SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: October 1, 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.

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

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.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV406991	Ryan Lotz v. Mircea Dragomir	Demurrer to complaint: it appears that plaintiff filed an amended complaint at the last minute, on September 25, 2024. The court therefore takes the demurrer OFF CALENDAR.
LINE 2	24CV431739	AmTrust North America, Inc. v. Kelly Nicholson	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 3	24CV431739	AmTrust North America, Inc. v. Kelly Nicholson	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 4	22CV396334	Kimberly A. Goheen v. David R. Lasich et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	23CV413608	Gabriel Garcia et al. v. Steve Schlegel	Click on LINE 5 or scroll down for ruling.
LINE 6	23CV418998	Holly Campana v. David Dellavecchia et al.	OFF CALENDAR
LINE 7	23CV418998	Holly Campana v. David Dellavecchia et al.	OFF CALENDAR
LINE 8	23CV418998	Holly Campana v. David Dellavecchia et al.	OFF CALENDAR
LINE 9	23CV418998	Holly Campana v. David Dellavecchia et al.	OFF CALENDAR
LINE 10	24CV429076	Jane AAY Doe v. Alum Rock Union School District et al.	Click on LINE 10 or scroll down for ruling.
LINE 11	24CV433052	Jessica Norton v. FCA US LLC	OFF CALENDAR
LINE 12	19CV352403	Deanna Lacy et al. v. San Joaquin Regional Rail Commission et al.	Application of Nathan Karlin to appear pro hac vice: parties to appear.
LINE 13	20CV363967	Jacob Saidian v. Accel Construction Corporation et al.	Click on LINE 13 or scroll down for ruling.

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LINE #	CASE #	CASE TITLE	RULING
LINE 14	23CV427462	Xiaoxue Wu et al. v. Xiang Wang et al.	Motion for leave to amend complaint: notice is proper, and the motion is unopposed. Good cause appearing, including the absence of any discernible prejudice to defendants, the court GRANTS the motion. Moving party to prepare proposed order.
LINE 15	24CV444772	MojoBreak, Inc. v. Santa Clara Police Department	Petition for return of stolen property: parties to appear. The court questions whether notice is proper for this petition, and whether service of process is proper for this case as a whole. The answer to both questions appears to be "no," and so the court is inclined to deny the petition without prejudice.

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Calendar Lines 2-3
Case Name: *AmTrust North America, Inc. v. Kelly Nicholson*
Case No.: 24CV431739

I. BACKGROUND

This lawsuit arises from a dispute over a settlement agreement. Plaintiff Amtrust North America, Inc. ("Amtrust"), is a Delaware corporation whose principal place of business is in New York City, New York. Amtrust alleges that defendant Kelly Nicholson ("Nicholson") is a resident of Arizona who entered into a settlement agreement (referred to as the "Google Settlement") which required her to pay Amtrust $141,443.74 to satisfy a workers' compensation lien. The complaint alleges that the Google Settlement was executed in Santa Clara County.

Amtrust filed its original and still-operative complaint on February 23, 2024, stating five causes of action: (1) Unjust Enrichment; (2) Breach of Contract—Third Party Beneficiary; (3) Common Count—Money Had and Received; (4) Conversion; and (5) Violation of Labor Code § 3852. There are no exhibits to the complaint.

Currently before the court are Nicholson's demurrer to and motion to strike portions of the complaint, both filed on July 9, 2024.

II. DEMURRER TO THE COMPLAINT

A. General Standards

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.)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents for which judicial notice is properly requested and may be granted. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. This includes declarations. The court has only considered the declaration of counsel Scott Seabaugh to the extent it discusses the meet-and-confer efforts required by statute.

Code of Civil Procedure section 430.60 states: "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The rules of court also require that the demurrer itself (distinct from a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer

must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

Finally, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1273; See also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

B. Basis for the Demurrer

Nicholson demurs to the fifth cause of action on the ground that it does not state sufficient facts support a cause of action for violation of Labor Code section 3852. (See Notice of Demurrer, p. 1:21-23.) Nicholson's supporting memorandum adds another ground for the demurrer not stated in the notice: uncertainty. (See Memorandum, p. 2:16-19.)

C. Discussion

Assuming for purposes of argument that it has been properly raised as a ground for demurrer, Nicholson's challenge to the fifth cause of action on the ground of uncertainty ground is OVERRULED. "'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' 'A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.'" (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.) Nicholson fails to provide any support for this bare assertion of "uncertainty." The court finds that the allegations of the complaint are not so incomprehensible that Nicholson cannot reasonably respond.

As for Nicholson's demurrer on the ground that the fifth cause of action fails to state sufficient facts, the court SUSTAINS the demurrer with 20 days' leave to amend.

Labor Code section 3852 permits an employer or insurer to bring an action against a third-party tortfeasor to recover payments made as a proximate result of the injury to or death of the employee. (See *Eli v. Travelers Indemnity Co.* (1987) 190 Cal.App.3d 901, 904.) The general rule is that statutory causes of action must be pled with particularity. The sparse allegations of the fifth cause of action, including the prior allegations incorporated by reference, fail to explain how Nicholson's alleged failure to pay Amtrust money owed pursuant to a settlement agreement constitutes a violation of Labor Code section 3852.

In opposition, Amtrust cites a number of facts from the Google Settlement, but these facts are all extrinsic to the complaint. Amtrust justifies the lack of detail in its complaint on the ground that the Google Settlement was confidential, but the court finds that sufficient facts can be pleaded—including whether Amtrust is authorized to bring a cause of action under Labor Code section 3852 and whether Nicholson is a responsible party or third party—without running afoul of any confidentiality considerations. Thus, the court determines that there are potential amendments that can cure the pleading defects identified by Nicholson.

The court reminds Amtrust 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 to 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. "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." (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.) The court does not grant leave to add any new causes of action or parties.

III. MOTION TO STRIKE

A. General Standards

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. Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc. § 431.10, subds. (b), (c).) 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].)

A motion to strike may be brought against a portion of a cause of action that is purportedly defective—*e.g.*, because it seeks an improper remedy. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680.) At the same time, as Courts of Appeal have emphasized, "[W]e have no intention of creating a procedural 'line item veto' for the civil defendant." (*Id.* at p. 1683.) California Rule of Court 3.1322(a) requires that "[a] notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively."

As with a demurrer, extrinsic evidence cannot be considered on a motion to strike, and additional arguments cannot be raised for the first time in a reply brief. The court has only considered the declaration in support of the motion from Scott Seabaugh to the extent that it discusses the meet-and-confer efforts required by statute. The court has not considered the declaration of Paul John Badum submitted with the opposition or the attached exhibits, as they constitute extrinsic evidence.

B. Basis for the Motion to Strike

Nicholson moves to strike "the Punitive Damage and Attorney Fee request for judgment in the Complaint, on the grounds that the Complaint does not state any facts to support claims for Punitive Damages and/or attorney fees." (Notice of Motion, p. 1:21-23.) The supporting memorandum clarifies that Nicholson is seeking to strike the requests for punitive damages and attorney's fees in the *prayer* of the complaint.

C. Discussion

1. Punitive Damages

"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 statute, 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].)

Specific factual allegations are required to support a punitive damages claim. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.) At the same time, because a pleading is read as a whole, even conclusory allegations may suffice when read in context with facts alleged as to defendant's wrongful conduct. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7.)

As Nicholson points out, the complaint currently does not contain any allegations of the type of conduct that would support a request for punitive damages. The only mention of punitive damages is in the complaint's prayer. Amtrust's opposition argues that Nicholson's alleged failure to pay money owed under the Google Settlement supports the request, but a mere breach of contract—and offer to pay much less than what was agreed to—is not a basis for seeking punitive damages. It does not even come close. In any event, there are currently no allegations in the complaint identifying *any* factual basis for the prayer for punitive damages.

The court GRANTS Nicholson's motion to strike the complaint's request for punitive damages in paragraph 3 of the prayer. The court grants 20 days' leave to amend, although the court does not presently discern any possible basis upon which Amtrust can actually make a proper request.

2. Attorney's Fees

In the absence of some special agreement, statutory provision, or exceptional circumstances, attorney's fees are to be paid by the party employing the attorney. (Code Civ. Proc., § 1021.) Attorney's fees are awardable as costs to a prevailing party if the fees are

authorized by contract, statute, or law. (Code Civ. Proc. § 1033.5, subd. (a)(10).) The contractual or statutory basis for a request for attorney's fees should be alleged within the body of the complaint. (See *Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470, 1474 [due process is satisfied if complaint requests unspecified amount of attorney fees and alleges entitlement to fees based on contract or statute]).

While the opposition argues that the Google Settlement provides for the recovery of attorney's fees, no basis is actually identified *in the complaint*. As with punitive damages, the one and only mention of attorney's fees is in the prayer. Accordingly, the court GRANTS the motion to strike the request for attorney's fees in paragraph 6 of the complaint's prayer with 20 days' leave to amend.

IV. CONCLUSION

The demurrer to the fifth cause of action is OVERRULED on the ground of uncertainty; it is SUSTAINED with 20 days' leave to amend on the ground of failure to state sufficient facts. The motion to strike is GRANTED with 20 days' leave to amend.

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Calendar Line 4
Case Name: *Kimberly A. Goheen v. David R. Lasich et al.*
Case No.: 22CV396334

I. BACKGROUND

This is a dispute between neighboring residential landowners regarding a redwood tree growing on or near the boundary line between their properties. Plaintiff Kimberly Goheen ("Goheen"), Trustee under the Kimberly Goheen Revocable Trust Dated June 26, 2015, owns real property located at 1859 Creek Drive in San Jose. Defendants David and Pamela Lasich (the "Lasiches," or "Defendants"), individually and as Trustees Under Trust Dated December 12, 2013, own adjoining real property located at 1869 Creek Drive.

Goheen's original and still-operative complaint, filed on March 28, 2022, states five causes of action: (1) Trespass; (2) Negligent Trespass; (3) Nuisance; (4) Declaratory Relief; and (5) Injunctive Relief.[1] Legal descriptions of the properties are attached to the complaint as Exhibits A and B. A copy of a land survey is attached to the complaint as Exhibit C. Defendants answered the complaint on May 4, 2022.

Currently before the court is Goheen's motion for summary judgment, filed on July 15, 2024. Defendants filed their opposition on September 13, 2024.[2] This matter is currently set for a jury trial on October 14, 2024—*i.e.*, less than two weeks from today—and that trial date was set on January 30, 2024, nearly six months before the present motion was filed.

II. MOTION FOR SUMMARY JUDGMENT

A. General Standards

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."]; *Palm Spring Villas II Homeowners Association, Inc. v. Parth* (2016) 248 Cal.App.4th 268, 288.)

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[1] Injunctive relief is a remedy, not a cause of action.
[2] Defendants also filed an "objection" to the motion on August 11, 2024. That separate filing is not authorized by Code of Civil Procedure section 437c.

Where a plaintiff has moved for summary judgment or summary adjudication, it has the burden of showing that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a).) That burden can be met if the plaintiff "has proved each element of the cause of action entitling it to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1); see also *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965.)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of an opponent's claim or defense. All "evidentiary doubts or ambiguities" are resolved in the opposing party's favor. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.) While the same standards of admissibility govern both, the opposition declarations are liberally construed, while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) As a general matter, the moving party may not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252.)

B. Basis for Goheen's Motion

Goheen moves "for an order granting Summary Judgment in favor of Plaintiff and against Defendants" on the basis that "there is no triable issue as to any material fact and Plaintiff is entitled to judgment as a matter of law. Specifically, [Defendants'] actions in planting and failing to maintain a non-compliance Redwood tree have resulted in significant and ongoing encroachments onto Plaintiff's property, causing substantial damage and interference." (Notice of Motion at p. 1:21-27.)

The motion is one for summary judgment *only*. While the notice of motion states, "Alternatively . . . [plaintiff] will and hereby does move the Court for an order summarily adjudicating the following causes of action, claims and issues contained in the Complaint on file," the notice then fails to identify any specific causes of action for summary adjudication.

In addition, Goheen's separate statement fails to set forth any bases for summary adjudication. Rule 3.1350(b) of the California Rules of Court states: "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." Rule 3.1350(d)(1)(A) further states that the separate statement "must separately identify: (A) Each cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion." Because Goheen's notice of motion does not specifically identify any causes of action, and her separate statement only lists facts in support of summary judgment, the motion can only be considered one for summary judgment.

C. Discussion

The court denies the motion for summary judgment, for the reasons that follow.

First, as defendants point out, the motion does not comply with Code of Civil Procedure section 437c, subdivision (a)(3), which requires a summary judgment motion to be noticed "no later that 30 days before the date of trial, unless the court for good cause orders otherwise." The 30-day time period between a summary judgment hearing and trial is calculated based on the trial date in effect *at the time the summary judgment motion is filed and noticed*, regardless of whether or not that is the original trial date. (See *Green v. Bristol Meyers Co.* (1988) 206 Cal.App.3d 604.)

Ordinarily, if a moving party is unable to obtain a hearing date for the summary judgment motion more than 30 days before trial, that party will seek an order finding good cause to hear the motion within 30 days of the trial date, shortly after the summary judgment motion itself is filed. Here, that was not done by Goheen. In this case, the October 14, 2024 trial date in the case was set at a January 30, 2024 trial setting conference, attended by both sides. Goheen and her counsel had ample time after the trial setting to file a motion for summary judgment that would comply with Code of Civil Procedure section 437c, subdivision (a)(3). Unless a trial court finds good cause under subdivision (a)(3), a notice of motion setting a summary judgment motion for hearing within 30 days of the trial date is invalid. (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1268; see also *Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1204-1205 ["the court lacks jurisdiction to rule on a motion that has not been properly noticed for hearing on the date in question"].)

While the court could find good cause on its own even at this late date, Goheen has presented no apparent rationale for doing so. In fact, Goheen has simply ignored subdivision (a)(3).

Second, even if the court were to find good cause to hear the motion, the motion would still be denied for failure to meet the initial burden. As the Lasiches point out, none of the evidence submitted in support of Goheen's motion has been authenticated by a sworn declaration.

A motion for summary judgment must be supported by admissible evidence. Evidence must be authenticated to be admissible. (See Evid. Code, § 1401, subd. (a) ["Authentication of a writing is required before it may be received into evidence."]; *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 273 [a writing must be authenticated by evidence establishing that the writing is what it purports to be]; *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 523 [explaining that ordinarily in law-and-motion matters, a writing is authenticated by declarations establishing how the documents were obtained, who identified them, and their status as "true and correct" copies of the original].) Here, the only declaration submitted with the motion is from Goheen's attorney, and it does not discuss or authenticate any of the evidence attached to the supporting memorandum or cited in the separate statement.[3]

Third, even if the court were to consider the motion on the merits *and* consider Goheen's unauthenticated evidence, the court would find that the Goheen has not met her burden of showing that there is no defense to any cause of action. As the Lasiches point out,

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[3] The separate statement also does not comply with Rule of Court 3.1350(d)(3). "Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers."

there remains a material fact issue as to whether Goheen's causes of action are barred by statutes of limitations, given the passage of time between the planting of the tree, Goheen's purchase of her property, and the claims that she now raises. (Opposition, pp. 14:24-15:8.)

Fourth, the court also finds that the Lasiches have identified several other material factual disputes that remain unaddressed in Goheen's motion, including (but not limited to) whether and the extent to which Goheen has been harmed by the Lasiches' actions.

For all of these reasons, the motion must be denied.

D. Objections to Evidence

Defendants have submitted objections to Goheen's evidence with their opposition, noting (among other things) that Goheen's evidence is not authenticated. For the reasons set forth above, the court sustains the objection that the evidence lacks foundation, even though (as discussed above) the court would deny the motion even if the evidence were considered.

The summary judgment motion is DENIED.

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Calendar Line 5
Case Name: *Gabriel Garcia et al. v. Steve Schlegel*
Case No.: 23CV413608

Defendant Steve Schlegel moves for terminating sanctions, or in the alternative, issue or evidence sanctions, for plaintiffs' (Gabriel Garcia and Maribel Garcia's) failure to respond to discovery, notwithstanding orders compelling such responses and imposing monetary sanctions. On April 9, 2024, the court heard Schlegel's motions to compel responses to form interrogatories, special interrogatories, and requests for production from the Garcias, and the court signed formal orders granting the motions on May 31, 2024. Those motions to compel were unopposed.

Notice is proper for the present sanctions motion, and the motion is again unopposed. Schlegel asserts that the Garcia's have continued to refuse to provide discovery responses, in violation of the court's orders; in addition, they have not paid the monetary sanctions. Nevertheless, the court finds that Schlegel has not presented a sufficient justification for the drastic option of terminating sanctions. Case law instructs that an incremental approach to discovery sanctions should be the customary one, not an approach that goes straight for termination. (See *J.W. v. Watchtower Bible & Tract Society of New York, Inc.* (2018) 29 Cal.App.5th 1142, 1169-1170; *Creed-21 v. City of Wildomar* (2017) 18 Cal.App.5th 690, 701.) It is axiomatic that this court must consider "whether a sanction short of dismissal or default would be appropriate to the dereliction." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796-797.) In this case, Schlegel does not show that lesser sanctions present an insufficient remedy for the failure to respond to discovery; in fact, Schlegel actually makes a case for lesser sanctions.

His argument for issue sanctions is overbroad: he requests that the court "determine that all issues presented within the Causes of Action set forth in Plaintiffs' Complaint be found in favor of Defendant." (Memorandum, p. 6:15-16.) This is tantamount to a terminating sanction, and the court rejects it.

His argument for evidentiary sanctions is also somewhat overbroad, but at least some of the proposed sanctions are tied to specific discovery requests. The court orders the following evidentiary sanction against the Garcias:

> The Garcias may not present any documents at trial in support of the allegations that: (1) the property they rented from Schlegel (1476 Portobelo Drive, San Jose, California) was not safe and habitable (Special Interrogatories Nos. 19-22); (2) there were habitability defects and dangerous conditions on the property during their tenancy (Special Interrogatories Nos. 23-32); (3) Schlegel had actual or constructive notice of any alleged habitability defects or dangerous conditions (Special Interrogatories Nos. 33-43); (4) the Garcias made complaints to governmental agencies regarding the property (Special Interrogatories Nos. 48-51); and (5) Plaintiffs suffered injury as a result of conditions on the property (Special Interrogatories Nos. 52 *et seq.*)
>
> It is so ordered.

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Calendar Line 10
Case Name: *Jane AAY Doe v. Alum Rock Union School District et al.*
Case No.: 24CV429076

Plaintiff Jane AAY Doe brings this motion to compel compliance with a subpoena against non-party Rehon & Roberts, a law firm that represented defendant Alum Rock Union School District ("ARUSD") in an administrative employment proceeding concerning Maria Gutierrez, the former principal of Adelante Dual Language Academy ("Adelante"). Adelante is a school in the ARUSD. Doe argues that Gutierrez covered up reports of sexual abuse committed by another Adelante employee, Israel Santiago, and that documents from the employment proceeding—including communications with the Commission on Teacher Credentialing and with the San Jose Police Department, as well as depositions of certain witnesses—would therefore be directly relevant to her claims of sexual abuse against Santiago. For its part, Rehon & Roberts does not disagree that the requested documents may potentially be relevant to this case; instead, it argues that disclosure is prohibited by the protective order in the administrative employment proceeding, and it also argues that Doe failed to comply with the notice requirements of Code of Civil Procedure sections 1985.3 and 1985.4.

The court grants the motion to compel *in part*.

The court has reviewed the protective order from that proceeding and finds that it does not serve as an absolute bar to the production of the documents in this case. In fact, it appears that while that proceeding was still pending, the Superintendent of ARUSD, Hilaria Bauer, requested a modification of the protective order to allow for the use of one of the depositions—for witness Erlinda Munoz—as part of an investigation of potential employee misconduct. The administrative law judge granted the modification in September 2023.

The request by Doe here to obtain discovery relevant to an investigation of potential misconduct by Santiago (and Gutierrez) is analogous to the previous request, except there is no vehicle to do so via the administrative proceeding, as it is now closed. Doe correctly notes that the primary goal of the protective order in the administrative proceeding was to prevent disclosure to the public. Rehon & Roberts also correctly notes that the protective order was specifically concerned with revealing information about minors and their confidential education records under the Family Educational Rights and Privacy Act (FERPA). At the same time, Doe argues that any confidentiality concerns are outweighed by her "exceptional need" for these documents.

The court is hindered by the parties' unhelpful "all-or-nothing" approach to the discovery at issue, where each side treats the various items of discovery as a single unit, without any detailed explanation of the different categories of information. Based on the information presently available to it, the court makes the following findings and orders:

- While at least some of the requested discovery appears to be potentially relevant to this case, there is no way to determine that all of it is. For example, Doe requests "[w]ritten discovery of any kind" from the administrative proceeding, but this formulation is overbroad on its face, and it appears most likely to encompass the information about minors (FERPA records) that was intended to be protected by the protective order; such records simultaneously appear to have the least potential

probative value with respect to the allegations here. Certainly, no explanation has been provided by Doe regarding their probative value for this case.

- Assuming that the parties enter into a stipulated protective order in this case—the parties can use the model protective order for Santa Clara County as a starting point—any concerns about public disclosure are diminished.

- In the administrative proceeding, the protective order states that "[r]edaction of portions of the documents to delete this information is not practicable," but no explanation is provided. While redaction may not have been "practicable" in an administrative employment proceeding, the court has been given no basis to find here that redaction of the most sensitive information—*i.e.*, identifying information of minor students—would not be "practicable."

- The court therefore orders the parties to stipulate to a protective order within the next 30 days, after which Rehon & Roberts must produce the following documents pursuant to the protective order, *with redactions of any student names or student-identifying information*, within 30 days of entry of the protective order:

    - Communications with the Commission on Teacher Credentialing regarding Gutierrez

    - Communications with the San Jose Police Department regarding Gutierrez and compliance with the mandated reporter law

    - Deposition transcripts of Cesar Torrico, Hilaria Bauer, and Maria Gutierrez

- The court denies the motion as to "[w]ritten discovery of any kind," as well as deposition transcripts of "[a]ny other testifying party."

In short, the motion is GRANTED in part and DENIED in part.

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Calendar Line 13
Case Name: *Jacob Saidian v. Accel Construction Corporation et al.*
Case No.: 20CV363967

The present motion appears to perpetuate the parties' ongoing confusion as to what a "good faith" settlement is under Code of Civil Procedure section 877.6 and what an "enforceable" settlement is under Code of Civil Procedure section 664.6.

On April 22, 2024, the court determined that *to the extent* that a settlement was reached between plaintiff Jacob Saidian and defendant YNR Construction ("YNR"), it was a "good faith" settlement under section 877.6. The purpose of any such determination is to bar a joint tortfeasor (*i.e.*, the co-defendants in this case) from making any further claims against the settling tortfeasor. In this case, YNR filed a proper application for determination of good faith settlement, and no co-defendant filed a timely objection within 25 days, as required by section 877.6, subdivision (a)(2). Accordingly, it was granted. Confusingly, Saidian filed an untimely "objection" to his own settlement, but as the court noted, the objection was both untimely and procedurally improper, as "[t]he court has never seen a plaintiff object to his own settlement in an application for determination of good faith." (See Order, dated April 22, 2024.)

Now it is YNR's turn to sow confusion. In the present motion to enforce the settlement, YNR relies on the court's ruling regarding the good faith of the settlement as support for the notion that it has an *enforceable* agreement with Saidian. Those are two different things. The court's April 22, 2024 ruling did not determine that there was an enforceable settlement agreement under section 664.6; instead, it determined that *if* there was a settlement, then it was entered into in good faith under section 877.6, barring claims from co-defendants. As the court noted in the April 22, 2024 order, there is no requirement under section 877.6 that "a copy of the executed settlement agreement . . . be attached." But on a motion to enforce under section 664.6, there is expressly a requirement that the parties' agreement either be set forth "in a writing signed by the parties' outside the presence of the court" or presented "orally before the court." (Code Civ. Proc., § 664.6, subd. (a).) Here, YNR has failed to produce an agreement signed by the parties or a transcript of court proceedings. Instead, it has submitted email correspondence, but emails do not satisfy the strict signature requirement of section 664.6. (See *J.B.B. Inv. Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 986-991.)

The court does not understand why the parties have been unable to finalize an exceedingly basic settlement that they apparently agreed to months ago. Nevertheless, their apparent meeting of the minds, as to which Saidian now seems to be having second thoughts, does not meet the standard for an enforceable settlement under section 664.6.

The motion is DENIED.

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