorities clearly resolving the issue.. Plaintiff at the outset of his Opposition agrees that there is no binding California authority addressing individual liability with respect to these statutes. (Opposition at pp. 1:19-2:7.) However, the Court relies on persuasive authority, including federal court decisions interpreting California law and California Supreme Court decisions interpreting similarly worded statutes, to hold that individual liability does not arise under these sections of the Labor Code.

Section 1102.5 is a whistleblower statute which is intended to encourage employee whistle-blowers to report unlawful acts without fearing retaliation. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287.) As relevant here, this code section reads, in pertinent part that:

> [a]n employer, *or any person acting on behalf of the employer*, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency ….

(Lab. Code, § 1102.5, subd. (b) [emphasis added].)

In 2014, the California legislature revised section 1102.5 to include this language; prior to that point, courts "reliably found that [section] 1102.5 precluded individual liability." (*United States ex rel. Lupo v. Quality Assurance Services, Inc.* (S.D. Cal. 2017) 242 F.Supp.3d 1020, 1030 (*Quality Assurance Services*).) Neither the California Supreme Court nor any intermediate appellate courts have addressed whether the amendment permits claims for money damages against individual non-employers under section 1102.5. As noted above, Plaintiff concedes that there is no binding California authority on the issue and only mixed federal court decisions. (Opposition at 6:13-16.)

Because the meaning of a statute is strictly a legal issue, however, there is no reason for the Court to delay making a determination as to whether or not Plaintiff can maintain a claim under section 1102.5 against the Individual Defendants. (See *Jones v. Pierce* (1988) 199 Cal.App.3d 736, 741.) While no published decision by the California courts has settled this

issue, numerous federal courts have considered it and concluded that the amendment does *not* create a basis for liability against individual employees under Section 1102.5. (See, e.g., *Quality Assurance Services, supra,* 242 F.Supp.3d at 1030; *Tillery v. Lollis* (E.D. Cal. 2015, No. 1:14-cv-02025-KJM-BAM) 2015 U.S. Dist. LEXIS 106845, at *9 (*Tillery*); *Vera v. Con-way Freight, Inc.* (C.D. Cal. 2015, No. CV 15-874 AJW) 2015 U.S. Dist. LEXIS 45424, at *1 (*Vera*).)

Moreover, the California Supreme Court has come to the same conclusion when evaluating similarly worded statutes. (See, e.g., *Reno v. Baird* (1998) 18 Cal.4th 640, 645 (*Reno*) [affirming that no individual liability exists under the FEHA based on the statute's definition of "employer" to include "any person acting as an agent of an employer …."]; see also *Jones v. Lodge at Torrey Pines P'ship* (2008) 42 Cal.4th1158, 1162 (*Jones*) [finding that use of "person" in portion of the FEHA prohibiting retaliation does not compel finding of individual liability and noting that the Legislature can signal individual liability when it means it such as the portion of the FEHA prohibiting harassment].) The Court sees no reason to deviate from these well-reasoned findings and therefore finds that no individual liability exists under section 1102.5. Consequently, Defendants' demurrer to the second cause of action as to Defendants Wasinger, Bravo, and Hudson on the ground of failure to state facts as to individual liability under Labor Code section 1102.5 is SUSTAINED WITHOUT LEAVE TO AMEND.

The same rationale applies to section 98.6, which begins with "[a] *person* shall not discharge an employee in any manner discriminate, retaliate, or take any adverse action against any employee . . . ." (Lab. Code, § 98.6, subd. (a), emphasis added.) The term "person" is defined under Labor Code section 18 as "any person, association, organization, ..." (*Id.* at § 18, see also Section 98.6 refers to a "person" when discussing the prohibited retaliatory conduct, but refers to the "employer" when discussing liabilities and remedies. However, nothing in the language of section 98.6 or the authorities suggest that an individual can be held liable as an employer. Conversely, it is also not clear or settled that Plaintiff cannot pursue a section 98.6 claim against the Individual Defendants. (See, e.g., *Fernandez v. Big Lots Stores Inc.* (C.D. Cal. July 10, 2024, No. EDCV 14-00806 DDP (ASx)) 2014 U.S. Dist. LEXIS

94051, at *4 (*Fernandez*).) Plaintiff likewise concedes here that there are no reported California decisions addressing the issue. (Opposition at pp. 7:20-8:11.) In the absence of clear and well-settled authorities, the Court declines to conclude that a section 98.6 claim can be made against the Individual Defendants and follows the persuasive authority interpreting similarly worded statutes as cited above. Therefore, the Demurrer to the second cause of action on the ground of failure to state facts for individual liability under Labor Code section 98.6 with respect to the Individual Defendants is SUSTAINED WITHOUT LEAVE TO AMEND.

Similarly, Defendants argue sections 6310 and 6311, asserted as to the Individual Defendants under the third cause of action, do not provide for individual liability and therefore the cause of action fails as a matter of law. (Demurrer at pp. 5:17-6:1.) Plaintiff again concedes "[a]s with Labor Code sections 1102.5 and 98.6, there are no reported California decisions that have decided the issue of individual liability under Labor Code section 6310." (Opposition at p. 8:21-22.) Section 6310 provides, in relevant part, as follows:

> (a) No person shall discharge . . . any employee because the employee has done any of the following:
>
> (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative…. [¶]
>
> (b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative, of unsafe working conditions, or work practices, in his or her employment or place of employment, or has participated in an employer-employee occupational health and safety committee, shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or

> promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.
>
> (c) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section.

The enforcement provision of section 6310, subdivision (b), on its face applies only to *employers*, but not employees. While the statute prohibits individual employees from retaliating, it does not confer liability on them anywhere as it does to employers. The statute provides no remedy for a plaintiff against an individual employee defendant; thus, it does not follow that an individual employee may be liable pursuant to the statute. Since the statute only furnishes a remedy recoverable from an employer, the language of the statute suggests that only the plaintiff's employer is subject to liability. (See *Hart v. Tuolumne Fire Dist.* (E.D. Cal., Aug. 30, 2011) No. CV F 11-1272 LJO DLB, 2011 U.S. Dist. LEXIS 97113, at *10 (*Hart*) [finding that supervisors cannot be sued for retaliation under Section 6310 because the enforcement provision is directed at an employee who has suffered an adverse employment action by "his or her employer"].)

Moreover, the California Supreme Court in *Jones, supra*, 42 Cal.4th at p. 1162 held that the prohibition of discrimination and retaliation by any "person" as a subsequent amendment to FEHA does not impose individual liability on individual employees. Other courts have subsequently applied *Jones*[3] and similar cases to Section 6310 and other sections of the Labor Code. (See, e.g., *Hart, supra*, 2011 U.S. Dist. LEXIS 97113 at *25 [discussing *Reno* and *Jones* to conclude "the same term in similar labor contexts excludes supervisory personnel" and that individual defendants cannot be sued for retaliation under section 6310]; *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 798 [comparing lack of liability provision for individuals under FEHA to other sections of the Labor Code containing similarly worded statutes].) Further, California courts have also interpreted the FEHA based on cases analyzing section 6310 claims. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th

[3] *Jones, supra*, 42 Cal.4th at p. 1162.

1241, 1255 [finding the analysis applicable to FEHA persuasive for analyzing section 6310].) Thus, the two statutes inform how to interpret the other.

In sum, the California Supreme Court's exclusion of non-employers from liability in similar statutes supports the finding that Section 6310 does not apply to individual employees. (See *Jones, supra,* 42 Cal.4th at p. 1173; see also *Reno, supra,* 18 Cal.4th at p. 663; *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1087-1088 [stating that individual corporate agents acting within the scope of their agency are not liable for unpaid overtime], abrogated on other grounds by *Martinez v. Combs* (2010) 49 Cal.4th 35.) In light of the above, the Court finds Plaintiff fails to allege facts establishing Defendant's individual liability under section 6310 because individual employees may not be held personally liable under this statute. Accordingly, the Demurrer to the third cause of action on the ground of failure to state facts for individual liability under Labor Code section 6310 with respect to the Individual Defendants is SUSTAINED WITHOUT LEAVE TO AMEND.

Finally, Labor Code section 6311 protects an employee from termination for refusing to perform work in hazardous conditions in violation of occupational safety standards. The statute does not expressly state whether liability extends to individual non-employees. Neither Plaintiff nor Defendants have cited any direct authority to provide clarification on the issue, nor is the Court aware of any cases that have resolved, let alone addressed whether individual liability attaches to section 6311. Much like the above, the rationale articulated in *Jones*[4], *Reno*[5], and several federal court decisions interpreting California law cited above, such as *Fernandez*[6] and *Hart*[7], is also persuasive as applied to section 6311. Accordingly, individual employees may not be held personally liable under this statute. The Demurrer to the third cause of action on the ground of failure to state facts for individual liability under Labor Code section 6311 with respect to the Individual Defendants is SUSTAINED WITHOUT LEAVE TO AMEND.

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[4] *Jones, supra,* 42 Cal.4th at p. 1173.
[5] *Reno, supra,* 18 Cal.4th at p. 663.
[6] *Fernandez, supra,* 2014 U.S. Dist. LEXIS 94051, at *4
[7] *Hart, supra,* 2011 U.S. Dist. LEXIS 97113 at *25

iv. *Whether Plaintiff Has Stated Sufficient Facts to State a Claim for a Violation of Labor Code sections 6310 and 6311 as to Defendant CUHSD*

Defendants argue the third cause of action fails to state a claim because there are no facts that Plaintiff made a bona fide complaint for unsafe working conditions or that he refused to work in hazardous conditions. (Demurrer at pp. 6:14-7:23.) Defendants argue Plaintiff does not make any assertions that he refused to work in hazardous conditions. (*Id.* at p. 7:16-23.) In Opposition, Plaintiff makes clear that his section 6310 claim is premised on his request for an ice machine "for his maintenance, operations, and landscaping team, due to the high temperatures while working and to prevent any workplace injuries." (Opposition at pp. 11:21-23, 13:8-13.) However, Defendants argue his request for an ice machine without more is insufficient to state a violation of section 6310. (Demurrer at p. 7:16-23.) Defendants contend there is no allegation that Plaintiff had a bonafide concern for anyone's safety or any facts that would have reasonably alerted Defendant Wasinger to a safety problem and the need to take correct action. (*Ibid.*)

Labor Code section 6310 provides in pertinent part: "No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following: (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative." (Lab. Code, § 6310, subd. (a)(1).) Section 6310 protects employees against discrimination or retaliation for making a good-faith oral or written complaint directly to the employer "about working conditions or practices which [she] reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA standard or order which is being violated." (*Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 299-300 [superseded by statute on other grounds].) Section 6310 "reflects a significant public policy interest in encouraging employees to report health and safety hazards existing in the workplace without fear of discrimination or reprisal." (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1350.) As noted above, section 6311 protects an employee from being terminated for refusing to perform work in

conditions that create hazards to the employee in violation of occupational safety standards. (See Lab. Code, § 6311.)

As noted in Defendants' Reply, claims for retaliation in violation of Labor Code section 1102.5 and Labor Code section 6310 have similar requirements. (Reply at p. 8-17; *St. Myers v. Dignity Health* (2019) 44 Cal.App.5th 301, 314.) To establish a prima facie case under each, a plaintiff must show (1) he engaged in a protected activity; (2) his employer subjected him to an adverse employment action; and (3) a causal link between the two. (*Jadwin v. County of Kern* (E.D. Cal. 2009) 610 F.Supp.2d 1129, 1144; *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384; *Cuevas v. SkyWest Airlines* (N.D. Cal. 2014) 17 F.Supp.3d 956, 964.)

Plaintiff has sufficiently pled the first element (he engaged in a protected activity). Although Plaintiff's whistleblower complaints filed with the County of Santa Clara on August 23 and 29, 2023 pertain to the misuse of public funds, (Complaint at ¶ 15), Plaintiff's Complaint nonetheless alleges that he made an oral complaint to his supervisor, Defendant Wasinger. In paragraph 13 of the Complaint, Plaintiff alleges that he "requested to purchase an ice machine for his maintenance, operations, and landscaping team, due to the high temperatures while working and to prevent any workplace injuries." (*Id.* at ¶ 13.) Plaintiff alleges that in addition to Mr. Wasinger, the construction management team members were also present and made demeaning remarks with respect to his request. (*Ibid.*) Plaintiff alleges that the request was denied. (*Ibid.*) Here, the Court agrees that Plaintiff's allegations concerning the request for an ice machine highlight the risk of workplace injuries due to high temperatures as a health and safety concern. Therefore, Plaintiff has sufficiently pled thathe engaged in a protected activity.

However, as to the second element, an adverse employment action even in the retaliation context is defined as requiring that the adverse action " 'materially affect [ ] the terms and conditions of employment.'" (*Patten, supra*, 134 Cal.App.4th at p. 1388 [quoting *Yanowitz v. L'Oreal USA, Inc.* 36 Cal.4th 1028, 1050-1061].) Thus, the denial of a request or failure to accommodate is not enough to constitute an adverse employment action for a retaliation claim. (See generally, *Doe v. Department of Corrections & Rehabilitation* (2019)

43 Cal.App.5th 721, 735-36.) Although Plaintiff alleges that he was terminated, the Complaint does not allege that the termination was because of his request for an ice machine in response to the high temperatures. Rather, the Complaint clearly indicates that he made this request before making his complaints with the County of Santa Clara, and that Plaintiff endured retaliatory conduct and was terminated because of the whistleblower complaints much like the employee before him. (See Complaint at ¶¶ 13, 15, 16-23.) Thus, Plaintiff does not plead a causal link between his alleged protected activity and Defendants' actions. As such, Plaintiff has failed to state a claim under Labor Code section 6310.

Although Plaintiff argues in Opposition that he refused to work in unsafe conditions, the Complaint does not allege as much. (Opposition at 10:12-15; Complaint at ¶ 13.) Paragraph 13 of the Complaint only states that he requested the ice machine, and not that he stopped working because his request was denied. Therefore, Plaintiff has failed to allege sufficient facts to state a claim under Labor Code section 6311. Accordingly, Defendants' Demurrer to the third cause of action on the ground of failure to state sufficient facts to constitute a cause of action as to a violation of Labor Code sections 6310 and 6311 is SUSTAINED.

Plaintiff bears the burden of proving an amendment would cure the defect identified on demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; see also *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 112 fn. 8 (*Medina*) ["As the Rutter practice guide states 'It is not up to the judge to figure out how the complaint can be amended to state a cause of action. Rather, the burden is on the plaintiff to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the pleading.'"]; *Drum v. San Fernando Valley Bar Ass'n*. (2010) 182 Cal.App.4th 247, 253 [citing *Medina*].)

"[W]here the plaintiff requests leave to amend the complaint, but the record fails to suggest how the plaintiff could cure the complaint's defects, 'the question as to whether or not [the] court abused its discretion [in denying the plaintiff's request] is open on appeal … .' (Code Civ. Proc., § 472c, subd. (a).) Because the trial court's discretion is at issue, we are limited to determining whether the trial court's discretion was abused as a matter of law.

Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found 'only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case.'" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal App 4th 497, 507, disapproved on another ground in *Yvanova v. New Century Mortg. Corp*., *supra*, 62 Cal.4th at p. 939, fn. 13.)

Here, Plaintiff requests leave to amend but fails to state how exactly the Complaint can be amended. However, since Plaintiff has not yet amended his Complaint, the Court will exercise its discretion to grant 20 DAYS' LEAVE TO AMEND only as to the third cause of action for violations of Labor Code sections 6310 and 6311.

Plaintiff is reminded 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 also *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1023 ["Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend."].) The Court's order does not authorize the addition of any new claims or parties.

III. Conclusion

Defendants' Demurrer to the first cause of action is OVERRULED because Plaintiff maintains a private right of action with respect to Labor Code section 98.6 for the enforcement of section 232.5. Defendants' Demurrer to the second and third causes of action for individual liability as to Defendants Wasinger, Bravo, and Hudson under Labor Code sections 1102.5, 98.6, 6310, and 6311 is SUSTAINED WITHOUT LEAVE TO AMEND. Defendants' Demurrer to the third cause of action on the grounds of failure to state sufficient facts to

constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND as to violations of Labor Code sections 6310 and 6311 against Defendant CUHSD.

The Court will prepare the formal order

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Calendar Line 4
Case Name: *Cathay Bank v. RPRO152N3, LLC, et al.*
Case No.: 23CV416339

Before the Court is the motion for summary adjudication of the plaintiff's fourth cause of action for judicial foreclosure against defendant Brent W. Lee. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

On or about April 1, 2019, plaintiff Cathay Bank ("Bank") extended credit to defendant RPRO152N3, LLC ("Borrower") in the form of a loan ("Loan") in the original principal amount of $8,500,000. (Complaint, ¶5.) The Loan was extended pursuant to certain instruments, documents, and agreements (collectively, "Loan Documents") including a promissory note ("Note") dated April 1, 2019; business loan agreement ("Loan Agreement") dated April 1, 2019; deed of trust dated April 1, 2019 and recorded in Sacramento County on June 7, 2019 encumbering real property commonly known as 11931 Foundation Place in Gold River, California ("Sacramento Property"); assignment of rents dated April 1, 2019 and recorded in Sacramento County on June 7, 2019 encumbering the Sacramento Property; deed of trust dated April 1, 2019 and recorded in Placer County on June 7, 2019 encumbering real property commonly known as 9040 Vista De Lago Court in Granite Bay, California ("Placer Property"); and other related documents. (Complaint, ¶5(a) – (f).)

On or about April 1, 2019, defendant Brent W. Lee aka Lee Brent ("Guarantor") executed a written Commercial Guaranty ("Guaranty") in favor of plaintiff Bank wherein defendant Guarantor agreed to, among other things, unconditionally and irrevocably guaranty payment of all amounts defendant Borrower owes plaintiff Bank under the Loan Documents and defendant Borrower's performance under the Loan Documents. (Complaint, ¶6.)

Commencing on or about December 1, 2022, defendant Borrower defaulted under the Loan Documents by, among other things, failing to make payments when due on December 1, 2022 and in each month thereafter. (Complaint, ¶9.) On or about February 10, 2023, plaintiff Bank elected to accelerate all sums due under the Loan and declare them immediately due and payable, and made demand for such payment. (*Id.*)

Despite demand therefor, defendant Borrower failed and refused to pay the indebtedness in full to plaintiff Bank. (Complaint, ¶10.) As of May 9, 2023, the amounts due, owing, and outstanding under the Loan Documents are principal of $7,658,725.36, plus interest in the amount of $264,240.36, plus interest at the Interest After Default Rate of $169,130.19 from December 1, 2022 through May 9, 2023, plus late charges of $14,054.01, appraisal fee of $3,320, force placed insurance premiums of $5,830, for a total sum of at least $8,115,299.91, exclusive of legal fees and costs in the litigation of this action. (Complaint, ¶13.) On May 10, 2023 and on each day thereafter, interest continues to accrue at a daily rate of $2,606.09. (*Id.*)

On May 16, 2023, plaintiff Bank filed a complaint against defendants Borrower and Guarantor asserting causes of action for:

(1) Breach of Note [against defendant Borrower]

(2) Breach of Guaranty [against defendant Guarantor]

(3) Judicial Foreclosure as against Sacramento Property [against defendant Borrower]

(4) Judicial Foreclosure as against Placer Property [against defendants Borrower and Guarantor]

(5) Specific Performance and Appointment of Receiver for Sacramento Property [against defendant Borrower]

On November 1, 2023, defendants Borrower and Guarantor jointly filed an answer to plaintiff Bank's complaint.

On April 11, 2024, plaintiff Bank filed the motion now before the court, a motion for summary adjudication of its fourth cause of action against defendant Guarantor.

II. PLAINTIFF BANK'S MOTION FOR SUMMARY ADJUDICATION IS DENIED.

A. PROCEDURAL VIOLATION.

As a preliminary matter, the court notes that defendant Lee's opposition is untimely filed. Code of Civil Procedure section 437c, subdivision (b)(2) states, "Any opposition to the motion shall be served and filed not less than 14 days preceding the notice or continued date of hearing, unless the court for good cause orders otherwise." Based on a hearing date of October

8, 2024, defendant Lee's opposition was due by September 24, 2024. Defendant Lee did not file his opposition until September 30, 2024, six calendar days late.

California Rules of Court, rule 3.1300, subdivision (d) states, "No paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate." Since the court has discretion to consider a late filed paper, since plaintiff has not shown any real prejudice from the late filing, and to avoid the expenditure of any further judicial resources, the court will look past this procedural deficiency and consider the late-filed opposition papers in this instance. However, defendant Lee and defendant Lee's counsel are hereby admonished that any future failure to comply with either the Code of Civil Procedure or California Rules of Court may result in the court's refusal to consider their filings.

B. **OTHER PRELIMINARY REQUESTS.**

In opposition, defendant Lee makes a number of preliminary requests including a request that the court first hear defendants' motion/ petition to compel arbitration. Defendant Lee acknowledges, however, that the court already denied defendants' ex parte application to advance (and thereby prioritize) the hearing on their motion/ petition to compel arbitration. Having already denied defendants' request, the court finds no basis for reconsideration of that ruling now. Nor will the court entertain any of defendant Lee's other preliminary requests regarding amendment of defendants' answer or change of venue. The only properly noticed motion presently before the court is plaintiff Bank's motion for summary adjudication.

As a further preliminary matter, defendant Lee requests the hearing on plaintiff's motion for summary adjudication be continued to allow for further discovery. Defendant Lee's current counsel substituted into this action on August 30, 2024. Defendant's counsel requests a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h), which states, in pertinent part, that, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just."

"To mitigate summary judgment's harshness, the statute's drafters included a provision making continuances—which are normally a matter within the broad discretion of trial courts—virtually mandated upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion." (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395 (*Bahl*); internal punctuation omitted.)

However, "[i]t is not enough to ask for a continuance … in opposing points and authorities. The statute requires that the opposition be accompanied by affidavits or declarations showing facts to justify opposition may exist; or that such showing be made by an ex parte motion on or before the date the opposition is due." (Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶10:207.10, pp. 10-88 to 10-89.) In *Hill v. Physicians & Surgeons Exch.* (1990) 225 Cal.App.3d 1, 7 – 8, the "pleadings contain[ed] no affidavit detailing facts to show the existence of evidence supporting her theory of coverage and the reasons why this evidence could not be presented at the time of the hearing." "The purpose of the affidavit required by Code of Civil Procedure 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion." (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 325 – 326.)

The opposing party's declaration in support of a motion to continue the hearing should show the following:

- Facts establishing a likelihood that controverting evidence may exist and why the information sough is essential to opposing the motion;
- The specific reasons why such evidence cannot be presented at the present time;
- An estimate of the time necessary to obtain such evidence; and
- The specific steps or procedures the opposing party intends to utilize to obtain such evidence.

(Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶10:207.15, p. 10-89 citing Code Civ. Proc., §437c, subd. (h) and *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254 (*Cooksey*), et al.)

A declaration in support of a request for continuance under section 437c, subdivision (h) must show: "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]" [Citation.] "The purpose of the affidavit required by Code of Civil Procedure section 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion. [Citations.]" [Citation.] "It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show 'facts essential to justify opposition may exist.' [Citation.]

(*Cooksey, supra*, 123 Cal.App.4th at p. 254.)

Where a party requests a continuance under the statute and satisfies its conditions, the determination whether to grant the request is vested in the discretion of the trial court, and will not be disturbed on appeal unless an abuse of discretion appears. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100 [20 Cal. Rptr. 3d 1]; *Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 190 [133 Cal. Rptr. 2d 408].) In exercising its discretion the court may properly consider the extent to which the requesting party's failure to secure the contemplated evidence more seasonably results from a lack of diligence on his part. (*Desaigoudar v. Meyercord*, *supra*, 108 Cal.App.4th at p. 190 ["Where a lack of diligence results in a party's having insufficient information to know if facts essential to justify opposition may exist, and the party is therefore unable to provide the requisite affidavit under Code of Civil Procedure section 437c, subdivision (h), the trial judge may deny the request for continuance of the motion."]; *Knapp v. Doherty*, *supra*, 123 Cal.App.4th 76, 102, quoting *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 76 [41 Cal. Rptr. 2d 404] [request for discovery properly denied where requesting party offered " 'no justification for the failure to have commenced the use of appropriate

> discovery tools at an earlier date' "]; *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 257 [19 Cal. Rptr. 3d 810] ["majority of courts" have held that "lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing"]; but see *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398 [107 Cal. Rptr. 2d 270] [questioning whether diligence plays any proper role in the matter, given absence of any statutory reference to it].) [Footnote.]

(*Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1038 (*Rodriguez*).)

"[T]he court must determine whether the party requesting the continuance has established good cause for it. That determination is within the court's discretion." (Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶10:208, pp. 10-90 to 10-91 citing *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716, et al.) "Usually, the court's discretion should be exercised in favor of granting a continuance: 'The interests at stake are too high to sanction the denial of a continuance without a good reason.'" (*Id.* citing *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 634; et al.)

Factors the court may consider in deciding to continue include:

- The length of time the case has been pending. [17 months: Complaint filed May 16, 2023.]
- The length of time the requesting party had to oppose the motion. [1 month: MSJ filed April 11, 2024; but, current counsel substituted in on August 30, 2024.]
- The proximity of the trial date or the 30-day discovery cut-off before trial. [Not applicable.]
- Whether the continuance motion could have been made earlier.
- Prior continuances for this purpose.
- Whether the evidence sought is "essential" to the issue to be adjudicated. [As set forth in the supporting declaration/ opposition.]
- Death or serious illness of an attorney or party is normally good cause for granting a continuance. [Not applicable.]

(*Id.* at ¶10:208.1, pp. 10-91 to 10-92.)

Here, defendant Lee's counsel submits a declaration in which he states he received emails from defendant Lee's former counsel on September 5, 2024 attaching some of the pleadings.[1] Defendant's former counsel further stated his office would send the rest of the file to defendant's current counsel on the following week, but that did not occur.[2] Defendant's current counsel received defendant Lee's deposition transcript, but did not receive exhibits to that deposition until September 26, 2024.[3] Defendant's current counsel concludes with the statement that "discovery which is identified in the accompanying Memorandum of Points and Authorities is reasonably necessary to provide a full and complete response to Plaintiff's Motion for Summary Adjudication."[4] In the accompanying memorandum of points and authorities, defendant identifies people and documents it contends are relevant, but does not explain whether such people/ documents exist, how they are essential to defeating the plaintiff's motion for summary adjudication, what specific steps or procedures defendant intends to utilize to obtain such evidence; or how much time is necessary to obtain such evidence. While the court can appreciate current counsel's limited involvement in this action thus far, his declaration in support of a request for continuance is grossly inadequate. As such, the court, exercising its discretion, hereby DENIES defendant Lee's request for a continuance.

C. **PLAINTIFF BANK'S MOTION FOR SUMMARY ADJUDICATION OF THE FOURTH CAUSE OF ACTION [JUDICIAL FORECLOSURE] AGAINST DEFENDANT LEE IS DENIED.**

> When a borrower defaults on a loan secured by real property, the lender can use one of three procedures to recover the debt. First, the lender can initiate a judicial foreclosure by filing a lawsuit. (§ 725a.) As the plaintiff in the suit, the lender must prove that "the subject loan is in default and the amount of default." (*Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 470 [145 Cal. Rptr. 3d 678] (*Arabia*).) If the lender proves its case, the court can order the sale of the property to satisfy the borrower's debt. (§ 726.)

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[1] See ¶3 to the Declaration of William C. Dresser in Opposition to Motion for Summary Adjudication, etc. ("Declaration Dresser").
[2] See ¶4 to the Declaration Dresser.
[3] See ¶5 to the Declaration Dresser.
[4] See ¶8 to the Declaration Dresser.

(*Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 672.)

> As its name implies, to commence a judicial foreclosure, the foreclosing party must file a lawsuit. Therefore, instead of merely causing a notice of default to be recorded and proceeding toward a foreclosure sale per the Civil Code without court involvement, the plaintiff must prove its case to the satisfaction of the court. The plaintiff must establish the subject loan is in default and ***the amount of default***. (See 1 Bernhardt, Mortgages, Deeds of Trust, and Foreclosure Litigation (Cont.Ed.Bar 4th ed. 2011) Judicial Foreclosure, § 3.1, p. 181 (Bernhardt).) If successful in proving the loan is in default, the plaintiff will ask the court to order the property sold to satisfy the loan balance. (*Ibid.*) Inherent in this process, the plaintiff must prove it has the right to initiate the judicial foreclosure.

(*Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 470-471; emphasis added.)

Code of Civil Procedure section 726 "provides that the court may, by its judgment, direct the sale of the encumbered property and the application of the proceeds thereof to the amount due to the plaintiff. ***It follows that this judgment directing such sale and such application must also fix the amount which is then to be paid to the plaintiff***." (*Kuster v. Parlier* (1932) 122 Cal.App. 432, 434; emphasis added.)[5]

Irrespective of whether plaintiff Bank has met its initial burden[6], defendant Lee proffers evidence in opposition which, in this court's opinion, creates a triable issue of material fact with regard to the amount plaintiff Bank contends should be fixed in its favor. In relevant part, plaintiff Bank contends and submits evidence that, "[a]s of April 8, 2024, the total amounts due, owing, and outstanding under the Loan Documents are principal of $1,460,628.74, plus

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[5] Code of Civil Procedure, section 726, subdivision (a), continues to read, in relevant part, "In the action the court may, by its judgment, direct the sale of the encumbered real property … and the application of the proceeds of the sale to the payment of the costs of court, the expenses of levy and sale, and the amount due plaintiff…"

[6] "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 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." (Code Civ. Proc., §437c, subd. (q).) Since the court finds the existence of a triable issue, the court finds it unnecessary to rule on defendant Lee's evidentiary objections.

interest under the Loan Documents in the amount of $64,815.40, plus interest at the Interest After Default Rate under the Loan Documents of $43,210.27 from September 9, 2023 through April 8, 2024, plus Late Charges of $44,164.80, plus Appraisal Fee of $3,320.00, plus Force Placed Insurance Premium Fees of $19,430.00, plus foreclosure fees of $14,755.52, plus recording fees of $800.00, plus [plaintiff Bank's] attorneys' fees and costs of $129,517.85, for a total sum of at least $1,780,642.58.[7] On April 9, 2024 and on each day thereafter, daily interest continues to accrue at the Interest After Default Rate of $202.87 per day plus interest at the Note rate of $304.30 per day, for a combined daily rate of $507.17.[8]

In opposition, defendant Lee proffers the following relevant evidence: defendant Lee paid money to [plaintiff] Cathay Bank for principal and interest.[9] Defendant Lee tendered additional money - $500,000 – to [plaintiff] Cathay Bank.[10] Plaintiff Bank has not provided credit for the amounts paid and tendered by defendants [Borrower] and [Lee].[11]

There being at least a triable issue of material fact with regard to the amount of default and/or the fixed amount to be paid to plaintiff Bank, plaintiff Bank's motion for summary adjudication of its fourth cause of action against defendant Lee is DENIED.

The Court will prepare the formal order.

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[7] See Separate Statement of Undisputed Material Facts in Support of Motion for Summary Adjudication of the Plaintiff's Fourth Cause of Action for Judicial Foreclosure against Defendant Brent W. Lee ("Bank's UMF"), Fact No. 23.
[8] See Bank's UMF, Fact No. 23.
[9] See Defendants' Additional Undisputed Material Facts ("Defendant Lee's AMF"), Fact No. 113.
[10] See Defendant Lee's AMF, Fact No. 114.
[11] See Defendant Lee's AMF, Fact No. 118.