SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

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"Every case is important" . . . . . "No case is more important than any other."— United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Tuesday, 30 January 2024
TIME: 9:00 A.M.

This Department uses Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in-court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building. If the doors to the Old Courthouse are locked, please see the deputies at the metal detector next door at 191 North First Street.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit

photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	19CV357031	Chun Lu vs Rabindra N. Chakraborty	**Order of Examination.** Has the judgment debtor been served? Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM via the Zoom virtual platform. The appropriate oath will be administered by the Court and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely. NO FORMAL TENTATIVE RULING.
LINE 2	22CV396819	BMO Bank, N.A. as successor-in-interest to Bank of the West vs Arroyo & Silva Corporation d.b.a. Cal-West Precision Solutions.	**Application of Plaintiff for Writ of Possession.** No party has filed opposition to this application. It appears that plaintiff sent proper notice to the defendant. The application is GRANTED. Plaintiff is to prepare an appropriate order and submit it to this Department via the e-filing queue. NO FORMAL TENTATIVE RULING.
LINE 3	23CV417159	Home Comforts, Inc.; Aron Yakovlev vs Walmart.com USA, LLC.	**Demurrer of Cross-Defendant Alana Yakovlev to Cross-Complaint of Walmart.com USA, LLC.** CONTINUED by stipulation and order to 29 February 2024 at 9:00 AM in Department 20.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 4	20CV368367	Martha Merino Cavero et al. vs George Chiala Farms, Inc. et al. and related cross-complaint.	**Motion Of Cross-Defendant/Cross-Complainant Ameri-Kleen Inc d.b.a. Sanitation Specialists for Summary Judgment/Adjudication Of Issues.** Cross-defendant Ameri-Kleen's motion for summary judgment of the cross-complaint is GRANTED. SEE ATTACHED TENTATIVE RULING.
LINE 5	22CV398679	C2K Architecture, Inc. v. Full Power Properties, LLC, et al.	**Order on Motion of Plaintiff C2K Architecture, Inc. for Summary Judgment Or Adjudication.** Plaintiff C2K's motion for summary judgment is DENIED. Plaintiff C2K's alternative motion for summary adjudication of the first cause of action of its complaint for breach of the contract is GRANTED. Plaintiff C2K's alternative motion for summary adjudication of the second cause of action of its complaint for breach of the covenant of good faith and fair dealing is DENIED. Plaintiff C2K's alternative motion for summary adjudication of the third cause of action of its complaint for foreclosure of mechanic's lien release bond is GRANTED. Plaintiff C2K's alternative motion for summary adjudication of the fourth and fifth causes of action of its complaint for common count and quantum meruit, respectively, is DENIED. SEE ATTACHED TENTATIVE RULING.
LINE 6	21CV382422	Elizabeth Brierley vs Costco Wholesale Corporation	**Motion of Plaintiff to Compel Cross-Defendant Apogee Delivery and Installation, Inc. to Provide Further Responses to Discovery Requests (Sets One) and for Monetary Sanctions.** The moving papers (200 pages) failed to set forth any attempt by plaintiff to meet and confer with cross-defendant concerning the sufficiency of the responses. Plaintiff did not file a Separate Statement in support of the motions setting forth the deficiencies in the responses. Plaintiff is reminded of this Court's order of 12 December 2023. The motion is DENIED. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 7	22CV406851	Nurretin Beser vs Mateon Therapeutics, Inc.; Oncotelic Therapeutics; PointR Data, Inc.; Amit Shah; Vuong Trieu,	**Motion Of Plaintiff To Compel Defendants To Produce Responsive Documents and for Monetary Sanctions.** The motion of plaintiff to compel defendants to provide further responses is GRANTED in its entirety. Defendants are to prepare co-compliant responses as set forth in this tentative ruling. This Court will allow monetary sanctions in favor of plaintiff in the amount of $2,460.00 for six hours' worth of work at $400.00 per hour and filing fee of $60.00. Further responses in the payment of sanctions are due within 20 days of the filing and service of this Order. SEE ATTACHED TENTATIVE RULING.
LINE 8	23CV410044	Mark Smith vs Terry Drymonacos; Big Stream Solutions; Brad Kashani.	**Motion of Plaintiff for a Protective Order.** OFF CALENDAR PER REQUEST. See also LINE #9 and LINE # 21
LINE 9	23CV410044	Mark Smith vs Terry Drymonacos; Big Stream Solutions; Brad Kashani.	**Motion of Defendant Terry Drymonacos to Compel Plaintiff to Produce Subpoenaed Records and Request for Discovery Referee and Request for Monetary Sanctions.** OFF CALENDAR PER REQUEST. See LINE #8 and LINE #21.
LINE 10	23CV416519	Linda Lisner vs City of San José; Bascom Station Residential LLC, s.d.a. Doe 1; Bay West Development Holdings, LLC; South Bay Construction & Development Company I, LLC.	**Motion of Defendant County of Santa Clara to Compel Plaintiff to Provide Further Responses to Special Interrogatories and for Monetary Sanctions.** On 22 January 2024, plaintiff dismissed the County of Santa Clara from this lawsuit. On 22 December 2023, plaintiff dismissed defendant Caltrans. Does the dismissal take the motion off calendar? May the plaintiff dismiss this lawsuit once the defendant filed opposition to the motion in which defendant requested sanctions? (***Frank Annino & Sons Construction, Inc. v. McArthur Restaurants*** (1989) 215 Cal.App.3d 353, 356; ***Manhan v. Gallagher*** (2021) 62 Cal.App.5th 504, 509.) NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 11	2008-1-CV-130677	Kenmark Ventures, LLC vs Electronic Plastics, LLC; Mike Gardiner; Anthony Thomas and related cross-complaint	**Motion of Defendant Anthony Thomas to Quash Deposition Subpoena for Production of Business Records.** Defendant seeks to quash a deposition subpoena that plaintiff issued for the protection of business records served on IBEW Local 1245 for records pertaining to him. He asserts that the subpoena is an unreasonable and oppressive demand, violates his right to privacy, and is unreasonably cumulative and duplicative. Plaintiff opposes the motion as plaintiff seeks the current name, address and telephone number of defendant's/judgment debtor's employer so that plaintiff may serve an Earnings Withholding Order upon the employer. As an alternative, defendant as this Court to delay ruling on this matter until there is an opinion from the Court of Appeal, Sixth Appellate District. Oral argument on this matter is scheduled to take place on 04 April 2024 at 9:30 AM. ***Code of Civil Procedure***, § 916(a) automatically stays only "proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order …." Does this Court have the authority to rule on this motion while the appeal is pending? NO TENTATIVE RULING. The parties are to use the Tentative Ruling Protocol to advise the Court if they wish to submit on the papers presented or appear and argue the merits.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 12	20CV373708	AK Construction Enterprises, Inc. vs Vivienne Tran; Hieu Van Tran; Thu Trung Pham and related cross-complaints.	**Motion of Joshua J. Borger, Esq. and Berliner Cohen LLP to Withdraw as Counsel for Defendant/Cross-Complainant Vivienne Tran.** This is an action to foreclose on a mechanic's lien. The complaint seeks damages on alleged unpaid labor, material and services related to a project in Morgan Hill. This is an action to foreclose on a mechanic's lien. The complaint seeks damages on alleged unpaid labor, material and services related to a project in Morgan Hill. Counsel for defendant seeks to withdraw as counsel due to a breakdown of the attorney-client relationship. Communication between client and counsel has deteriorated due to an irreconcilable breakdown of the attorney-client relationship (***Estate of Falco v. Decker*** (1987) 188 Cal.App.3d 1004, 1014.) Therefore, counsel is filing this motion to withdraw as counsel. Counsel alleges that his client will not be prejudiced by the withdrawal. The motion to be relieved as counsel is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and an order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel should add the next court date on ¶ 8 pf the proposed order as a Trial Setting Conference on 30 April 2024 at 11:00 AM in Department 20. Counsel should submit the orders to this Department via the Clerk's efiling queue. NO FORMAL TENTATIVE RULING.
LINE 13	20CV373708	AK Construction Enterprises, Inc. vs Vivienne Tran; Hieu Van Tran; Thu Trung Pham and related cross-complaints.	**Motion of Joshua J. Borger, Esq. and Berliner Cohen LLP to Withdraw as Counsel for Defendant/Cross-Complainant Trung Phan.** SEE LINE #12.
LINE 14	20CV373708	AK Construction Enterprises, Inc. vs Vivienne Tran; Hieu Van Tran; Thu Trung Pham and related cross-complaints.	**Motion of Joshua J. Borger, Esq. and Berliner Cohen LLP to Withdraw as Counsel for Defendant/Cross-Complainant Hieu Van Tran.** SEE LINE #12.
LINE 15	20CV373708	AK Construction Enterprises, Inc. vs Vivienne Tran; Hieu Van Tran; Thu Trung Pham and related cross-complaints.	**Motion of Joshua J. Borger, Esq. and Berliner Cohen LLP to Withdraw as Counsel for Defendant/Cross-Complainant Thu Trang Phan.** This is an action to foreclose on a mechanic's lien. The complaint seeks damages on alleged unpaid labor, material and services related to a project in Morgan Hill. SEE LINE #12..

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 16	22CV393836	Genasys, Inc. vs Gregory Almeida	**Motion of Plaintiff to Correct the Clerical Errors in Judgment.** There is no opposition to this motion. Odyssey reflects proper service on the defendant. The motion is GRANTED. Plaintiff is to submit a proposed order to this Department via the e-filing queue. NO FORMAL TENTATIVE RULING.
LINE 17	22CV397861	Discover Bank vs Shiju Sivadasan	**Motion of Plaintiff to Correct the Clerical Errors in Judgment.** There is no opposition to this motion. Odyssey reflects proper service on the defendant. The motion is GRANTED. Plaintiff is to submit a proposed order to this Department via the e-filing queue. NO FORMAL TENTATIVE RULING.
LINE 18	22CV404786	Wenxiang Ding; Xu Zhang vs County of Santa Clara; Ferrara Ranches, LTD.	**Motion of Defendants Ferrara Ranches LTD and County of Santa Clara for Leave to File an Amended Answer to Plaintiffs' Complaint.** No opposition has been filed. The motion is GRANTED. Moving party should submit a copy of the proposed amended answer to the clerk via the e-filing queue and then serve a file endorsed copy upon all parties. Any party who wishes to object to the proposed amendment may file a demurrer to the answer or motion to strike certain allegations in the answer. NO FORMAL TENTATIVE RULING.
LINE 19	19CV341677	Persolve Legal Group, LLP vs Esther Jensen	**Claim of Exemption.** The claim itself is not contained in the file**.** Good cause appearing, IT IS ORDERED that the hearing be CONTINUED to 20 February 2024 at 9:00 AM in this Department. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 20	23CV442749	County of Santa Clara, Office of the Sheriff vs Corey Syverson	**Petition of Plaintiff for Disposition of Firearms.** Continued from 05 December 2023. Respondent has filed opposition to this application and was present at the last court hearing. Santa Clara County Sheriff's Deputy Benjamin Bunal declared that on 23 August 2023, he was assigned to investigate a report relating to the well-being of respondent. After speaking to responded and his wife, respondent suffers from depression and alcoholism. Because his wife secured his weapons, he wanted to grab the knife in slice open his throat. The deputy That believes that respondent was a danger to himself due to a mental illness and placed him on a 72-our mental health hold pursuant to ***Welfare & Institutions Code***, § 5150. Law enforcement authorities seized 45 firearms or weapons. Good cause appearing, IT IS ORDERED that respondent is subject to the five-year prohibition imposed per ***Welfare & Institutions Code***, § 8103(f)(1)(A). He is subject to said five-year prohibition. He has not shown that he has met the requirement for a request for early termination of said five-year prohibition pursuant to ***Welfare & Institutions Code***, § 8103(f)(1)(C) or if he decides not to make such request for early termination. Good cause appearing, IT IS ORDERED that that petition is GRANTED as follows: The seized firearms and ammunition feeding devices are to be released to a licensed California firearms dealer pursuant to ***Penal Code***, §§ 33850 and 33870 along with ***Welfare and Institutions Code***, § 8102. NO FORMAL TENTATIVE RULING.
LINE 21	23CV410044	Mark Smith vs Terry Drymonacos; Big Stream Solutions; Brad Kashani.	**Motion of Defendant Terry Drymonacos to Compel Plaintiff to Attend and Testify at Deposition and Request for Monetary Sanctions.** OFF CALENDAR PER REQUEST. SEE LINES #8 and LINE #9.
LINE 22	23CV410044	Mark Smith vs Terry Drymonacos; Big Stream Solutions; Brad Kashani.	**Motion of Defendant Terry Drymonacos to Compel Plaintiff to Attend and Testify at Deposition and Request for Monetary Sanctions.** OFF CALENDAR PER REQUEST. SEE LINES #8 and LINE #9.
LINE 23			SEE ATTACHED TENTATIVE RULING.
LINE 24			SEE ATTACHED TENTATIVE RULING.
LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

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Calendar Line 3

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Calendar Line 4

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 20CV368367 **Martha Cavero, et al. v. George Chiala Farms, Inc., et al.**
DATE: 30 January 2024 **TIME: 9:00 am** **LINE NUMBER: 04**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 29 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On
Cross-Defendant Ameri-Kleen's Motion For Summary Judgment,
Or Alternatively, Summary Adjudication.

I. Statement of Facts.

A. Plaintiff's First Amended Complaint.

Defendants George Chiala Farms, Inc. ("GCF") and Chiala Family Property Management, LLC ("CFPM") are corporations doing business at 15500 Hill Road in Morgan Hill ("Subject Premises"). (First Amended Complaint ("FAC"), ¶2.) CFPM owns the Subject Premises. (*Id.* at ¶9.) GCF owns a screw conveyor blancher machine ("Subject Machine") operated on the Subject Premises. (*Id.* at ¶¶5, 10.)

Cross-defendant Ameri-Kleen, Inc., dba Sanitation Specialists ("Ameri-Kleen") was the employer of plaintiff Martha Merino Cavero ("Plaintiff"). (FAC, ¶12.) At all relevant times, Ameri-Kleen was an independent contractor who performed daily sanitation services for GCF on the Subject Machine. (*Id.* at ¶15.)

There is a written agreement, dated 22 October 2017, between Ameri-Kleen and GCF for the performance of sanitation services. (*Id.* at ¶19.) The agreement contains an indemnity provision. (*Id.* at ¶24.) GCF failed to provide Ameri-Kleen with a lockout/tagout ("LOTO") procedure specific to the Subject Machine. (*Id.* at ¶¶27-32.) Plaintiff and other Ameri-Kleen employees were told to clean the Subject Machine while it was in motion. (*Id*. at ¶33.) Plaintiff was never advised of the hazards of cleaning the Subject Machine while it was in motion. (*Id.* at ¶34.)

On 28 January 2019, Plaintiff was severely injured while attempting to clean the Subject Machine for the first time; her right hand was pulled into the machine and three of her fingers were fully or partially amputated. (FAC, ¶¶35-37.) An Ameri-Kleen employee ran to get help from a GCF security guard, who called an Ameri-Kleen supervisor but did not call 911. (*Id.* at ¶38.) The supervisor drove over forty miles to the Subject Premises and told an Ameri-Kleen employee to call 911. (*Id.* at ¶39.)

CAL FIRE responded, but because there was no Emergency Action Plan ("EAP") informing them how to disassemble the Subject Machine to free Plaintiff, CAL FIRE determined that the Subject Machine required disassembly by GCF's own mechanics. (*Ibid.*) Two GCF mechanics drove to the Subject Premises and were able to

disassemble the Subject Machine in approximately 20 minutes, allowing emergency responders to remove Plaintiff from the Subject Machine. (*Id.* at ¶40.)

A LOTO procedure specific to the Subject Machine would have both prevented Plaintiff's injuries and allowed for faster emergency medical treatment. (FAC, ¶41.) After the incident, CAL-OSHA investigated and cited Ameri-Kleen with several violations, including the lack of a safe LOTO procedure for hazardous equipment. (*Id.* at ¶42.) Ameri-Kleen had asked GCF for a LOTO for the Subject Machine, the lack of which rendered it unreasonably dangerous. (*Id.* at ¶¶43-44.) Because the Subject Machine is a unique machine designed exclusively for GCF, GCF could not delegate to Ameri-Kleen any duties relating to the creation of a LOTO or compliance with a non-existent LOTO. (*Id.* at ¶45.)

GCF negligently and/or knowingly provided Ameri-Kleen and Plaintiff with a dangerous and defective instrumentality when it hired Ameri-Kleen to clean the Subject Machine without also providing a LOTO procedure for the machine. (FAC, ¶46.) GCF was responsible for and did create safety policies for the Subject Premises and Subject Machine but failed to provide the same to Ameri-Kleen employees. (*Id.* at ¶47.) GCF was aware of the danger the Subject Machine posed to persons such as Plaintiff at the Subject Premises. (*Id.* at ¶¶48-49.)

GCF created an unsafe work environment by providing unsafe equipment which affirmatively contributed to Plaintiff's injuries. (FAC, ¶¶50-51, 54-56.) GCF knew the Subject Machine lacked the necessary emergency stop buttons and other safety features, and GCF either designed or caused the design flaw of the Subject Machine. (*Id.* at ¶52.) Before the incident, Plaintiff and other workers received safety training for other equipment, but neither Ameri-Kleen nor GCF provided a LOTO for the Subject Machine, which was unique and one of a kind. (*Id.* at ¶53.)

A party who hires an independent contractor normally delegates responsibility for contractor's workers to the contractor, under ***Privette v. Superior Court*** (1993) 5 Cal.4th 689 (***Privette***). (FAC, ¶73.) But the normal rule does not apply here because GCF retained control over the Subject Machine for several reasons. (*Id.* at ¶¶74-105.)

For example, the Subject Machine had an emergency cord, but due to the machine's design, the cord follows the angle of the conveyor and was very likely unreachable by Plaintiff from where she was at the time of the incident. (*Id.* at ¶¶79-80.) CAL-OSHA regulations provide that machines shall be equipped with adequate means for an operator to disconnect power promptly in case of emergency (*Id.* at ¶81.) Ameri-Kleen lacked the ability to redesign GCF's Subject Machine or implement safety procedures to comply with safety requirements. (*Id.* at ¶¶82, 95-99.)

GCF is a multiple employer worksite, and GCF is responsible under **Labor Code** section 6400 for compliance with CAL-OSHA regulations pertaining to the Subject Machine. (FAC, ¶¶101-106.) GCF's negligent exercise of its retained control over the Subject Machine, Subject Premises, and safety conditions related thereto was a substantial factor in causing Plaintiff's harm. (*Id.* at ¶¶107-115.)

Creating a LOTO specific to the Subject Machine, creating an EAP, providing on-site personnel who could disassemble the Subject Machine, and/or providing/knowing disassembly schematics for the Subject Machine was not part of the work that GCF hired Ameri-Kleen or Plaintiff to perform. (FAC, ¶120.)

B. Cross-Complaint against Ameri-Kleen

Cross-complainants GCF, CFPM, Mary Alice Chiala, George Allen Chiala, and Timothy Chiala ("Cross-Complainants") are defendants in the main action, where Plaintiff alleges that Cross-Complainants are responsible in some manner for damages. (Cross-Complaint ("XC"), ¶¶12-13.) If Plaintiff recovers against Cross-Complainants, then Cross-Complainants are entitled to equitable indemnity, apportionment of liability, contribution among and from cross-defendant Ameri-Kleen, according to their respective fault. (*Id.* at ¶15.) Should Cross-Complainants be found liable, their acts were passive and secondary, while those of Ameri-Kleen were active, primary, and superseding. (*Id.* at ¶16.) If Cross-Complaints are found liable to Plaintiff, then Cross-Complainants are entitled to a judgment of indemnification against Ameri-Kleen and Roe cross-defendants for the total amount of the judgment. (*Id*. at ¶23.)

Cross-Complainants entered into certain written contracts with Ameri-Kleen that entitle Cross-Complainants to be fully indemnified with respect to any loses incurred as a consequence to Plaintiff's allegations. (XC, ¶¶26-27.) Cross-Complaints request a judicial determination that they be indemnified by Ameri-Kleen. (*Id.* at ¶¶29-31.)

C. Procedural History

On 15 July 2020[1], plaintiffs Martha Cavero and Jorge Navarro filed a complaint against GCF, CFPM, the Estate of George Allen Chiala, Mary Alice Chiala, George Allen Chiala, Timothy Chiala, George Chiala Packing, and George Chiala Frozen, Inc. stating the following causes of action:

(1) General Negligence

(2) Premises Liability

(3) Negligent Undertaking

(4) Negligent Hiring

(5) Gross Negligence

(6) Strict Products Liability—Design Defect

(7) Strict Products Liability—Failure to Warn

(8) Negligent Failure to Retrofit or Recall

(9) Intentional Failure to Retrofit or Recall

(10) Breach of Express and Implied Warranty

(11) Negligent Misrepresentation

(12) Intentional Misrepresentation

On 14 January 2021, Plaintiff (Martha Cavero) filed a request for dismissal as to plaintiff Jorge Navarro.

On 25 January 2021, Plaintiff filed a request for dismissal as to the 6th through 10th causes of action.

On 29 January 2021, Cross-Complainants filed an answer to Plaintiff's complaint.

On 16 June 2022, Cross-Complainants filed a cross-complaint against Ameri-Kleen, asserting causes of action for:

(1) Equitable Indemnity

(2) Implied Total Indemnity

(3) Express Contractual Indemnity

(4) Declaratory Relief

On 15 September 2022, Ameri-Kleen filed an answer to Cross-Complainant's cross-complaint and also filed a cross-complaint against Cross-Complainants, asserting causes of action for:

(1) Express Contractual Indemnity

(2) Implied Total Indemnity

(3) Equitable Indemnity

(4) Contribution

(5) Declaratory Relief

On 19 October 2022, Cross-Complainants filed an answer to Ameri-Kleen's cross-complaint.

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

On 22 May 2023, plaintiff Martha Cavero filed the FAC against GCF, CFPM, the Estate of George Allen Chiala, Mary Alice Chiala, George Allen Chiala, Timothy Chiala, George Chiala Packing, and George Chiala Frozen, Inc., asserting causes of action for:

(1) General Negligence

(2) Premises Liability

(3) Gross Negligence (Willful, Wanton, Reckless Disregard)

(4) Negligent Products Liability

(5) Negligent Failure to Warn

On 6 June 2023, Cross-Complainants filed an answer to plaintiff Cavero's FAC.

On 5 October 2023, Cross-Complainants filed a motion to continue the trial date of 5 February 2024.

On 19 October 2023, Ameri-Kleen filed the motion now before the court: a motion for summary judgment, or in the alternative, for summary adjudication, as to Cross-Complainant's 16 June 2022 cross-complaint against Ameri-Kleen.

On 9 January 2024, the court granted Cross-Complainant's motion to continue the trial date, setting a trial date of 10 June 2024.

II. Summary Judgment and Summary Adjudication Generally.

Any party may move for summary judgment. (***Code Civ. Proc.***, § 437c, subdivision (a); ***Aguilar v. Atlantic Richfield Co***. (2001) 25 Cal.4th 826, 843 (***Aguilar***).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (***Code Civ. Proc.***, § 437c, subdivision (c); ***Aguilar,*** *supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (***Aguilar,*** *supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (***Aguilar,*** *supra,* 25 Cal.4th at p. 850; see ***Evid. Code,*** § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (***Aguilar,*** *supra,* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (***Code Civ. Proc.***, § 437c, subdivision (p)(2); see ***Aguilar,*** *supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (***Aguilar,*** *supra,* at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (***Id.*** at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (***Aguilar,*** *supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (***Id.*** at p. 843.)

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (***California Bank & Trust v. Lawlor*** (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

III. Procedural Violations.

As a preliminary matter, the court notes that Ameri-Kleen's reply is untimely filed and served. Code of Civil Procedure section 1005, subdivision (b) states, "All papers opposing a motion … shall be filed with the court and a copy served on each party at least nine court days, and all reply papers at least five court days before the hearing." Based on a hearing date of 30 January 2024, Ameri-Kleen's reply had to be filed and served no later than 23 January 2024. Ameri-Kleen did not file and serve their reply until 25 January 2024, two court days late.

California Rules of Court, rule 3.1300, subdivision (d) states, "No paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate." Since the court has discretion to consider a late filed paper, since Cross-Complainants have not suffered substantial prejudice from the late filing, and to avoid the expenditure of any further judicial resources, the court will look past this procedural violation and consider the reply on its merits. However, Ameri-Kleen is hereby admonished for the procedural violation. Any future violation may result in the court's refusal to consider the untimely filed papers.

IV. Judicial Notice.

In support of the motion for summary judgment (or alternatively, summary adjudication), cross-defendant Ameri-Kleen requests that the court take judicial notice of records pertaining to Plaintiff's Worker's Compensation claim related to her claims alleged in the FAC.

The request is GRANTED insofar as the court takes judicial notice of the existence of the documents, though not necessarily the truth of any hearsay statements therein. (**Evid. Code**, § 452, subd. (c) [court may take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States"]; see also ***Barri v. Workers' Comp. Appeals Bd.*** (2018) 28 Cal.App.5th 428, 437 [court may take judicial notice of documents related to workers' compensation cases, but not of the truth of hearsay statements in such documents unless an independent hearsay exception exists; "it is improper to rely on judicially noticed documents to prove disputed facts"].)

V. Analysis.

Ameri-Kleen seeks summary judgment, or in the alternative, for summary adjudication, as to Cross-Complainants' 16 June 2022 cross-complaint against Ameri-Kleen and each cause of action therein. Ameri-Kleen asserts that, because Plaintiff's alleged injuries were incurred during the course of her employment with Ameri-Kleen, and its workers' compensation insurance provided coverage for the injuries, Ameri-Kleen is entitled to summary judgment under the rule of workers' compensation exclusivity, as discussed and applied in ***Privette***, *supra*, 5 Cal.4th 689, and ***Redfeather v. Chevron United States*** (1997) 57 Cal.App.4th 702 (***Redfeather***). (Ameri-Kleen's MPA, p. 5:2-8.)

In opposition, Cross-Defendants do not appear to address Ameri-Kleen's equitable indemnity arguments but contend that Ameri-Kleen is liable to them for express indemnity based on a written agreement, and that the contract provides grounds for their declaratory relief cause of action. (Cross-Complainant's Opp., pp. 3, 6.)

A. Cross-defendant Ameri-Kleen's motion for summary adjudication of the first cause of action [equitable indemnity] and second cause of action [implied total indemnity] is GRANTED.

Ameri-Kleen asserts that, because Plaintiff's alleged injuries were incurred during the course of her employment with Ameri-Kleen, and its workers' compensation insurance provided coverage for the injuries, Ameri-Kleen is entitled to summary judgment under the rule of workers' compensation exclusivity, as discussed and applied in ***Privette v. Superior Court*** (1993) 5 Cal.4th 689 (***Privette***) and ***Redfeather v. Chevron United States*** (1997) 57 Cal.App.4th 702 (***Redfeather***). (Ameri-Kleen's MPA, p. 5:2-8.)

Ameri-Kleen contends that the first and second causes of action fail because the conditions for workers' compensation recovery are present, and the rule of workers' compensation exclusivity completely bars claims for equitable indemnity. Cross-Complainants do not offer any argument or facts in opposition as to the first and second causes of action.

"Under the **Workers' Compensation Act** (hereafter the **Act**), all employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' [Citations.]" (***Privette***, *supra*, 5 Cal.4th at pp. 696-697 [quoting and citing, inter alia, **Lab. Code,** § 3600, subd. (a)].) "When the conditions of compensation exist, recovery under the workers' compensation scheme 'is the exclusive remedy against an employer for injury or death of an employee.' [Citations.]" (***Privette***, *supra*, 5 Cal.4th at p. 697; see also **Lab. Code**, § 3602, subd. (a)[2].) "The **Act**'s exclusivity clause applies to work-related injuries regardless of fault, including those attributable to the employer's negligence or misconduct, as well as the employer's failure to provide a safe workplace." (***Privette***, *supra*, 5 Cal.4th at p. 697 [internal citations omitted].) "But the exclusivity clause does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury. [Citations.]" (***Ibid***.)

Here, Ameri-Kleen proffers the following facts: while working for Ameri-Kleen, Plaintiff sustained an injury resulting in the total or partial amputation of three of her fingers.[3] At the time of the injury, Ameri-Kleen had a workers' compensation insurance policy in place with AmTrust North America ("AmTrust") which provided coverage for Plaintiff's on-the-job injuries at issue in this litigation.[4] All conditions of compensation set forth in **Labor Code** section 3600 were met.[5]

On 6 February 2019, AmTrust sent Plaintiff a letter notifying her it was accepting her claim and would provide her benefits.[6] On 8 February 2019, AmTrust sent plaintiff a notice of the status of her temporary disability payments.[7] On 12 March 2019, Plaintiff completed and signed the Department of Industrial Relations' Workers' Compensation Claim Form (DWC 1) regarding the incident.[8]

As of 23 August 2023, the workers' compensation policy applicable to Plaintiff's claim has made payments totaling $403,984 in workers' compensation benefits and has incurred total workers' compensation liability in the amount of approximately $642,068.[9] The Division of Workers' Compensation Electronic Adjudication Management System (EAMS) also reflects that Plaintiff has an active workers' compensation claim.[10]

Based on the above evidence, Ameri-Kleen has met its burden of showing that the conditions of workers' compensation recovery exist and that Plaintiff has received such recovery. Thus, Ameri-Kleen has sufficiently established that Plaintiff's recovery under the workers' compensation scheme is the exclusive remedy available to her against Ameri-Kleen, and that as a result, Cross-Complainant's claims for equitable indemnity against Ameri-Kleen (whether titled "equitable indemnity" or "implied total indemnity") are without merit. Cross-complaints do not dispute any of Ameri-Kleen's evidence[11], or offer argument or authority in opposition as to their equitable indemnity claims[12].

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[2] **Labor Code**, section 3602, subdivision (a): **"**Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer. The fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer."

[3] See Ameri-Kleen Separate Statement of Undisputed Material Facts ("Ameri-Kleen UMF"), Fact Nos. 1-3.

[4] *Id.*, Fact No. 4.

[5] *Id.*, Fact No. 5.

[6] *Id.*, Fact No. 6.

[7] *Id.*, Fact No. 7.

[8] *Id.*, Fact No. 8.

[9] *Id.*, Fact No. 9.

[10] *Id.*, Fact No. 10.

[11] See Cross-Complaints' Separate Statement of Undisputed Material Facts ("Cross-Complainant's UMF"), Fact Nos. 1-11.

[12] See Cross-Complaint's Opposition, pp. 3-6.

Accordingly, cross-defendant Ameri-Kleen's motion for summary adjudication of the first cause of action [equitable indemnity] and second cause of action [implied total indemnity] is GRANTED.

C. Cross-defendant Ameri-Kleen's motion for summary adjudication of the third cause of action [express contractual indemnity] is GRANTED.

In support of its motion as to the third cause of action, Ameri-Kleen offers no additional facts, but argues that ***Redfeather***, *supra*, 57 Cal.App.4th 702, extends the workers' compensation exclusivity rule to apply to express contractual indemnification claims. There, the Chevron corporation hired an independent contractor to close down an oil well, and the contract contained an express indemnity agreement requiring the contractor to indemnify the corporation against all liability for injury to employees of the contractor. (***Redfeather***, *supra*, 57 Cal.App.4th at p.704.) An injured employee sued Chevron, and the court of appeal held that Chevron was not liable to the employee for personal injuries – based on its interpretation of the ***Privette*** decision. (***Id.*** at pp 705-708.) "The overarching principle in the ***Privette*** decision … was whether liability advanced any 'societal interest that is not already served by the worker's compensation system.'" (***Id.*** at p. 705 [quoting and citing ***Privette***, *supra*, 5 Cal.4th at p. 692].) The ***Redfeather*** court said the presence of an express indemnity made no difference. (***Ibid.***)

In opposition, Cross-Complainants contend that the motion as to this cause of action is defeated by **Labor Code** section 3864, which provides as follows in full [emphasis added]:

> If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement ***in absence of a written agreement so to do executed prior to the injury***.

Without directly addressing the general rule of workers' compensation exclusivity as set forth in the **Act** and discussed by ***Privette*** and subsequent decisions, Cross-Complainants assert that the presence of express indemnity provision is dispositive of the third cause of action. (Cross-Complainants' Opp., pp. 3-5.) The opposition cites several decisions in support this position, including: ***Herman Christensen & Sons, Inc. Paris Plastering, Inc.*** (1976) 61 Cal.App.3d 237, 243; ***Western Gulf Oil Co. v. Oilwell Service Co.*** (1963) 219 Cal.App.2d 235, 241; and ***Gonzales v. R.J. Novick Constr. Co., Inc.*** (1978) 20 Cal.3d 798, 809 (***Gonzales***). Each of these decisions acknowledge that since the addition of workers' compensation statutes to the **Labor Code** in 1959, '"[i]n order to recover in indemnity the third party must now rely on an *express* contract….' [Citations.]" (***Gonzales,*** *supra*, 20 Cal.3d at p. 808.)

However, as pointed out by Ameri-Kleen in reply, the decisions relied upon by Cross-Complainants pre-date the 1993 ***Privette*** decision. Further, while Cross-Complainants' opposition avoids discussion of the general rule of workers' compensation exclusivity, ***Privette*** and subsequent decisions have emphasized the policy reasons underlying the workers' compensation statutory scheme, including "whether liability advances any 'societal interest that is not already served by the workers' compensation system.'" (***Redfeather***, *supra*, 57 Cal.App.4th at p.705 [quoting and citing ***Privette***, *supra*, 5 Cal.4th at p. 692].)

Moreover, for the reasons discussed previously, Ameri-Kleen has sufficiently established that Plaintiff's recovery under the workers' compensation scheme is the exclusive remedy available to her against Ameri-Kleen. Even if it were presumed *arguendo* that an applicable express indemnity clause could overcome the general rule of workers' compensation exclusivity in this case, it remains Cross-Complainants' burden to establish the existence of such an express indemnity clause. However, as noted by Ameri-Kleen in reply, the "Master Sanitation Services Agreement" relied upon Cross-Complainants is dated 22 October 2019, whereas Plaintiff's alleged injuries occurred on 28 January 2019.[13]

The court notes briefly that there is an "Agreement for Performance of Sanitation Services" dated 22 October 2017 attached to Cross-Complainants' counsel's declaration in support of the opposition to the motion. (See

[13] See Cross-Complainant's UMF, Fact. No. 12 [citing Ex. A of the Declaration of Mark Dawson in support of Cross-Complainants' opposition]; see also FAC at ¶35.

Declaration of Mark L. Dawson in Support of Opposition, p. 30.) But, the neither the Cross-Complaint, nor the opposition refer to this agreement or make any argument as to how it might apply.

In fact, the Cross-Complaint as well as the opposition expressly rely on language from the 2019 "Master Sanitation Services Agreement" as the basis for any express indemnity. As explained in ***Hutton v. Fidelity National Title Co.*** (2013) 213 Cal.App.4th 486, 493, "[t]he pleadings play a key role in a summary judgment motion. ' "The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues" " and to frame 'the outer measure of materiality in a summary judgment proceeding.' [Citation.]" Accordingly, the 2017 agreement provides no basis to deny summary adjudication of the third cause of action in this case.

Thus, cross-defendant Ameri-Kleen's motion for summary adjudication of the third cause of action [express contractual indemnity] is GRANTED.

D. Cross-defendant Ameri-Kleen's motion for summary adjudication of the fourth cause of action [declaratory relief] is GRANTED.

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (***Hood v. Superior Court*** (1995) 33 Cal.App.4th 319, 322 [quoting and citing **Code Civ. Proc.**, § 437c, subd. (f)(1).) "A party cannot cloak a nondispositive issue in a declaratory relief count to evade the requirement that a summary adjudication must completely disposed of a cause of action." (**Weil & Brown**, California Practice Guide—Civil Procedure Before Trial (2022) ¶10:39.15, p. 10-11 [citing ***Hood***].) "But if there is a properly pled cause of action for declaratory relief, summary adjudication may be proper even though the controversy spills over into other causes of action." (***Id.*** at ¶10:39.17, p. 10-12 [citing ***Southern Calif. Edison Co. v. Superior Court*** (1995) 37 Cal.App.4th 839, 845 (***Southern Calif. Edison***)].) Summary adjudication of a cause of action for declaratory relief is not precluded merely because the issues subject to the declaratory relief are present in other causes of action. (***Southern Calif. Edison,*** *supra*, 47 Cal.App.4th at p. 845.)

Here, the cause of action for declaratory relief seeks a judicial determination of Cross-Complainants' right and duties with respect to its indemnification causes of action. (See Cross-Complaint, ¶30.) As discussed above, the indemnity causes of action do not survive Ameri-Kleen's motion. Thus, Ameri-Kleen's motion as to this cause of action does completely dispose of "a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (**Code Civ. Proc.**, §437c, subd. (f)(1).)

Accordingly, cross-defendant Ameri-Kleen's motion for summary adjudication of the fourth cause of action [declaratory relief] is GRANTED.

As the court grants summary adjudication as to all causes of action subject to Ameri-Kleen's motion, cross-defendant Ameri-Kleen's motion for summary judgment is GRANTED.

VI. Tentative Ruling

The tentative ruling was duly posted

VII. Case Management

The dates currently set for jury trial, trial assignment, and the mandatory settlement conference shall REMAIN AS SET.

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VIII. Order.

Cross-defendant Ameri-Kleen's motion for summary judgment of the cross-complaint is GRANTED.

DATED:	**HON. SOCRATES PETER MANOUKIAN** ***Judge of the Superior Court*** ***County of Santa Clara***

---oooOooo---

Calendar Line 5

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 22CV398679 **C2K Architecture, Inc. v. Full Power Properties, LLC, et al.**
DATE: 30 January 2024 **TIME: 9:00 am** **LINE NUMBER: 5**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 29 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Plaintiff C2K Architecture, Inc.
for Summary Judgment Or Adjudication.

I. Statement of Facts.

Plaintiff C2K Architecture, Inc. ("C2K") is an architectural, planning, and design firm. (Complaint, ¶1.) From at least September 2014 through October 2019, defendant Full Power Properties, LLC ("FPP") was the record owner of reputed owner of real property located at 188 West St. James Street in San Jose ("Property"). (Complaint, ¶2.) Defendant FPP MB LLC is the current record owner or reputed owner of the Property pursuant to a grant deed recorded on 25 October 2019. (Complaint, ¶3.)

In or about September 2014, defendant FPP hired plaintiff C2K as the architect to design and provide architectural, engineering, and other professional services for the Silvery Towers, a new 643-unit condominium development in two towers with a six-story parking garage and community and commercial facilities ("Project") located at the Property. (Complaint, ¶7.)

On or about 9 September 2014, defendant FPP and plaintiff C2K entered into a written AIA Document B101 – 2007 Standard Form Agreement ("Architect Agreement") whereby plaintiff C2K agreed to provide architectural, engineering, construction administration and other professional services for the Project ("Work") in exchange for payment. (Complaint, ¶8.)

From on or about February 2016 through November 2021, in addition to but consistent with and supplementary to the Architect Agreement, defendants FPP and FPP MB LLC contracted with plaintiff C2K to provide additional architectural, engineering, construction administration and other professional services for the Project pursuant to several Additional Service Proposals in exchange for payment. (Complaint, ¶9.) Plaintiff C2K provided said services for the Project pursuant to the Architect Agreement and the Additional Service Proposals in good faith and consistent with the terms of said agreements. (*Id.*)

Defendants FPP and FPP MB LLC failed to make timely payment of invoices dated 18 May 2021 through 21 January 2022 submitted by plaintiff C2K for agreed additional services for the Project. (Complaint, ¶10.) The total principal amount due and owing pursuant to those invoices is $498,767.31. (*Id.*) Defendants FPP and FPP MB LLC have refused to pay plaintiff C2K this amount which remains due, owing and unpaid. (*Id.*)

On 16 May 2022[1], plaintiff C2K filed a complaint against defendants FPP, FPP MB LLC, and Federal Insurance Company ("FIC") asserting causes of action for:

(1) Breach of Written Contract [against defendants FPP and FPP MB LLC]

(2) Breach of the Covenant of Good Faith and Fair Dealing [against defendants FPP and FPP MB LLC]

(3) Foreclosure of Mechanic's Lien Release Bond [against defendants FPP MB LLC and FIC]

(4) Common Count for Work, Labor, and Materials Furnished [against defendants FPP and FPP MB LLC]

(5) Quantum Meruit [against defendants FPP and FPP MB LLC]

On 17 October 2022, defendants FPP, FPP MB LLC, and FIC jointly filed an answer to plaintiff C2K's complaint.

On 9 November 2023, plaintiff C2K filed the motion now before the court, a motion for summary judgment/ adjudication of its complaint against defendants FPP, FPP MB LLC, and FIC.

II. Motions for Summary Judgment.

Any party may move for summary judgment. (***Code of Civil Procedure*****,** § 437c, subd. (a); ***Aguilar v. Atlantic Richfield Co***. (2001) 25 Cal.4th 826, 843 (***Aguilar***).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (***Code of Civil Procedure*****,** § 437c, subd. (c); ***Aguilar,*** *supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (***Aguilar,*** *supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (***Aguilar,*** *supra,* 25 Cal.4th at p. 850; see ***Evidence Code*****,** § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (***Aguilar,*** *supra,* at p. 851.) A defendant moving for summary judgment may satisfy its initial burden either by producing evidence of a complete defense or by showing the plaintiff's inability to establish a required element of the case. (***Code of Civil Procedure*****,** § 437c, subd. (p)(2); ***Aguilar,*** *supra,* at p. 853.) *supra,* at p. 853.) Allegations in the complaint alone are not enough to defeat a motion for summary judgment. (***Coyme v. Krempels*** (1950) 36 Cal.2d 257.)

If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (**Code of Civil Procedure,** § 437c, subd. (p)(2); see ***Aguilar,*** *supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (***Aguilar,*** *supra,* at p. 850, fn. omitted.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (***Id.*** at p. 856.)

"An issue of fact can only be created by a conflict of evidence. It is not created by speculation, conjecture, imagination or guess work. Further, an issue of fact is not raised by cryptic, broadly phrased, and conclusory assertions, or mere possibilities that or by allegations in the complaint." (***Lyons v. Security Pacific National Bank*** (1995) 40 Cal.App.4th 1001, 1014) (internal citations omitted, punctuation modified.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (***Aguilar,*** *supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (***Id.*** at p. 843.)

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C).

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (***California Bank & Trust v. Lawlor*** (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

In addition to the facts provided by a moving defendant, the burden of production on summary judgment can shift to the plaintiff upon a showing that the plaintiff cannot factually support his claim. (See, e.g., ***Chavez v. Glock, Inc.*** (2012) 207 Cal.App.4th 1283.) Indeed, a defendant can satisfy its initial burden to show an absence of evidence through discovery responses that are factually devoid. (Id. at 1302.)

Thereafter, the plaintiff must present evidence supporting the challenged claim.

III. Analysis.

A. Plaintiff C2K's motion for summary adjudication is GRANTED, in part, and DENIED, in part.

1. Breach of contract.

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., §437c, subd. (a)(1).) "A plaintiff … has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant … to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., §437c, subd. (p)(1).)

To meet its initial burden, plaintiff C2K proffers the following evidence to establish each element of a breach of contract cause of action: On or about September 2014, defendant FPP hired plaintiff C2K to provide architectural, engineering, and consulting services for the construction of two residential high-rise towers, then known as Silvery Towers ("Project") located at 188 West St. James Street in San Jose ("Subject Property").[2] On 9 September 2014, defendant FPP and plaintiff C2K entered into a written agreement titled AIA Document B101 – 2007 Standard Form Agreement Between Owner and Architect ("Agreement").[3]

Pursuant to the "Payments to the Architect" provision in the Agreement, plaintiff C2K and defendant FPP agreed that "unless otherwise agreed, payments for services shall be made monthly in proportion to services performed. Payments are due and payable within thirty (30) days after the Owner's receipt and approval of the Architect's detailed monthly statement… Amounts unpaid more than thirty (30) days after the invoice date shall bear interest…"[4] The parties' agreement expressly states that defendant FPP cannot "withhold amounts from the Architect's compensation to impose a penalty" on the Architect for whatever reason.[5] Section 8.2.5 of the Agreement entitles the "prevailing party to recover reasonable attorneys' fees, expenses and costs from the other party" in the case of a dispute between the parties.[6]

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[2] See Separate Statement of Undisputed Material Facts in Support of Plaintiff C2K Architecture, Inc.'s Motion for Summary Judgment or Adjudication ("Plaintiff's UMF"), Issue No. 1, Fact No. 1. See also Plaintiff's UMF, Issue No. 1, Fact Nos. 5 – 8.

[3] See Plaintiff's UMF, Issue No. 1, Fact No. 2. See also Plaintiff's UMF, Issue No. 1, Fact No. 4.

[4] See Plaintiff's UMF, Issue No. 1, Fact No. 9.

[5] See Plaintiff's UMF, Issue No. 1, Fact No. 10.

[6] See Plaintiff's UMF, Issue No. 1, Fact No. 11.

Throughout plaintiff C2K's work on the Project, plaintiff C2K timely submitted invoices to defendant FPP for its services each month, with a detailed description of the labor performed.[7] During the course of the Project, plaintiff C2K and defendant FPP entered into additional service proposals consistent with and supplementary to the Agreement.[8] These additional service proposals were expressly authorized pursuant to the Agreement.[9] Plaintiff C2K and defendant FPP executed approximately 60 such additional service proposals.[10]

On or about October 2019, defendant FPP transferred the Subject Property to defendant FPP MB LLC.[11] In addition to the transfer of the Subject Property, any agreements and permits, and all improvements were also transferred under the Grant Deed.[12] Defendant FPP granted defendant FPP MB LLC all agreements affecting the Subject Property, including defendant FPP's Agreement with plaintiff C2K.[13]

Defendant FPP MB LLC assumed the Agreement and resulting payment obligations to plaintiff C2K based on the transfer of the Subject Property.[14] Plaintiff C2K's practice of submitting monthly invoices for work performed remained unchanged with the exception that it updated the "client" line on the invoices to "FPP MB LLC."[15] Defendant FPP MB LLC did not dispute plaintiff C2K's invoices and submitted payments from approximately October 2019 through May 2021.[16]

From approximately May 2021 through November 2021, defendants FPP and FPP MB LLC failed to pay C2K's monthly invoices for services rendered and accepted on the Project.[17] The outstanding principal balance for these services totals $498,767.31.[18]

Based upon the evidence presented, the court finds plaintiff C2K has met its initial burden of demonstrating each element of its claims for breach of contract against defendants FPP and FPP MB LLC. In opposition, defendants FPP and FPP MB LLC contend there are triable issues of material fact in dispute, directing the court to, "See generally Separate Statement."[19] However, defendants FPP and FPP MB LLC's opposition is unaccompanied by any evidence. "The defendant … shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, ***shall set forth the specific facts*** showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (Code Civ. Proc., §437c, subd. (p)(1); emphasis added.)

In looking at defendants FPP and FPP MB LLC's separate statement in opposition, the court confirms defendants FPP and FPP MB LLC have not set forth any specific facts nor pointed to any evidence which would present a triable issue of material fact. Instead, defendants FPP and FPP MB LLC apparently question or challenge the adequacy of plaintiff's evidence. For instance, defendants FPP and FPP MB LLC contend plaintiff C2K has not provided any evidentiary support for its assertion that it performed the Agreement. More specifically, defendants

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[7] See Plaintiff's UMF, Issue No. 1, Fact No. 12.

[8] See Plaintiff's UMF, Issue No. 1, Fact No. 13.

[9] See Plaintiff's UMF, Issue No. 1, Fact No. 14.

[10] See Plaintiff's UMF, Issue No. 1, Fact No. 15.

[11] See Plaintiff's UMF, Issue No. 1, Fact No. 16. See also Plaintiff's UMF, Issue No. 1, Fact No. 18.

[12] See Plaintiff's UMF, Issue No. 1, Fact No. 19.

[13] See Plaintiff's UMF, Issue No. 1, Fact No. 20.

[14] See Plaintiff's UMF, Issue No. 1, Fact No. 21.

[15] See Plaintiff's UMF, Issue No. 1, Fact No. 23.

[16] See Plaintiff's UMF, Issue No. 1, Fact No. 24.

[17] See Plaintiff's UMF, Issue No. 1, Fact No. 25.

[18] See Plaintiff's UMF, Issue No. 1, Fact No. 26.

[19] See page 4, line 24 of the Memorandum of Points and Authorities in Support of Defendants Full Power Properties, LLC and FPP MB LLC's Opposition to Plaintiff's Motion for Summary Judgment or Adjudication ("Defendants' MPA in Opposition").

contend the Agreement itself is not evidence of plaintiff C2K's performance. However, the court located evidentiary support for plaintiff's performance albeit cited elsewhere. (See Plaintiff's UMF, Issue No. 1, Fact No. 5—Sauser Decl., ¶¶3-4.) Moreover, to the extent defendants challenge the evidentiary admissibility of plaintiff C2K's evidence, defendants have not submitted any evidentiary objections as required by California Rules of Court, rules 3.1352 and 3.1354. Defendants FPP and FPP MB LLC fail to show that a triable issue of one or more material facts exists as to plaintiff C2K's first cause of action for breach of contract.

Accordingly, plaintiff C2K's alternative motion for summary adjudication of the first cause of action of its complaint for breach of the contract is GRANTED.

2. Breach of the Covenant of Good Faith and Fair Dealing.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest.2d Contracts, § 205.) "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658; see also CACI No. 325.)

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. [Citation.] The covenant thus cannot 'be endowed with an existence independent of its contractual underpinnings.' [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 – 350 (*Guz*).)

"The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. [Citation.] 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' [Citation.] … 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.'" (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031 – 1032.)

In *Guz*, *supra*, 24 Cal.4th at p. 327, the California Supreme Court stated, "[W]here breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." It is this court's opinion that the alleged breach of the implied covenant of good faith and fair dealing here is merely a restatement of the exact same breach alleged as a breach of contract. In relevant part, plaintiff C2K's FAC alleges defendants FPP and FPP MB LLC "have breached the covenant of good faith and fair dealing by … ultimately withholding payment for additional services that are due and owing under the Contract." (Complaint, ¶20; *Cf.* Complaint, ¶15—"Defendants [FPP] and [FPP MB LLC] breached the Contract by failing to pay C2K pursuant to the Contract.")

In moving for summary adjudication of this second cause of action, plaintiff C2K affirms, "[FPP] and [FPP MB LLC] unfairly interfered with C2K's rights to receive the benefits of the contract, namely, [by] refusing to remit payment for C2K's services."[20] The first and second causes of action allege the same breach, i.e., non-payment, and thus the second cause of action is superfluous.

Accordingly, plaintiff C2K's alternative motion for summary adjudication of the second cause of action of its complaint for breach of the covenant of good faith and fair dealing is DENIED.

3. Foreclosure of Mechanic's Lien Release Bond.

> Mechanic's lien law derives from our state Constitution, which provides:" Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of

[20] See page 14, lines 8 – 9 of the Memorandum of Points and Authorities in Support of Plaintiff C2K Architecture, Inc.'s Motion for Summary Judgment or Adjudication.

such liens." (Cal. Const., art. XIV, § 3.) CA(2) (2) The mechanic's lien is the only creditors' remedy stemming from constitutional command and our courts "have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen." (*Connolly Development, Inc. v. Superior Court* (1976) 17 Cal.3d 803, 826-827 [132 Cal.Rptr. 477, 553 P.2d 637], fn. omitted.) "[State] policy strongly supports the preservation of laws which give the laborer and materialman security for their claims." (*Id.* at p. 827.)

The purpose of the release bond procedure is to provide a means by which, before a final determination of the lien claimant's rights and without prejudice to those rights, the property may be freed of the lien, so that it may be sold, developed, or used as security for a loan. 5 Section 3143 provides that a mechanic's lien release bond "shall be conditioned for the payment of any sum which the claimant may recover on the claim together with his costs of suit in the action, if he recovers therein." The "claim" for which the principal and surety assume liability in the bond is the "claim of lien." (See fn. 2, ante.) The release bond procedure thus protects the lien claimant by providing an alternate source of recovery on the claim of lien. The release bond procedure "does not deprive the [lien claimant] of its constitutional right to a lien" but "[on] the contrary, it provides for the speedy and efficient *enforcement* of such lien . . . ." (*Frank Curran Lbr. Co. v. Eleven Co.* (1969) 271 Cal.App.2d 175, 184 [76 Cal.Rptr. 753], italics added.) The recording of the release bond does not extinguish the lien; rather, the bond is substituted for the land as the object to which the lien attaches. (See Marsh, Cal. Mechanics' Lien Law (3d rev. ed. 1988) § 8.28 ["The recordation of the bond in effect transfers the claim of lien from the owner's land to the bond."].)

Because recovery on the bond is a part of the process for enforcing the mechanic's lien, authorities from other jurisdictions have concluded that a cause of action to foreclose a mechanic's lien is substantially the same whether relief is sought against the liened property or against a bond which has been substituted for the property.

(*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 462-463 (*Hutnick*).)

In the complaint, plaintiff C2K alleges, "On or about March 16, 2022, C2K duly recorded a verified Mechanic's Lien Claim in the principal amount of $498,767.31, describing the Property and the services performed for the work of improvement … On or about April 7, 2022, Defendant FPP MB, as principal, and Defendant [FIC], as surety, recorded a Bond for Release of Mechanic's Lien … in the amount of $623,459.14, or one hundred twenty five percent (125%) of $498,767.31, the principal amount of C2K's Mechanic's Lien Claim." (Complaint, ¶¶23 – 24 and Exh. A – B.)

In moving for summary adjudication of this third cause of action for foreclosure of the Mechanic's Lien Release Bond, plaintiff C2K proffers evidence which this court finds sufficient to meet its initial burden. (See Plaintiff's UMF, Issue No. 4, Fact Nos. 28 – 35.)

In opposition, defendant FPP MB LLC (joined by defendant FIC) argue, without citation to any legal authority, that "when a release bond is recorded, the cause of action to foreclose a mechanics lien is terminated and the owner is entitled to dismissal."[21]

To the contrary, "Upon the recording of such bond ***the real property described in such bond is released from the lien*** and from any action brought to foreclose such lien." (Hutnick, supra, 47 Cal.3d at p. 461, fn. 2; emphasis added.) As explained, *supra*, the lien survives; the bond merely serves as a substitute for the real property as the object to which the lien attaches. The court finds no merit to defendants FPP MB LLC and FIC's assertion that the action to foreclose is terminated. Defendants FPP MB LLC and FIC otherwise fail to show that a triable issue of one or more material facts exists as to plaintiff C2K's third cause of action for foreclosure of mechanic's lien release bond.

Accordingly, plaintiff C2K's alternative motion for summary adjudication of the third cause of action of its complaint for foreclosure of mechanic's lien release bond is GRANTED.

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[21] See page 3, lines 2 – 3 of Defendants' MPA in opposition.

4. Common Count/ Quantum Meruit.

A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. See, e.g., 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, sections 12, page 47; 91, pages 122-123; 112, pages 137-138. However, ***it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation***. *Willman v. Gustafson* (1944) 63 Cal. App. 2d 830 [147 P.2d 636] (there can be no implied promise to pay reasonable value for services when there is an express agreement to pay a fixed sum). See also 55 California Jurisprudence Third, Restitution, sections 19, page 328 et seq.; and 58, and pages 375-376 (no ground to imply payment obligation in conflict with express contract).

…

When parties have an actual contract covering a subject, a court cannot--not even under the guise of equity jurisprudence--substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract. [Footnote omitted.]

(*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419 – 1420; emphasis added.)

In light of the court's finding and ruling above, it would be inconsistent for the court to concurrently grant summary adjudication on plaintiff C2K's fourth and fifth causes of action for common count and quantum meruit which seek recovery of the same damages sought in the first cause of action for breach of contract. (See Complaint, ¶¶15 – 17, 27 – 28, and 30 – 32.)

Accordingly, plaintiff C2K's alternative motion for summary adjudication of the fourth and fifth causes of action of its complaint for common count and quantum meruit, respectively, is DENIED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

All currently-calendared future dates shall REMAIN A SET.

VI. Order.

Plaintiff C2K's motion for summary judgment is DENIED.

Plaintiff C2K's alternative motion for summary adjudication of the first cause of action of its complaint for breach of the contract is GRANTED.

Plaintiff C2K's alternative motion for summary adjudication of the second cause of action of its complaint for breach of the covenant of good faith and fair dealing is DENIED.

Plaintiff C2K's alternative motion for summary adjudication of the third cause of action of its complaint for foreclosure of mechanic's lien release bond is GRANTED.

Plaintiff C2K's alternative motion for summary adjudication of the fourth and fifth causes of action of its complaint for common count and quantum meruit, respectively, is DENIED.

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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Calendar Line 7

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 22CV406851 **Nurretin Beser vs Mateon Therapeutics, Inc.,. et a;l.**
DATE: 30 January 2024 **TIME: 9:00 am** **LINE NUMBER: 07**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 29 January 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion Of Plaintiff To Compel Defendants To Produce Responsive Documents and for Monetary Sanctions.

I. Statement of Facts.

Plaintiff filed this complaint on 02 November 2022.[1]

Plaintiff alleges that on 15 November 2019, he and the defendants entered into a written employment agreement which is attached as Exhibit A to the complaint.

Plaintiff failed to receive the wages that he was due under the contract and that on or about 08 February 2022, he gave the defendants 30 days to remedy their failure to compensate plaintiff. Defendants did not cure their breach of the agreement. He claims that he is due $76,644.00 in unpaid salary and $138,000.00 in unpaid bonuses.

He therefore resigned with good reason on 14 March 2022.

In his 15-page complaint, plaintiff alleges causes of action for:

1. Failure to Pay Minimum Wage;
2. Failure to Pay Wages on Termination (***Labor Code***, §§ 201 and 203);
3. Failure to Provide Accurate Itemized Wage Statements (***Labor Code***, §§ 226, 1174);
4. Violation of ***Labor Code***, § 558;
5. Unfair Business Practices under the Unfair Competition Law (***Business & Professions Code***, § 17200 et seq.); and
6. Breach of Contract.

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil ***Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

II. Motion To Compel Responses to Request for Production etc.

It appears that there is an issue as to the relationship between Mayteon and Oncolectic and the other defendants.

On 28 June 2023, plaintiff served all defendants with discovery requests.

All five defendants stated that they would produce responsive documents. However, defendants Mateon and Oncolectic objected to request for documents identifying their employees and directors on the basis that such documents are irrelevant.

Nine days after service of the motion to compel, Defendants produced "about 4000 documents that primarily relate to emails to and from Plaintiff while he was employed." Defendants did not indicate to which requests the documents were responsive and did not differentiate between responsive and non-responsive documents.

III. Analysis.

A. Right to Discovery.

"Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, "Our discovery statute recognizes that "the identity and location of persons having [discoverable] knowledge" are proper subjects of civil discovery. (Code of Civil Procedure, § 2017.010; see Judicial Council of Cal. Form Interrogatories Nos. 12.1–12.7.)" *(**Pioneer Electronics (USA), Inc. v. Superior Court*** (2007) 40 Cal.4th 360, 374.)

In exercising its discretion in determining what is relevant for purposes of discovery, this Court follows the approach articulated in ***Norton v. Superior Court*** (1994) 24 Cal.App.4th 1750, 1761 and ***Volkswagen of America, Inc. v. Superior Court*** (2006) 139 Cal.App.4th 1481, 1497:

> "In accordance with the liberal policies underlying the discovery procedures, California courts have been broad-minded in determining whether discovery is reasonably calculated to lead to admissible evidence. As a practical matter, it is difficult to define at the discovery stage what evidence will be relevant at trial. Therefore, the party seeking discovery is entitled to substantial leeway. Furthermore, California's liberal approach to permissible discovery generally has led the courts to resolve any doubt in favor of permitting discovery. In doing so, the courts have taken the view if an error is made in ruling on a discovery motion, it is better that it be made in favor of granting discovery of the nondiscoverable rather than denying discovery of information vital to preparation or presentation of the party's case or to efficacious settlement of the dispute. The courts have also taken the view that wherever possible objections to discovery should be resolved by protective orders addressing the specific harm shown by the respondent as opposed to a more general attack on the 'relevancy' of information the proponent seeks to discover."

"[T]he claim that a party is engaged upon a fishing expedition is not, and under no circumstances can be, a valid objection to an otherwise proper attempt to utilize the provisions of the discovery statutes. Should the so-called fishing expedition be subject to other objections, it can be controlled." (**Greyhound Corp. v. Superior Court of Merced County** (1961) 56 Cal.2d 355, 386).

"[F]ishing expeditions are permissible in some cases. (**Greyhound Corp. v. Superior Court** (1961) 56 Cal. 2d 355, 385 [although fishing may be improper or abused in some cases, that "is not of itself an indictment of the fishing expedition per se"].)" (***Gonzalez v. Superior* Court** (1995) 33 Cal.App.4th 1539, 1546.)

This Court frowns upon Defendant's "deliberate indifference to responsibility in discovery" and has "no time for such antics." (***Collisson & Kaplan v. Hartunian*** (1994) 21 Cal.App.4th 1611, 1618.)

"[T]he court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs and expenses, including attorney's fees, as the court may deem reasonable." (***Greyhound Corp. v. Superior Court of Merced County***, supra at 370-371.)

B. Meet & Confer.

"A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (***Code of Civil Procedure***, § 2016.040.)

"Where a party must resort to the courts, the burden is on the party seeking the protective order to show good cause for whatever order is sought. Even assuming California trial courts may in appropriate circumstances issue an umbrella protective order that allows the parties to designate as confidential documents produced in discovery. . . . (but see ***Stadish v. Superior Court*** (1999) 71 Cal.App.4th 1130, 1144 [trial court impermissibly "delegated to the parties the responsibility of determining which items of discovery contained trade secrets"]) and specifies the permissible use of those designated documents, the declaration submitted in support of AHMSI's motion for such a protective order was entirely conclusory and lacked any factual specificity." (***Nativi v. Deutsche Bank National Trust Co.*** (2014) 223 Cal.App.4th 261, 318.)

A motion to compel further responses shall be accompanied by a meet and confer declaration "showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (***Code of Civil Procedure***, §§ 2016.040, 2030.300(b); 2031.310(b)(2); 2025.420(a).)

A reasonable and good faith attempt at informal resolution entails something more than argument with opposing counsel. (***Townsend v. Superior Court (EMC Mortgage Co.)*** (1998) 61 Cal.App.4th 1431, 1435, 1439.) It requires that the parties present the merits of their respective positions with candor, specificity, and support. (*Id.*) The level of effort at informal resolution that satisfies the "reasonable and good faith attempt" standard depends upon the circumstances of the case. (***Obregón v. Superior Court (Cimm's, Inc.)*** (1998) 67 Cal.App.4th424, 431.) The Court has discretion to deny discovery absent efforts to meet and confer, but must consider whether a less drastic remedy is appropriate given the circumstances presented. (See ***Townsend v. Superior Court****,* supra, 61 Cal.App.4th at p. 1439; ***Obregón v. Superior Court****,* supra, 67 Cal.App.4th at p. 434.)

C. Discussion.

Inspection Demands to Mateon Therapeutics, Inc.

1. RFP No. 1: Defendants state they would produce responsive documents. Have they done so?

2. RFP No. 27: Plaintiff seeks the identity of documents listing the employees of Mateon from 01 January 2018 to the present time. Defendants objected on the grounds that such request was not reasonably calculated to lead to the discovery of admissible evidence. This Court believes that there was probably insufficient meet and confer on this particular request. In reading the statement of reasons offered by plaintiff, this Court will order that defendants produce the names of individuals that made decisions concerning compensation for plaintiff.

3. RFP No. 28: The request for documents identifying directors is GRANTED.

4. RFP No. 29: Defendants state that they would produce responsive documents relating to employment agreements between the parties. Have they done so?

5. RFP No. 30: Defendants state that they would produce responsive documents relating to timesheets and wage statements. Have they done so?

6. RFP No. 32: Defendants state that they would produce responsive documents that were non-privileged pertaining to disproving the allegations in plaintiff's complaint. Have they done so?

Inspection Demands to Oncotelic Therapeutics, Inc.

1. RFP No. 1: Defendants state that they would produce responsive documents that were non-privileged pertaining to disproving the allegations in plaintiff's complaint. Have they done so?

2. **RFP No. 27:** Plaintiff seeks the identity of documents listing the employees of Oncolectic Therapeutics from 01 January 2018 to the present time. Defendants objected on the grounds that such request was not reasonably calculated to lead to the discovery of admissible evidence. This Court believes that there was probably insufficient meet and confer on this particular request. In reading the statement of reasons offered by plaintiff, this Court will order that defendants produce the names of individuals that made decisions concerning compensation for plaintiff.

3. **RFP No. 28:** The request for documents identifying directors is GRANTED.

4. **RFP No. 29:** Defendants state that they would produce responsive documents relating to employment agreements between the parties. Have they done so?

5. **RFP No. 30:** Defendants state that they would produce responsive documents relating to timesheets and wage statements. Have they done so?

6. **RFP No. 32:** Defendants state that they would produce responsive documents that were non-privileged pertaining to disproving the allegations in plaintiff's complaint. Have they done so?

Inspection Demands to Pointr Data, Inc.

1. **RFP No. 1:** Defendants state that they would produce nonprivileged and responsive documents. Have they done so?

2. **RFP No. 27:** Plaintiff seeks the identity of documents listing the employees of Oncolectic Therapeutics from 01 January 2018 to the present time. Defendants objected on the grounds that such request was not reasonably calculated to lead to the discovery of admissible evidence. This Court believes that there was probably insufficient meet and confer on this particular request. In reading the statement of reasons offered by plaintiff, this Court will order that defendants produce the names of individuals that made decisions concerning compensation for plaintiff.

3. **RFP No. 29:** Defendants state that they would produce responsive documents relating to employment agreements between the parties. Have they done so?

4. **RFP No. 30:** Defendants state that they would produce responsive documents relating to timesheets and wage statements. Have they done so?

6. **RFP No. 31:** Defendants state that they would produce responsive documents that were non-privileged pertaining to disproving the allegations in plaintiff's complaint. Have they done so?

Inspection Demands to Vuong Trieu.

1. **RFP No. 1:** Defendant states that he would produce nonprivileged and responsive documents. Has he done so?

2. **RFP No. 23:** Defendant state that he would produce responsive documents relating to responsive documents that were non-privileged pertaining to disproving the allegations in plaintiff's complaint. Has he done so?

Inspection Demands to Amit Shah.

1. **RFP No. 23:** Defendant state that he would produce responsive documents relating to responsive documents that were non-privileged pertaining to disproving the allegations in plaintiff's complaint. Has he done so?

Plaintiff complains that defendants did not specify which document was responsive to which request, as otherwise required by ***Code of Civil Procedure***, § 2031.280(a) ("any documents or category of documents produced in response to a demand . . . shall be identified with the specific request number to which the documents respond."). This Court interprets plaintiff's assertion that the documents produced were not Bates stamped or otherwise identified in responding to a specific request.

Matthew Bender® Practice Guide: California Civil Discovery Practice Guide: California Civil Discovery, § 10.23 offers the following:

"**10.23 Manner in Which Documents Must Be Produced.** Commonly, documents are stamped or labeled with unique sequential alpha-numeric designations ("Bates-stamped") to provide a means to determine exactly what has and has not been produced and to identify documents withheld on privilege grounds and listed on a privilege log. It is customary to have the first part of the identifying designation be an acronym or abbreviation that allows easy identification of the producing party (e.g. "DOE-00001"). In some instances the designation may identify a specific office or facility from which the document has been produced.

It seems that defendants have sent copies of documents to Plaintiff. There has been no specificity of what documents were delivered. Nothing has been stated about the specifics of the manner of delivery. A privilege log has not been produced, and therefore Plaintiff does not know whether any documents are being withheld on the basis of privilege.

In other respects, the unverified response referring to online sources is not a sufficient answer. Plaintiff is entitled to know what documents defendants have in their possession at the current time.

D. Request of Plaintiff for Monetary Sanctions.

Plaintiff makes a code-compliant request for monetary sanctions against defendants Mateon Therapeutics, Inc., PointR Data, Inc., and Oncotelic Therapeutics, Inc. and attorney James R. Felton, Esq. in the amount of $4,469.00.

While the merits of the moving papers are well taken, it seems that there is somewhat of a "cut and paste" nature to the separate statement. Additionally, this Court wonders why the paralegal and the attorney spent almost the same amount of time in preparing these papers. Finally, there is no breakdown in time between preparing the moving and reply papers and reviewing the opposition papers as well as anticipated time in appearing at a hearing on this motion.

This Court will allow monetary sanctions in favor of plaintiff in the amount of $2,460.00 for six hours' worth of work at $400.00 per hour and filing fee of $60.00.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The Mediation Status Review currently set for 28 March 2024 at 10:30 AM shall REMAIN AS SET.

VI. Order.

The motion of plaintiff to compel defendants to provide further responses is GRANTED in its entirety. Defendants are to prepare co-compliant responses as set forth in this tentative ruling.

This Court will allow monetary sanctions in favor of plaintiff in the amount of $2,460.00 for six hours' worth of work at $400.00 per hour and filing fee of $60.00.

Further responses in the payment of sanctions are due within 20 days of the filing and service of this Order.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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