SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Hon. Carrie Zepeda (covering for Hon. Frederick S. Chung)

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

DATE: September 14, 2023 TIME: 9:00 A.M.

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

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV373013	Manoutchehr Movassate et al. v. Mary Ly et al.	Order of examination: Parties to appear.
LINE 2	20CV373013	Manoutchehr Movassate et al. v. Mary Ly et al.	Order of examination: Parties to appear.
LINE 3	20CV373013	Manoutchehr Movassate et al. v. Mary Ly et al.	Order of examination: Parties to appear.
LINE 4	19CV359905	Derrick Hix v. RealPage, Inc. et al.	Click on Line 4 or scroll down for ruling.
LINE 5	19CV359905	Derrick Hix v. RealPage, Inc. et al.	Click on Line 4 or scroll down for ruling.
LINE 6	23CV413621	Diamond Elevator, Inc. v. John Construction, Inc.	Click on Line 6 or scroll down for ruling.
LINE 7	23CV413621	Diamond Elevator, Inc. v. John Construction, Inc.	Click on Line 6 or scroll down for ruling
LINE 8	22CV407302	Portfolio Recovery Associates, LLC v. Franklin Diblasi	Click on Line 8 or scroll down for ruling.
LINE 9	22CV407302	Portfolio Recovery Associates, LLC v. Franklin Diblasi	Click on Line 8 or scroll down for ruling.
LINE 10	22CV403338	Dylan T. Rogers et al. v. Prime Vista Montana, LLC et al.	Mr. Kurtz is ordered to appear and verify that Mr. Rogers was properly served with an amended notice of hearing.

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Calendar Line 1

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Calendar Line 2

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Calendar Line 3

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Calendar Lines 4-5
Case Name: ***Derrick Hix v. RealPage, Inc. et al***
Case No.: 19CV359905

I. INTRODUCTION

This is a wages and hours action brought by Plaintiff Derrick Hix ("Hix") against his former employers. The First Amended Complaint ("FAC") filed on June 6, 2023 alleges that Hix was employed by Defendant On-Site Manager, Inc. ("On-Site") as an "IT Support worker" from March 2007 to September 2017, when On-Site was acquired by Defendant RealPage, Inc. ("RealPage"). (FAC, ¶ 6.) On-Site subsequently changed its name to Orchard City Holdings, Inc. at an unspecified date. (*Id*. at ¶ 8.) Hix worked for RealPage as a "System Administrator" from September 2017 until his termination on September 30, 2019. (*Ibid*.)

On March 3, 2020, an amendment substituted "Orchard City Holdings, Inc." ("Orchard") in place of Doe 1. On April 14, 2021, an amendment substituted "Thomas Harrington" for Doe 2 and "Jonathan Harrington" for Doe 3 (collectively, "Harrington Defendants").

Currently before the court is a demurrer and motion to strike by Defendant Orchard and the Harrington Defendants (collectively, "OCH Defendants"), filed on June 6, 2023. This matter is set for trial on October 30, 2023.

The FAC alleges that Hix was misclassified by his employers as an exempt employee and paid a fixed salary even though Hix was primarily engaged in performing nonexempt duties. (*Id*. ¶¶ 18-19.) Hix allegedly worked a substantial amount of overtime but was never paid overtime wages and did not qualify for exemption from overtime law. (*Id*. at ¶¶ 20-21.)

The FAC alleges the following causes of action:

1. Failure to pay overtime (violation of Labor Code §§ 510, 1194, et seq. and Wage Order 4-2001);
2. Failure to provide mandated meal periods (violation of Labor Code §§ 226.7, 512 and Wage Order 4-2001);
3. Failure to provide mandated rest periods (violation of Labor Code § 226.7 and Wage Order 4-2001);
4. Failure to furnish accurate itemized wage statements (violation of Labor Code §§ 226 & 226.3 and Wage Order 7-2001);
5. Failure to pay all wages upon termination (violation of Labor Code §§ 201, 203 and Wage Order 4-2001); and
6. Unfair Competition Law Violations (violation of Bus. & Prof. Code §17200 et seq.).

II. THRESHOLD PROCEDURAL ISSUE: TIMELINESS

Hix contends that the demurrer and motion to strike are untimely because the OCH Defendants "improperly invoked" Code of Civil Procedure sections 430.41, subdivision (a)(2) and 435.5, subdivision (a)(2) to further delay. (Opposition, p. 2:8-9.)

Before filing a demurrer or motion to strike, a demurring or moving party must meet and confer with the party who filed the challenged pleading to determine whether an agreement

can be reached that would resolve the objections to the pleading. (Code Civ. Proc., §§ 430.41, 435.5.) If the parties are unable to confer at least five days before the responsive pleading is due, the demurring or moving party is granted an automatic 30-day extension to file a responsive pleading if he or she files and serves a declaration on or before the date the responsive pleading is due. (Code Civ. Proc., §§ 430.41 subd. (a)(2), 435.5, subd. (a)(2).) The extension begins from the date the responsive pleading was previously due, and the demurring party is not subject to default during the extension period. (Code Civ. Proc., §§ 430.41 subd. (a)(2), 435.5, subd. (a)(2).)

Hix served the FAC on June 6, 2023; therefore, the parties had until July 5, 2023 to meet-and-confer or July 10, 2023[1] to file a declaration seeking a 30-day extension. (Code Civ. Proc. §§ 430.41, subd. (a)(2), 435.5, subd. (a)(2).) Counsel for the OCH Defendants filed the declaration on July 10, 2023, claiming the parties had an initial telephone call on June 27, 2023 regarding the anticipated demurrer and motion to strike.[2] Hix's counsel contends the initial call was the meet-and-confer session. (Opposition, p. 2:9-11.) During the session, counsel for the OCH Defendants refused to agree to an amendment of the pleadings due to Plaintiff's counsel alleged, unspecified violations of the Rules of Professional Conduct. (*Id.* at p. 2:14-16.) Defendants subsequently invoked Code of Civil Procedure sections 430.41, subdivision (a)(2) and 435.5, subdivision (a)(2) to extend their time to file.

Failure to meet and confer in compliance with Code of Civil Procedure sections 430.41 and 435.5 is not by itself a ground for overruling a demurrer or motion to strike. (See Code Civ. Proc. §§ 430.41, subd. (a)(4), 435.5, subd. (a)(4).) In addition, the court has discretion to consider a demurrer filed after the normal 30-day period. (See Code Civ. Proc., § 473, subd. (a)(1); *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 749 [judge has discretion to consider demurrer filed eight days after 30-day period when plaintiff fails to demonstrate any prejudice from the delay].) Hix has submitted substantive oppositions to the OCH Defendants' demurrer and motion to strike. Hix does not appear to have suffered any prejudice; nor has Hix alleged any prejudice in his oppositions. The court will therefore address the merits of the demurrer and motion to strike.

III. REQUEST FOR JUDICIAL NOTICE

"In ruling on a demurrer, a court may consider facts of which it has taken judicial notice. (Code Civ. Proc. § 430.30, subd. (a).) This includes the existence of a document. When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]" (*StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9.)

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[1] July 6, 2023, is 30 days after June 6, 2023, but the responsive pleading had a two-day grace period for filing because Hix electronically served the FAC. Thus, the responsive pleading would have been due on July 8, 2023. (Code Civ. Proc., § 1010.6, subd. (a)(3)(B) ["Any period of notice, or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by two court days"].) However, because July 8, 2023 is a Saturday, the OCH Defendants had until the next business day – July 10, 2023 – to file the demurrer and motion to strike. (See Code Civ. Proc. § 12a.)

[2] The court takes judicial notice of its own records. (Evid. Code § 452, subd. (d).)

a. The OCH Defendants' Request for Judicial Notice

In support of their demurrer, the OCH Defendants submit the following for judicial notice[3]:

1. Defendant Orchard's Special Interrogatories to Plaintiff;
2. Plaintiff's Amended Responses to Special Interrogatories;
3. Declaration of Holly Fahn;
4. Excerpts from the Deposition of Holly Fahn;
5. Excerpts from the Deposition of Jonathan Harrington; and
6. Excerpts from the Deposition of Luz Ramirez.

The court DENIES judicial notice as to all exhibits.

Deposition transcripts and declarations cannot be noticed as to the truth of their contents. (See *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81 [truth of contents of court records cannot be judicially noticed]; *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057 [court may take judicial notice of existence of declaration but not of facts asserted in it]; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 (court may not notice the truth of declarations or affidavits filed in court proceedings); *Garcia v. Sterling* (1985) 176 Cal App 3d 17, 22 ["Although the existence of statements contained in a deposition transcript filed as part of the court record can be judicially noticed, their truth is not subject to judicial notice."])

However, a court may take judicial notice of discovery responses to the extent 'they contain statements of the [party] or his agent which are inconsistent with the allegations of the pleading before the court.'" (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 477 (*Bounds*) [quoting *Del E. Webb Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 605].) "But in doing so, '[t]he hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such material which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff.'" (*Ibid*.)

While the OCH Defendants frame their request for judicial notice as a means to contradict allegations of facts in the FAC, the OCH Defendants actually seek an evidentiary hearing to challenge the claims on the merits and request this court to draw factual inferences regarding whether the Harrington Defendants knew Hix was an exempt employee. (*C.R. v. Tenant Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1103–1104 ["[T]he contents of a document [that is judicially noticed] may only be accepted '"'where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.'"' [Citations.]"]. The OCH Defendants generally cite to Exhibit 2 for the proposition that the Harrington Defendants had no knowledge regarding Hix's classification as an exempt employee. Exhibit 2 is nearly 200 pages in length and contains 366 responses, and the OCH Defendants do not provide a page number or response number that clearly indicates a contradiction to the pleadings. (See *Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal.App.4th 927, 934 [trial

[3] The court notes that Hix filed an objection to the OCH Defendants' request for judicial notice. There is no authority for the filing of separate briefs in support of or in opposition to requests for judicial notice. The fillings cannot be used to evade otherwise applicable page limits. Accordingly, the court has not considered the separate opposition or reply briefs addressing any requests for judicial notice.

court not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide"].)

The OCH Defendants also proffer Holly Fahn's deposition testimony to show that Defendants gave Hix meal and rest breaks. Hix contends that his position is not that meal and rest breaks were not provided, but that Defendants failed to meet their legal obligation in informing Hix of his rights and keeping time records to show they provided compliant meal periods. (See Opposition, p. 9:3-21.) Accordingly, the proffered evidence does not directly contradict the FAC.

b. Plaintiff's Request for Judicial Notice

In support of his opposition, Hix submits the following for judicial notice:

B. Defendant Thomas Harrington's Responses to Plaintiff's Form Interrogatories – General dated January 4, 2022;
C. Defendant Jonathan Harrington's Responses to Plaintiff's Form Interrogatories – General dated January 4, 2022;
D. California Industrial Wage Commission Wage Order 4-2001;
E. December 14, 2022 Order of Judge Kirwan denying Defendants' Motion to Disqualify Plaintiff's Counsel; and
F. February 14, 2023 Order of Judge Chung on RealPage, Inc.'s Motion for Summary Judgment/Adjudication.

The court GRANTS judicial notice of Exhibit C pursuant to Evidence Code section 452, subdivision (c) and Exhibits D-E pursuant to Evidence Code section 452, subdivision (d).

For the same reasons discussed above, the court DENIES judicial notice of Exhibits A and B. (*Bounds v. Superior Court*, *supra*, 229 Cal.App.4th at p. 477.)

IV. LEGAL STANDARDS

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, [citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318].) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

In general, "a complaint must contain '[a] statement of the facts constituting the cause of action, in ordinary and concise language.'" (*Davaloo v. State Farm Insurance Co.* (2005) 135 Cal.App.4th 409, 415 [quoting Code Civ. Proc., § 425.10, subd. (a)(1)].) "This fact-pleading requirement obligates the plaintiff to allege ultimate facts that as a whole apprise[ ] the adversary of the factual basis of the claim." (*Davaloo*, *supra*, 135 Cal.App.4th at p. 415 [internal quotation marks and citations omitted].) A demurrer tests whether the plaintiff alleges each fact essential to the cause of action asserted. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 873.

V. ANALYSIS

The OCH Defendants demur to all causes of action within the FAC on the ground that each claim fails to allege facts sufficient to constitute a cause of action against them. (Code Civ. Proc. § 430.10, subd. (e).) Defendants also demur to the second through sixth causes of action on the ground of uncertainty. (Code Civ. Proc. § 430.10, subd. (f).)

A. Uncertainty

As a threshold matter, it is clear from the OCH Defendants' arguments and overall demurrer that they understand the nature of the claim and misapplies Code of Civil Procedure section 430.10, subdivision (f) to contend that the FAC fails to allege facts sufficient to state a cause of action pursuant to Code of Civil Procedure section 430.10, subdivision (e). The absence of certain details does not render the complaint "so incomprehensible that a defendant cannot respond." (*Lickiss v. Financial Industry Reg. Authority* (2012) 208 Cal.App.4th 1125, 1135 ["[D]emurrers for uncertainty are disfavored and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond."]; see also *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616 ["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."]) It simply means that the complaint is not as specific as the OCH Defendants would like.

The OCH Defendants assert within a footnote that the FAC is also uncertain because of "group pleading." In support, they cite to *Hawley Bros. Hardware Co. v. Brownstone* (1899) 123 Cal. 643, 646 in which the Supreme Court determined the pleadings solely addressed the copartnership as the defendant because the complaint used the a "neuter gender, singular number" to refer to the defendant. Accordingly, "not possible by any reading of the complaint, without interpolation, to say, whether one, and if one, which one, of the persons named in the caption, or whether both, or whether the partnership by its common name, is the defendant." (*Id.* at pp. 646-647.)

The OCH Defendants also cite to *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135 for the proposition that a failure to adequately identify parties could support a demurrer for uncertainty. While the *Williams* court recognized the local court rules requiring identification of parties and causes of action, the court ultimately held, "under our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend." (*Id.* at p. 139, fn. 2.) The *Williams* ruling is followed by recent cases holding, "[a] demurrer for uncertainty should be overruled when the facts as to which the complaint is uncertain are presumptively within the defendant's knowledge. (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822 [citing 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 976, p. 389]; see also *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695 [stating that a complaint was not "a model of clarity," but contained "substantive factual allegations sufficient to apprise [defendants] of the claims."])

The FAC alleges that On-Site employed Hix from March 2007 to September 2017, until RealPage acquired On-Site on September 26, 2017.[4] (FAC, ¶ 6.) On-Site subsequently became Orchard after the acquisition. (*Id.* at ¶ 8.) RealPage employed Hix from September 26, 2017, to September 30, 2019. (*Id.* at ¶ 6.) Accordingly, the FAC alleges a specific timeline from which the OCH Defendants can deduce and understand issues they are asked to meet. (*Williams, supra,* 185 Cal.App.3d at p. 139, fn. 2.)

The court therefore OVERRULES defendants' demurrer to the second through sixth causes of action on uncertainty grounds. (Code Civ. Proc. § 430.10, subd. (f).)

a. Sufficiency of Pleadings

i. Group Pleading

The OCH Defendants also maintain that the FAC's group pleading fails to allege facts sufficient to state a claim. However, the citations to *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, *Shields v. Singleton* (1993) 15 Cal.App.4th 1611, and *Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120 are inapposite. (See Demurrer, pp. 4-5.) Defendants' citation to *Arce* focused on the trial court's ruling on a second demurrer, while the matter before the appellate court concerned a third demurrer that did not reach the "grouping" issue. (*Arce, supra,* 211 Cal.App.4th at p. 1467.) Moreover, in *Shields*, the appellate court declined to address the trial court's ruling that the group allegations were insufficient to state a cause of action. (*Shields, supra,* 15 Cal.App.4th at p. 1623.) Finally, in *Moore*, while the Supreme Court did criticize the usage of boilerplate allegations, the issue was also not before the Court. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 133-134 ["Because the superior court found that Moore had not stated such a cause of action, it had no occasion to address the sufficiency of Moore's allegation that the Regents and Quan were acting as Golde's 'agent[s]' and 'joint venturer[s].' … Because no court has yet addressed the Regents' and Quan's secondary liability and because the superior court will need to consider other issues on remand, there is no need to address these issues at this time."])

Defendants' citations to *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71 and *Garcia v. Superior Court* (1990) 50 Cal.3d 728 are also inapplicable. In *Bockrath*, the Supreme Court remanded a product liability and personal injury claim because plaintiff failed to allege that each *product* was a substantial factor in causing his cancer. (*Bockrath, supra,* 21 Cal.4th at p. 78 ["[P]laintiff must allege facts, albeit as succinctly as possible, explaining how the conduct caused or contributed to the injury."].) Thus, plaintiff was required to allege (1) the toxic material that caused the complained-of illness; (2) the product, not just the toxin, that caused the illness; (3) as a result of exposure, toxins entered the body; (4) the specific illness plaintiff suffered and that the each toxin entering the body was a substantial factor; and (5) each toxic absorbed was manufactured or supplied by a named defendant. (*Id.* at p. 80.) However, *Bockrath* is still distinguishable because the plaintiff brought a products liability action against 55 defendants, all of which manufactured a number of products that could have caused the injury. Accordingly, the Supreme Court emphasized that when "'the pleaded facts of negligence and injury do not naturally give rise to an inference of causation[,] the plaintiff must plead specific facts affording an inference the one caused the others.'" (*Id.* at p. 78 [citing *Christensen v. Superior Court* (1991) 54 Cal. 3d 868, 900-901].) In *Garcia,* the

[4] Paragraph 8 of the FAC alleges that RealPage acquired On-Site on September 26, 2019. However, the court understands that the acquisition was in 2017.

Supreme Court considered a claim for negligent misrepresentation involving a risk of physical harm as insufficiently alleged because the plaintiffs failed to plead reasonable reliance with comparative specificity. (*Garcia, supra* 50 Cal.3d at p. 737 ["The complaint, however, is deficient in this regard. In view of the very specific allegations that Morales was afraid of Johnson because of his past death threats and violent behavior towards her, the allegation that she 'failed to take steps to protect herself from Johnson' does not suffice."])

The OCH Defendants' assertion that Hix indiscriminately attributes each alleged wrongdoing to all defendants generally is unpersuasive. As noted above, the FAC specifically alleges when Real Page and On-Site employed Hix, providing sufficient notice to apprise the OCH Defendants of the claims brought against them. The OCH Defendants note that Hix provides "two distinct time periods, two distinct employers, and two distinct job titles." (Demurrer, p. 5:8-12.) While the FAC may not be well-drafted, the facts alleged are sufficiently detailed to inform the OCH Defendants of the claim they are to meet. (*Perez, supra,* 209 Cal.App.4th at p. 1239 ["This rule of liberal construction means that the reviewing court draws inferences favorable to the plaintiff, not the defendant."])

ii. Labor Code section 558.1

Moreover, the OCH Defendants' argument on Labor Code section 558.1 clearly shows that they understand Hix intended the claims against the Harrington Defendants to be derivative of the claims against Orchard. The OCH Defendants cite to *Reynolds v. Bement* (2005) 36 Cal.4th 1075 ("*Reynolds*") to support the proposition that the Harrington Defendants, as officers, cannot be personally liable for unpaid wages.

In *Reynolds*, the Supreme Court reviewed whether a plaintiff, seeking unpaid wages under Labor Code section 1194, could recover against defendant corporations and their officers who "'directly or indirectly, or through an agent or any other person, employed or exercised control over wages, hours, or working conditions of Class members.'" (*Reynolds, supra*, 36 Cal.4th at p. 1082.) The Court of Appeal ruled the officers were not liable because the statute did not define the term employer to include corporate agents. (*Id.* at p. 1087.) The Supreme Court affirmed on the basis that the Legislature did not explicitly "expose to personal civil liability any corporate agent who 'exercises control' over an employee's wages, hours, or working conditions." (*Id.* at p. 1088.) However, Labor Code section 558.1 supersedes the holding in *Reynolds* to the extent it limits the liability of directors and officers of a corporate employer.

Labor Code section 558.1, states:

> (a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.
>
> (b) For purposes of this section, the term "other person acting on behalf of an employer" is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term "managing agent" has the same meaning as in subdivision (b) of Section 3294 of the Civil Code.

(c) Nothing in this section shall be construed to limit the definition of employer under existing law.

The OCH Defendants also contend that the FAC fails to allege facts beyond Thomas Harrington's status as an officer, such as an action that actually caused the Labor Code violation. To support the proposition, the OCH Defendants cite to *Espinoza v. Hepta Run, Inc*. (2022) 74 Cal.App.5th 44 ("*Espinoza*"), which stated that "in order to 'cause' a violation of the Labor Code, an individual must have engaged in some affirmative action beyond his or her status as an owner, officer or director of the corporation." (*Espinoza*, *supra*, 74 Cal.App.5th at p. 59.) However, involvement in the day-to-day operations is not required. (*Ibid*.) Thus, for an individual "to be held personally liable he or she must have had *some* oversight of the company's operations or *some* influence on corporate policy that resulted in Labor Code violations." (*Ibid*. [emphasis added].)

Although *Espinoza* reviewed a summary adjudication and says nothing regarding the level of detail required to overcome a demurrer or other pleading challenge, courts have consistently applied the general rule that statutory causes of action must be pleaded with particularity." (*Covenant Care, Inc. v. Superior Court (Inclan)* (2004) 32 Cal.4th 771, 790.) Thus, "the plaintiff must set forth facts in his complaint sufficiently detailed and specific to support an inference that *each of the statutory elements* of liability is satisfied." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5, [italics added].) This standard of "reasonable particularity" is more lenient than the pleading standard that applies to fraud claims. (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1261, discussing *Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 619.)

Thus, while Hix is correct in maintaining that the FAC is sufficient to provide notice to the Harrington Defendants of the claim brought against them, Hix fails to actually plead facts sufficient to invoke Labor Code section 558.1. The FAC alleges the Harrington Defendants were founders of On-Site Manager, Inc. and each was a shareholder that managed overall operations of the company. (FAC, ¶¶ 10-11.) The FAC further alleges that Thomas Harrington is a current shareholder and officer of Orchard City Holdings, Inc. (*Id*. at ¶ 10.) The FAC does not allege, however, that the Harrington Defendants "caused" a violation of the Labor Code by an "affirmative action" beyond his status as an officer. There are no other substantive allegations against the Harrington Defendants that would support a reasonable inference that they were personally involved in or contributed to the alleged statutory violations.

The court therefore SUSTAINS the demurrer to the first through fifth causes of action by the Harrington Defendants on the ground that the FAC fails to sufficiently allege that they qualify as "an owner, director, officer, or managing agent of the employer" under Labor Code section 588.1. (Code Civ. Proc. § 430.10, subd. (e).) The court grants 10 days' leave to amend.

iii. Unfair Competition Law (UCL) Violations

Hix alleges the OCH Defendants' violations of the Labor Code constitutes unlawful, unfair, and fraudulent business practices. (See FAC, ¶ 60.)

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of

conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (*Id.*)

The Labor Code violations articulated in the first through fifth causes of action form the basis of the UCL claim. However, the court has sustained the demurrer as to those claims. Therefore, the court SUSTAINS the OCH Defendants' demurrer to the sixth cause of action. (Code Civ. Proc. § 430.10, subd. (e).) The court grants 10 days' leave to amend.

VI. CONCLUSION

The court OVERRULES the OCH Defendants' demurrer to the second through sixth causes of action on uncertainty grounds. (Code Civ. Proc. § 430.10, subd. (f).)

The court SUSTAINS with 10 days' leave to amend the Harrington Defendants' demurrer to the first through fifth causes of action on the ground that the FAC fails to sufficiently allege that they qualify as "an owner, director, officer, or managing agent of the employer" under Labor Code section 588.1. (Code Civ. Proc. § 430.10, subd. (e).) The court grants 10 days' leave to amend.

The court SUSTAINS with 10 days' leave to amend the OCH Defendants' demurrer to the sixth cause of action on the ground of insufficient facts. (Code Civ. Proc. § 430.10, subd. (e).)

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

In light of the court's ruling on the demurrer, the OCH Defendants' motion to strike is DENIED AS MOOT pending the filing of a second amended complaint.

OCH Defendants shall prepare an order for the court's signature.

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Calendar Line 5
See Line 4.

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Calendar Lines 6 & 7

Case Name: Diamond Elevator, Inc. v. John Construction, Inc.
Case No.: 23CV413621

On September 14, 2023, Plaintiff's Motion to Compel Defendant John Construction, Inc.'s Verified and Objection-Free Responses to Its Form Interrogatories, Special Interrogatories and Request for Production of Documents, Set One and Motion for Order to Deem Its Request for Admissions, Set One, Propounded to Defendant John Construction, Inc. as Admitted came before the court.

On or about November 21, 2022, Plaintiff Diamond Elevator propounded to Defendant John Construction, Inc., its Form Interrogatories, which included a Request for Admissions, Special Interrogatories, and Requests for Production, Set One. When Defendant did not respond to the discovery, Plaintiff filed its motion to compel. Defendant failed to file an opposition to the motion to compel. A hearing on the motion was held on August 1, 2023. At the hearing, Judge Chung continued the motion to September 14, 2023, allowed Defendant to reply to the discovery by August 24, 2023, but prohibited Defendant from filing any further briefing, and allowed Plaintiff to file a further reply to the motion by September 7, 2023. On August 25, 2023, Defendant's attorney filed a declaration which stated that on August 24, 2023, he served his client's verified responses to the form interrogatories, including responses to requests for admissions, special interrogatories, requests for production and all documents referenced in the responses to the requests for production.

In its reply brief filed on September 7, 2023, Plaintiff contends that any objections contained in the discovery responses are waived because the responses are not in substantial compliance with [Code of Civil Procedure] sections 2030.290 and 2031.300 and the untimely responses were not the result of mistake, inadvertence or excusable neglect. Plaintiff also contends that it is entitled to an order to compel further responses to specific form interrogatories, special interrogatories and request for documents and an award of monetary sanctions.

The court has reviewed the discovery responses attached to Defendant's attorney's declaration and the Plaintiff's separate statement in support of its reply. The court finds that Defendant's discovery responses are cursory, and it appears that little care or effort was exercised in making the responses. Furthermore, as pointed out by Plaintiff, Defendant's responses to specific interrogatories seem to contradict responses to other discovery, including requests for admissions. The court also agrees with Plaintiff that any objection by Defendant to the discovery requests are waived because Defendant's discovery responses are not in substantial compliance with the relevant code sections and Defendant has never asserted that its untimely responses were the result of mistake, inadvertence, or excusable neglect. Moreover, there is merit to Plaintiff's claims that Defendant has failed to respond fully to all questions set forth in the interrogatories; its responses are not complete or straightforward; stating that Defendant is "still investigating" is an inadequate response; and, Defendant has failed to state whether it is producing all or part of the responsive documents in its possession, custody, or control. Furthermore, stating that Defendant will provide documents when located is insufficient as Defendant is not afforded the luxury of searching for documents at its leisure. Plaintiff's Motion to Compel Defendant John Construction, Inc.'s Verified and Objection-Free Responses to its Form Interrogatories, Special Interrogatories and Request for Production of Documents, Set One, is GRANTED. No later than 5:00 p.m. on October 16, 2023, Defendant shall:

1) Fully respond to each of their subpart of Interrogatory No. 3.1;
2) Provide complete and straightforward responses, and make and state that a reasonable and good faith inquiry was made, to Interrogatories Nos. 50.1, 50.2, 50.3, 50.4, 50.5, and 50.6;
3) Provide complete and straightforward responses, and make and state that a reasonable and good faith inquiry was made, to Special Interrogatories Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11;
4) Provide code compliant responses, conduct a diligent search and locate all documents in response to Request for Production Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 (including each request listed as No. 9), 10, and 11.

As for the motion to deem requests for admissions admitted, the court "shall" grant the motion "unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response . . .in substantial compliance with Section 2033.220." (*St. Mary v. Superior Court* (2014) 223 Cal.App. 4th 762, 778.) To make this determination, the court must evaluate the responses "in toto," rather than based on responses to individual RFAs. (*Id*. at 779-780.))

It appears that Judge Chung gave Defendant the opportunity to submit discovery responses before the hearing on Plaintiff's motion. Defendant served its proposed responses by the deadline set by the court and before the hearing on Plaintiff's motion. Plaintiff admits that some of Defendant's responses are adequate. And, while Plaintiff believes that Defendant's responses are not credible, Defendant's denials are in substantial compliance with section 2033.220. Accordingly, Plaintiff's Motion for Order to Deem Its Request for Admissions, Set One, Propounded to Defendant John Construction, Inc. as Admitted is DENIED.

There is no objection to Plaintiff's request for attorney fees. Furthermore, although delayed responses may defeat a motion to compel, they will not avoid monetary sanctions and it is mandatory that a monetary sanction be imposed for the failure to serve a timely response to RFAs that necessitated the filing of the motion. Accordingly, Plaintiff's request for attorney fees is GRANTED. Defendant shall pay $14,610.00 to Plaintiff in sanctions no later than 5:00 p.m. on October 16, 2023.

Plaintiff shall prepare an order for the court's signature.

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Calendar Line 7

See above, Line 6.

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Calendar Line 8

Case Name: Portfolio Recovery Associates, LLC v. Franklin Diblasi

Case No: 22CV407302

Franklin Diblasi served Interrogatories (Set One) and Request for Production of Documents and Electronically Stored Information (Set One) on Portfolio Recovery Associates, LLC. (PRA). Initially PRA only served objections to the discovery requests. After several attempts to meet and confer their discovery disputes, and despite PRA's agreement to serve amended responses by deadlines agreed to, PRA failed to meet its promises. Accordingly, Diblasi was forced to filed a Motion to Compel Further Responses and Documents Responsive to Request For Production of Documents Responsive to Request for Production of Documents and Electronically Stored Information and for Monetary Sanctions Against PRA. Diblasi requested $4,025.72 in sanctions for the cost of filing the motion. Thereafter, Diblasi was forced to file a Motion to Compel Further Responses to Interrogatories, Request for Production of Documents, Documents Responsive Thereto, and For Monetary Sanctions Against PRA because once again PRA failed to meet its promise to serve amended responses to the discovery. Diblasi requested $11,067.52 in sanctions for the cost of filing that motion. While the motions were pending, PRA finally served the promised amended responses. In his reply, Diblasi agrees that PRA's responses to the interrogatories are adequate and withdraws that portion of the motion, however, Diblasi contends that the amended responses to the RFP and document production are still inadequate.

For the reasons set forth in the moving papers and reply, the court agrees with Diblasi and GRANTS its motions to compel as to the RFP and document production responsive thereto. Furthermore, the court finds that, despite their promises, PRA would not have responded further to the discovery had Diblasi not filed his motions to compel and might not produce documents as promised without a court order. Accordingly, Portfolio shall serve code-compliant responses, with a privilege log, to Diblasi's RFP Nos. 1-4, 6-7, and 10, and produce all documents responsive to those requests, including but not limited to, its document retention policy and unredacted Master Purchase & Sale Agreement dated August 13, 2020, and Addendum No. 1, by 3:00 p.m. (PST) on September 15, 2023.

Furthermore, although delayed responses may defeat a motion to compel, they will not avoid monetary sanctions and it is mandatory that a monetary sanction be imposed for the failure to serve a timely response to discovery that necessitated the filing of the motion. (See, *St. Mary v. Superior Court* (2014) 223 Cal.App. 4th 762, 778.) Therefore, Portfolio shall pay $13,443.24 in monetary sanctions to Diblasi by 5:00 p.m. September 30, 2023.

Diblasi shall prepare an order for the court's signature.

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Calendar Line 9

See above, Line 8.

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Calendar Line 10

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