SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

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

DATE: 04-11-24 TIME: 9 A.M.

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

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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

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

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV383409 Hearing: Claim of Exemption	Debt Management Partners, LLC vs Helen Cabanas	Based on the financial statement of Helen Cabanas, the Court finds she can pay $75.00 per pay period. Plaintiff shall submit the final order.
LINE 2	21CV389408 Hearing: Claim of Exemption	Discover Bank vs Noe Sanchez	Debtor has made a credible showing for the need for an exemption of at least some amount. Creditor has not explained its claims that $75 is “non exempt.” As such the claim of exemption is GRANTED, except that debtor must continue to pay $10 per pay period. Plaintiff shall submit the final order.
LINE 3	24CV432191 Hearing: OEX	Balboa Capital Corporation vs Anne M. Cummings, MD et al	All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 4	23CV412223 Hearing: Demurrer	TOP TIER BUILDERS, INC., a California corporation vs SILICON VALLEY ATHLETICS, LLC et al	It appears that Plaintiff is attempting to file a first amended complaint which would moot the motion. The FAC has not yet been accepted or rejected for filing. The Court will take the matter off calendar, assuming it is or will be MOOT.

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LINE 5	23CV417291 Hearing: Demurrer	Daniel Waylonis et al vs Clayton Johnson Enterprises, Inc. et al	See Tentative Ruling. Court will prepare the final order.
LINE 6	19CV357289 Motion: Summary Judgment/Adjudication	BAYAREACHESS, INC., a California nonprofit Corporation vs MECHANICS INSTITUTE, a California Nonprofit Corporation et al	See Tentative Ruling. Court will prepare the final order.
LINE 7	22CV396209 Motion: Compel	Matthew Wesley vs Marc Poirier et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 8	22CV396209 Motion: Compel	Matthew Wesley vs Marc Poirier et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 9	23CV424769 Motion: Compel	First-Citizens Bank & Trust Company vs Epicentrx, Inc.	Notice appearing proper, the unopposed motion to compel judicial reference and stay proceedings is GRANTED in its entirety. The failure to file a written opposition "'creates an inference that the motion or demurrer is meritorious.'" *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410. Plaintiff shall submit the final order.

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

LINE 10	21CV382249 Motion: Set Aside order dismissing plaintiff	AHMAD WALI MOMAND; WALI MOMAND; AHMAD NADIEM DANIEL MOHMAND; MOMAND NAJLA; VS FRIT SAN JOSE TOWN AND COUNTRY VILLAGE, LLC; STEPHANIE COLBERT; SHERRY NGUYEN AND DOES 1-30,	Defense counsel is correct that the dismissal was the result of three failures to appear, on August 22, 2023, October 17, 2023 and December 7, 2023. Defense counsel is also correct that Plaintiff offers no explanation whatsoever for its failure to appear in August. Moreover, it appears that the Court notified Mr. Granato, the prior counsel, of the order to show cause hearing on November 2, 2023, a week before he substituted out of the case. Therefore, his knowledge is imputed to the Plaintiffs. However, this Court will give the plaintiffs one more chance, primarily because it appears that counsel did make arrangements to have Plaintiffs represented, or at least to account for counsel's absence at the October 17, 2023, such that the Court would not ordinarily set an OSC in such a circumstance. Had that not been set, the Court would not have dismissed the case at the December 7, 2023 hearing. For this reason, the motion to set aside the dismissal of the complaint is GRANTED. Plaintiffs shall submit the final order.
LINE 11	23CV411788 Motion: Protective Order	Alfredo Castaneda et al vs Staggs Construction, Inc.	Motion withdrawn.

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

LINE 12	23CV425688 Hearing: Petition Compel Arbitration	Akshat Batra vs Hyundai Motor America	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 13	20CV368213 Motion continue trial	Katherine Gilson vs GS Almaden, LLC et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 5
Case Name: *Waylonis v. Clayton Johnson Enterprises, Inc. dba Premiere Builders, et al.*
Case No.: 23CV417291

According to the allegations of the complaint, on February 4, 2021, plaintiffs Daniel and Assana Waylonis (collectively, "Plaintiffs") and defendant Clayton Johnson Enterprises, Inc. dba Premiere Builders ("Premiere") entered into a contract to build a home in Paso Robles for $2,762,517.60. (See complaint, ¶¶ 7, 8.) Various change orders increased the total amount to $2,812,720.52. (See complaint, ¶ 7.) Construction of the project was to be substantially completed by July 7, 2022. (See complaint, ¶ 8.) Plaintiffs contend that Premiere improperly over-excavated and demolished the base rock of an approved location of a 10,000-gallon water tank with its foundation without notifying Plaintiffs, and the project ultimately was severely delayed and incomplete. (See complaint, ¶ 9.) Premiere stopped work and left the project in May 2022. (See complaint, ¶ 10.) On June 8, 2023, Plaintiffs filed a complaint against Premiere and American Contractors Indemnity Company ("ACIC"), asserting causes of action for: breach of contract; breach of implied covenant of good faith and fair dealing; negligence; breach of express warranty; breach of implied warranty; breach of express indemnity; and, claim upon license bond.

On August 18, 2023, Premiere filed a cross-complaint ("XC") against Plaintiffs, Armando's Elite Construction ("Armando's"), Marco Hernandez dba Hernandez Electrical Services ("Hernandez"), J.B.'s General Engineering, Inc. ("J.B.'s"), North County Insulation, Inc. ("NCII"), RCM Innovative Construction, Inc. ("RCM"), South Creek Roofing & Waterproofing, Inc. ("South Creek"), Templeton Steel Fabrication, Inc. ("Templeton"), Thorpe Design, Inc. ("Thorpe"), and Gilkey Plumbing, Inc. dba 4GS Plumbing ("Gilkey"), asserting causes of action for:

1) Breach of written contract (against Plaintiffs);
2) Quantum meruit (against Plaintiffs);
3) Breach of written contract—duty to defend and indemnify (against Armando's, Hernandez, J.B.'s, NCII, RCM, South Creek, Templeton, Thorpe and Gilkey (collectively, "subcontractor cross-defendants");
4) Implied indemnity[1] (against subcontractor cross-defendants);
5) Equitable indemnity (against subcontractor cross-defendants);
6) Contribution and apportionment (against subcontractor cross-defendants); and,
7) Declaratory relief (against all cross-defendants).

Defendant Gilkey demurs to each of the causes of action of the XC, on the grounds that they are uncertain and fail to state facts sufficient to constitute a cause of action.

I. GILKEY'S DEMURRER TO THE XC

Gilkey's request for judicial notice in support of demurrer

[1] The causes of action for implied indemnity, equitable indemnity, contribution and apportionment and declaratory relief are misnumbered in the XC. The implied indemnity cause of action is labeled as a "third cause of action" despite the fact that the breach of written contract is the third cause of action.

Gilkey requests judicial notice of the complaint and the XC. The request for judicial notice is GRANTED. (Evid. Code § 452, subd. (d).)

Third cause of action for breach of contract

Gilkey demurs to the third cause of action arguing that the indemnification provision in the contract requires indemnification when damages are "caused by the negligent acts or omissions of the Subcontractor," and the XC does not allege any negligent acts or omissions by Gilkey. (See Gilkey's memorandum of points and authorities in support of demurrer to XC ("Gilkey's memo"), p.5:7-25.) However, as Gilkey acknowledges, paragraph 36 alleges that "the injuries and damages claimed by PLAINTIFFS, if true, were in whole or in part caused by the negligent acts or omission of the SUBCONTRACTOR CROSS-DEFENDANTS." (XC, ¶ 36.) Gilkey contends that this allegation "amounts to nothing more than a conclusion of law" (Gilkey's memo, p.5:24-28), and [t]he Cross-Complaint fails to state, with the requisite level of specificity, allegations of negligent acts or omissions attributable to [Gilkey]." (Gilkey's reply brief, p.2:26-27.) However, for a breach of contract cause of action, all that is required to allege is the existence of the contract, the plaintiff or cross-complainant's performance or excuse for nonperformance, a breach of the contract and resulting damages. (See *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913.) Contrary to Gilkey's assertion, a breach of contract cause of action is not required to be pled with particularity and Gilkey does not cite to any legal authority in support of its assertion. Gilkey's demurrer to the third cause of action is OVERRULED.

Fourth cause of action for implied indemnity

As to the fourth cause of action, Gilkey argues that "Premiere has failed to directly allege the existence of a binding agreement with [Gilkey] such that [Gilkey] would bear responsibility to Premiere for damages arising from its fault… [and] fails to state any direct facts that support its conclusory allegation that Plaintiffs' damages were 'caused in whole or in part, by [Gilkey]." (Gilkey's memo, p.6:15-21.) However, the XC plainly alleges that the subcontractor defendants entered into agreements with Premiere in which they agreed to defend and indemnify Premiere for claims involving damages caused, in whole or in part, by them. (See XC, ¶ 43.) As to Gilkey's argument that the fourth cause of action fails to allege further facts supporting the causation of damages, Gilkey again fails to cite to any authority requiring a cause of action for indemnity to be alleged with particularity. Gilkey's demurrer to the fourth cause of action is OVERRULED.

Fifth cause of action for equitable indemnity

Gilkey argues that "Premiere fails to plead facts to support its conclusory allegations that Plaintiffs' damages 'were entirely caused' by [Gilkey] as one of the nine subcontractors, and that Premiere's liability to Plaintiffs, if any, arises 'solely from actions or omissions' by [Gilkey]." (Gilkey's memo, p.7:6-11.) However, causation is an ultimate fact. (See *Rannard v. Lockheed Aircraft Corp*. (1945) 26 Cal.2d 149, 154 (stating that "it is sufficient to allege that an act was negligently done by defendant, and that it caused damage to plaintiff… the plaintiff [may] state the negligence in general terms, without stating the facts constituting such negligence… [t]he term 'negligence,' for the purpose of pleading, is a fact to be pleaded -- an ultimate fact"); see also *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 737 (stating that "an allegation… of ultimate fact… [is] good against a general demurrer"); see also

Esparza v. Kaweah Delta Dist. Hospital (2016) 3 Cal.App.5th 547, 552, fn. 4 (stating that the "proper plead[ing of] an ultimate fact… is not a conclusion of law"); see also *Peninsula Properties Co. v. County of Santa Cruz* (1950) 34 Cal.2d 626, 629 (stating that the allegation that "pleads an ultimate fact… [is] good against a general demurrer"); see also *Smith v. Workers' Comp. Appeals Bd.* (1989) 212 Cal.App.3d 22, 27 (stating that Labor Code presumption was "designed to aid peace officers in establishing the ultimate fact of causation").) Here, Gilkey is incorrect that the allegations regarding negligence and causation are insufficiently pled. Gilkey's demurrer to the fifth cause of action is OVERRULED.

Sixth cause of action for contribution and apportionment

Gilkey argues that "the Cross-Complaint is devoid of any direct allegations that [Gilkey] could be jointly liable under… the exemplar subcontractor agreement, or any work allegedly performed thereunder… [and] fails to state any facts beyond mere conclusory allegations, pertaining to alleged negligent acts or omissions on the part of [Gilkey]." (Gilkey's memo, pp.7:26-28, 8:1-2.) Here, these arguments are identical to the meritless arguments regarding the prior causes of action. Gilkey's demurrer to the sixth cause of action is OVERRULED.

Seventh cause of action for declaratory relief

As to the seventh cause of action, Gilkey again argues that "[t]he Cross-Complaint relies entirely on conclusory allegations to allege negligent acts and omissions, or any other basis of [Gilkey's] legal responsibility to Premiere." (Gilkey's memo, pp.8:27-28, 9:1-3.) This argument is identical to the meritless arguments regarding the prior causes of action. Gilkey's demurrer to the seventh cause of action is OVERRULED.

Gilkey's demurrer to the XC on the ground of uncertainty

Gilkey argues that the XC "fails to allege the [Gilkey] is a proper cross-defendant… or that [Gilkey] engaged in negligent acts or omissions at the Project," and is thus uncertain. (Gilkey's memo, p.4:11-18.) "Demurrers for uncertainty under Code of Civil Procedure section 430.10, subdivision (e) are disfavored." (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Id*.) "[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135.) Here, the XC is not so incomprehensible that Gilkey cannot reasonably respond. Gilkey's demurrer to the XC on the ground that it is uncertain is OVERRULED.

The Court will prepare the Order.

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Calendar Line 6
Case Name: *BayAreaChess, Inc. v. Mechanics' Institute LLC, et al.*
Case No.: 19CV357289

According to the allegations of the third amended complaint ("TAC"), from March 2014 through June 9, 2019, Defendant Judit Sztaray ("Sztaray") was the Executive Director for Plaintiff BayAreaChess, Inc. ("Plaintiff") and Defendant Abel Talamantez ("Talamantez") was an employee with Plaintiff from April 2015 through December 1, 2018. (See TAC, ¶¶ 4-5.) In April 2015, Sztaray arranged for the merger of Plaintiff with Talamantez' Castling Kids Chess, and then the hiring of Talamantez as Plaintiff's Director of Enrichment. (See TAC, ¶¶ 28, 37-38.) On May 14, 2018, Talamantez executed a nondisclosure agreement with Plaintiff, in which he agreed not to disclose Plaintiff's confidential information or solicit its customers and to return all property in his possession at the time of termination with Plaintiff. (See TAC, ¶ 49, exh. D.)

However, during this time, Talamantez and Sztaray conspired to: make large withdrawals of cash from Plaintiff's bank account without Plaintiff's Board's approval (see TAC, ¶¶ 58-59); use BayAreaChess ("BAC") funds for personal expenses and unauthorized business expenses (see TAC, ¶¶ 63-65); make purchases using Plaintiff's funds without Board approval to promote themselves (see TAC, ¶¶ 69-71); make payments of unauthorized bonuses to themselves after termination (see TAC, ¶ 72); conceal those payments from the Board (see TAC, ¶ 73); and steal business opportunities of Plaintiff after resigining from Plaintiff's employment (see TAC, ¶¶ 80-111).

On November 20, 2020, Plaintiff filed the TAC against defendants Mechanics Institute ("MI"), Sztaray and Talamantez (collectively, "Defendants"), asserting causes of action for:

1) breach of employee duty of loyalty (against Sztaray and Talamantez);
2) breach of fiduciary duty (against Sztaray and Talamantez);
3) conversion (against all defendants);
4) breach of written employment contracts (against Sztaray and Talamantez);
5) breach of written contract (against Talamantez);
6) breach of oral contracts (against Sztaray);
7) conspiracy (against Sztaray and Talamantez); and,
8) aiding and abetting (against Talamantez and MI).

Defendants move for summary judgment, or, in the alternative, for summary adjudication of each cause of action of the TAC. In opposition to the motion, Plaintiff does not present any argument as to the motion. Instead, it merely requests a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h).

On March 29, 2024, Plaintiff filed an ex parte application for an order to continue the hearing for the motion for summary judgment, or, in the alternative, for summary adjudication. (See Code Civ. Proc. § 437c, subd. (h) (stating that "[t]he application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due").) The ex parte application noted that it "is based on the same declaration submitted yesterday in support of BayAreaChess's response to the summary judgment motion pursuant to Section 437c(h)." (Pl.'s ex parte application for an order to continue hearing on motion for summary judgment, p.2:12-13.) The ex parte

application argued that it sought a continuance so that it could obtain discovery of the BayAreaChess laptop that Sztaray took with her when she went to Mechanics, and the documents in Sztaray's and Talamantez's possession, custody and control. (*Id*. at p.3:6-21.) On April 3, 2024, the Court denied the ex parte application agreeing with "the reasons laid out in Defendant's opposition to the application, including, though not limited, to the fact that Plaintiff did not diligently pursue the discovery and has not laid out with specificity how the missing discovery relates to the issues raised in the motion for summary judgment." (April 3, 2024 order re: Pl.'s ex parte application for order continuing the hearing on Defs.' motion for summary judgment, p.2:4-10.)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF EACH CAUSE OF ACTION OF THE TAC

Defendants' burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 (internal citations omitted; emphasis added).)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Summary judgment on the ground that Plaintiff cannot establish damages.

Defendants argue that they are entitled to summary judgment because Plaintiff is unable to establish its damages. (See Defs.' memorandum of points and authorities in support of motion for summary judgment ("Defs.' memo"), p.8:1-24.) In support of their position, Defendants present Plaintiff's responses to interrogatories in which Defendants seek "the amount of damage [Plaintiff is] claiming… and how the amount was calculated." (See Melnyk decl., exh. 23 (Pl.'s FI responses), FI no. 7.1.) Plaintiff's response does not provide any

amount of damages, or a calculation of that amount. Instead, Plaintiff merely states that "BAC has been deprived of the full value of the laptop including BAC's confidential and proprietary information contained within the laptop… [and] has been deprived of the full value of the [BAC office and storage unit] key including damage caused by access to the BAC office and its storage unit by non-employees and the increased risk of theft of BAC equipment. While the value of the key itself may be nominal, the damage done to BAC not being able to protect its office equipment and confidential and proprietary information is material and significant." (*Id*.) Here, Plaintiff's response fails to provide either an amount of damage or a calculation of that amount; as Defendants argue, damages are an element of each of Plaintiff's causes of action. (See *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 410 (Sixth District stating that "[t]he elements of a cause of action for breach of a duty of loyalty…[include] damage proximately caused by that breach"); see also *Brown v. Cal. Pension Adm'rs & Consultants (*1996) 45 Cal.App.4th 333, 347-348 (stating that "for breach of fiduciary duty, there must be shown…. damage proximately caused by that breach"); see also *Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 543-544 (stating that "[t]he elements of a conversion… [include] damages"); see also *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (stating that "the elements of a cause of action for breach of contract… [include] the resulting damages to the plaintiff"); see also *Doctors' Co. v. Super. Ct. (Valencia)* (1989) 49 Cal.3d 39, 44 (stating that "[t]he elements of an action for civil conspiracy… [include] damage resulting to plaintiff from an act or acts done in furtherance of the common design").) Defendants meet their initial burden to demonstrate that Plaintiffs cannot demonstrate an essential element of their causes of action. (See *Bayramoglu v. Nationstar Mortgage LLC* (2020) 51 Cal.App.5th 726, 739 (affirming trial court's determination that defendant Nationstar met its initial burden by presentation of plaintiffs' responses to Nationstar's form interrogatories in which responses showed that plaintiffs could not establish damages, a requisite element for the cause of action); see also evidence cited by Defs.' separate statement of undisputed material facts, numbers ("UMFs") 55-57, 66-69, 91.) The burden thus shifts to Plaintiff to demonstrate the existence of a triable issue of material fact.

In opposition, Plaintiff does not present any evidence demonstrating damages and thus fails to demonstrate the existence of a triable issue of material fact. Instead, Plaintiff requests a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h), stating that it "has been denied access to documents essential to its ability to respond to defendants' summary judgment motion… [namely,] the documents in the personal possession, custody, or control of the two named individual defendants, and the laptop computer that Sztaray used for over two years in her role as the Executive Director of BayAreaChess before leaving to join Mechanics." (Pl.'s opposition to Defs.' motion for summary judgment ("Opposition"), p..4:14-28, 5:1-21.) Here, it is unclear how these documents affect Plaintiff's ability to calculate or state any amount of damages to demonstrate the existence of a triable issue of material fact—the facts essential to justify opposition. (See Code Civ. Proc. § 437c, subd. (h); see also *Ace American Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017, 1023 (stating that "the nonmoving party seeking a continuance 'MUST SHOW: (1) the facts to be obtained are essential to opposing the motion… [t]he trial court need not grant a continuance where the proposed discovery is focused on matters beyond the scope of the dispositive issues framed by the pleadings").)

Moreover, the Court already addressed the request for continuance since Plaintiff opted to make the request by ex parte motion pursuant to Code of Civil Procedure section 437c, subdivision (h) and the Court denied the application, noting that Plaintiff did not diligently

pursue the discovery and has not laid out with any specificity how the missing discovery relates to the issues raised in the motion for summary judgment." (April 3, 2024 order re: Pl.'s ex parte application for order continuing the hearing on Defs.' motion for summary judgment, p.2:4-10; see also *Braganza v. Albertson's LLC* (2021) 67 Cal.App.5th 144, 156 (stating that "a party who seeks a continuance under section 437c, subdivision (h), must show why the discovery necessary to oppose the motion for summary judgment or summary adjudication could not have been completed sooner, and accordingly requires the court to grant the continuance"); see also *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 257 (stating that "lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing… [a]n inappropriate delay in seeking to obtain the facts may not be a valid reason why the facts cannot then be presented"); see also *Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1038 (stating that "[i]n exercising its discretion the court may properly consider the extent to which the requesting party's failure to secure the contemplated evidence more seasonably results from a lack of diligence on his part").) As already stated, Plaintiff's request for continuance is DENIED.

As Defendants have met their initial burden to demonstrate that each of the causes of action are without merit because at least one element of the cause of action cannot be established, and, in opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact, Defendants' motion for summary judgment is necessarily GRANTED.

In light of the above ruling, the Court declines to address the alternative motion for summary adjudication.

The Court will prepare the Order.

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Calendar Lines 7 and 8
Case Name: Wesley v. Poirier
Case No. 22CV396209

Plaintiff was hired to do construction work at Defendants' home. There is now a dispute about whether Defendants still owe Plaintiff money for the work he performed.

Defendants propounded discovery. Plaintiff responded to some of the discovery, but Defendants did not believe all requests were adequately answered or verified. Plaintiff then changed counsel and new counsel asked for more time to respond. After providing more time, but not sufficient time according to Plaintiff, Defendants filed a motion to compel on November 2, 2023. That motion was set to be heard on February 6, 2024. After the filing of the motion, Plaintiff further responded. Defendants still contended that some of the answers are insufficient. Defendants filed a second motion to compel on January 4, 2024. This motion was set to be heard until April 11, 2024. Both motions sought the compulsion of further responses to the same interrogatories and RFPs.

At the hearing of February 6, 2024, the Court ordered this motion continued to the April 11, 2024 date, given that the motions involved the same discovery requests and it appeared that the parties were continuing to work out a resolution. Plaintiff provided more responses to Defendants since the hearing and as of now the only things at issue are RFP 43 and Defendants' requests for Form interrogatory 15.1.

In response to RFP 43, Plaintiff states that it has complied by stating that "Despite diligent search and reasonable inquiry, Responding Party cannot locate any responsive documents in its possession, custody, or control which have not already been produced by Responding Party." Opp. p.4 As Defendants note, however, CCP section 2031.230 requires that a party's response state that not only that a diligent search and a reasonable inquiry has been made in an effort to comply, but shall "also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody or control of the responding party." Plaintiff failed to comply with this code section in responding to RFP # 43. While it is unclear whether Defendants made this objection clear in their meet and confers efforts, it is clearly stated in their separate statement. Plaintiff offers no reason for why it has continued to fail to abide by the requirements of 2031.230. This request is GRANTED and Plaintiff must provide a code-compliant response within 10 days.

In response to Form interrogatory 15.1, Plaintiff states:

> Objection. This interrogatory seeks information protected by the attorney-client privilege and attorney work product doctrine as set forth in Code Civ. § 2018 by forcing counsel for Responding Party to determine for the benefit of Propounding Party what allegations are material and what allegations are immaterial. All affirmative defenses pleaded were set forth in order to avoid waiver thereof and the denial set forth in the answer was a general denial proffered in order to require Plaintiff to prove his case. Responding to this Interrogatory would necessitate the making of a compilation, abstract, or summary of documents, the burden of making such summary would be substantially the same for Propounding Party as it is for Responding Party. Responding Party therefore exercises its option pursuant to Code of Civ. Proc. § 2030.230 to

identify all pleadings, discovery responses, document productions, and any and all other documents produced in or otherwise associated with the instant litigation, as well as all facts and identities of witnesses contained therein. All of the above described documents are equally available to Propounding Party.

This is not a code-compliant response. Even if CCP 2030.230 did apply, that section still requires Plaintiff to "specify the writings from which the answer may be derived or ascertained. This specification shall be in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained." Plaintiff failed to do this. Moreover, this Court does not find that 2030.230 even applies, as Defendants want to know the facts which support each of Plaintiff's affirmative defenses -- an eminently reasonable request. It may be that Plaintiff already provided the discovery underlying these facts, but Plaintiff must assert which facts go to which defense. As relates to Plaintiff's affirmative defenses, the request is GRANTED. To the extent Defendants also want to know which facts support Plaintiff's denial of material allegations, that is DENIED as Defendants failed to specify which material allegations it wanted discovery about.

Plaintiff is required to provide code-compliant verified responses to RFP 43 and 15.1, as it relates to affirmative defenses, within 10 days of service of the final order. Plaintiff is required to pay sanctions in the amount of $990 (2 hours at $495/hr) as most of its objections were without substantial justification and compliance took too long and two motions. Defendants shall submit the final order.

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Calendar line 12
Case Name: Akshat Batra vs Hyundai Motor America
Case No.: 23CV425688

Defendant Hyundai Motor America ("Hyundai") moves to compel arbitration first based on the Arbitration Agreement found in the warranty for the subject vehicle. (Declaration of Jordan A. Willette ["Willette Decl."], ¶ 2 and Ex. B.) As Defendant notes, FAA applies to any arbitration agreement that is "written" and in a contract. (9 U.S.C. § 2.) Exhibit B, as Plaintiff correctly points out, is not admissible as no proper foundation has been laid for it. Even it if were, however, it is the Owner's Handbook & Warranty Information manual that accompanied the sale of the Vehicle. It is not a contract, was not signed by either party, and therefore provides no basis for compelling arbitration.

Next, Defendant argues that it can compel arbitration, even though it is a nonsignatory to the sales contract, under the doctrine of equitable estoppel, citing *Felisada v. FCA US LLC* (2020) 53 Cal.App.5th 486. As stated in *Felisada*, equitable estoppel allows a nonsignatory defendant to """invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations." *Felisilda*, 53 Cal.App.5th 486, 495.

Since *Felisada*, the Second District Court of Appeal has issued two decisions—one from the Eighth Division (*Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324 (*Ochoa*)), and one from the Seventh Division (*Montemayor v. Ford Motor Co.* (June 26, 2023, B320477) __ Cal.App.5th __ [2023 Cal.App.Lexis 481; 2023 WL 4181909] (*Montemayor*))—both of which expressly disagree with *Felisilda*. More recently, the Third Appellate District Court of Appeal in *Keilar* on August 16, 2023, and, the First Appellate District Court of Appeal in *Yeh* on September 6, 2023, have entered opinions that agree with *Ochoa* and *Montemayor* and disagree with *Felisilda*. Having carefully reviewed these decisions, the court finds that these are better reasoned than *Felisilda*.

The motion to compel arbitration is DENIED. Plaintiff shall submit the final order.

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Calendar line 13
Case Name: Katherine Gilson v. GS Almaden, LLC, et al.
Case No.: 20CV368213

Defendants move to continue the trial date due to substituting in new counsel approximately one month before trial. Defendants ask for the continuance to allow counsel to prepare for trial. While the substitution of counsel may constitute good cause to continue a trial, that is the case only "where there is an affirmative showing that the substitution is required in the interests of justice." CRC 3.1332(c). Here, there is no such showing. The only basis for the substitution of counsel is current defense counsel's hearsay, inadmissible statement that she "was advised that on March 11, 2024, Wolfe & Wyman LLP (Wolfe & Wyman), counsel of record for Greystar, advised its client that due to a breakdown between W&W and Greystar, their relationship had become untenable and that they withdrew from representation forthwith." The Court will not rely on this hearsay statement and, in any event, finds it insufficient to meet the required standard. Because there is no showing that the substitution was required in the interests of justice and because current defense counsel will have had a month to prepare for trial, which constitutes sufficient time, the continuance is DENIED.

Plaintiff shall submit the final order.

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