SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 08-27-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

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

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV424913 Motion: Strike	Peter Zhong vs Pohing Chan	See Tentative Ruling. Court will prepare the final order.
LINE 2	24CV431690 Hearing: Demurrer	Matthew Chroust vs Intuitive Surgical Operations, Inc et al	See Tentative Ruling. Court will prepare the final order.
LINE 3	24CV431690 Hearing: Motion to Strike	Matthew Chroust vs Intuitive Surgical Operations, Inc et al	See Tentative Ruling. Court will prepare the final order.
LINE 4	24CV431690 Motion: Compel	Tsai v. Chang, et al	See Tentative Ruling. Defendants shall prepare the final order.

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LINE 5	21CV375506 Motion: Set Aside	RAYNALDO GARCIA vs RESTORATION SPECIALISTS, INC. et al	Plaintiff's counsel's affidavit is not sufficient to meet the standard for mandatory set aside, as counsel takes no responsibility for his negligence in failing to file a change of address with the court. The Court sent the notices to the address it had on file for counsel. Rather than explain why he failed to file a change of address, counsel simply drops in a footnote the fact that no change of address was filed and does not even include this fact in his affidavit. The Court declines to grant discretionary relief as this is the second time that Plaintiff's counsel has filed to set aside a default based on its nonappearance, another fact Plaintiff's counsel fails to acknowledge it its motion and declaration. The motion to set aside is DENIED. Defendant is ordered to submit the final order within 10 days of the hearing.
LINE 6	21CV377584 Motion: Approve Good Faith Settlement	Selvin Ortiz vs Northwall Builders Inc et al	Defendant PG&E's unopposed motion for good faith settlement is GRANTED. PG&E shall submit the final order.

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DATE: 08-27-24 TIME: 9 A.M.

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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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 7	23CV413008 Motion: Enforce Settlement	Jesus Vargas et al vs Richard Vargas et al	The unopposed motion to enforce settlement is GRANTED with respect to the outstanding judgment amount of $90,423.09. Plaintiff's counsel has failed to provide any legal basis to include the commission fee or attorney's fees, as the settlement agreement does not discuss either. Plaintiff shall submit the final order and final judgment for $90,423.09 within 10 days of the hearing.
LINE 8	23CV426220 Motion: Order for prejudgment possession	Santa Clara Valley Transportation Authority vs IAC At Cupertino, LLC et al	See Tentative Ruling. Plaintiff shall prepare the final order.
LINE 9	24CV438600 Hearing: Petition Compel Arbitration	Thang Dinh et al vs Nick Pusateri et al	The Court fails to see any proof of service for the petition to compel arbitration. If moving party appears, the court may grant a continuance to allow for proper notice. If moving party can prove that service was proper, the unopposed petition will be granted, including the appointment of J. Murphy as the arbitrator.
LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 15			
LINE 16			
LINE 17			

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Calendar Line 1
Case Name: *Peter Zhong v. Pohing Chan* (and related cross-actions)
Case No.: 23CV424913

I. Factual and Procedural Background

Cross-complainant Pohing Chan ("Chan") brings his cross-complaint ("XC") against Peter Zhong ("Zhong").[1] According to the allegations of the XC, Chan paid $50,000 to Fremont Hill Development Corporation ("FDHC") and Zhong cheated Chan out of this money. (XC, ¶ 1.) On or around May 9, 2019, Zhong emailed Chan and informed him that the FHDC would refund him the $50,000 because the FDHC's condo project could not proceed. (XC, ¶ 2.) But, Chan never received a refund. (XC, ¶ 3.)

On July 29, 2019, Zhong emailed Chan with a Mutual Termination Agreement ("the Agreement"). (XC, ¶ 3.) By having Chan sign this agreement, Zhong made it impossible for Chan to claim he did not receive a refund of his money. (*Ibid*.) On or around August 12, 2019, Zhong executed the Agreement and repeatedly promised Chan would receive a refund. (XC, ¶ 4.) After the Agreement was entered, FDHC ran out of funds by paying Zhong and others in control first. (XC, ¶ 5.)

After Chan and others discovered Zhong's false promises, lawsuits were filed against FDHC and Zhong for their joint liability in breach of contract and fraud. (XC, ¶ 6.) Zhong was personally served in two lawsuits and throughout the entire process he was properly served with all papers. (XC, ¶¶ 7-8.) Zhong made no appearances in the two lawsuits and therefore, default judgment was entered against Zhong on August 6, 2021 in Chan's lawsuit. (XC, ¶ 9.)[2]

It was not until April 2021, when Chan enforced the default judgment by levying Zhong's bank account, that Zhong finally contacted Chan's counsel for the first time. (XC, ¶ 10.) Zhong continues to attempt to avoid the judgment enforcement from Chan's lawsuit and he still owes over $30,000 in judgment. (XC, ¶ 14.)

On October 23, 2023, Zhong filed his underlying complaint in this action with the intention of relitigating Chan's lawsuit without a factual or legal basis and stalling the judgment from a properly entered default judgment which Zhong had the opportunity to set aside but did not do so. (XC, ¶ 16.)[3] Zhong falsely claims the service of Chan's lawsuit was improper. (XC, ¶ 17.)

On March 19, 2024, Chan filed his XC, asserting a single cause of action for Abuse of Process against Zhong. On April 29, 2024, Zhong filed a special motion to strike the XC, also referred to as an anti-SLAPP motion, pursuant to Code of Civil Procedure section 425.16. Chan opposes the motion. Zhong filed a reply.

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[1] Zhong is the plaintiff in the underlying action and Chan is the defendant.
[2] Case No. 20CV369927 and Case No. 20CV369925.
[3] Zhong's underlying first amended complaint ("FAC") asserts a single cause of action against Chan labeled as an independent action to vacate and set aside default judgment. (See FAC, p. 4; see also *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752 ["the court may take judicial notice on its own volition"].)

II. Anti-SLAPP Legal Standard

In *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, the California Supreme Court established the trial court's duty in ruling on an anti-SLAPP motion to strike:

> Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds [that defendant has made its threshold showing], it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'

(*Id*. at 67.)

"[I]n order to establish the requisite probability of prevailing [citation], the plaintiff need only have 'stated and substantiated a legally sufficient claim.'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88, quoting *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) "Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Id*. at pp. 88-89.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Id*. at p. 89; see also *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 ["[i]f the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit'"].)

"In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; see also *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 530 [a plaintiff or cross-complainant in "a SLAPP motion [is allowed] a certain degree of leeway in establishing a probability of prevailing on its claims due to 'the early stage at which the motion is brought and heard [citation] and the limited opportunity to conduct discovery'"]; see also *Monster Energy Co*., *supra*, 7 Cal.5th at p.795 ["at the second anti-SLAPP step, a court 'does not weigh the credibility or comparative probative strength of competing evidence… [i]t 'accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it

defeats the plaintiff's claim as a matter of law… [w]e resolve conflicts and inferences in the record in favor of plaintiff"].)

III. Chan's Request for Judicial Notice[4]

In support of his opposition to the motion to strike, Chan requests the Court take judicial notice of the following:

1) Case docket of filing activities in Case No. 20CV369927 (Ex. 1); and
2) Case docket of filing activities in Case No. 20CV369925 (Ex. 2).

The request is GRANTED. (Evid. Code, § 452, subd. (d).)

IV. Anti-SLAPP

Zhong moves to strike the XC in its entirety, or alternatively, moves to strike Paragraph 13, and 15-18 on the ground the claims against him are based upon communications in court proceedings which are absolutely privileged under the litigation privilege.

a. Zhong Establishes that the Challenged Allegations Arise from Protected Activity

Zhong argues that the gravamen of the XC is that Zhong's actions to sue Chan to vacate a default judgment entered against Zhong is an abuse of process. (Motion, p. 6:13-14.) Zhong asserts that the conduct alleged in the XC is privileged under Civil Code section 47, subdivision (b). (Motion, p. 6:14-16, citing Civ. Code, § 47, subd. (b).) Under Civil Code section 47, a publication or broadcast is privileged if it is made in any "(1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . ." (Civ. Code, § 47, subd. (b).) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 [internal quotations omitted].) "Thus, communications with some relation to judicial proceedings are absolutely immune from tort liability by the litigation privilege[.]" (*Ibid*. [internal citations and quotations omitted].)

"A defendant meets the burden of showing that a plaintiff's action arises from a protected activity by showing that the acts underlying the plaintiff's cause of action fall within one of the four categories of conduct described in section 425.16, subdivision (e). Those four categories are: '(1) any written or oral statement or writing made before a legislative,

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[4] Zhong's memorandum of points and authorities in support of his motion indicates that he has filed a request for judicial notice. (See Motion, p. 1:26-27.) The Court finds no request for judicial notice on file. Instead, there is a declaration filed by Zhong's attorney, which also mentions a request for judicial notice and includes several attachments. (See Silva Decl., ¶ 4.) This is not a proper request for judicial notice and the Court declines to take judicial notice of the Silva Declaration's attached exhibits. (See Cal. Rules of Court, rule 3.1113(l) ["Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with rule 3.1306(c)."].)

executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.'" (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1569 [internal citations omitted].)

"The filing of a lawsuit is a publication in the course of a judicial proceeding." (*Williams v. Coombs* (1986) 179 Cal.App.3d 626, 645.) Therefore, "the filing of a complaint or petition is in itself a publication which is privileged because it is required by law to initiate the judicial proceeding." (*Asia Investment Co. v. Borowski* (1982) 133 Cal.App.3d 832, 841.) "Such a conclusion is mandated by the policy behind Civil Code section 47 which is to afford litigants the utmost freedom of access to the courts to secure their rights and defend themselves without fear of being harassed by retaliatory lawsuits. . . . Although application of the privilege accorded by Civil Code section 47 usually arises in the context of a defamation action, it has also been applied to other allegedly tortious conduct such as abuse of process[.]" (*Ibid*.)

In this case, the XC alleges that: after default judgment was entered against Zhong and his bank account was levied, Zhong filed the underlying lawsuit to challenge the judgment against him (XC, ¶¶ 10, 13); Zhong abused the litigation process by filing a lawsuit to vacate the default judgment against him (XC, ¶ 17); and due to the filing of Zhong's lawsuit, Chan has incurred legal costs (XC, ¶ 18). These allegations support Zhong's assertion that the XC arises from the protected activity of filing a legal complaint. (See e.g., *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 [where there is a threshold showing that the allegations are that the defendant committed a tort by filing a lawsuit, "defendants have fulfilled the required threshold showing"].) Thus, Zhong has met his burden as to step one. Next, the Court addresses whether Chan meets his burden of showing a probability of prevailing on the merits of his abuse of procedure claim.

b. Chan Fails to Demonstrate that He has a Probability of Prevailing as to the Abuse of Process Cause of Action

To meet his burden, Chan "'must demonstrate that the [XC] is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the [cross-complainant] is credited.'" (*Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370, quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.)

"The common law tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed. . . . To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056-1057 (*Rusheen*) [internal citations and quotations omitted].) However, "the mere filing or maintenance of a lawsuit – even for an improper purpose – is not a proper basis for an abuse of process action." (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169; see also *Friedman v. Stadum* (1985) 171 Cal.App.3d 775, 780.)

Moreover, the litigation "privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Id.*) "It is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Rusheen*, *supra*, 37 Cal.4th at p. 1057.) "The '[p]leadings and process in a case are generally viewed as privileged communications.'" (*Id*. at p. 1058.)

Zhong contends that Chan cannot demonstrate a probability of prevailing because Chan will be unable to show that the abuse of process cause of action is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment since, to the extent that the cause of action is premised on the filing of a complaint in a judicial proceeding, it is barred by the litigation privilege. (See Motion, pp. 5:17-19, 21-23, 26, 28; 6:15-20.)

Here, Chan largely ignores Zhong's arguments.[5] The gravamen of the first cause of action for abuse of process is that Zhong filed the underlying lawsuit, intending to stall enforcement of a default judgment entered against him. To the extent that the first cause of action is premised on the filing of a lawsuit, this is a written statement made before a judicial proceeding and is therefore protected by the litigation privilege. (See *Rusheen*, *supra*, 37 Cal.4th at p. 1057; see also *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 38 ["[t]he privilege in section 47 is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense plaintiff must overcome to demonstrate a probability of prevailing'. . . [because the statements] were privileged under section 47 . . . Plaintiff cannot meet her burden under the second step in applying the anti-SLAPP statute of demonstrating a probability of prevailing"]; see also *Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 965 ["Civil Code section 47, subdivision (b) protects any statements or writings that have 'some relation' to a lawsuit"].)

Additionally, Chan fails to support the first cause of action with a sufficient prima facie showing of facts to sustain a favorable judgment through admissible evidence. Instead, he argues that *Zhong* cannot prevail under the XC or the underlying FAC. (Opposition, p. 2:2-6.) This is not the proper showing. Chan additionally asserts that Zhong knows he was properly served and only filed the underlying FAC to gain post-judgment settlement leverage or avoid judgment enforcement. (Opposition, p. 4:9-11.) Chan does not support his argument with any relevant evidence. While the Court has taken judicial notice of the docket in two cases, this does not address or establish an ulterior motive of Zhong. (See *Rusheen*, *supra*, 37 Cal.4th at p. 1057 ["[t]o succeed in an action for abuse of process, a litigant must establish that the defendant… contemplated an ulterior motive in using the process"].) As such, Chan fails to demonstrate a probability of prevailing as he neither demonstrates that the cross-complaint is legally sufficient nor supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (See e.g., *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546 ["[i]n satisfying their burden in step two of the anti-SLAPP analysis, plaintiffs may not merely rely on the allegations in their complaint [citations] or evidence that would not be admissible at trial"]; *Muddy Waters, LLC v. Superior Ct.*

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[5] In his opposition, Chan additionally argues that the litigation privilege applies to the allegations of the underlying complaint. (See Opposition, p. 4:15-16.) However, the underlying complaint is not the subject of this anti-SLAPP motion and Chan has not filed his own special motion to strike.

(*Perfectus Aluminum, Inc.*) (2021) 62 Cal.App.5th 905, 923, 926 ["[t]o establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited' . . . [t]he plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial . . . [t]he burden was upon plaintiff to produce evidence to show a probability of prevailing . . . [w]here there is no evidence to support an essential factual element of the cause of action alleged, plaintiff has not met its burden"].) Accordingly, Chan does not meet his burden as to the second step.

Based on the foregoing, Zhong's special motion to strike the allegations of the XC is GRANTED.

V. Conclusion and Order

The special motion to strike the XC is GRANTED in its entirety.

Zhong shall provide a proposed judgment to Chan as to the XC, for approval as to form within 10 days of this Order, and then submit the proposed judgment to the Court.

The court shall prepare the final Order.

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Calendar Lines 2 and 3
Case Name: *Chroust v. Intuitive Surgical Operations, Inc., et al.*
Case No.: 24CV431690

This is an action for wrongful termination. According to the allegations of the complaint, Plaintiff Matthew Chroust ("Plaintiff") was hired by defendant Intuitive Surgical Operations, Inc. ("Intuitive") as a Director, Quality Systems on November 20, 2017. (See complaint, ¶ 16.) Plaintiff made a demand of his employment records pursuant to Labor Code section 1198.5 and his wage records pursuant to Labor Code section 226, and despite the demand, Intuitive failed to timely produce his personnel records, has not produced all of Plaintiff's personnel records and has destroyed certain records that Intuitive was required to maintain for purposes of litigation. (See complaint, ¶¶ 18-19.) Plaintiff voiced concerns regarding Intuitive's violation of labeling laws and legal compliance issues, and Intuitive had delinquencies in its Quality System training records; in retaliation for those actions, Plaintiff was transferred to a different department and given the position of Principal Engineer to marginalize his voice relative to the significant legal compliance concerns he kept raising. (See complaint, ¶¶ 21-26.) Thereafter, Plaintiff raised to Intuitive that it violated the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") and its own Code of Compliance policy. (See complaint, ¶¶ 27-30.) However, in retaliation, Plaintiff's supervisor Madhavi Bellamkonda ("Bellamkonda") prevented Plaintiff from renewing a key supplier contract, created last minute tasks for Plaintiff and withheld information and decisions needed to complete them, admonished Plaintiff for starting work on specific tasks that he was given to make Intuitive legally compliant, prevented Plaintiff from attending meetings necessary for him to complete assigned tasks, ignored recommendations and proposals for certain projects Plaintiff was assigned to, prevented Plaintiff from working with various suppliers necessary to do his job, cancelled meetings with Plaintiff routinely in order to impact his ability to finish tasks timely, admonished Plaintiff for picayune infractions that seemed pretextual or inconsequential, made derogatory comments and remarks to Plaintiff to publicly humiliate and belittle him in front of co-workers, and reduced Plaintiff's visibility at Intuitive. (See complaint, ¶ 32.) After Plaintiff formally complained to HR for discrimination, harassment and retaliation, Plaintiff was abruptly told by Intuitive that his position would be eliminated, and Plaintiff was terminated on May 2, 2023. (See complaint, ¶¶ 33-38.)

On February 23, 2024, Plaintiff filed a complaint against Intuitive and Bellamkonda (collectively, "Defendants"), asserting causes of action for:

1) Violation of Labor Code § 1102.5;
2) Violation of Government Code § 12940, subdivision (j)—harassment based on gender;
3) Violation of Government Code § 12940, subdivision (a)—discrimination based on gender;
4) Violation of Government Code § 12940, subdivision (h)—unlawful retaliation;
5) Violation of Government Code § 12940, subdivision (k)—failure to prevent harassment and/or discrimination;
6) Wrongful termination in violation of public policy;
7) Intentional infliction of emotional distress; and,
8) Violation of Labor Code § 1198.5.

Defendants demur to each of the causes of action on the ground that they fail to state facts sufficient to constitute a cause of action. Defendants also move to strike paragraphs 21 through 26 of the complaint regarding Plaintiff's reporting of delinquencies in the Quality System training records, legal compliance issues and violations of statutory labeling requirements and Plaintiff's resulting transfer to a different department as a Principal Engineer.

I. DEFENDANTS' DEMURRER TO THE COMPLAINT

First cause of action for violation of Labor Code section 1102.5

As Defendants note, "[a] claim for violation of Labor Code section 1102.5 requires '(1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation.'" (*Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 591.) "To establish the first element, the plaintiff must show (1) the plaintiff engaged in protected activity, (2) the defendant subjected the plaintiff to an adverse employment action, and (3) there is a causal link between the two." (*Id*.)

Defendants argue that the first cause of action fails to sufficiently allege causation because: "Plaintiff fails to plausibly plead any decisionmaker involved in the decision to eliminate his position or any other materially adverse action had knowledge of those alleged internal reports"; "no reasonable inference of causation can be drawn based on temporal proximity between Plaintiff's engagement in protected activity and the elimination of his position… [because t]he elimination of Plaintiff's position in May 2023 came many years after he first raised concerns regarding ISI's computer systems and tools, training records, delegation of work, staffing, and his transfer to the Principal Engineer position"; and, "[t]he Complaint itself pleads facts undercutting the plausibility of causation." (Defs.' memorandum of points and authorities in support of demurrer ("demurrer memo"), pp.11:9-28, 12:1-28, 13:1-16.)

To support Defendants' argument that the first cause of action fails to allege causation because it does not allege that "any decisionmaker… had knowledge of those alleged internal reports," Defendants cite to *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982) 686 F.2d 793. (See demurrer memo, p.11:18-21.) However, *Cohen* is a federal case that does not discuss California Labor Code section 1102.5. (See *Haynes v. EMC Mortgage Corp*. (2012) 205 Cal.App.4th 329, 335 (stating that state courts "are not bound by federal decisions on matters of state law").) Moreover, *Cohen* involved findings of fact in a judgment after a trial, not the allegations of a complaint subject to a demurrer nor a 12(b)(6) motion to dismiss. Defendants also cite to *Le Mere v. Los Angeles Unified School Dist*. (2019) 35 Cal.App.5th 237, which likewise does not involve section 1102.5 and determined that a two-year gap between the protected activity and the alleged retaliatory conduct against the plaintiff was insufficient as a matter of law to show causation. (*Id*. at pp.243-244.) Here, however, the complaint alleges that Plaintiff was transferred to a different department and a different position with fewer opportunities, responsibilities and challenges "[i]mmediately after" reporting alleged violations of labeling laws. (Complaint, ¶¶ 25-26.) Further, the complaint also alleges that, in September 2022 and again on December 5, 2022, April 25, 2023 and May 1, 2023, Plaintiff told HR that Bellamkonda subjected Plaintiff to discrimination and harassment based on gender and retaliation for reporting noncompliance with Proposition 65, and Plaintiff was terminated on May 2, 2023. *Le Mere* does not support Defendants' argument.

Defendants' argument regarding temporal proximity lacks merit because Defendants fail to address the alleged temporal proximity of the reporting of labeling law violations and Plaintiff's transfer to a different position. (See *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047 (stating that "a demurrer cannot rightfully be sustained to part of a cause of action"); see also *Munoz v. Patel* (2022) 81 Cal.App.5th 761, 780, fn. 9 (stating that "[o]rdinarily, a general demurrer does not lie as to a portion of a cause of action, and if any part of a cause of action is properly pleaded, the demurrer will be overruled"), quoting *Elder v. Pacific Bell Telephone Co.* (2012) 205 Cal.App.4th 841, 856, fn. 14; see also *PH II, Inc. v. Super. Ct. (Ibershof)* (1995) 33 Cal.App.4th 1680, 1682 (stating that "[a] demurrer does not lie to a portion of a cause of action").) Moreover, as to the termination, the complaint alleges that Plaintiff told HR that Bellamkonda subjected Plaintiff to discrimination and harassment based on gender and retaliation for reporting noncompliance with Proposition 65 on September 2022, December 5, 2022, April 25, 2023 and May 1, 2023, and was terminated on May 2, 2023. As Defendants acknowledge, "close temporal proximity between a plaintiff's protected activity and the alleged retaliatory conduct against the plaintiff has been found sufficient to support a prima facie case of causation." (*Le Mere*, *supra*, 35 Cal.App.5th 237, 243; see also *Zirpel v. Alki David Productions, Inc*. (2023) 93 Cal.App.5th 563, 578 (stating that "[t]emporal proximity alone, 'when very close, can in some instances establish a prima facie case of … retaliation'").) Here, Plaintiff was fired one day after his last complaint to HR, thereby supporting a prima facie case of causation.

Lastly, Defendants assert that because the complaint alleges that Plaintiff never received a poor performance review, a suspension, a written warning or a reduction in pay, and that because Intuitive allowed Plaintiff to present his concerns regarding its purported noncompliance with Proposition 65, these facts "undermine any notion of a connection between Plaintiff's internal complaints and the elimination of his position." (Demurrer memo, p.13:11-13.) Again, however, this argument fails to address the reporting of labeling law violations and Plaintiff's transfer to a different position. (See *Kong*, *supra*, 108 Cal.App.4th at p.1047 (stating that "a demurrer cannot rightfully be sustained to part of a cause of action"); see also *Munoz*, *supra*, 81 Cal.App.5th at p.780, fn. 9; see also *PH II, Inc.*, *supra*, 33 Cal.App.4th at p.1682.)

Defendants' demurrer to the first cause of action for violation of Labor Code § 1102.5 is OVERRULED.

Second cause of action for violation of Government Code section 12940, subdivision (j)—harassment based on gender

Defendants argue that the second cause of action (1) fails to allege harassing conduct that is sufficiently severe or pervasive such that it altered the conditions of Plaintiff's employment, and (2) fails to allege the harassing conduct was made on the basis of gender. (See demurrer memo, pp. 13:22-26, 14:1-28, 15:1-19.)

However, paragraphs 33 and 49 plainly allege that Plaintiff was the only male in his department, and that the alleged harassing conduct was done "against Plaintiff [and] that similarly situated female co-workers were not subjected to" the alleged conduct. (See

complaint, ¶¶ 33, 49.) Defendants' argument that the second cause of action fails to allege the harassing conduct was made on the basis of gender lacks merit.

As to whether the second cause of action fails to allege harassing conduct that is sufficiently severe or pervasive, Defendants cite to *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, in which the Sixth District stated that "[w]hether the conduct of the alleged harassers was sufficiently severe or pervasive to create a hostile or abusive working environment depends on the totality of the circumstances." (*Id*. at p.870.) "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (*Id*.) "Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing… and conduct [that] a reasonable person in the plaintiff's position would find severely hostile or abusive." (*Id*.) "[T]he plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's… work performance and would have seriously affected the psychological well-being of a reasonable employee and that [he or she] was actually offended." (*Id*.) Defendants assert that, in *Serri*, the "supervisor's comments to [a] Puerto Rican plaintiff that her shawl looked like a poncho and her curly hair looked 'more relaxed and professional' when she blew it dry, and [a] coworker's remarks concerning nearby taquerias were neither the type that would have interfered with a reasonable employee's performance and not pervasive enough to establish a harassment claim." (Demurrer memo, p.15:7-12.)

Here, however, the second cause of action alleges that because of Plaintiff's gender, Plaintiff's supervisor engaged in the following: prevented Plaintiff from renewing a key supplier contract; created last minute tasks for Plaintiff and then withheld information and decisions needed to complete them; admonished Plaintiff for starting work on specific tasks that he was given; prevented Plaintiff from attending meetings which were necessary for him to complete assigned tasks; ignored recommendations and proposals for certain projects Plaintiff was assigned to; prevented Plaintiff from working with various suppliers necessary to do his job; routinely cancelled meetings with Plaintiff to impact his ability to finish tasks timely; admonished Plaintiff for petty infractions that seemed pretextual or inconsequential; publicly made derogatory comments and remarks to Plaintiff to humiliate and belittle him in front of co-workers; and, otherwise reduced Plaintiff's visibility at Intuitive. (See complaint, ¶ 49.) This alleged conduct against Plaintiff is certainly more pervasive than the few stray comments made over nearly 15 years of Serri's employment at Santa Clara University, and is expressly alleged to have interfered with Plaintiff's work performance such that it would have seriously affected Plaintiff's psychological well-being. *Serri* is inapposite.

Defendants' demurrer to the second cause of action is OVERRULED.

Third cause of action for violation of Government Code section 12940, subdivision (a)—discrimination based on gender

Defendants argue that the third cause of action fails to allege an adverse employment action and discrimination based on gender. In support of their argument regarding the lack of an adverse employment action, Defendants argue that certain actions such as preventing Plaintiff from renewing a contract, creating last minute tasks, ignoring Plaintiff's recommendations, cancelling meetings, making derogatory comments, and admonishing Plaintiff for picayune infractions do not constitute adverse employment actions that support a

discrimination claim. (See demurrer memo, p.16:14-24.) Defendants misunderstand the alleged adverse employment actions in the complaint. Plaintiff was transferred to a different position with fewer opportunities, responsibilities and challenges and then terminated. (See *Doe v. Department of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 734 (stating that an "'adverse employment action' is one that 'materially affects the terms, conditions, or privileges of employment'"); see also *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1054 (stating that FEHA's adverse employment actions are "not only… so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career").) Defendants may not pick and choose adverse employment actions (see *Kong*, *supra*, 108 Cal.App.4th at p.1047 (stating that "a demurrer cannot rightfully be sustained to part of a cause of action"); see also *Munoz*, *supra*, 81 Cal.App.5th at p.780, fn. 9; see also *PH II, Inc.*, *supra*, 33 Cal.App.4th at p.1682). This is sufficient, as Plaintiff's transfer to a different position with fewer opportunities and termination are alleged to have adversely and materially affected Plaintiff's opportunity for advancement.

Further, citing a federal case, Defendants argue that although the complaint alleges that Plaintiff was discriminated against because of his gender, he must nevertheless "plead some actual facts identifying the women who were treated more favorably and to establish that they were similarly situated." (Demurrer memo, p.17:7-10.) Again, however, state courts "are not bound by federal decisions on matters of state law." (*Haynes*, *supra*, 205 Cal.App.4th at p.335.) The third cause of action adequately alleges discrimination based on gender.

Accordingly, Defendants' demurrer to the third cause of action is OVERRULED.

Fourth cause of action for violation of Government Code section 12940, subdivision (h)—unlawful retaliation

Defendants argue that the fourth cause of action fails to state facts sufficient to constitute a cause of action because it does not allege either an adverse employment action or the identity of who was responsible for his termination. As to Defendants' argument regarding the lack of an adverse employment action, this argument is identical to that made in the third cause of action and likewise lacks merit.

As to Defendants' argument that the fourth cause of action fails to identify who was responsible for his termination, Defendants cite to *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590; however, *Fisher* does not suggest that a cause of action for retaliation under the FEHA requires any such identification. Rather, the *Fisher* court indicated that: (1) the employer could be liable for retaliation under FEHA if Plaintiff "can establish that the hostile work environment was created as retaliation for her complaints" (*Fisher*, *supra*, 214 Cal.App,3d at p.614); (2) former section 12940, subdivision (f) prohibited retaliation by an employer but not an individual and has since been amended to provide for individual liability (*id*. at pp.615-616); and, (3) the plaintiff "ha[d] probably alleged a cause of action for retaliation against SPPH based on the cancellation of his office lease" despite the fact "that Dr. Fisher did not plead the date when the FEHA complaint was filed or the date the lease was cancelled, that the lease was cancelled because he filed an FEHA complaint, or that SPPH knew that he filed the FEHA complaint…." (*Id*. at p.617.) None of these statements in *Fisher* supports Defendants' argument. Moreover, the complaint plainly alleges that Plaintiff complained about Defendants' noncompliance with Proposition 65 to Intuitive's HR

department in September 2022, December 5, 2022, April 25, 2023 and May 1, 2023 and was terminated on May 2, 2023—one day after his final complaint to HR. (See complaint, ¶¶ 33-36.) The complaint adequately alleges a causal link between Plaintiff's protected activity and Defendants' adverse employment action. (See *Zirpel*, *supra*, 93 Cal.App.5th at p. 578 (stating that "[t]emporal proximity alone, 'when very close, can in some instances establish a prima facie case of … retaliation'").)

Defendants' demurrer to the fourth cause of action is OVERRULED.

Fifth cause of action for violation of Government Code section 12940, subdivision (k)—failure to prevent harassment and/or discrimination

Defendants argue that the fifth cause of action "is entirely derivative of his discrimination, harassment, and retaliation claims, which for the reasons set forth above, he failed to sufficiently plead… [and a]s a result, these derivative claims necessarily fail as well." (Demurrer memo, pp.18:22-24, 19:1-3.) As Defendants' argument is dependent on their arguments to the prior causes of action, and as their demurrer to the prior causes of action were overruled, Defendants' demurrer to the fifth cause of action likewise is OVERRULED.

Sixth cause of action for wrongful termination in violation of public policy

Defendants argue that the sixth cause of action for wrongful termination in violation of public policy fails to allege the violation of any public policy. (See demurrer memo, p.19:5-22.) In support of their argument, Defendants cite to *Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, in which the court stated that "where a wrongful termination claim would not be cognizable under the provisions of FEHA, the conduct at issue cannot offend fundamental public policy." (*Id*. at p. 1323.) Since their demurrer was overruled as to the causes of action for violation of the FEHA, Defendants' argument lacks merit. Moreover, the California Supreme Court has stated that the FEHA is a public policy upon which a wrongful termination cause of action may be based. (See *Jennings v. Marralle* (1994) 8 Cal.4th 121, 130 (stating that "[t]he FEHA is a statute which clearly states a public policy against discrimination").)

Defendants' argument is without merit and their demurrer to the sixth cause of action is OVERRULED.

Seventh cause of action for intentional infliction of emotional distress

Defendants argue that the seventh cause of action fails to state facts sufficient to constitute a cause of action for intentional infliction of emotional distress because it is preempted by the Workers' Compensation Act. (See demurrer memo, pp.19:24-28, 20:1-18.) However, "claims for intentional infliction of emotional distress in the employment context may be asserted where the actionable conduct also forms the basis for a FEHA violation." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 97.) "[U]nlawful discrimination and retaliation in violation of FEHA falls outside the compensation bargain and therefore claims of intentional infliction of emotional distress based on such discrimination and retaliation are not subject to workers' compensation exclusivity." (*Id*. at p. 101.) This argument is without merit.

Defendants also argue that the seventh cause of action fails to allege "extreme and outrageous conduct." (Demurrer memo, pp.20:20-28, 21:1-20.) In support of their argument, Defendants cite to *Light*, *supra*; however, *Light* determined that summary adjudication was improper as to the defendant who engaged in the retaliatory conduct against *Light*. (See *Light*, *supra*, 14 Cal.App.5th at p.102 (stating that "[t]riable issues of fact… preclude summary adjudication of this claim as to Seals… [because t]he trier of fact could conclude this conduct was extreme and outrageous (especially in light of Seals's supervisory position), taken for purposes of retaliation prohibited by FEHA, and intended to cause Light emotional distress").) Here, the complaint alleges that Defendants subjected Plaintiff to public ridicule through derogatory comments and transferred him to a position with fewer opportunities, responsibilities and challenges, ultimately terminating him because of his gender and his reporting of Defendants' violation of labeling laws, and noncompliance with Proposition 65, all in violation of FEHA. Taken as true, these allegations support extreme and outrageous conduct. Defendants' demurrer to the seventh cause of action is OVERRULED.

Eighth cause of action for violation of Labor Code section 1198.5

Defendants argue that the eighth cause of action for violation of Labor Code section 1198.5 fails to allege "when the request was made, what documents are suspected of being withheld, or any other factual details whatsoever." (Demurrer memo, p.21:23-28, 22:1-3.) In support of their argument, Defendants cite to *Thomas v. Regents of University of California* (2023) 97 Cal.App.5th 587. However, *Thomas* does not involve a cause of action for violation of Labor Code section 1198.5 and does not suggest that such a cause of action requires that a plaintiff allege the details that Defendants seek. Rather, *Thomas* states that "a plaintiff is required only to set forth the essential facts with 'particularity sufficient to acquaint a defendant with the nature, source and extent of [the plaintiff's] cause of action… [however,] less specificity is required in pleading matters of which the defendant has superior knowledge." (*Id*. at p. 611.) Here, the eighth cause of action alleges that Defendants failed to provide Plaintiff's personnel records within the 30-day statutory deadline from the receipt of the request in violation of section 1198.5. (See complaint, ¶ 102.) Labor Code section 1198.5 states that "[t]he employer shall make the contents of those personnel records available for inspection to the current or former employee, or his or her representative, at reasonable intervals and at reasonable times, but not later than 30 calendar days from the date the employer receives a written request, unless the current or former employee, or his or her representative, and the employer agree in writing to a date beyond 30 calendar days to inspect the records, and the agreed-upon date does not exceed 35 calendar days from the employer's receipt of the written request." (Lab. Code § 1198.5, subd.(b)(1).) Here, it is clear that the eighth cause of action sufficiently alleges facts acquainting Defendants with the nature, source and extent of Plaintiff's cause of action. To the extent that Defendants need further specific information, they may obtain that through discovery.

Defendants' demurrer to the eighth cause of action is OVERRULED.

II. DEFENDANTS' MOTION TO STRIKE PORTIONS OF THE COMPLAINT

Defendants move to strike paragraphs 21 through 26 of the complaint on the ground that the allegations are irrelevant.

Defendants first argue that the allegations are time-barred because Plaintiff filed his administrative complaint with the California Civil Rights Department on January 24, 2024, and thus, "only conduct occurring on or after January 24, 2021 can form the basis of his FEHA claims." (Defs.' memorandum of points and authorities in support of motion to strike ("strike memo"), p.6:17-19.) Defendant also argues that these paragraphs "do not tend to support or relate to any of Plaintiff's asserted causes of action…." (*Id*. at p.7:25-26.)

Paragraph 21 indeed discusses Plaintiff's first year of employment; however, it is merely background information regarding Plaintiff that frames Plaintiff's prior duties. Similarly, while paragraphs 22 and 23 discuss events that occurred shortly after starting working for Intuitive, these events merely provide context into Plaintiff's responsibilities. Defendants even note that "Plaintiff does not mention or specifically rely on these allegations anywhere else in his Complaint, including the causes of action themselves." (See strike memo, p.8:9-17.) While none of the causes of action are based on these paragraphs, the paragraphs nevertheless contain relevant information for a trier of fact. The motion to strike paragraphs 21-23 is DENIED.

As Defendants note, paragraph 24 does not reference any dates but rather alleges that "Plaintiff voiced all of these concerns [regarding legal compliance issues] to management of Defendant throughout his employment." (Complaint, ¶ 24.) But for a motion to strike or demurrer, "[t]he running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint might be barred." (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324; see also *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403). Thus, the allegations of paragraph 24 are not subject to strike on the basis of being time-barred. Moreover, it is clear that paragraph 24 is relevant. The motion to strike paragraph 24 is DENIED.

Paragraphs 25 and 26 also do not reference any dates and thus, their allegations are not subject to strike on the basis of being time-barred. Moreover, paragraph 27 indicates that the conduct alleged in paragraphs 25 and 26 occurred close to July 2021 when Plaintiff began his position as Principal Engineer, which would make these paragraphs within three years of the filing of his administrative complaint. Paragraphs 25 and 26 are also relevant. The motion to strike paragraphs 25 and 26 is DENIED.

III. CONCLUSION

The demurrer and motion to strike are DENIED.

The Court will prepare the Order.

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Calendar line 4
Case Name: *Kristin Tsai et al. v. Alice Chang et al.*
Case No.: 23CV414590

Background

Plaintiffs Kristin Tsai and Kent Kuo (collectively, "Plaintiffs") bring an action for reasonable value of services rendered and value of goods sold and delivered against defendants Alice Chang and Judy Rall (collectively, "Defendants").

Currently before the Court is Plaintiffs' motion to compel further responses to their request for production of documents ("RPD"), set two, and for monetary sanctions. Defendants oppose the motion.

Meet and Confer

A motion to compel further discovery responses must be accompanied by a meet and confer declaration pursuant to Code of Civil Procedure section 2016.040. (Code Civ. Proc., § 2031.310, subd. (b)(2) [document requests].) Section 2016.040 requires a moving party to make a "reasonable and good faith attempt at an informal resolution of each issue presented by the motion." A determination of whether an attempt at informal resolution was adequate depends upon the particular circumstances and involves the exercise of discretion. (See *Obregon v. Superior Ct*. (1998) 67 Cal.App.4th 424, 431; see also *Stewart v. Colonial Western Agency, Inc*. (2001) 87 Cal.App.4th 1006, 1016 [meet and confer rule is designed to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order].)

In this case, the parties appear to have met and conferred. (See Plaintiffs' Separate Statement, p. 15:19-21, citing Booke Decl., ¶ 6 [referencing a telephone meet and confer]; see also Booke Decl., ¶ 4 ["I engaged in multiple meet and confer conversations with Defendants' counsel, by phone and email, all to not avail."].) Defendants appear to concede that meet and confer efforts took place, although they were unsuccessful. (See Opposition, pp. 4-5, subd. (C); see also Quach Decl., ¶ 4, Ex. A.) Thus, the parties have sufficiently met and conferred.

Motion to Compel Further Responses to Plaintiffs' Production of Documents, Set Two

Plaintiffs move to compel further responses to RPD Nos. 9, 10, 11, and 12 propounded on both Defendants.[6]

The RPDs

RPD No. 9: Any and all DOCUMENTS RELATED TO the estate plan from January 2014 through the present, of Charles Chang, including but not limited to trusts, wills, bequests, schedules, attachments and amendments.

[6] Plaintiffs have misnumbered their requests. RPD No. 8 in the separate statement is actually RPD No. 9 and No. 9 is 10, according to the copy of the RPDs provided to the court. (See Booke Decl., Ex. A.) The Court refers to the requests by their correct number.

RPD No. 10: Any and all DOCUMENTS RELATED TO the estate plan from January 2014 through the present, of Jeany Chang,[7] including but not limited to trusts, wills, bequests, schedules, attachments and amendments.

RPD No. 11: Any and all DOCUMENTS RELATED TO the savings account, checking accounts, bonds, stocks from June 2014 through the present.

RPD No. 12: Any and all DOCUMENTS RELATED TO your parents' monthly income sources from June 2014 to June 2023 besides the income received from 839 Oregon Avenue, Palo Alto, California.

Good Cause Requirement

A motion to compel further responses to RPDs must "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Proc., § 2031.310, subd. (b)(1).) The moving party establishes good cause by showing: (1) relevance to the subject matter of the case; and (2) specific facts justifying discovery. (*Kirkland v. Superior Ct.* (2002) 95 Cal.App.4th 92, 98 (*Kirkland*) [the party who seeks to compel production has met his burden of showing good cause simply by a fact-specific showing of relevance].) Discovery is allowed for any matters that are not privileged and relevant to the subject matter, and a matter is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc., § 2017.010.) Moreover, for discovery purposes, information is "relevant to the subject matter" if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement thereof. (*Gonzalez v. Superior Ct.* (1995) 33 Cal.App.4th 1539, 1546.)

To support their requests, Plaintiffs contend they are relevant because the basis of their lawsuit is Defendants' refusal to compensate Plaintiffs for plans, permits, city fees, labor, materials provided to repair, and improve their parents' residential rental property. (Plaintiffs' Separate Statement, p. 2:20-23, citing Complaint, ¶¶ 7-12.) In opposition, Defendants argue that in an action seeking only compensatory damages, evidence of a defendant's wealth is not subject to disclosure during discovery, as damages should be measured by the alleged loss. (Opposition, p. 7:23-25, citing *People v. Superior Court* (1973) 35 Cal.App.3d 710, 713 ["When a plaintiff seeks compensatory damages only, he is not entitled to discovery relative to the defendant's financial worth. His damages are to be measured by his own loss."]; see also *Coy v. Superior Court of Contra Costa County* (1962) 58 Cal.2d 210, 222 ["in the ordinary action for damages information regarding the adversary's financial status is *inadmissible*"][emphasis original].) Plaintiffs do not address this argument in their reply and merely assert that the request is relevant to determine if the Chang Parents lied about their ability to pay for repairs and remodeling.

Here, Plaintiffs are seeking only compensatory damages for their quantum meruit and quantum valebant causes of action. (See Complaint, Pray for Relief.) Both causes of action are common counts and require only that there is a statement of indebtedness in a certain sum, consideration, and nonpayment. (See e.g., *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4*th* 445, 460.) Thus, the damages owed to Plaintiffs are measured by their own loss, and not the financial status of Defendants' or their parents. Accordingly, the Defendants'

[7] Charles and Jeany Chang are referred to as the "Chang Parents."

wealth is not subject to disclosure during discovery and Plaintiffs' fail to establish good cause. (See *Kirkland, supra,* 95 Cal.App.4th at p. 98 ["party who seeks to compel production has met his burden of showing good cause simply by a fact-specific showing of relevance"].)

As such, Defendants' relevancy objections are sustained. Additionally, the Court is also persuaded by Defendants' objections that the requests are overbroad and will likely capture confidential financial information, including information about bank accounts, assets, and debts of Defendants. (Motion, p. 10:19-22, citing *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1428 ["In civil cases courts must 'indulge in a careful balancing of the right of civil litigants to discover relevant facts, on the one hand, with the right of individuals to maintain reasonable privacy regarding their financial affairs, on the other.'"].) In particular, RPD No. 11 does not even identify whose bank accounts, bonds, and stocks Plaintiffs are requesting information from.

Plaintiffs also contend that none of the responses to the RPDs at issue are code-compliant because they do not contain a statement that a diligent search has been conducted and responsive documents were not located and why. Code of Civil Procedure section 2031.210, governing responses to RPDs, does not require such a statement and an objection-only response is sufficient. (See Code Civ. Proc., § 2031.210, subd, (a) ["The party to whom a demand for inspection, copying, testing, or sampling has been directed shall respond separately to each item or category of item by any of the following: [¶] **(1)** A statement that the party will comply with the particular demand for inspection, copying, testing, or sampling by the date set for the inspection, copying, testing, or sampling pursuant to paragraph (2) of subdivision (c) of Section 2031.030 and any related activities. [¶] **(2)** A representation that the party lacks the ability to comply with the demand for inspection, copying, testing, or sampling of a particular item or category of item. [¶] **(3)** An objection to the particular demand for inspection, copying, testing, or sampling."].)

Finally, Plaintiffs raise an argument Defendants have been unjustly enriched and that the enrichment is "possibly fraudulent." Plaintiffs assert that the RPDs are reasonably calculated to lead to admissible evidence because they show whether the Chang Parents fraudulently induced Plaintiffs to enter into the agreement central to the case. (Motion, p. 5:21-24.) As noted above, Plaintiffs assert only two common counts in their complaint. The pleading is devoid of fraud allegations, allegations of malice, or any request for exemplary damages. Further, even if the Chang Parents had sufficient money to pay for the remodeling and repairs, this does not necessarily show that there was fraud. Plaintiffs are merely seeking to be redressed for debts owed by Defendants. Thus, any argument regarding fraud is unpersuasive.

Based on the foregoing, Plaintiffs' motion to compel further responses to RPD Nos. 9-12 is DENIED.

Monetary Sanctions

The Court shall impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to a demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Code Civ. Proc., § 2031.310, subd. (h).)

Plaintiffs have made a code-compliant request for monetary sanctions in the amount of $4,000 ($400/hr x 8 hours). Plaintiffs' motion was unsuccessful and the Court declines to grant their request for monetary sanctions.

Defendants likewise seek monetary sanctions pursuant to Code of Civil Procedure sections 2023.030, 2023.010, subdivision (a), and 2031.310, subdivision (h). Defendants' opposition indicates they are seeking $5,775 in attorneys' fees and costs and sanctions. (See Opposition, p. 12:15-16.) Defense counsel's declaration, however, appears to indicate they are seeking $6,937.50 in sanctions ($375/hr x 18.5 hours). Defendants' opposition is 12-pages long; however, it is a copy and paste of the arguments asserted in the separate statement. Moreover, the separate statement contains the same identical arguments for each RPD request. The Court finds 18.5 hours on the opposition and related papers to be excessive. Accordingly, the Court grants sanctions against Plaintiffs in the amount of $1,125 ($375/hr x 3 hours).

Conclusion

The motion to compel further responses to RPD Nos. 9-12 is DENIED in its entirety. Plaintiffs' request for monetary sanctions is DENIED. Defendants' request for monetary sanctions is GRANTED, in part. Counsel for Plaintiffs shall pay $1,125 to Defense counsel within 20 days of this Order.

Defendants shall prepare the final Order.

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Calendar Line 8
Case Name: Santa Clara Valley Transportation Authority v. IAC at Cupertino, et al.
Case No: 23CV426220

VTA brings a motion for order for prejudgment possession in its action in eminent domain. The land for which it wants possession is a parcel belonging to Defendant IAC at Cupertino ("IAC"). IAC opposes the motion on three grounds: The condemnation deposit is inadequate; Plaintiff cannot show an overriding need; and Defendant has a valid 'right to take' challenge which should be adjudicated first.

Factual Background and Legal Standard

This is an eminent domain action. On November 15, 2023, Plaintiff Santa Clara Valley Transportation Authority ("VTA") filed its Complaint in Eminent Domain to acquire certain property located in Cupertino, California, for the construction of the I-280/Wolfe Road Interchange Improvement Project ("the Project"). The property being acquired is part of a larger parcel of approximately 12.5 acres. The owners of record (and named defendants) of the larger parcel are: IAC at Cupertino, LLC, ("IAC"); First American Title Insurance Company; and Prudential Multifamily Mortgage, LLC. The larger parcel is improved with a 346-unit apartment complex. VTA seeks to acquire 3,936 square feet in fee and a 673 square foot 40-month temporary construction easement ("TCE") from the larger parcel. The portions of the larger parcel sought to be acquired by VTA (referred to herein as "the Subject Property") include only landscaping areas and portions of a concrete sidewalk and metal fence. They do not include any of the apartments.

IAC is entitled to just compensation for VTA's proposed acquisition of the Subject Property -- including the fair market value of the property taken, and severance damages (if any) to the remainder parcel. If the Parties are unable to settle on the value of the property interests, IAC is entitled to have a jury determine the issue of just compensation. No trial date has been set yet.

In the meantime, the California Eminent Domain Law authorizes VTA to obtain prejudgment possession of the Subject Property if it can demonstrate the following: (1) VTA is entitled to acquire the Subject Property by eminent domain; (2) VTA has deposited with the State Treasury the probable amount of compensation, based on the appraisal, that will be awarded in this proceeding; (3) there is an overriding need for VTA to take possession of the Subject Property prior to the issuance of a final judgment, and VTA will suffer substantial hardship if possession is denied or limited; and (4) the hardship that VTA will suffer if possession is denied or limited outweighs any hardship that IAC will suffer if the order is granted. CCP § 1255.410.

Evidentiary Objections and Requests for Judicial Notice

Defendant's objections to the Gonzalo and Wilcox declarations are OVERRULED. VTA's requests for judicial notice of Exhibits A and B are GRANTED and unopposed.

Whether the Condemnation Deposit is Adequate

IAC's first contention is that VTA 's condemnation deposit is inadequate. Under CCP § 1255.010, a plaintiff must have a qualified expert make an appraisal of the property and prepare a written statement of the basis for the appraisal. It must contain certain information specified in the statute. VTA has done that in this case and IAC does not claim otherwise. Rather, IAC takes issue with the appraisal itself and argues that it is too low and fails to account for improvements and relevant comparable sales. The question for this court for purposes of this motion is whether VTA complied with its statutory obligations, not to weigh the quality of the expert's opinion. If IAC disagrees with the expert valuation or wants an increase in the size of the deposit, it may seek such an increase under § 1255.030(a).

Whether VTA has Established Overriding Need and will Suffer Hardship if Prejudgment Possession is Denied

To meet its burden for prejudgment possession, VTA must demonstrate it has an overriding need for prejudgment possession and that if its application is denied, it will suffer a substantial hardship. CCP § 1255.410(d). VTA claims that it needs prejudgment possession to "maintain the Project's schedule and budget," to obtain certification, and to meet the CTC STIP Funding allocation requirements. Motion, p14. It claims that delayed possession will result in delays of work resulting in higher costs, estimated at $143,000 per month, and the possible need to update its design causing more expense. In addition, delay will postpone the public safety and transport benefits of the Project. VTA claims that its hardship from not getting prejudgment possession outweighs any hardship suffered by IAC because possession will not interfere with residents' parking or access, won't occur until next spring at best, and because IAC can be compensated for any impacts by seeking such compensation at trial.

IAC argues that VTA's desired timeline is not an "overriding" need but rather a preference. It claims that the Gonzalo declaration on which many of Plaintiff's claims are based is conclusory and speculative and that the claims of increased costs are suspect. Moreover, it claims that prejudgment possession will eliminate some of the parking.

The Court finds that Plaintiff has met its burden. First, the VTA's concerns about the need to keep to its schedule and its claims that costs will increase if they are not allowed to proceed as planned, is a valid basis for establishing the need for prejudgment possession. Even the case cited by Defendant*, Israni v. Superior Court*, held that "'the court may consider all relevant facts, including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan.'" *Israni v. Superior Court* (2001) 88 Cal.App.4th 621, 637. VTA has shown that without possession, Caltrans will not certify its right of way such that VTA cannot advertise or award the Project and cannot apply for the last pool of money needed for the project. See Gonzalo Decl. ¶¶ 10-12. Such delay will greatly increase the cost of the project. *Id*. at ¶¶ 13-15. Although not alone sufficient to grant prejudgment possession, it is also true that postponement of the project will delay the safety and transportation benefits which necessitate the need for the project in the first place. Defendant's claim that Plaintiff has instead simply alleged a speculative "parade of horribles" ignores the reality of these kinds of projects. Each step requires prerequisites before the next step can be taken. The ability to move forward on large public works projects is logistically

complex, such that the Court finds Plaintiff's representations that prejudgment possession is required to move the project forward both credible and sufficiently evidenced.

VTA has also shown that its overriding need outweighs the hardships to IAC. In support of its hardships, IAC points to the loss of 24 redwood trees, increased noise and dust, loss of view, and loss of parking. First, to the extent it will suffer such losses, IAC will suffer these hardships as a result of the project regardless of whether VTA takes possession of the property pre- or post-judgment. None of the hardships is a result of the prejudgment possession, as opposed to a result of the eminent domain action. IAC does not even claim that VTA is not entitled to acquire the property by eminent domain. As such IAC fails to show that the hardships outweigh the needs of VTA for prejudgment possession.

Whether IAC must have its "right to take" Challenges Adjudicated First

Part of IAC's hardship claim is that it has valid "right to take" challenges that need to be adjudicated prior to possession being given to Plaintiff. VTA contends that construction will begin at the earliest in Spring of 2025. The granting of an order for possession does not prejudice the defendant's right to demur to the complaint or to contest the taking. (Code Civ. Proc. § 1255.410 Legis. Committee Cmnts.) If IAC wishes to pursue its right to take challenge, it may do so by bifurcated trial of that issue which it may schedule at any time. (Code Civ. Proc. § 1260.110.) In addition, if Defendant were to prevail on its right to take action, after Plaintiff has taken possession, the court has equitable powers to fashion an appropriate remedy. As the courts have explained, "Subdivision (c) of section 1260.120 goes on to state that '[a]n order made under this paragraph [conditional dismissal] may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff's failure or omission which constituted the basis of the objection to the right to take.'(§ 1260.120, subd. (c)(2).)" *City of Stockton v. Marina Towers LLC* (2009)171 Cal. App. 4th 93, 117.

Plaintiff's motion is GRANTED. Plaintiff shall prepare the final order.

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