SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: September 17, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM 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 at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	19CV345665	SILVIA NATERA vs HYUNDAI MOTOR AMERICA	Vacated; this matter resolved.
3	23CV421899	Corporate Electric, Inc. vs Brian McClure & Associates, Inc. et al	Parties are ordered to appear for debtor's examination.
4-5	23CV422882	Estate of DANIEL BUGARIN-HERNANDEZ et al vs KEVIN ALVAREZ et al	Vacated; addressed by the Court's September 12, 2024 order.
6	23CV425497	Diane Robinson et al vs Scott Wharton et al	Plaintiffs' motion to compel is granted, in part. Scroll to line 6 for complete ruling. Court to prepare formal order.
7	23CV427950	Anthony Cardoso et al vs General Motors LLC et al	Eric D. Pearson's verified unopposed pro hac vice application is GRANTED. Court will use proposed order on file.
8	24CV429405	Darlene Boucher vs Carmel Stone Imports et al	Plaintiff's motion to transfer venue is GRANTED. Plaintiff shall bear the costs of the transfer and prepare the formal order.
9	24CV430026	Jeanette Dariano vs JAVAD GNSS, INC et al	Defendants' demurrer is SUSTAINED and motion to strike is DENIED. Scroll to line 9 for complete ruling. Court to prepare formal order.
10	24CV432080	SERENITY MSO LLC et al vs PALO ALTO MIND BODY et al	Defendants' petition to compel arbitration is DENIED pursuant to Code of Civil Procedure section 1281.2(c). Scroll to line 10 for complete ruling. Court to prepare formal order.
11-12	24CV438828	EDGES ELECTRICAL GROUP LLC, a California limited liability company vs NHU PHAM et al	Travelers Casualty Insurance Company of America's demurrer to the first and second causes of action is OVERRULED and its motion to strike is GRANTED with 20 days leave to amend. Scroll to lines 11-12 for complete ruling. Court to prepare formal order.
13	24CV445616	Skykatsdevelopment LLC vs Haris Bosnjakovic et al	The Court finds the requirements of Civil Code sections 8480 et. seq. are met, and Skykatsdevelopment LLC's petition to release mechanics lien is GRANTED. Petitioner to prepare formal order.
14	23CV422621	MICHAEL HERTZ vs MARK A. OLIVEREZ et al	This matter came before the Court on August 29, 2024, the Court issued the tentative ruling set forth at line 14 below on August 28, 2024, and the Court continued the hearing for the parties to meet and confer regarding a practical schedule in the light of the tentative ruling. The Court was unable to locate any communication from the parties regarding the results of the meet and confer, and the parties are therefore ordered to appear at the hearing.

Calendar Line 6
Case Name: *Diane Robinson et al vs Scott Wharton et al*
Case No.: 23CV425497

Before the Court is Plaintiffs' motion to compel and for sanctions. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a dispute between neighbors over a property line. The Robinsons (Plaintiffs) and Whartons (Defendants) own property on either side of Adobe Creek. The parties dispute the location of the property line in this area, which they refer to as the Greenbelt. The Robinsons claim prior owners reached an agreement in writing "the Boundary Agreement" that resolved this dispute. The Whartons claim, among other things, that they have been using the Greenbelt for a long time without interference from or complaint by the Robinsons, the Boundary Agreement is vague, and the Boundary Agreement is insufficient to change a property line. Plaintiffs ultimately filed suit and moved for preliminary relief.

In the context of Plaintiffs' preliminary injunction motion, the Whartons submitted declarations referencing legal advice they received in connection with this dispute in 2016—long before the Robinsons filed this lawsuit—and in 2023 just before the Robinsons filed the lawsuit. Specifically, at paragraph 14 of her declaration, Mariette Wharton states:

> Since the Boundary Agreement did not show up in disclosures when we were purchasing our house, we were suspicious as to whether it had any legal impact. We sought the counsel of a real estate lawyer to determine whether we had a problem with our title. We also contacted our title company, which told us that the boundary agreement did not alter our title description. The lawyer told us that we could ignore the claimed Boundary Agreement as he told us that two parties cannot between themselves reach an agreement over the location of a boundary, that it required approval of a municipality through a formal lot line adjustment. Since there was no lot line adjustment approved by either city in which the properties are located, he informed us that we were free to install a

> fence wherever we wanted on our side of the creek. So, we did just that, and continued at all times thereafter to treat our rear yard all the way to the top of the bank of Adobe Creek as part of our property, and have been the only ones making use of and improving our rear yard to Adobe Creek, without prior objection by ROBINSON.

After the Robinsons put their property up for sale in 2023, again, before the Robinsons filed this lawsuit, the Whartons again consulted counsel—this time Harry L. Price, who represented the Whartons in this litigation after it was filed. Mariette Wharton explains in paragraphs 20-21 of her declaration:

> From my review of the ROBINSON's "disclosure packet" for sale of the Robinson property, I was surprised that there was absolutely no mention made of the MacLeod Survey that we had provided to ROBINSON, or the fact that my husband and I had been utilizing and claimed ownership of an interest in title to the disputed area.
>
> As a result, I sought the advice of counsel, Mr. Price. We were advised to notify the real estate company marketing the Robinson property, by letter, of the issues surrounding the two surveys, and that <u>the two surveys conflicted</u>, and requesting information as to how that realtor was going to have her clients (ROBINSON) address the controversy. (Emphasis in original.)

Mr. Price has since substituted out as Defendants' trial counsel. Plaintiffs now move to compel certain documents, including documents and interrogatory responses concerning the Whartons' communications with counsel regarding the Greenbelt.

II. **Legal Standard**

Discovery is generally permitted "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." (Code Civ. Pro. § 2017.010.) Everything that is relevant to the

subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.)

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) A party may move for an order compelling a further response to a document demand on the ground that (1) an objection is without merit or too general, (2) a statement of compliance with the demand is incomplete, or (3) a representation of inability to comply is inadequate, incomplete, or evasive. (Code Civ. Pro. §2031.210(a).) A party seeking to compel is required to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) This burden may be satisfied by a fact-specific showing of relevance. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448.) Information is relevant to the subject matter of the action if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.)

A party responding to interrogatories must respond in writing, under oath separately to each interrogatory with an answer that contains the information sought, an exercise of the party's option to produce writings from which the answer can be determined, or an objection to the interrogatory. (Code Civ. Pro. §2030.210(a).) The responding party must make a reasonable, good faith effort to obtain information to provide a response and generally may not respond to the interrogatory by simply stating it cannot respond. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406; Code Civ. Pro. §2030.210(c).)

III. **Analysis**

First, the Court is not persuaded by Defendants' argument that this motion is moot because they have served verified code compliant written responses. The statement the Court presumes Defendants rely on for this argument is insufficient: "Responding party agrees to produce documents that are in the possession of Responding Party and are responsive to both this request and the remaining requests that are not objected to." This statement does not inform Plaintiff as to what documents Defendants are producing, withholding, or do not have so cannot produce. Accordingly, Plaintiffs' motion to compel further responses to Request for Production Nos. 26, 27, and 28 is GRANTED.

For similar reasons, Plaintiffs' motion to compel further response to Special Interrogatory No. 9 is GRANTED. Given Defendants' representations under "Why Further Response to Special Interrogatory No. 9 Necessary [sic]", it appears Defendants' current response is incomplete. Defendants must at a minimum confirm the response contains all responsive information in their possession, custody, or control. If Defendants intend to permit the inspection and copying of documents to further respond to this Interrogatory, they must amend their written response accordingly, and include the document categories and/or bates numbers they claim are responsive.

The motion to compel further responses to Request for Production No. 29 is DENIED. Defendants state "Defendant confirms that all responsive documents in its possession, custody, or control have already been provided. No additional documents responsive to the request exist beyond those previously produced." This is a code compliant statement.

The balance of Plaintiffs' motion to compel concerns the Whartons' refusal to produce attorney-client communications. "To successfully invoke the lawyer-client privilege, three requirements must be met. There must be a (1) communication, (2) intended to be confidential, and (3) made in the course of the lawyer-client relationship." (*Sullivan v. Superior Court* (1972) 29 Cal. App. 3d 64, 69, citing *City & County of S.F.* v. *Superior Court* (1951) 37 Cal.2d 227, 234-235.)) The policy behind the privilege is well known, as summarized by *Sullivan*:

> The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may

> sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. 'Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result. Thirdly, unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavorable facts.' [Citation.]" (City *& County of S.F.* v. *Superior Court, supra*, at p. 235.) (*Sullivan v. Superior Court* (1972) 29 Cal. App. 3d 64, 69.)

There is no dispute that the Whartons had an attorney-client relationship; the issue is whether the privilege was nevertheless waived based on the above-quoted portions of their declarations. The attorney client privilege can be waived under a variety of circumstances:

> The privilege may be waived impliedly or by disclosure of the subject communication. The privilege is waived with respect to a protected communication if any holder of the privilege voluntarily discloses a significant part of the communication or has consented to such disclosure made by anyone. (Evid. Code, § 912, subd. (a).) What constitutes a significant part of the communication is a matter of judicial interpretation; however, the scope of the waiver should be determined primarily by reference to the purpose of the privilege. (*Jones* v. *Superior Court* (1981) 119 Cal.App.3d 534, 547 [174 Cal.Rptr. 148].)

> The privilege may also be impliedly waived where a party to a lawsuit places into issue a matter that is normally privileged. It is said that in that case the gravamen of the lawsuit is so inconsistent with the continued assertion of the privilege as to compel the conclusion that the privilege has

> in fact been waived. (*Wilson* v. *Superior Court* (1976) 63 Cal.App.3d 825 [134 Cal.Rptr. 130].) The scope of either a statutory or implied waiver is narrowly defined and the information required to be disclosed must fit strictly within the confines of the waiver. (See, e.g., *Travelers Ins. Companies* v. *Superior Court* (1983) 143 Cal.App.3d 436 [191 Cal.Rptr. 871]; *Jones* v. *Superior Court, supra*, 119 Cal.App.3d 534.) Privileged communications do not become discoverable simply because they are related to issues raised in the litigation. (*Schlumberger Limited* v. *Superior Court* (1981) 115 Cal.App.3d 386 [171 Cal.Rptr. 413].) (*Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal. App. 3d 1047, 1052-1053 (emphasis added).)

The Whartons do not appear to be relying on an advice of counsel defense. In their Answer, they assert Affirmative Defense 10, which states "Defendants allege that each of their conduct was justified and privileged under the circumstances, in that Defendants acted fairly and reasonably at all times, without improper motive." Based on the above-cited case law, the Court finds a much clearer, unequivocal statement must be made before a party can be understood to be relying on an advice of counsel defense.

The Court similarly finds the "disclosures" in their declarations insufficient to find a waiver of the Whartons' communications with their counsel. The cursory mention of the high-level conclusion they reached that the Boundary Agreement was not enforceable after consultation with counsel does not represent a "significant part of the communication" they had with their lawyers regarding the Greenbelt. The Whartons should understand, however, that if they do intend to rely on the advice of counsel as a defense to their actions, not only is such reliance not currently asserted as an affirmative defense, but such reliance would result in a waiver of the attorney-client privilege at least with respect to those subjects for which they assert such reliance.

Based on the above, Defendants are ordered to produce (a) all documents in their possession, custody, and control they have agreed to produce responsive to Special Interrogatory No. 9 and Request for Production Nos. 26, 27, and 28, (b) supplemental written verified responses stating that

after a reasonable search, all documents have now been produced and, if not, specifically why any documents have been withheld, and (c) a privilege log listing any documents created before the Robinsons filed this lawsuit Defendants are withholding on attorney-client privilege and/or work product grounds within 20 days of service of this formal order.

Plaintiffs' motion to compel attorney-client communications is DENIED.

The Court declines to award sanctions, as each party had substantial justification in bringing these matters to the Court for resolution.

Calendar Line 9
Case Name: *Jeanette Dariano v. JAVAD GNSS, Inc., et al.*
Case No.: 24CV430026

Before the Court is defendants JAVAD GNSS, Inc.'s ("JAVAD") and Jyoti Kheskani ("Kheskani") (collectively, "Defendants") demurrer to plaintiff Jeanette Dariano's first amended complaint ("FAC") and motion to strike portions contained therein. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of Plaintiff's alleged wrongful termination resulting from noncompliance with JAVAD's COVID-19 protocols. According to the FAC, JAVAD manufacturer's handheld GPS devices, mainly for land surveyors. (FAC, ¶ 10.) Plaintiff worked for JAVAD from January 11, 2010, until September 30, 2021. (FAC, ¶¶ 12, 49.) In 2012, Plaintiff was given Human Resources Administrator responsibilities, but she did not receive an official promotion or a pay raise. (FAC, ¶ 13.) In December 2014, Plaintiff had her first performance review which indicated her work was viewed as more than satisfactory; Plaintiff did not receive a performance review for the next seven years. (FAC, ¶ 14.) On March 16, 2020, Plaintiff was directed to work from home because of COVID-19, and because 80% of her duties were computer-based, she was able to competently perform her duties remotely. (FAC, ¶ 19.) On March 26, 2020, defendant Nedda Ashjaee, JAVAD's Chief Operating Officer, instructed Plaintiff to come perform visual building inspections, replenish snacks, and restock supplies. (FAC, ¶ 20.) Plaintiff was uncomfortable doing so and requested to continue working from home but was met with hostility and accusations from Ashjaee. (*Ibid*.)

In April 2020, Plaintiff started working on site two to three times a week, under duress. (FAC, ¶ 21.) On May 11, 2021, JAVAD sent out a company-wide email about its "Vaccine Rewards Program," which offered paid time off to incentivize employees to get vaccinated. (FAC, ¶ 23.) On May 24, 2021, JAVAD sent an email regarding the end of the mask mandate in California and its procedures going forward, which would permit fully vaccinated people to stop wearing masks and require remote employees to return to the office in phases with the goal of returning to the pre-pandemic working environment (the "Return to Work Policy"). (FAC, ¶ 24.)

At the end of May 2021, Ashjaee asked Plaintiff and another co-worker to rotate between onsite work and remote work. (FAC, ¶ 25.) On June 29, 2021, while she was on a planned vacation, Plaintiff informed Kheskani and the Operations Manager Assistant, Mayette Sumajit, that she would not return to work the following day because she did not feel well. (FAC, ¶ 26.) On July 4, 2021, Kheskani informed Plaintiff that she would be required to have a negative COVID-19 PCR test within 24 hours of returning on site and Plaintiff said she would quarantine and work from home. (*Ibid*.) On July 8, 2021, Plaintiff was informed she was required to wear a mask when she returned to the office and later that day, Plaintiff discovered she had been removed from the HR email list, despite HR being one of her primary job duties. (FAC, ¶ 27.) The same day, Plaintiff requested a religious exemption form from Kheskani, but one was not provided as JAVAD did not have one. (FAC, ¶ 28.) The following day, Plaintiff submitted a notice of her religious exemption. (FAC, ¶ 29.) On July 14, 2021, Kheskani directed Plaintiff to prepare documents detailing the work she conducted in her role at JAVAD. (FAC, ¶ 30.) On July 16, 2021, Plaintiff received a letter denying her religious accommodation, which stated she was required to wear a mask to work on site. (FAC, ¶ 31.)

On July 19, 2021, Kheskani called Plaintiff to discuss the letter and Plaintiff explained the basis for her request, however, Plaintiff felt intimidated by the interrogative and interruptive nature of the conversation, and informed Kheskani that she would reply to the letter by email. (FAC, ¶ 33.) Plaintiff submitted a medical exemption form, at Kheskani's request, which stated Plaintiff could not wear a mask and recommended that Plaintiff could work from home. (FAC, ¶¶ 34-35.) In August 2021, Kheskani asked how long Plaintiff could wear a mask, requested to speak to Plaintiff's medical provider, and stated that not wearing a mask was unreasonable. (FAC, ¶ 36.)

Plaintiff then suffered adverse employment events such as removal from projects and the termination of her ability to work from home. (*Ibid*.) Kheskani offered Plaintiff an alternate position with reduced hours and pay as a "reasonable accommodation." (FAC, ¶ 37.) Plaintiff accepted the reduced role because she needed a job, but the role was only for 7 hours a week, which resulted in the termination of benefits for Plaintiff and her family, in addition to paid time off and holiday pay. (FAC, ¶ 38.) In her new role, she still carried out some of the same tasks as in her former position, but other employees began doing her other tasks over the next month and a half. (*Ibid*.) On August 13,

2021, after it was clear Plaintiff's beliefs conflicted with JAVAD's COVID-19 policies, Plaintiff received an unfavorable performance review, which did not provide an accurate assessment of her work or JAVAD's positive attitude towards her prior to the conflict. (FAC, ¶ 37.) On September 2021, Plaintiff filed her complaint with the Department of Fair Employment and Housing ("DFEH") and informed JAVAD of the complaint. (FAC, ¶ 40.) On September 30, 2021, Plaintiff was terminated from her employment in retaliation for filing her DFEH complaint. (FAC, ¶ 41.)

Plaintiff filed her complaint on January 25, 2024, and on February 14, 2024, she filed her FAC, asserting (1) wrongful termination in violation of public policy, (2) religious discrimination (Gov. Code, § 12940), (3) failure to accommodate religious belief or observance (Gov. Code, § 12940, subd. (l)), (4) violation of constitutionally protected autonomous privacy rights (California Constitution, Art. I, § 1), (5) violation of Civil Code section 52.1, (6) failure to prevent discrimination (Gov. Code, § 12940, subd. (k)), (7) retaliation in violation of Government Code section 12940, subd. (h), (8) discrimination and harassment (Gov. Code, § 12940, subd. (j)) and (9) human experimentation (Health & Safety Code, 24170, et seq). On May 29, 2024, Defendants filed the instant motions, which Plaintiff opposes.[1]

II. Oversized Memorandum

Defendants argue Plaintiff's opposition violates California Rule of Court 3.113(d), which states, "[e]xcept in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages… The page limit does not include the caption page, the notice of motion and motion, exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service." (Cal. Rules of Ct., rule 3.1113(d).)

Plaintiff's opposition is 16 pages long, which exceeds the page limit. As the opposition is oversized, it must be considered the same as a late-filed paper. (See Cal. Rules of Ct., rule 3.1113(g) ["a memorandum that exceeds the page limit of these rules must be filed and considered in the same manner as a late-filed paper."].) The opposition is only over the page limit by one page and the Court notes that the parties' papers address the demurrer and motion to strike together. As there is no

[1] The motions were originally set for hearing on August 1, 2024, however on June 28, 2024, the parties submitted a stipulation which continued the motions to September 17, 2024.

prejudice to Defendants and in deference to the policy that matters should be decided on their merits, the Court exercises its discretion to consider the opposition, despite the defect. (See *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 696 [policy of the law is to have every litigated case tried upon its merits].) Counsel is admonished that a future violation may not meet with the same result.

III. Demurrer

A. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendants demur to the first, fourth, fifth, eighth, and ninth causes of action on the ground they fail to allege sufficient facts to state a claim. (See Code Civ. Proc., § 430.10, subd. (e).)

B. Analysis

1. <u>First Cause of Action-Wrongful Termination in Violation of Public Policy</u>

"To establish a claim for wrongful discharge in violation of public policy, each of the following must be proved, (1) an employer-employee relationship, (2) termination or other adverse employment action, (3) termination of plaintiff's employment was a violation of public policy (or more accurately, a 'nexus' exists between the termination and the employee's protected activity." (*Holmes v. General Dynamics* (1993) 17 Cal.App.4th 1418, 1426.)

Defendants argue Plaintiff's claim is time-barred because it accrued on or before September 30, 2021. (Defendants' Memorandum of Points and Authorities ("MPA"), p.6:27-28.)

A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its fact the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315 (*E-Fab*).) A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading [and matters of which the court may properly take judicial notice]. (*Id*. at pp. 1315-1316.) When evaluating whether a claim is time-barred, the court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*Id*. at p. 1316.)

The statute of limitations for claims for wrongful termination in violation of public policy is two years. (See Code Civ. Proc., § 335.1 ["Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another]; *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1189 (*Mathieu*) [the statute of limitations for wrongful termination in violation of public policy is two years under Code Civ. Proc., § 335.1].)

Plaintiff was discharged on September 30, 2021, and she did not file her action until 2024. However, Plaintiff contends her claim is timely because it was tolled by California Rule of Court, Emergency Rule 9, which was enacted in response to COVID-19. Emergency Rule 9, provides, "the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020, until October 1, 2020. (Cal. Rules of Ct., Appx., Emergency Rule 9, amended effective May 29, 2020.) Emergency Rule 9 is "intended to apply broadly to toll any statute of limitations on the filing of a pleading in a court asserting a civil cause of action." (Advisory Com. com., Cal. Rules of Ct., Appx., Emergency Rule 9.) Generally, the effect of tolling is that the limitations period stops

running during the tolling event and begins to run when the tolling event has concluded. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) "As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Id*. at pp. 370-371; see also *Committee for Sound Water & Land Development v. City of Seaside* (2022) 79 Cal.App.5th 389, 403.)

"Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements." (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 510.) A claim for wrongful termination in violation of public policy accrues at the time of discharge. (See *Castelo v. Xceed Financial Credit Union* (2023) 91 Cal.App.5th 777, 791 (*Castelo*); *Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1282.)

Plaintiff argues the harassment over her religious beliefs began in 2016 and continued through termination. (Opp., p.3:7-8.) However, even if the underlying conduct occurred before her discharge, Plaintiff's claim for wrongful termination could not accrue until her termination on September 30, 2021. (See *Castelo, supra,* 91 Cal.App.5th at p. 791.) Therefore, Emergency Rule 9 does not and cannot apply to this claim. (See Cal. Rules of Court, Appx., Emergency Rule 9 ["causes of action that exceed 180 days are tolled *from April 6, 2020, until October 1, 2020*"] [emphasis added].) Consequently, Plaintiff's claim is time-barred because she was terminated on September 30, 2021, and did not file the complaint until January 25, 2024, which is beyond the two-year statute of limitations. (See *Mathieu, supra,* 115 Cal.App.4th at p. 1189.) Plaintiff does not allege or argue that any other tolling principles apply. Therefore, Plaintiff's claim is time-barred. (*E-Fab, supra,* 153 Cal.App.4th at p. 1315.) There is no way that Plaintiff's claim can be amended to change this result. Accordingly, Defendants' demurrer to the first cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

2. **Fourth Cause of Action-Violation of Constitutionally Protected Autonomous Privacy**

Section 1 of the California Constitution provides, "all people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const., art. I, § 1.)

Defendants argue this claim is time-barred and Plaintiff fails to allege sufficient facts to state a claim. (MPA, p.6:3.)

A claim alleging violation of the state constitutional right of privacy under California Constitution Article I, section 1 must be filed within two years of accrual. (See Code Civ. Proc., § 335.1; *Cain v. State Farm Mut. Auto. Ins. Co.* (1976) 62 Cal.App.3d 310, 313.)

Plaintiff filed her Complaint more than two years after her termination. Plaintiff alleges her privacy was violated by the following:

(1) Kheskani demanding to speak to her medical provider,

(2) The mandate to receive the vaccine or wear a mask,

(3) Conditioning future employment on proof of vaccination or masking.

Plaintiff again relies on Emergency Rule 9. However, as the FAC alleges, the events regarding the requirement to get vaccinated or wear a mask did not occur until 2021. For example, JAVAD sent the email regarding its "Vaccine Reward Program" on May 11, 2021. (FAC, ¶ 23.) The email regarding the Return to Work Policy was sent on May 24, 2021. Kheskani's demand to speak to Plaintiff's medical provider occurred in August 2021. Therefore, the claim did not accrue until 2021, which is after the applicable time for Emergency Rule 9. It appears the claim accrued in August 2021, but even if it accrued on the date of termination, her claim is time-barred because she did not file her complaint until January 25, 2024. Plaintiff does not allege or argue that any other tolling principles apply. There is no way that Plaintiff's claim can be amended to change this result. Accordingly, Defendants' demurrer to the first cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

3. **Fifth Cause of Action-Violation of the Bane Act (Civil Code section 52.1)**

"The Bane Act provides a civil cause of action against anyone who 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' [Citations.]" (*Simmons v. Super Ct.* (2016) 7 Cal.App.5th 1113, 1125.) "To state a cause of action under section 52.1, there must first be violence or intimidation by threat of violence. Second, *the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set*

forth in Civil Code section 51.7 or a group similarly protected by the constitution or a statute from hate crimes." (*Gabrielle A. v. County of Orange* (207) 10 Cal.App.5th 1268, 1290 [emphasis added].)

Defendants argue this claim is time-barred and Plaintiff fails to allege sufficient facts to state a claim.

A cause of action under the Bane Act that is based on a constitutional right is subject to the two-year statute of limitations for injury caused by the wrongful act of another. (See Code Civ. Proc., § 335.1; *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 760.)

Plaintiff's claim is based on Ashaee and Kheskani's conduct regarding the policy requiring employees to be vaccinated or wear a mask at work. As the Court stated above, this conduct did not occur until 2021. Thus, Plaintiff cannot rely on Emergency Rule 9 to toll this claim. Although it appears the claim accrued earlier, even if it accrued on the date of termination, Plaintiff filed her complaint more than two years after her claim accrued. Plaintiff does not allege or argue any other tolling principles apply. There is no way that Plaintiff's claim can be amended to change this result. Accordingly, Defendants' demurrer to the first cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

4. **Eighth Cause of Action-Harassment and Discrimination (Government Code section 12940, subdivision (j))**[23]

Government Code section 12940, subdivision (j)(1), prohibits employers from harassing employees because of their race, religious creed, national origin, gender, and age, among other things. (Gov. Code, § 12940, subd. (j)(1).) The elements of a FEHA harassment cause of action are (1) the plaintiff was a member of a protected class; (2) he or she was subjected to unwelcome harassment; (3) the harassment was based on the plaintiff's protected status; and (4) the harassment unreasonably interfered with his or her work performance by creating an intimidating, hostile, or offensive work environment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876 (*Thompson*).)

"[H[arassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other

[2] This claim is only asserted against JAVAD.
[3] While the claim is labelled harassment and discrimination, the allegations in the FAC and parties' arguments address it as the claim for harassment; the Court will address it accordingly.

personal motives. (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63 (*Janken*).) "[H]arassment focuses on situations in which the social environment of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communications an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 (*Roby*).) The plaintiff must show the harassment was sufficiently severe or pervasive so as to alter the terms and conditions of his or her employment. The conduct complained of "cannot be occasional, isolated, sporadic, or trivial; rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Hope v. California Youth Auth.* (2005) 134 Cal.App.4th 577, 588 (*Hope*).) Moreover, "a mere offensive utterance or…a pattern of social slights by either the employer or co-employees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for the purposes of section 12940, subdivision (a)." (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1381.)

"Whether the conduct of the alleged harassers was sufficiently severe or pervasive to create a hostile or abusive working environment depends on the totality of the circumstances." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869 (*Serri*).) The totality of the circumstances may include the frequency and severity of the conduct, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it reasonably interferes with work performance. (*Ibid*.) "Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing… and conduct [that] a reasonable person in the plaintiff's position would find severely hostile or abusive." (*Id*. at p. 870.)

Defendants argue Plaintiff fails to allege any facts that the conduct was severe or pervasive. (MPA, p.12:18-19.) In opposition, Plaintiff relies on the following conduct to support her claim:

(1) She was "humiliate[ed] during meetings for just trying to stay silent" (FAC, ¶ 16);

(2) She was called an "anti-vaxxer" who "f*cked things up" (FAC, ¶ 22);

(3) Defendants failed to meaningfully engage in an interactive process to determine if her religious accommodations could be granted without severe hardship (FAC, ¶ 31);

(4) She suffered demands that violated her religious beliefs (FAC, ¶ 33);

(5) She had her privacy violated and was removed from her projects then demoted and had her hours cut after requesting an accommodation (FAC, ¶¶ 36, 38);

(6) She was written up suddenly after 12 years (FAC, ¶ 37); and

(7) Defendants terminated her employment (FAC, ¶ 41).

While Plaintiff argues she alleges 12 years of harassment, the FAC does not support such an assertion. Plaintiff began working at JAVAD on January 11, 2010. (FAC, ¶ 12.) The first incident of alleged harassment did not occur until 2016, six years into her employment. (See FAC, ¶ 16.) Plaintiff's assertion of harassment since the beginning of her employment is further belied by her allegation that she viewed her manager and co-workers as a second family during her 11 years at JAVAD. (See FAC, ¶ 15.)

Plaintiff alleges she was humiliated during a team group lunch in 2016, where Ashjaee shared her disdain for a particular president. (FAC, ¶ 16.) Plaintiff was quiet but Ashjaee "began to interrogate her about who she was voting for, accused her of voting for the president [she] hated, then began to interrogate and humiliate Plaintiff about her religious beliefs. She went so far as to ask, 'what would you do if your daughter turned out gay' which had nothing to do with her job duties at JAVAD." (*Ibid.*) However, this appears to be an isolated incident as the next event occurred on April 23, 2021. (See *Hope, supra,* 134 Cal.App.4th at p. 588 [The conduct complained of "cannot be occasional, isolated, sporadic, or trivial; rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or generalized nature."].) On April 23, 2021, Ashjaee shared a disparaging comment about "anti-vaxxers." (FAC, ¶ 22.) However, Plaintiff does not allege that the comment was directed towards her or whether her personal beliefs were known at the time such that the comment would have been targeted towards her.

Plaintiff's claim for harassment cannot be based on her removal from projects, demotion, negative performance evaluation or termination. (See *Thompson, supra,* 186 Cal.App.4th at p. 879 [harassment does not include commonly necessary personnel management actions, such as hiring, firing, job assignments, promotion, demotion, performance evaluation, excluding from meetings, and laying off].) And given Javad's Return to Work Policy (FAC, ¶ 24), it appears JAVAD's failure to engage meaningfully in the interactive process regarding her religious exemption request and

Kheskani's follow up with Plaintiff regarding the denial of her exemption and whether she could wear another type of face covering falls within conduct necessary for the management of the business. (See *Janken, supra,* 46 Cal.App.4th at p. 63; *Thompson, supra,* 186 Cal.App.4th at p. 879.)

Plaintiff's reliance on *Pansini v. Burbank Unified Sch. Dist.* (2023) 2023 Cal.Super.LEXIS 3896, is without merit because it is a superior court order and not binding on this Court. (See Cal. Rules of Ct., Rule 8.1115; see also *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 ["a written trial court ruling has no precedential value"]; *In re Molz* (2005) 127 Cal.App.4th 836, 845 ["trial court decisions, of course, have no precedential authority"].) Moreover, any persuasive value is undercut by the fact that it is factually distinguishable. For instance, *Pansini* involved a policy that mandated employees be vaccinated with respect to COVID-19, whereas the Return to Work Policy did not mandate vaccination—it allowed people to stay unvaccinated but wear a mask when on site. And Plaintiff here does not allege she was deprived of accommodations that were offered to other employees similarly situated, which was central to the plaintiffs' claims in *Pansini*.

Accordingly, Defendants' demurrer to the eighth cause of action is SUSTAINED with 20 days leave to amend from the service of the final order.

5. **Ninth Cause of Action-Human Experimentation**

Health and Safety Code section 24170, et seq. ("Section 24170"), titled the "Protection of Human Subjects in Medical Experimentation Act") (the "Act"), was enacted in 1978 and was intended to "provide minimum statutory protection for the citizens of this state with regard to human experimentation and to provide penalties for those who violate such provisions." (Health & Safety Code, § 24171, subd. (d).) As relevant here, the Act provides that "no person shall be subjected to any medical experimentation unless the informed consent of such person is obtained." (*Id.*, Health & Safety Code, § 24175, subd. (a).)

Under the Act, "medical experiment" is defined as the "severance or penetration or damaging of tissues of a human subject or the use of a drug or device… electromagnetic radiation, heat or cold, or biological substance or organism, in or upon a human subject in the practice or research of medicine in a manner *not reasonably related* to maintaining or improving the health of the subject or otherwise directly benefiting the subject." (Health & Safety Code, § 24174, subd. (a) [emphasis added].)

Plaintiff has not alleged the masks represent a "practice or research of medicine in a manner not reasonably related to maintaining or improving health." (*Trantafello v. Med. Ctr. Of Tarzana* (1997) 182 Cal.App.3d 315, 320, fn. 2.) Moreover, while the claim is based on masking, Plaintiff's argument in opposition focuses almost entirely on the vaccine. Even if the claim was based on the vaccine, Plaintiff does not allege she was forced to receive the vaccine, in fact the FAC alleges Plaintiff exercised her choice to forego receiving it. Moreover, "[t]he applicable authorities-legal and scientific-clearly show that immunization is reasonably related to maintaining the health of the subject of the immunization as well as the public health." (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1148 [concluding that claims that "vaccines are 'medical experiments'" under section 24190, *et seq.* was "patently erroneous"].) Thus, Defendants' demurrer to the ninth cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

IV. Motion to Strike

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an

allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"While under Code of Civil Procedure section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281, internal citations omitted.)

Defendants seek to strike "certain allegations" that "are immaterial, impertinent, relate to claims not properly before the Court in this lawsuit, and are unduly prejudice to Defendants." (Notice of motion, p.2:13-15.)

B. **Analysis**

California Rule of Court, rule 3.1322, provides, "[a] notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, or defense. Specifications in a notice must be numbered consecutively." (Cal. Rules of Court, rule 3.1322(a).)

Defendants move to strike portions of several paragraphs, however, their notice fails to identify the paragraphs or the portions subject to this motion in violation of the Rules of Court. However, Defendants identify the specific portions in the MPA and Plaintiff responded on the merits. Therefore, there is no prejudice to Plaintiff and the Court will disregard this defect since it does not affect the substantial rights of the parties. (See Code Civ. Proc., § 475.)

Defendants move to strike the following portions of the FAC,

(1) Paragraph 13: "yet she received no official promotion or pay raise",

(2) Paragraph 15: "However, JAVAD overwhelmed Plaintiff with a workload of 2-3 jobs",

(3) Paragraph 16: "One such humiliating experience took place in 2016",

(4) Paragraph 16: "As the HR Manager, many employees would confide in Plaintiff about the hostile work environment they were experiencing at the hands of warehouse management", and

(5) Paragraph 49: "yet she received no official promotion or pay raise."

Plaintiff directly relies on Paragraph 16: "One such humiliating experience took place in 2016" in her first cause of action and the demurrer has been sustained to that claim. Therefore, the motion to strike that portion of the FAC is DENIED as MOOT.

Defendants move to strike portions of Paragraph 13 and 49 on the ground that they are untimely. Defendants argue it "would be required to expend substantial time and resources investigating allegations that date back many years, for some over a decade, and on which Plaintiff cannot recover as a matter of law." (MPA, p.15:12-14.) However, the portions of Paragraphs 13 and 49 do not form the basis of any claim (i.e., Plaintiff is not seeking to recover on the lack of a raise or promotion). Rather, they are background allegations regarding Plaintiff's work experience. Thus, Defendants' motion to strike portions of Paragraphs 13 and 49 is DENIED.

Defendants move to strike a portion of Paragraph 15 on the ground that "[she] has not alleged that the Company discriminated against her by assigning her work. The only potential purpose for including this allegation in the FAC is to create prejudice against Defendants." (MPA, p.15:17-19.) Plaintiff does not seek to recover on the amount of work assigned to her and the allegation is relevant to Plaintiff's work experience. Thus, Defendants' motion to strike the portion of Paragraph 15 is DENIED.

Similarly, Defendants move to strike the first sentence of Paragraph 16 on the ground that they "are irrelevant to Plaintiff's claims in the FAC. Moreover, any potential relevancy is outweighed by the potential prejudice if the allegations are included." (MPA, p.15:23-25.) However, that is an evidentiary determination that goes beyond the scope of this motion. Furthermore, motions to strike should be used sparingly, and not as a procedural device to accomplish a "line item veto" of

allegations in a pleading, as appears to be the case here. (See *PH II, Inc, supra,* 33 Cal.App.4th a p. 1683.) Thus, Defendants' motion to strike the portion of Paragraph 16 is DENIED.

Calendar Line 10
Case Name: *SERENITY MSO LLC et al vs PALO ALTO MIND BODY et al*
Case No.: 24CV432080

Before the Court is Defendants' Palo Alto Mind Body ("PAMB") and M Rameen Ghorieshi MD, MPHs' petition to compel arbitration. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a dispute between brothers. Plaintiff Reza Ghorieshi is the principal owner of plaintiff Serenity MSO, LLC, and Rameen is the CEO and principal owner of PAMB. Rameen provides psychiatric services through PAMB. In essence, Reza alleges his work funneled patients to his brother, first in his individual capacity and later through Serenity, and that his brother underpaid him for that work.

On February 29, 2024, Plaintiffs filed their Complaint, asserting (1) breach of contract, (2) quantum meruit, (3) restitution/unjust enrichment, (4) accounting, (5) conversion, (6) promissory fraud, and (7) violation of Penal Code, § 496. On April 24, 2024, Defendants filed the instant motion, which Plaintiffs oppose. By order dated June 21, 2024, the Court sustained Defendants' demurrer with leave to amend. The Court also conducted a hearing then an informal discovery conference on Defendants' motions to quash Plaintiff's subpoenas to Wells Fargo Bank and Bennett H. Weinblatt and for sanctions, issuing an order regarding those motions on August 19, 2024.

The present motion concerns Defendants' petition to compel arbitration, which was filed after the aforementioned activity on August 20, 2024. The parties agreed to stay discovery briefly until resolution of this motion.

Defendants allege Reza, PAMB, and Insperity PEO Services, L.P. ("Insperity") entered an arbitration agreement when PAMB engaged with Insperity to provide payroll and human resource relation service to PAMB. The three-way agreement is entitled "Mutual Arbitration Agreement" and provides that Insperity, Reza, and PAMB "mutually agree to resolve by arbitration Covered Claims", which the agreement defines to include "(a) all claims or disputes related to or arising out of . . .my employment, or the termination of my employment with [PAMB], and (b) all claims that . . .[PAMB]

may have against me, and/or (c) all claims that I may have against Covered Persons." "Covered Persons" are defined to include PAMB and "its officers, directors, employees, affiliates or agents."

It is undisputed that Serenity is not a party to this agreement. However, Defendants argue Serenity can be held to its terms through Reza.

II. Legal Standard and Analysis

In a motion to compel arbitration, the Court must determine "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." (*Bruni v. Didion* (2008) 160 Cal. App. 4th 1272, 1283 (citations omitted).) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]" (*Bruni,* 160 Cal. App. 4th at 1282 (citations omitted).)

Here, there is an agreement to arbitration between and amongst PAMB, Reza, and Insperity, that includes a delegation clause. Code of Civil Procedure section 1281.2 states: "the court shall order a matter to arbitration if it determines that there is an agreement to arbitrate and (1) the agreement has not been waived or (2) the agreement has not been revoked." (*Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) There is a presumption against waiver, and "when allocation of a matter to arbitration. . .is uncertain, we resolve all doubts in favor of arbitration." (*Cinel,* 206 Cal.App.4th at 1389; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.) Plaintiffs argue Defendants' heavy litigation activity thus far constitutes waiver.

"In determining a waiver, a court can consider (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been *substantially* invoked and the parties were *well into preparation of the lawsuit* before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps

[e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party." (*St. Agnes medical Center v. PaciviCare of California* (2003) 31 Cal.4th 1187, 1196 (emphasis added; internal citations and quotations omitted).)

Here, there has already been a demurrer litigated to an order, which sustained without leave to amend some aspects of Plaintiffs' complaint, and discovery motion practice that resulted in Defendants being ordered to produce certain documents Defendants found to be sensitive to their business and patients. However, the cases where courts have found an implied waiver involved substantially more litigation than what has taken place thus far in this case. The Court cannot find on this record Defendants waived their right to arbitrate.

However, the Court finds Code of Civil Procedure section 1281.2 (c) precludes arbitration here. That section states:

> A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. (Code Civ. Proc § 1281.2(c).)

Here, plaintiff Serenity is not a party to the "Mutual Arbitration Agreement." The Court cannot, as Defendants request, simply waive its hands over Reza and Serenity and find that they are one in the same. The parties agree that some of Plaintiffs' claims relate to services Reza provided in an individual capacity and some relate to services Reza provided through Serenity, which was not even formed at the time Reza and PAMB entered the "Mutual Arbitration Agreement" with Insperity. If the Court were to send part of this case to arbitration and keep part of it here, there is a risk of inconsistent rulings, which is precisely what section 1281.2(c) is designed to protect against.

Accordingly, Defendants' petition to compel arbitration is DENIED pursuant to Code of Civil Procedure section 1281.2(c).

Calendar Lines 11-12
Case Name: *Edges Electrical Group LLC v. travelers Casualty Insurance Company of America*
Case No.: 24CV438828

Before the Court is Defendant Travelers Casualty Insurance Company of America's ("Travelers") demurrer and motion to strike portions of Plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

According to the complaint, on December 12, 2014, Defendant, Nhu M. Pham, doing business as Green Design Indoor/Outdoor Plantscape, entered a written agreement with CPS Holding Company to lease property located at 1131 Auzerais Avenue in San Jose ("Property"). (Complaint, ¶ 6.)

On November 1, 2018, Ed Auzerais LLC ("Ed") purchased the Property from CPS Holding Company and master leased it to Plaintiff Edges Electrical Group LLC ("Edges"). Pham's lease remained in force and he thus became Plaintiff's subtenant. The lease was amended on February 1, 2019 and January 1, 2020 and prevented Pham from causing damage and/or waste to the Property and from modifying the Property without Plaintiff's consent. (Complaint, ¶¶ 8-10, 28.)

In connection with the lease, Pham procured an insurance policy from Travelers. Policy no. 680-0G972304-21-42 provided liability coverage and coverage for damage to the Property for the period of January 9, 2021, through 12:01 a.m. on January 9, 2022 ("Policy"). Pham and Plaintiff were both named insureds under the Policy. (Complaint, ¶¶ 11, 14.)

On February 8, 2022, Pham vacated and relinquished possession of the Property to Plaintiff. Soon after, Plaintiff discovered extensive damage to the Property, including dilapidation throughout the building, holes in exterior walls, damaged roll-up door, damaged gate, and a damaged fence. Plaintiff alleges substantially all this damage occurred prior to January 9, 2022. (Complaint, ¶ 12.)

Plaintiff notified Travelers of the damage and sought compensation. On September 18, 2023, Plaintiff filed an online claim with Travelers against the Policy, and on February 27, 2023, facilitated Travelers' inspection of the Property. Thereafter, Travelers failed to keep Plaintiff informed as to the status of the claim and failed to give Plaintiff a complete copy of the Policy. Eventually, on April 29, 2024, Travelers denied the claim stating Plaintiff was not an insured and the damages were not of the nature covered by the Policy. (Complaint, ¶¶ 16-20.)

Plaintiff filed its complaint on May 10, 2024, alleging (1) breach of insurance contract, (2) breach of covenant of good faith and fair dealing, and (3) breach of lease.

II. Legal Standards

A. Demurrer

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. Motion to Strike

The court may, upon a motion made pursuant to Code of Civil Procedure section 435:

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc. § 436.)

On a motion to strike, "the court treats as true the material facts alleged in the complaint, as well as any facts which may be implied or inferred from those expressly alleged." (*Washington Int'l Ins. Co. v. Superior Court* (1998) 62 Cal. App. 4th 981, 984, n. 2.) A motion to strike is the proper vehicle to attack a punitive damages claim where the facts alleged do not rise to the level of fraud, malice or oppression. (Code. Civ. Proc. §§ 435-436; *Truman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.)

III. Analysis

A. Demurrer

1. Improper Joinder

Relying on *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880 ("*Royal Globe*"), Travelers contends it is improperly joined in this action since Plaintiff may not sue both the insurer and the insured in the same lawsuit. In opposition, Plaintiff argues not only that *Royal Globe* is inapposite, but that *Royal Globe* was explicitly overruled by *Moradi-Shalal v. Fireman's Fund Ins. Company* (1988) 46 Cal.3d 287, ("*Moradi-Shalal*"). The Court agrees with Plaintiff, in part.

In *Royal Globe,* the plaintiff was a third-party claimant who sued the insurer of property where she was injured. (*Royal Globe*, *supra*, 23 Cal.3d 880 at p. 884.) Plaintiff contended the insurer violated Insurance Code section 790.03(h)(5) by failing to settle her claim promptly and fairly and section 790.03(h)(14) by advising her not to obtain the services of an attorney. (*Id.* at p. 884.) The *Royal Globe* court decided that section 790.03(h) permitted third-party plaintiffs to sue insurers for unfair acts or practices proscribed by the statute. (*Id.* at pp. 884–885.) However, the Court imposed the procedural prerequisite of "conclusion" of the action between the injured third-party and the insured, explaining that a joint trial against the insured for negligence and the insurer for statutory violation would defy both the letter and spirit of the Evidence Code section 1155. (*Id*. at p. 891.)

While the *Moradi-Shalal* court overruled *Royal Globe's* decision to permit third-party statutory bad faith actions, it left intact not only administrative remedies, but also traditional common law theories of private recovery against insurers. These include "fraud, infliction of emotional distress, and (as to the insured) either breach of contract or breach of the implied covenant of good faith and fair

dealing." (*Moradi-Shalal, supra*. 46 Cal.3d at p. 305.) Thus, first-party bad faith actions were unaffected by *Moradi-Shalal*. *Moradi-Shalal* also did not dispense with the requirement of concluding the underlying action, but rather superimposed upon the *Royal Globe* "predetermination" rule the additional condition precedent in section 790.03 actions of final judicial determination of the insured's liability. (*Id*. at pp. 305-306) Thus, *Moradi-Shalal* held that "the insured's liability must be judicially determined before a *Royal Globe* action can be brought." (*Id*. at p. 313.)

Nonetheless, *Royal Globe* and *Moradi-Shalal* are inapposite as this is a first-party action brought by the insured Plaintiff based on contractual obligations of Nhu M. Pham (the insured) and Travelers (the insurer). Travelers insists Plaintiff is a third-party claimant since it seeks to hold Pham liable for the damages and recover from Travelers for the acts of its insured.

Royal Surplus Lines Ins. Co. v. Ranger Ins. Co. (2002) 100 Cal.App.4th 193 ("*Royal Surplus*") analogous and instructive. There, the owner of a residential apartment complex entered a written agreement with a contractor for renovations. Their agreement required the contractor to obtain a general liability insurance policy naming the owner as an additional insured. Later, the owner was sued by the tenants for injuries sustained during and as the result of the construction project. The owner tendered the claims to the contractor and the insurer who refused and/or failed to respond. Among other claims, the owner alleged breach of contract and breach of the implied covenant of good faith against the insurers. The appellate court reversed a judgment of dismissal after the trial court sustained the insurer's demurrer on the ground of misjoinder without leave to amend. *Royal Surplus* noted that *Royal Globe's* holding was limited to injured third-party claimants and not applicable to additional insureds who are first-parties and have standing to sue an insurer for breach of contract and breach of the implied covenant. (*Royal Surplus, supra*, at p. 200, internal citation omitted.) The court further explained that Evidence Code section 1155 is not a concern in a suit by an insured against an insurer. (*Id*. at p. 201 citing *California State Auto Ass'n. Inter-Ins. Bureau v. Superior Court* (1986) 184 Cal.App.3d 1428, 1433 ("*California State Auto*).)

Here, the complaint alleges:

- In connection with its lease, Defendant Pham procured insurance from Travelers; Policy of insurance bearing number 680-0G972304-21-42.

- Pursuant to the policy, Travelers provided various types of coverage, including without limitation, liability coverage and coverage for damage to the Property, with a period of January 9, 2021, through 12:01 a.m. on January 9, 2022.
- Plaintiff is a named insured under the policy.
- After becoming aware of the Covered Damage, plaintiff notified Travelers and submitted an online claim on September 18, 2023.
- Plaintiff facilitated Traveler's inspection of the Property on or about February 27, 2024.
- Travelers failed to keep Plaintiff apprised of the status of its claim and failed to provide a complete copy of the policy despite repeated requests.
- On April 29, 2024, Travelers denied the claim.

(Complaint, ¶¶ 11, 14, 16-20.)

Travelers denies Plaintiff is a named insured and submits the supporting declaration of Julie Senerth authenticating an attached copy of the policy no. 680-0G972304. The Court cannot consider Ms. Senerth's declaration and the attached copy of the policy because a demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 [in ruling on a demurrer, a court may not consider declarations, matters not subject to judicial notice, or documents not accepted for the truth of their contents].) For purposes of ruling on a demurrer, all facts pleaded in a complaint are assumed to be true. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Therefore, in ruling on this demurrer, the Court assumes the truth of Plaintiff's allegation that it is a named insured in the Traveler's policy no. 680-0G972304 and thus has privity of contract and standing to sue Travelers. Since Plaintiff is not a third-party claimant, *Royal Globe's* prohibition against suing an insured and insurer in the same action does not apply. (*Royal Surplus, supra*, 100 Cal.App.4th at p. 200; see also *California State Auto, supra*, 184 Cal.App.3d at p. 1433.)

Consequently, the Court finds Travelers was not improperly joined in this action and its demurrer on this ground is OVERRULED.

2. Failure to Allege Sufficient Facts Establishing Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing

A breach of contract cause of action requires: (1) a contract, (2) plaintiff's performance of the contract or her excuse from performance, (3) breach of the agreement by the defendant, and (4) injury to plaintiff due to said breach. (*Abdelhamid v. Fire Ins. Exchange* (2010) 182 Cal.App.4th 990, 999.) To assert a breach of contract cause of action, the plaintiff may attach the contract, set forth the terms of the contract at issue verbatim, or plead the legal effect of the contract. (*Construction Protective Services, Inc. v. TIG Specialty* (2002) 29 Cal.4th 189, 198-199.)

Every contract contains an implied covenant of good faith and fair dealing that neither party will do anything to interfere with the other party's right to receive the benefits of the agreement. (*Howard v. American Nat'l Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 528.) The precise nature and extent of the duty depends on the nature and purpose of the underlying contract and the parties' legitimate expectations arising from the contract. (*Ibid*.) "A breach of the implied covenant of good faith is a breach of the contract … and breach of a specific provision of the contract is not … necessary to a claim for breach of the implied covenant of good faith and fair dealing." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.)

Here, Travelers contends the complaint is uncertain and fails to allege the existence of a contract because (1) a copy of the Policy is not attached to the complaint, (2) no terms of the purported Policy is provided to establish coverage, and (3) it fails to establish what is owed under the policy that was not paid and/or why it was wrong not to be paid. Travelers adds that Plaintiff's failure to attach the Policy or plead its terms voids its claim for breach of the implied covenant of good faith and fair dealing since Plaintiff must first demonstrate existence and breach of a contract.

Plaintiff alleges the existence of the policy, identifies it by policy number, identifies the coverage type, identifies the primary named insured, and identifies the policy year. (Complaint, ¶ 11.) Plaintiff thus alleges the legal effect of the contract by alleging its nature, scope, and the parties' obligations. Failure to attach a contract or set out its terms verbatim is not fatal to a breach of contract cause of action. (*Miles v. Deutsche Bank National Trust Co*. (2015) 236 Cal.App.4th 394, 402.)

Accordingly, Travelers' demurrer to Plaintiff's causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing are OVERRULED.

B. Motion to Strike Portions of the Complaint

Travelers moves to strike the punitive damage prayer and a portion of paragraph 26 that pertains to its conduct, arguing the complaint does not allege sufficient facts to support a punitive damage award and the conclusory allegations fail to satisfy pleading requirements entitling a party to such recovery under Civil Code section 3294.

"In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damages statute, Civil Code §3294." (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal. App. 4th 53, 63.) Civil Code section 3294 allows a plaintiff to recover punitive damages "[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code §3294(a).) Punitive damages are not available in California for simple breaches of contract, no matter how willful. Rather, the breach must have been tortious, and the breaching party must have "been guilty of oppression, fraud, or malice". (Civ. Code § 3294; see also *Silberg* v. *California Life Ins. Co.*, (1974) 11 Cal. 3d 452, 462-63; *Mock* v. *Michigan Millers Mutual Ins. Co.*, (1992) 4 Cal. App. 4th 306, 327; *Patrick* v. *Maryland Casualty Co.*, (1990) 217 Cal. App. 3d 1566, 1575.) Put another way, punitive damages are recoverable only where the defendant "acted with the intent to vex, injure, or annoy." (*Neal* v. *Farmers Ins. Exch.*, (1978) 21 Cal. 3d 910, 922.)

Further, since the covenant of good faith and fair dealing is essentially a contract term that aims to effectuate the contractual intentions of the parties, 'compensation for its breach has almost always been limited to contract rather than tort remedies.'" (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43.) The California Supreme Court "recognizes only one exception to that general rule: tort remedies are available for a breach of the covenant in cases involving insurance policies." (*Ibid.*) "In the insurance policy setting, an insured may recover … punitive damages if there has been oppression, fraud, or malice by the insurer (see Civ. Code, § 3294)." (*Id.* at pp. 43–44.)

"'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294(c)(1).) "'Oppression' means despicable conduct that

subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code § 3294(c)(2).) "'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code § 3294(c)(3).) "Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down upon and despised by reasonable people. Such conduct has been described as having "the character of outrage frequently associated with crime." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal. App. 4th 702, 715.)

Here, Plaintiff's allegation malice and oppression allegation is made only in its second cause of action for breach of implied covenant of good faith and fair dealing against Travelers. Yet, the complaint seeks punitive damages against all Defendants jointly and severally. (Complaint, ¶ 26.) Therefore, it is unclear whether Plaintiff seeks punitive damages for each cause of action, including claims for contractual breaches that clearly cannot support an award of punitive damages.

In any event, the Complaint fails to sufficiently allege that Travelers' conduct, to the extent it is independent of Plaintiffs' contract claims, was fraudulent or despicable and was carried out with the intent to injure Plaintiff or with a willful and conscious disregard of Plaintiffs' rights.

Accordingly, Travelers' motion to strike portions of the complaint IS GRANTED WITH LEAVE TO AMEND within 20 days.

Calendar Line: **14**
Case Name: *MICHAEL HERTZ vs MARK A. OLIVEREZ et al*
Case No.: 23CV422621

Before the Court is Partition Referee Simon Offord's application requesting the Court determine (1) whether this case is now stayed pending Defendant's appeal (and, if so, to what extent) and (2) whether the Partition Referee or Defendant should collect rents from the property pending the appeal. The Court received these requests through Mr. Offord's ex parte application, held a brief hearing, then ordered the parties to brief these issues to assist the Court in making a final decision. The Court received and studied the parties' papers, and, in the interim, Defendant's opening appellate brief. Having considered these materials, the parties' various arguments, and the record in this case, the Court now issues its ruling.

I. Background

It is undisputed that Plaintiff Michael Hertz and Defendant Mark A. Oliverez each own 50% of a quadruplex located at 112 University Avenue, Los Gatos, California 95030-6059 ("Property"). Also undisputed is that Defendant manages the property, including collecting rents from the four units and a fifth un-permitted unit. Plaintiff alleges Defendant is breaching his fiduciary duty and engaging in fraud and conversion of the rents. Plaintiff therefore seeks to partition the property.

Defendant, through prior counsel, first stated he would stipulate to an interlocutory judgment and requested that the Court continue Plaintiff's petition to permit the parties to work on a stipulation. No stipulation was forthcoming, Defendant's counsel withdrew, and, while Defendant was in pro per, the Court granted Plaintiff's petition for an interlocutory judgment of partition and appointment of partition referee.

Defendant then moved ex parte to ask the Court to correct or vacate the interlocutory order, arguing the Court failed to follow the recently enacted Real Property Act (Code of Civil Procedure section 874.311, et. seq.). This was the first time Defendant ever raised this issue. In fact, all other representations to the Court were that Defendant agreed partition should take place but wanted to work on the nuances of the interlocutory judgment. The Court denied Defendant's ex parte application, finding it procedurally faulty.

Defendant then appealed the Court's interlocutory judgment, and the Partition Referee moved ex parte for the above-described orders from the Court.

After thorough review of the parties' papers, the Court finds it appropriate to reconsider, on its own motion, its orders entering the interlocutory judgment and denying Defendant's ex parte application to vacate or modify that interlocutory judgment.

II. Analysis

Code of Civil Procedure section 1008 (c) provides that if the court "at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion." (*Farmers Ins. Exch. v. Sup. Ct.* (2001) 218 Cal.App.4th 96, 106-07.) There is no time limitation on this inherent power; the court may change interim orders based on a change of law at any time before final judgment is entered. (*Blake v. Ecker* (2001) 93 Cal.App.4th 728, 739.) In considering whether to reconsider a prior order, the court should examine the extent of preparation in the case, the proximity of a trial date, and "the materiality of the change in the law and the potential for prejudice to any of the parties." (*Phillips v. Sprint PCS* (2012) 209 Cal. App. 4th 758, 769.)

Here, the law changed before Plaintiff's petition for an interlocutory judgment or this case was even filed. However, no party briefed the Court on the change in law until Defendant's ex parte application to vacate or modify the interlocutory order and the Court received Defendant's opening appellate brief. By the time of Defendant's ex parte application, Defendant had already engaged in significant tactics to delay partition, which the Court found was (and finds still is) inevitable, whether Defendant agrees or not. However, it is clear Code of Civil Procedure section 874.311, et. seq. applies to this case, and the Court is obligated to follow the law. The Court thus exercises its discretion to reconsider its own orders both to follow the law and to expedite the timeframe within which these parties can have their matter determined.

Plaintiff does not deny Code of Civil Procedure section 874.311, et. seq.'s applicability to this case on legal grounds but instead incorrectly repeats that Defendant stipulated to the interlocutory judgment the Court eventually entered. Defendant's prior counsel plainly counseled Defendant to enter a stipulation, but those counsel withdrew from representing Defendant, and Defendant never did stipulate. Thus, there is no stipulation as Plaintiff repeatedly (and erroneously) claims.

In addition, there will be no change to the Court's ultimate findings that (1) these parties each own 50% of the Property and (2) the Property should be partitioned by sale. However, Code of Civil Procedure section 874.311, et. seq. requires that the Court determine the fair market value of the Property and provide notice of that fair market value to all parties before the partition moves forward.

The Court therefore vacates its order denying Defendant's ex parte application to vacate or modify the interlocutory judgment for partition and appointment of a partition referee. The Court denies Defendant's motion to vacate, but grants Defendant's motion to modify the interlocutory judgment to include the fair market value of the Property.

Under the Real Estate Partition Act, the Court can affix the fair market value by (1) the parties stipulating to the fair market value, (2) appointing an appraiser, or (3) holding a hearing. The Court orders the parties to meet and confer and appear at the hearing with a proposed plan for the Court to determine fair market value.

Presumably, this order will moot the question of whether this matter is stayed pending appeal. But it does not necessarily moot the question of who should be collecting the rents while the issue of fair market value is being determined. The Court finds it most appropriate to modify the interlocutory judgment to identify the Partition Referee as the person who should collect and hold the rents and manage the distribution of any funds from the rent proceeds to maintain the Property. The parties are ordered to prepare a modified interlocutory judgment to reflect these orders.