**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: 06-11-24 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 | 23CV426612<br>Hearing: Demurrer | Bathena Dixon vs General Motors, LLC | Moot. FAC filed. |
| LINE 2 | 23CV426612<br>Motion: Strike | Bathena Dixon vs General Motors, LLC | Moot. FAC filed. |
| LINE 3 | 23CV428312<br>Motion: Strike | Dennis Kyne, Jr. vs Dennis Kyne, Sr. | Notice appearing proper and good cause appearing, the unopposed motion to strike is GRANTED. 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. |
| LINE 4 | 20CV372951<br>Motion: Summary Judgment/Adjudication | Tonya Hunter vs County of Santa Clara et al | See Tentative Ruling. Court will prepare the final ruling. |
| LINE 5 | 23CV410594<br>Motion: Compel | Cahalan Properties LLC et al vs Pacific Construction & Management et al | Continued to July 30, 2024 at 9 a.m. |

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

| | | | |
|---|---|---|---|
| LINE 6 | 20CV364355<br>Motion: Stay | Caixing XIE et al vs XIAOQIN WU | The motion for stay is moot, as the trial was already held. |
| LINE 7 | 22CV404055<br>Motion: Approve Good Faith Settlement | JOSEPH CORNAGGIA et al vs GLOBAL LEISURE INVESTMENT HOLDINGS, INC. et al | Off calendar, as already granted. |
| LINE 8 | 23CV424771<br>Hearing: Petition Compel Arbitration | Tuan Tran vs Pinnacle Property Management Services, LLC et al | See Tentative Ruling. Defendants shall submit the final order. |

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

| | | | |
|---|---|---|---|
| LINE 9 | 24CV430216<br>Hearing: Petition Compel Arbitration | John Doe vs Palo Alto Networks, Inc. | Defendant moves to compel Plaintiff to arbitrate his claims. Plaintiff opposes the motion claiming that the arbitration agreement was procured through fraud. Plaintiff presents no evidence of fraud, however. His claim relies on the fact that he also signed on the same date an offer letter which he claims superseded the arbitration agreement. In the opposition, Plaintiff states, "[a]s Plaintiff attests in his concurrently-filed Declaration, he executed the ADR Agreement only in reliance upon the Offer Letter and its language concerning its superseding all other agreements." Motion p7. First, Plaintiff failed to file a Declaration with his opposition. But even if he had filed it, this does not show fraud perpetrated by Defendant. (If anything, this statement suggests that Plaintiff was trying to mislead Defendant, by signing the agreement to arbitrate only because he thought he could get out of it.) For the reasons laid out in Defendant's papers, the motion to compel is GRANTED and the case stayed pending arbitration. Defendant 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 | 21CV390993 Hearing: Compromise of Minor's Claim | Alejandro Perez Carrillo et al vs Ismael Cisneros et al | The GAL and counsel for GAL shall appear at the hearing so that the court can conduct voir dire and determine that the amended settlement is being entered into knowingly. |
| LINE 11 | 23CV416455 Motion: Quash | N. Charles Podaras vs Valerie Weirauch et al | Withdrawn |
| LINE 12 | 23CV416455 Hearing: Demurrer | N. Charles Podaras vs Valerie Weirauch et al | See Tentative Ruling. Moving Defendants shall submit the final order. |
| LINE 13 | | | |
| LINE 14 | | | |
| LINE 15 | | | |
| LINE 16 | | | |
| LINE 17 | | | |

**- oo0oo -**

**Calendar line 4**
**Case Name:** *Hunter v. County of Santa Clara et al.*
**Case No.:** 20CV372951

## I. Factual and Procedural Background

Plaintiff Tonya Hunter ("Plaintiff") brings this action against defendant Santa Clara County ("Defendant" or "the County").

Plaintiff is a Black woman in her fifties who worked for the County for nearly 35 years. (UMFs 1-2.) For almost 20 of those years, Plaintiff served as a Confidential Secretary to four different clerks. (UMF 3.) Plaintiff received positive performance reviews for more than three decades and earned multiple raises. (UMFs 5-6.) Plaintiff's supervisor, Megan Doyle ("Doyle") was pleased with Plaintiff's work performance and colleagues described her as professional and helpful. (UMFs 7, 9, 10.) In early 2018, Plaintiff considered retiring but Doyle persuaded her to delay retirement. (UMFs 11, 13.)

In July 2018, Plaintiff learned that three white employees were given promotions that were created for them with no competition or open application process, each with a pay raise. (UMFs 16-19.) On July 23, 2018, Plaintiff emailed Doyle, who is also white, regarding these three promotions, stating that the pay disparity did not seem fair. (UMFs 20-22.) Following the email exchange, Plaintiff and Doyle had an in-person discussion where Plaintiff expressed that Doyle was not doing enough to help her move to a higher paying position. (UMF 23.) Thereafter, Doyle acknowledged points, but failed to notify superiors to rectify the situation. (UMFs 24-25.)

In addition to advocating for her own equal pay, Plaintiff advocated for equal pay on behalf of another Black employee, Camille Johnson ("Johnson"). (UMF 26.) Doyle initially refused to upgrade Johnson's pay until Plaintiff noted that white workers were provided with the benefit in similar circumstances. (UMF 28.) In a separate incident, Curtis Boone ("Boone"), a white County employee, used ageist and racist language against Plaintiff, including referring to Plaintiff's work process as "outdated" and saying "fo' shizzle my nizzle" to Plaintiff, who promptly notified Boone this was unacceptable to say. (UMFs 31-32.)

In August or September 2018, Doyle began the process of creating a new Program Manager I ("PMI") position, keeping Plaintiff in mind for the role. (UMF 34.) Plaintiff was notified of the open position immediately because her responsibilities as a Confidential Secretary included drafting the PMI duty statement, creating the job bulletin, and proposing supplemental interview questions. (UMFs 35, 38, 42.) Doyle agreed that Plaintiff drafting the PMI duty statements did not violate any policies because it was within her scope of duties and that it did not give her an advantage in the hiring process. (UMFs 39, 40.) Plaintiff applied for the PMI position, went through two rounds of interviews, and was awarded the position in January 2019. (UMF 45.)

Doyle had created the PMI position quickly to have it in place before she left on maternity leave and as result, confusion about the PMI and Confidential Secretary job duties arose. (UMF 49.) This confusion created tension between Plaintiff and Johnson, who took the role of Confidential Secretary. (UMF 50.) When Doyle returned, Plaintiff discussed these

issues with her and Doyle admitted that Johnson handled big deal issues poorly. (UMFs 55, 56.)

On October 4, 2019, Doyle informed Plaintiff that Johnson had filed a whistleblower complaint against her and that Plaintiff would be placed on immediate paid administrative leave while the claim was investigated. (UMF 58.) The investigation revealed that Johnson claimed Plaintiff learned of the PMI interview questions ahead of time, Plaintiff accessed the NEOGOV system, Plaintiff pressured Johnson to move the recruitment more quickly, Plaintiff communicated with Johnson about specifics of the PMI recruitment, and Plaintiff had the hiring manager, Chanthavy Sivongxay review her application. (UMF 63.)

On December 12, 2019, Plaintiff was asked to attend a meeting with Assistant County Counsel, Robert Coehlo ("Coehlo") and Doyle. (UMF 68.) Plaintiff was notified that Doyle was going to recommend that Plaintiff's employment be terminated. (UMF 72.) Plaintiff was given the option to resign or going through the County's disciplinary process. (UMF 73.) Coehlo informed Plaintiff that she engaged in conduct to benefit herself in the PMI hiring process, giving her an unfair competitive advantage over other candidates, and taking steps to cover up doing so. (UMF 75.) Thereafter, Coehlo threatened Plaintiff, including telling her that she would be jeopardizing her retirement benefits if she engaged in conduct that would be a felony in the course of her employment. (UMF 82.) Plaintiff then resigned out of a fear of losing her pension and threats of criminal prosecution. (UMFs 94, 96, 97.)

On February 23, 2021, Plaintiff filed her First Amended Complaint ("FAC") against the County, asserting the following causes of action:

1) Constructive Termination;
2) Retaliation;
3) Race Discrimination; and
4) Failure to Prevent Discrimination.

On December 22, 2023, Plaintiff filed a motion for summary judgment as to the FAC. On February 29, 2024, Defendant filed a joint opposition and motion for summary judgment as to the FAC. Plaintiff then filed an opposition and reply to Defendant's papers.

## II. Legal Standards

### a. Summary Judgment Generally

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

A plaintiff moving for summary judgment "bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no

defense' thereto." (*Aguilar, supra,* 25 Cal.4th at p. 850.) "Once the plaintiff … has met that burden, the burden shifts to the defendant … to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant … shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).)

A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* at 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra,* 25 Cal.4th at p. 856.) Thus, the court views the evidence in the light most favorable to Defendants and construes their submissions liberally while strictly scrutinizing Plaintiff's showing. (*Richards v. Sequoia Ins. Co.* (2011) 195 Cal.App.4th 431, 435-436.) "Summary judgment is a drastic remedy to be used sparingly, and any doubts about the propriety of summary judgment must be resolved in favor of the opposing party." (*Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 17.)

## III. Defendant's Objections

Objection 1 is OVERRULED. While Plaintiff has failed to sufficiently comply with California Rules of Court, Rule 3.1350, subd. (d)(1)(A),[1] the Court declines to sustain an objection to the entire separate statement on this ground. (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]; see also *Holt v. Brock* (2022) 85 Cal.App.5th 611, 619 ["'The court's power to deny summary judgment on the basis of failure to comply with California rules of Court, rule 3.1350 is discretionary, not mandatory.'"].) For the same reason, Objection 2 stating Plaintiff failed to comply with Rules of Court, Rule 3.1350, subdivision (d)(3)[2] is OVERRULED. Plaintiff is reminded to comply with all California Rules of Court going forward.

Objection 3 is OVERRULED. Defendant objects to UMF Nos. 11-13, 15, 26-30, 33, 34, 42, 45, 48-51, 58-62, 68, 98, and 99 on the ground that Plaintiff improperly cites to the allegations of the operative pleading. While Plaintiff does cite to the FAC for some of her UMFs, she also cites to evidentiary support. The Court relies only on Plaintiff's evidence, and

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[1] Rule 3.1350, subd. (d)(1)(a): **(1)** The Separate Statement of Undisputed Material Facts in support of a motion must separately identify:
**(A)** Each cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion.

[2] Rule 3.1350, subd. (d)(3): **(3)** The separate statement must be in the two-column format specified in (h). The statement must state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column. Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers.

not the allegations of the pleading, to support each UMF. Moreover, where Plaintiff has only cited to the FAC, the Court declines to rely on the UMF.

Objections 4-50 are OVERRULED. The Court declines to rule on Objections 51-86 since the Court did not consider the material objected to in rendering its ruling. (See Code Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

## IV. First Cause of Action – Constructive Termination

Constructive discharge is a materially adverse employment action under the California Fair Employment and Housing Act ("FEHA"). (*Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253.) Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. (*Ibid*.) "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Ibid.*, [internal quotations omitted], citing *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (*Turner*).) "For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner*, *supra*, at p. 1251.)

### a. Plaintiff's Burden

Plaintiff has the initial burden of establishing every element of each of her causes of action. As part of her initial burden, Plaintiff must show a causal nexus between the adverse employment actions and the County's discriminatory motive. (*Martin v. Board of Trustees of California State University* (2023) 97 Cal.App.5th 149, 162.)

Plaintiff[3] argues that the County knowingly created intolerable working conditions by: 1) promoting white employees ahead of black employees; 2) permitting ageist, racist language against Plaintiff; 3) only placing Plaintiff on administrative leave; and 4) threatening Plaintiff.

#### i. Promotion of White Employees

Plaintiff asserts that she always performed her job duties well and that the County acknowledged the quality of her work through performance reviews and pay increases, but failed to promote her until she brought unwanted attention to their discriminatory pattern of behavior. (Memo, p. 10:4-6, UMF 7, citing Doyle Depo, p. 16:17-23 [stating Plaintiff has a

[3] For future reference, the Court requests that both parties use consistent citations, i.e., citing to the UMF supported by the relevant evidence, when citing to evidentiary support in their memorandum of points and authorities. (See e.g., *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 75 [It is a party's "duty to direct the court to evidence that supports their claims. It is not the court's duty to rummage through the papers to construct or resuscitate their case."].)

keen eye for typos and producing written materials]; UMF 9, citing Colunga Depo,[4] p. 26:24-25, 35:7-10 [where colleague Colunga describes Plaintiff as "extremely professional" and "highly competent"]; UMF 10, citing Ex. 9, p. SCC_001865.)

Plaintiff contends that despite her qualifications, her non-Black colleagues were promoted over her. To support this assertion, Plaintiff relies on an email exchange with Doyle, Doyle's deposition responses, and Colunga's deposition response. The email exchange indicates that Plaintiff felt that pay disparity between her and the three employees who were promoted did not seem fair, but she does not indicate the race of the three employees. (Ex. 10, p. SCC_001423.) Similarly, the Doyle Deposition states that Plaintiff felt the pay disparity was unfair, but does not indicate that the unfairness was based on race. Moreover, Doyle states she took the email to mean that Plaintiff was upset that other executive administrative assistants moved to different positions. (Ex. 2, Doyle Depo., p. 36:1-7.) Colunga's deposition responses merely indicate that the three promoted employees are white. (See Ex. 1, Colunga Depo., p. 75:3-13.) Plaintiff also cites to page 39 and 42 of the Doyle Deposition. There, Doyle states that she had a conversation with Plaintiff and the "gist of [that] conversation" was that Doyle was not doing enough to help her and that other executives were helping their confidential secretaries get different positions that higher pay. (Ex. 2, Doyle Depo., p. 39:20-24.) Page 42 indicates that while Doyle felt Plaintiff had a point in being so upset, she also acknowledged that there were fewer executive administrative assistant positions throughout the county because those positions had been converted to other classifications. (*Id.* at pp. 42:25-43:4.)

Nothing in Plaintiff's cited evidence indicates that the other three employees were promoted over Plaintiff based on race or that Plaintiff notified her employer that she felt she was not given a promotion based on her race. (See e.g., *Kodwavi v. Intercontinental Hotels Group Res., Inc.* (N.D.Cal. 2013) 966 F.Supp.2d 971, 988 [plaintiff provided no evidence that his complaints to employer were based on his national origin]; *Jurado v. Eleven-Fifty Corp.* (9th Cir. 1987) 813 F.2d 1406, 1411 [plaintiff did not show that he opposed changes as discriminatory but merely opposed changes for personal reasons].)[5] Thus, Plaintiff does not proffer sufficient evidence to support her first argument.

**ii. <u>Racist/Ageist Comments</u>**

Plaintiff next contends that Boone made "what [was] perceived as ageist language when referring to Ms. Hunter's work processes as 'outdated' . . . and that he was going to reconfigure the 'old' processes when she retired." (Memo, p. 11:1-5, citing Ex. 2, Doyle Depo., p. 62:14-17 and 63:8-15.) In her deposition, Doyle indicates that Plaintiff did complain that Boone called her work processes "outdated" and that he was going to reconfigure the old processes when Plaintiff retired, but that she did not hear anything in that complaint related to age and that they were related to her processes, not her age. (Doyle Depo., pp. 62:14-63:15.) Plaintiff proffers no further evidence that Boone, or any other employee, made ageist comments directed at Plaintiff's age. Moreover, there is no evidence that Plaintiff complained to a supervisory employee about age-related comments. (See e.g., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1047 (*Yanowitz*) ["complaints about personal grievances or vague

[4] Luara Colunga is a colleague and longtime work friend of Plaintiff. (See Memo, p. 3:10.)
[5] *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*) ["Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes."].)

or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct"]; *Garcia-Paz v. Swift Textiles, Inc.* (D.Kan. 1995) 873 F.Supp. 547, 560 ["Employees often do not speak with the clarity or precision of lawyers. At the same time, however, employers need not approach every employee's comment as a riddle, puzzling over the possibility that it contains a cloaked complaint of discrimination"].)

Additionally, Plaintiff asserts that Boone stated "fo' shizzle my nizzle" and that Plaintiff promptly notified Boone that this was unacceptable. (Memo, p. 11:6-7, citing Ex. 1, Colunga Depo., p. 115:5-10.) While Plaintiff proffers evidence that this incident occurred, she does not proffer evidence that she notified her employer of this race-related comment. Moreover, in the Doyle Deposition cited by Plaintiff, Doyle specifically indicates that Plaintiff never complained to her that Boone "used what could be considered a racist slang in conversation with [Plaintiff.]" (Ex. 2, Doyle Depo., p. 63:18-25.) Therefore, Plaintiff does not proffer sufficient evidence to support her second argument.

**iii. Plaintiff's Administrative Leave**

In her third instance of alleged discrimination, Plaintiff contends that she emailed Doyle a list of issues she had with Johnson; Doyle admitted that there were "big deal issues" that Johnson handled poorly; yet Doyle did nothing to address the concerns. (Memo, p. 11:19-12.) Thereafter, Plaintiff became the only employee placed on paid administrative leave pending an investigation into Johnson's whistleblower complaint about Plaintiff. (*Id.* at p. 11:13-14.) To support this, Plaintiff directs the Court to: 1) the list of issues she emailed to Doyle; 2) Doyle's deposition testimony stating that some of the issues were "big deals;" and 3) Doyle's deposition testimony stating she does not recall if she took any action as a result of Plaintiff's email but that she may have had a verbal conversation with the involved parties; and 4) the letter notifying Plaintiff she was being placed on paid administrative leave.

It is not clear to the Court why other parties would be placed on paid administrative leave in a whistleblower complaint made solely against Plaintiff. If Plaintiff is implying that Johnson should have also been placed on leave because of an email she sent to Doyle, the Court does not find this argument persuasive. Moreover, Plaintiff does not indicate that she filed a whistleblower action against Johnson that would warrant Johnson being placed on leave. Furthermore, Plaintiff proffers no evidence that no other employees have been placed on paid administrative leave or that being placed on leave was not the typical protocol after a whistleblower complaint is filed. Accordingly, as to the third instance of discrimination, Plaintiff fails to proffer sufficient evidence.

**iv. Threatening Plaintiff**

As to the fourth instance, Plaintiff argues that in the December 12, 2019 meeting after she was placed on leave, she was told that Doyle intended to recommend her for employment termination. Thereafter, Mr. Coehlo threatened Plaintiff's pension and issued vague, unmerited, and bad-faith criminal threats against her. (Memo, p. 11:17-20.)

To support her argument, Plaintiff provides evidence from the Coehlo Deposition where he states that Doyle is going to recommend Plaintiff for termination. In the deposition, Coehlo also explains that Doyle values Plaintiff's service, they would like to explain why she is being recommended for termination, and give her a unique choice to either resign or go

through the County's standard disciplinary process. (Ex. 3, Coehlo Depo., p. 67:1-11.) At other points of the Coehlo Deposition, he states: 1) he did not tell Plaintiff she committed a felony or that he thought a felony had been committed; 2) he informed her that a change in pension legislation included a new provision regarding felonies and retirement benefits; 3) he was not a criminal lawyer and did not know if what she had done was a felony or not; and 4) that the approach to the meeting as a whole was to make sure Plaintiff could make an informed decision and had whatever information would be useful to her. (Ex. 3, Coehlo Depo., pp. 93, 96.)

Plaintiff merely provides evidence of what was said at the meeting but there is no evidence of Coehlo or Doyle's intent or any indication that they were intending to threaten Plaintiff's pension or threaten her with criminal prosecution. Consequently, the Court does not find evidence of bad faith or improper motive in connection with Coehlo's statements at the December 12, 2019 meeting and thus, Plaintiff fails to proffer sufficient evidence as to the fourth instance.

Plaintiff argues that the above four instances forced her to resign because the County created a corporate culture of discrimination, and management permitted an atmosphere of racial prejudice to infect the workplace. (Memo, p. 11:25-28.) Plaintiff asserts that both her and Colunga "believed [her] forced resignation was racially motivated and that she was forced to retire due to Coehlo's threats of criminal prosecution. (*Id.* at pp. 11:28-12:3.) As explained above, Plaintiff does not proffer sufficient evidence to support the instances of discrimination or threats of criminal prosecution. Therefore, as to the first cause of action, Plaintiff fails to meet her burden and the burden does not shift to Defendant.

## V. Second Cause of Action – Retaliation

"[T]o establish a prima facie case of retaliation under FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link between the protected activity and the employer's action." (*Yanowitz, supra,* 36 Cal.4th at p. 1042.) "'In order to engage in a protected opposition activity . . ., a plaintiff must make an overt stand against suspected illegal discriminatory action.'" (*Id.* at p. 1067.) Moreover, "[s]tanding alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination." (*Id.* at p. 1047.)

Plaintiff asserts there is no triable issue of fact as to the second cause of action because the County subjected her to threats, administrative leave, and constructive termination after she engaged in protected activity.

### a. Plaintiff's Protected Activity

Plaintiff argues she engaged in protected activity when she repeatedly complained about racially discriminatory pay discrepancies and promotion decisions. Similar to above, Plaintiff relies on her emails to Doyle regarding the promotion of the three employees. As the Court noted, Plaintiff did not indicate that she felt she was not promoted because of her race or that the three other employees had been promoted because of their race. (See e.g., *Hawkins v.*

*City of Los Angeles* (2019) 40 Cal.App.5th 384, 393 [complaining about internal personnel matters is not protected activity].) Plaintiff also relies on the fact that after she was promoted to PMI, she had issues with Johnson, which Doyle did nothing about. Again, there is no evidence that this was due to Plaintiff's protected categories. Plaintiff also asserts that she advocated on behalf of Johnson to receive fair compensation. To support this specific contention, Plaintiff merely cites to the allegations in her FAC. (*Regional Steel Corp. v. Liberty Surplus Ins. Corp.* (2014) 226 Cal.App.4th 1377, 1388 ["To defeat summary judgment, the plaintiff cannot rely on allegations of the complaint and must show specific facts."].) However, even if Plaintiff had cited relevant evidence, the County proffers evidence that Plaintiff did not advocate for equal pay on behalf of Johnson, thus creating a triable issue of material fact. (See Response to UMF 27, citing Doyle Decl., ¶¶ 6-8, Exs. 7-8; Akin Decl., Ex. 27, Anderson Decl. Exs. 30-32.)

Based on the foregoing, Plaintiff does not sufficiently establish that she engaged in protected activity[6] and therefore, fails to meet her burden as to the second cause of action.

## VI. Third Cause of Action – Race Discrimination

To establish a prima facie case of discrimination, "'generally, the plaintiff must provide evidence that (1) [s]he was a member of a protected class, (2) [s]he was qualified for the position [s]he sought or was performing competently in the position [s]he held, (3) [s]he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstances suggests discriminatory motive.'" (*Horne v. District Council 16 Internat. Union of Painters & Allied Trades* (2015) 234 Cal.App.4th 524, 534.)

Plaintiff's third cause of action is premised on the same four instances detailed above. As the Court explained, Plaintiff has not sufficiently established that she was discriminated against because of her race or age. (See e.g., *Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 383 [instances are not covered by FEHA where "'it is not conduct that gives rise to discrimination on the basis of any of the protected categories under FEHA'"].) Thus, Plaintiff fails to meet her burden as to the third cause of action.

## VII. Fourth Cause of Action – Failure to Prevent Discrimination

A necessary element of a claim of failure to prevent discrimination from occurring is dependent on actual discrimination. (See e.g., *Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1315-1316 [citing numerous cases stating the same]; *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925, fn. 4.)

As the Court found above, Plaintiff fails to meet her burden to show a triable issue of material fact as to actual discrimination based on a protected category. Thus, the fourth cause of action fails as a matter of law.

Based on the foregoing, Plaintiff's motion for summary judgment is DENIED.

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[6] Plaintiff also argues that she was retaliated against when she was placed on administrative leave. However, she was placed on administrative leave after Johnson filed a whistleblower complaint against Plaintiff and there is no evidence that this was due to a protected category or that it was not protocol to place an employee on leave after a complaint is filed.

## VIII. Defendant's Opposition/Cross-Motion for Summary Judgment

In response to Plaintiff's motion, the County has filed a joint opposition/cross-motion for summary judgment.

### a. Defendant's Request for Judicial Notice

In support of its motion, the County requests judicial notice of eleven documents. All of these documents are submitted as evidence and attached to various declarations. Thus, the Court finds it unnecessary to take judicial notice of them. Accordingly, the request is DENIED. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

### b. *McDonnell Douglas* Standard

"In analyzing an employee's claim for unlawful discrimination under the FEHA, California courts have adopted the three-stage, burden-shifting test the United States Supreme Court established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [(*McDonnell Douglas*)] . . . 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.'" (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 964 (*Swanson*).)

"At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. . . . While the plaintiff's prima facie burden is not onerous, he must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a prohibited discriminatory criterion. If the plaintiff meets this initial burden, a rebuttable presumption of discrimination arises." (*Swanson, supra*, 232 Cal.App.4th at pp. 964-965 [internal citations and quotations omitted].)

"The burden then shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to raise a genuine issue of fact and to justify a judgment for the employer, that its action was taken for a legitimate nondiscriminatory reason." (*Swanson, supra*, 232 Cal.App.4th at p. 965 [internal citations and quotations omitted].)

"Finally, if the defendant presents evidence showing a legitimate, nondiscriminatory reason, the burden again shifts to the plaintiff to establish the defendant intentionally discriminated against him or her. The plaintiff may satisfy this burden by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action." (*Swanson, supra*, 232 Cal.App.4th at p. 965 [internal citations and quotations omitted].)

That said, the *McDonnell Douglas* test was developed for use at trial, not in summary judgment proceedings. (*Swanson, supra*, 232 Cal.App.4th at p. 965.) "As explained above, California's summary judgment law places the initial burden on a moving party defendant to either negate an element of the plaintiff's claim or establish a complete defense to the claim. The burdens and order of proof therefore shift under the *McDonnell Douglas* test when an employer defendant seeks summary judgment." (*Id.* at pp. 965-966.) "An employer may meet

its initial burden on summary judgment, and require the employee plaintiff to present evidence establishing a triable issue of material fact, by presenting evidence that either negates an element of the employee's prima facie case, or establishes a legitimate nondiscriminatory reason for taking the adverse employment action against the employee." (*Id.* at p. 966; see also *Board of Trustees v. Sweeney* (1978) 439 U.S. 24, 25 ["employer's burden is satisfied if he simply 'explains what he has done' or '[produces] evidence of legitimate nondiscriminatory reasons'"].)

"'To avoid summary judgment on the second of these two grounds, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence that the employer acted with discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.'" (*Swanson*, *supra*, 232 Cal.App.4th at p. 966 [also stating plaintiff "need only present evidence establishing a triable issue on the specific element the [defendant] challenges" and need not prove her entire case].)

In this case, Defendant moves for summary judgment by establishing a legitimate nondiscriminatory reason for taking the adverse action against Plaintiff.

### c. First Cause of Action - Constructive Discharge

Defendant first argues that Plaintiff's assertion of a constructive termination is disputed and that Plaintiff resigned after a whistleblower investigation resulted in her being recommended for termination. (See the County's Memo, p. 21, subd. 4.) Additionally, Defendant asserts that the first cause of action fails as a matter of law for two reasons: 1) the claim is barred by the Government Claims Act; and 2) even if it is not barred by the Government Claims Act, the County is immune from a constructive discharge claim.

#### i. Dispute of Constructive Discharge

"In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. . . . 'There appears to be no disagreement in the cases that one of the essential elements of any constructive discharge claim is that the adverse working conditions must be so intolerable that any reasonable employee would resign rather than endure such conditions." (*Turner*, *supra*, 7 Cal.4th at p. 1247.)

In this case, the FAC alleges the constructive discharge was based on: lack of promotion, comments about her age and race, being placed on administrative leave, and being forced to retire or lose her pension and possible criminal charges. The County addresses each of these in turn.

##### 1. Lack of Promotion

First, the County contends that Plaintiff's assertion of race-based promotions, specifically that Plaintiff complained about white employees being promoted over her, is disputed. To support this, the County proffers evidence that two of the promotions occurred more than a decade before Plaintiff filed suit and before Doyle was Clerk of the Board. (Carrillo Decl., ¶¶ 9, 10.) As to the third promotion, the employee applied for and obtained the promotional position after the position was published to County employees. (Carrillo Decl., ¶ 8.) Plaintiff did not apply for the position. (*Ibid.*) Further, the County argues, Plaintiff's complaints to Doyle did not include claims of racial bias and she never mentions race or

discrimination to Doyle. (See the County's Memo, p. 16:8-13, citing Zeccola Decl., Ex. 10, 11, 31; Hunter Decl., ¶¶ 9-11; Doyle Decl., ¶¶ 9-12, 36-38.) Defendant also asserts that once Plaintiff told Doyle she was interested in a promotion, Doyle took steps to help Plaintiff do so. (Anderson Decl., Ex. 27, pp. 60:11-62:16, 76:1-77:11, 84:10-85:3 [Plaintiff's Deposition].) That Plaintiff thereafter did receive the PMI promotion, but wrongfully misused her access to the recruitment process to do so. (Akin Decl., ¶¶ 2-16, Exs. 2-5; Doyle Decl., ¶¶ 22-29, 36-38, Exs. 12-17.) Thus, Defendant meets its burden of providing evidence that the constructive discharge was not due to a lack of promotion because of Plaintiff's protected categories, and the burden now shifts to Plaintiff.

In opposition, Plaintiff submits the same evidence she relied on to support the same contentions in her own motion for summary judgment, including the email she sent to Doyle, Doyle's deposition responses, and Colunga's deposition responses. (See Plaintiff's Opposition, p. 3:19-26; AMFs, 4-8.) As the Court explained above, nothing in the cited evidence indicates that the other three employees were promoted over Plaintiff based on race or that Plaintiff notified her employer that she felt she was not given a promotion based on her race. Moreover, Plaintiff does not further address the County's evidence that the promotions happened a decade before Plaintiff's complaint was filed and before Doyle was in the supervisory role. Thus, Plaintiff fails to meet her burden.

**2. <u>Race and Age-Related Comments</u>**

The County next contends that Plaintiff's assertion that her co-worker made race or age-related comments are insufficient to amount to discrimination and her complaints regarding the comments were unrelated to her resignation. To support the argument, the County states that Boone's comments about Plaintiff's out-of-date processes had nothing to do with her race or her age. (Hunter Decl., ¶ 15, Boone Decl., ¶¶ 4, 5.) Defendant further asserts that there is no evidence that Plaintiff's co-workers played any role in Doyle's decision to discipline Plaintiff, which was based on the whistleblower investigation findings that Plaintiff misused her position to obtain the PMI promotion. (Doyle Decl., ¶¶ 23-29.) The County further asserts that while Plaintiff claims that Boone quoted an inappropriate song lyric, Plaintiff did not report the comment to anyone and that the comment would not amount to substantial evidence that the reasons for plaintiff's termination were pretextual. (See the County's Memo, p. 20:16-24, citing *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 866-868.) Therefore, the County meets its burden of establishing that race and age-related comments were not the reason for action taken against Plaintiff, and the burden shifts to Plaintiff.

In opposition, Plaintiff fails to address the age and race-related comments made by Boone. Therefore, she fails to meet her burden as to the second instance.

**3. <u>Administrative Leave and Resignation</u>**

To further support their burden that the action taken against Plaintiff was nondiscriminatory, Defendant asserts that Plaintiff was subject to the County's Charter and Merit System Rules and Protections which states that a notice of suspension or removal will be provided to the employee in writing and specify when it becomes effective. (Carrillo Decl., ¶¶ 4-7, Ex. 20.) The County contends that Hunter was notified that if Doyle issued a letter recommending her for release, she would have the opportunity to challenge the release through a disciplinary process, including a hearing before the personnel board. (The County's Memo, p. 22:3-8, citing Anderson Decl., Ex. 29.) Plaintiff was also notified that she could resign instead of explaining her actions to the review board and that she was offered the opportunity to hear the evidence that the whistleblower investigation found and to state her position to Doyle. (*Id.*

at p. 22:8-9.) Rather than review the evidence or go before the personnel board, Plaintiff voluntarily resigned, and it was therefore not a constructive discharge. (*Id.* at p. 22:11-13.)

Additionally, the County contends that even if Plaintiff established that she was constructively terminated, the employment action does not entitle her to summary judgment because she does not show that the action was based on a protected category since the whistleblower investigation refutes a connection between a protected category and her resignation. (*Id.* at p. 22:14-17, citing *Guz, supra*, 24 Cal.4th at p. 358; citing also Akins Decl., ¶¶ 2-16, Exs. 2-5; Doyle Decl., ¶¶ 22-29, 36-38, Exs. 12-17.) Based on the foregoing, the Court finds that Defendant has sufficiently met its burden.

In opposition, Plaintiff again relies on the same evidence as in her own motion to argue that she was pressured to resign and threatened with criminal prosecution which forced her to resign. (See Plaintiff's Opposition, p. 8, subds. G, H.) As noted above, Plaintiff's evidence is insufficient to establish that she was threatened with criminal prosecution or that she was forced to resign due to promotions or comments made based on her protected categories. Thus, Plaintiff fails to meet her burden.

**ii. <u>Government Claims Act</u>**

The County asserts that to the extent Plaintiff alleges that Labor Code section 1102.5 applies to her constructive discharge claim, the assertion fails because Plaintiff failed to comply with the Government Claims Act.

The FAC alleges that the first cause of action is brought under both FEHA and Labor Code section 1102.5. (See FAC, p. 9 and ¶ 28.)

"Before suing a public entity, the plaintiff must present a timely written claim for damages to the entity. (Gov. Code, § 911.2; *State of California v. Superior Ct.* (2004) 32 Cal.4th 1234, 1239 (*Bodde*), but see Gov. Code, § 905 [itemized exceptions].)" (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208 (*Shirk*) [overruled by statute on other grounds].) "Timely claim presentation is not merely a procedural requirement, but is, as this court long ago concluded, a condition precedent to plaintiff's maintaining an action against defendant, and thus an element of the plaintiff's cause of action. Complaints that do not allege facts demonstrating either that a claim was timely presented or that compliance with the claims statute is excused are subject to a general demurrer for not stating facts sufficient to constitute a cause of action." (*Shirk, supra*, 42 Cal.4th at p. 209 [internal citations and quotations omitted], citing *Bodde, supra*, 32 Cal.4th at pp. 1240, 1245.)

The County asserts that 1) the FAC does not allege compliance with the Government Claims Act (Anderson Decl., Ex. 23, ¶ 9 [Plaintiff's FAC indicating she filed with the EEOC and DFEH]); and 2) Plaintiff never presented any claim (Jones Decl., ¶¶ 2-7 [indicating Jones works at the Records Division and conducted a search to see if Plaintiff filed a claim and that her investigation revealed she did not present a claim]; Ex. 34 [database search results]). Thus, the County sufficiently negates one of the elements of Plaintiff's constructive discharge claim. In opposition, Plaintiff apparently concedes this point, as she does not address the argument. (See *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410 [failure to oppose creates inference that motion is meritorious].)

To the extent that Plaintiff's constructive discharge claim is brought under the FEHA, Courts have held that it was the legislature's intent to exempt actions under the FEHA from the Government Claims Act requirements. (*Garcia v. L.A. Unified Sch. Dist.* (1985) 173

Cal.App.3d 701, 711.) Thus, Plaintiff need not file a claim for an action brought under the FEHA.[7]

Based on the foregoing, while Defendant has met its initial burden, Plaintiff fails to meet her burden as to the first cause of action.

**d. Second and Third Causes of Action – Retaliation and Discrimination**

Defendant contends that Plaintiff fails to provide sufficient evidence of discriminatory conduct based on a protected category. The County relies on the same instances as above and disputes: race-based promotions; complaints of race-based pay; race and age-based comments; and termination based on race. Given that the Court has addressed three of these issues above, it will focus on Defendant's evidence regarding complaints of race-based pay.

The County asserts that whether Plaintiff complained about unfair race-based pay is disputed. It argues that Plaintiff's retaliation claim is "founded in part on the assertion that Doyle forced [Plaintiff] to retire because [she] had advocated for Johnson to received additional WOOC pay, which Doyle allegedly refused because Johnson is African American." (The County's Memo, p. 18:4-6.) The County contends that Plaintiff's own messages refute this, and it was *Doyle* who wanted to provide Johnson with WOOC pay, Plaintiff advised Doyle that Johnson was not eligible, and then Doyle agreed to provide it once Plaintiff confirmed the requirements were met. (Doyle Decl., ¶¶ 6-8, Exs. 7, 8.) The text messages cited by Defendant indicate that Doyle asked if she should work Johnson out of class and Plaintiff responded no because she did not meet the requirements. (*Ibid.*) Thus, Defendant proffers sufficient evidence that the reason for action taken against Plaintiff was nondiscriminatory because the instances alleged by Plaintiff were not based on a protected category.

In opposition, Plaintiff again fails to address the argument directly. However, Plaintiff does cite to evidence indicating that she advocated for *eliminating* the need for WOOC pay by taking over Johnson's role, refuting Plaintiff's own assertion that she advocated for higher pay for Johnson. (See Plaintiff's Opposition, p. 6, citing AMF 31.) As a result, Johnson appears to then have filed a claim against Plaintiff. Thus, Plaintiff does not proffer sufficient evidence that Defendant's stated reasons are untrue or pretextual.

As to the remaining three arguments, as noted above Defendant met its burden, and Plaintiff failed to meet her burden of establishing Defendant's stated reasons for the action

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[7] The County asserts an additional argument that it is immune from Plaintiff's constructive discharge claim. Specifically, Defendant argues that to the extent Plaintiff "now attempts to assert that this claim is not simply a FEHA retaliation claim (or a claim under Labor Code section 1102.5), such a '*Tameny* claim' fails as a matter of law because constructive discharge in violation of a public policy is a judicially created claim that cannot be asserted against a public entity." While Defendant is correct that Plaintiff may not bring a *Tameny* claim against a public entity, Defendant fails to direct the Court to where Plaintiff is asserting that the first cause of action is a *Tameny* claim. (*Ross v. San Francisco Bay Area Rapid Transit Dist.* (2007) 146 Cal.App.4th 1507, 1514 ["Since a public entity has no direct liability for its acts or omissions *except as provided by statute* (§ 815, subd. (a)), it follows that in the case of a *Tameny* claim against a public entity, the entity is liable, if at all, only vicariously, and that it is immune from liability to the extent that its employees are immune."][emphasis original].)

taken against Plaintiff were untrue or pretextual. Therefore, Plaintiff fails to meet her burden as to the second and third causes of action.[8]

### e. Fourth Cause of Action – Failure to Prevent Discrimination

A necessary element of a claim of failure to prevent discrimination from occurring is dependent on actual discrimination. As the Court found above, Plaintiff fails to meet her burden to show a triable issue of material fact as to actual discrimination based on a protected category and Defendant sufficiently met its burden as to each cause of action. Thus, the fourth cause of action fails as a matter of law.

Plaintiff asserted six objections to Defendant's evidence. These objections are OVERRULED.

Based on the foregoing, Defendant has proffered sufficient evidence to establish a nondiscriminatory reason for action taken against Plaintiff and Plaintiff has not met her burden. Thus, Defendant's motion for summary judgment is GRANTED.

## IX. Conclusion and Order

Plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED. The Court shall prepare the final order.

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[8] As noted above, claims of retaliation and discrimination under FEHA must be based on a protected category.

**Calendar line 8**
**Case Name: Tuan Thanh Tran v. Pinnacle Property Management Services, et al.**
**Case No.: 23CV424771**

Defendants Pinnacle Property Management Services (Pinnacle) and Cushman & Wakefield of California (collectively "Defendants") bring a motion to compel arbitration. Plaintiff contends that the agreement is both procedurally and substantively unconscionable and that the unconscionability is so pervasive that the offending provisions cannot be severed.

**Legal Standard**

A heavy presumption weighs the scales in favor of arbitrability, *Cione v. Foresters Equity Servs., Inc*. (1997) 58 Ca1.App.4th 625, 642, and courts will indulge every intendment to give effect to arbitration proceedings. *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1109.

Plaintiff contends that the agreement is both procedurally and substantively unconscionable, such that it cannot be enforced. "'[T]he doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.'" *Sanchez v. Valencia Holding Co., LLC,* (2015) 61 Cal. 4th 899, 910 (citation omitted). Both must be present, though not in the same degree, for the court to exercise its discretion to refuse to enforce an arbitration agreement. *Id*. This sliding scale approach means that the more substantively oppressive the agreement is, less evidence of procedural unconscionability is needed, and vice versa. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.

**Procedural Unconscionability**

Plaintiff claims the agreement is procedurally unconscionable because it was a condition of his employment, and thus an adhesion contract. Adhesive contracts under California law are at least minimally procedurally unconscionable, even where, as here, the arbitration clause is neither hidden nor buried. *De Leon v. Pinnacle Property Management Services, LLC* (2021) 72 Cal. App. 5th 476, 485-86. Plaintiff claims it was more than minimally unconscionable because it was also not translated into Vietnamese for him and because he was told he had to sign it. The Court finds the agreement, by virtue of its adhesive nature, is minimally procedurally unconscionable. That it was in English and not translated for Plaintiff does not add to its unconscionability given that there is no evidence that Plaintiff indicated he did not understand the agreement and never asked for the agreement to be translated for him.

**Substantive Unconscionability**

"Substantive unconscionability exists when a term is so one-sided as to shock the conscience. . . [and] 'may take various forms,' but typically is found in the employment context when the arbitration agreement is 'one-sided' in favor of the employer without sufficient justification.' (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 177 [185 Cal. Rptr. 3d 151].)" *De Leon*, 72 Cal. App. 5th at 486. A mandatory employment arbitration agreement must, among other things, provide for more than minimal discovery and

provide for all of the types of relief that would otherwise be available in court. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 102.

"The substantive inquiry considers whether the overall bargain is overly harsh or unreasonably one sided. (*Armendariz, supra*, 24 Cal.4th at p. 114.) California courts have stated the standard variously, defining it as, for example: so one sided as to shock the conscience (*Pinnacle, supra*, 55 Cal.4th at p. 246); unduly oppressive (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925 [216 Cal. Rptr. 345, 702 P.2d 503]); and unfairly one sided (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 [130 Cal. Rptr. 2d 892, 63 P.3d 979])." *Torrecillas v. Fitness Internat., LLC* (2020) 52 Cal. App. 5th 485, 496.

Plaintiff contends that the agreement is substantively unconscionable because it has a one-year statute of limitations and provides an unreasonable limit on discovery. Plaintiff cites to the *De Leon* case where appellate court the affirmed the lower court's finding of unconscionability for an almost identical arbitration agreement. In that case, the Defendant conceded that the one-year statute of limitations limit was unconscionable because Plaintiff had asserted claims with a longer limitations period. Here, Defendants argue that this is not an issue because Plaintiff brought his claims within the one-year period and because of the continuing violation doctrine. See Reply at pp5-6, and fn. 4. The cases cited by Defendants on this point (Reply p 6) are not persuasive. One is a federal decision, and therefore, not binding. The other is not in the context of an arbitration agreement, and thus not on point. The one-year statute of limitations provision does not appear to provide for all types of relief that would be available in court, as required. Because this exact provision has been found to be unconscionable under *De Leon,* this Court is bound to follow that decision.

Plaintiff also argues that the provisions limiting his right to discovery is an unreasonable restriction of that right. The agreement allows for the propounding of 20 interrogatories and 3 depositions. The arbitrator may permit additional discovery if a party demonstrate "substantial need." Ex. 1 attached to Defendants' Motion. There is nothing inherently unconscionable about limits on discovery and many cases have allowed them. While it is true that the *De Leon* case found this specific limitation unreasonable, Defendants are correct that in that case the Plaintiff had filed more claims of greater complexity and had established a specific evidentiary need for more discovery. Here, Plaintiff's while counsel asserts that more is needed, and identifies specific witnesses he wants to depose, he offers no specifics as to why the various documents or witnesses are necessary. If a counsel's claims of greater need alone were sufficient, it would basically undo the requirement of an evidentiary factual showing. Given that the arbitrator can order more discovery upon a showing of need, the Court fails to see how this provision "shocks" the conscience, as required for a showing unconscionability.

**Severability**

The final issue is whether the unconscionable provisions can be severed from the overall agreement. Severence is generally appropriate unless unconscionability "permeates" the agreement. *Armendariz,* 24 Cal. 4th at 122. Civil Code section 1670.5, subdivision (a) provides that when a court finds a clause of a contract unconscionable, "it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 121-122 (2000). Here, the unconscionable

provision cited by Plaintiff does not permeate the entire contract, as the basic purpose is to provide an efficient means of dealing with employment related claims. Even if both the statute of limitations provision and the discovery provision were unconscionable, those two provisions together would not permeate the entire contract, and both could be severed out.

Accordingly, Plaintiff is compelled to arbitration, but the statute of limitations clause is severed out from the agreement. Defendants' motion is GRANTED and the case is stayed pending arbitration. Defendant shall submit the final order.

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**Calendar line 12**
**Case Name: Podaras v. Weirauch, et al.**
**Case No.: 23CV416455**

Plaintiff N. Charles Podaras ("Plaintiff") filed his First Amended Form Complaint ("FAC") against defendants Valerie Weirauch, Tasha McDonald, Barry Vickrey, Marsha Dyslin, and Does 1-25 (collectively "Defendants"). Defendants Vickrey and Dyslin ("Moving Defendants") now bring a demurrer to the FAC asserting that Plaintiff has failed to assert causes of action against them.

**FACTS**

The factual allegations of the FAC indicate that in early 2019, Plaintiff moved onto a property in San Jose ("the Property"), owned by Weirauch. The parties verbally agreed that Plaintiff could reside at the Property. Plaintiff and Weirauch agreed that Plaintiff would help take care of the house and dogs; however, Plaintiff did not believe he was an employee. Plaintiff alleges there was no understanding that he would no longer be allowed to reside at the Property if Weirauch no longer wanted assistance with the dogs or house.

On April 28, 2022, Weirauch texted Plaintiff that he needed to have his belongings out by Saturday. On April 30, 2022, Weirauch repeatedly asserted that Plaintiff needed to leave and eventually began yelling at Plaintiff. Plaintiff closed his door to end the conversation. Thereafter, Weirauch sent Plaintiff multiple demands to move out and threatened to call law enforcement if he did not move out.

On May 11, 2022, Weirauch and McDonald knocked on Plaintiffs door and handed him a paper that stated he had 3 days to move out. On May 14, 2022, Plaintiff responded to the letter indicating he had rights under California's laws and requested she stop pressuring him to leave. After this, Plaintiff lost WiFi access and hot water pressure.

On May 23, 2022, Plaintiff received notice of Weirauch's CHRO/TRO legal proceeding against him. He discovered he was no longer allowed back in the home where his belongings were, including medication and medical devices. On October 25, 2022, the CHRO was denied and the TRO was lifted. Plaintiff was informed that his belongings were packed up in Weirauch's garage without Plaintiff's permission.

On November 18, 2022, Plaintiff visited the Property on an arranged appointment to get his belongings. He was denied entry by Vickrey and Dyslin. Upon leaving, Vickrey followed Plaintiff almost 70 yards down the street and indicated he was a lawyer. Plaintiff alleges that Vickrey retired from his law career in 2016.

On December 30, 2022, Plaintiff requested San Jose Police escort him to the Property to retrieve belongings.

On December 18, 2023, this Court (Hon. Rosen) issued its order sustaining Vickrey and Dyslin's demurrer to Plaintiff's initial complaint and providing 20 days leave to amend. On January 10, 2024, Plaintiff filed his FAC. On February 15, 2024, defendants Bryan Vickrey

and Marsha Dyslin (collectively, "Moving Defendants") filed a demurrer to the FAC on the following grounds:

1) The FAC is untimely per the Court's December 5, 2023 Order;
2) Plaintiff did not perfect service of the FAC;
3) As to all the causes of action, the FAC is vague, ambiguous, uncertain, confusing, and unintelligible;
4) The FAC fails to state a cause of action as to general negligence;
5) As to the standard form FAC box checked intentional tort, the FAC fails to state a cause of action;
6) As to the factual allegations in the FAC, Plaintiff himself indicates it is "incomplete" and adds three counts that make no sense.

Plaintiff failed to file an opposition to this demurrer. For the reasons stated below, the demurrer of the Moving Defendants only is sustained without leave to amend.

As an initial matter, the Court finds that Plaintiff untimely filed his FAC after the Court granted him 20 days leave to amend. Next, while the Court does not find the pleading to be so uncertain or ambiguous that Moving Defendants are unable to respond, the Court does find the allegations related to Moving Defendants to be insufficient to state a cause of action for general negligence. (See *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695 ["'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.'"]; *Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 634 ["The elements of a negligence cause of action are duty, breach, causation, and damages."].) The FAC is devoid of allegations that Moving Defendants owed Plaintiff a duty and subsequently breached that duty. There are very few allegations regarding the Moving Defendants. (See FAC, ¶¶ 27, 29, 30.)

As for Plaintiff's three counts, contained at the bottom of his factual allegations, the Court finds each count to be insufficient. Statutory causes of action must be pled with specificity. (*Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1020 [general rule that statutory causes of action must be specifically pled].) Plaintiff's three counts, alleging violations of various code sections which he does not specify, are not pled with any specificity whatsoever.

Finally, as stated above, Plaintiff did not file an opposition to Moving Defendants' demurrer, creating an inference that the demurrer is meritorious. (See *Sexton v. Superior Court* (1997) 58 Cal. App. 4th 1403, 1410.)

This Court has already provided Plaintiff with the opportunity to amend, and he has been unable to state valid claims to overcome a pleading challenge on demurrer. Further, Plaintiff has not requested leave to amend or explained how any further amendments will change the legal effect of his pleading. Therefore, the demurrer is SUSTAINED without leave to amend. (See e.g., *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case.'"].)

Moving Defendants shall prepare the final order incorporating the tentative ruling and dismissing the action against them within 10 days of the hearing.

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