**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**

**Department 18b**
**Honorable Shella Deen, Presiding**
Edgar De Santiago, Courtroom Clerk
191 North First Street, San Jose, CA 95113

**DATE: October 17, 2024 TIME: 9:00 A.M.**

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

****Please specify the issue to be contested when calling the Court and Counsel****

**LAW AND MOTION TENTATIVE RULINGS**

**FOR APPEARANCES:** Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

**SCHEDULING MOTION HEARINGS**: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

**FOR COURT REPORTERS:** The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have 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

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

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## LAW AND MOTION TENTATIVE RULINGS

| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 23CV427676 | Debra Maciel vs Julio Valencia et al | **Demurrer**<br><br>Scroll down to LINES 1 and 2 for Tentative Ruling. |
| LINE 2 | 23CV427676 | Debra Maciel vs Julio Valencia et al | **Motion to Strike**<br><br>Scroll down to LINES 1 and 2 for Tentative Ruling. |
| LINE 3 | 19CV358852 | LSI Corporation, A Delaware corporation et al vs Kiran Gunnam et al | **Motion for Summary Judgment/Adjudication**<br><br>This motion is CONTINUED to October 31, 2024 at 9 a.m. in Department 18b. |

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## LAW AND MOTION TENTATIVE RULINGS

| | | | |
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| LINE 4 | 23CV425731 | Apolinar Quiroz vs Kevin Pearson et al | **Motion to Compel (Demand for Production of Documents)**<br><br>Defendant Banksia Landscape, Inc.'s motion to compel responses and/or documents from Plaintiff Apolinar Quiroz (Code of Civil Procedure §2031.310) to its First Set of Requests for Production that were served on or about February 2, 2024 and request for sanctions. Some documents were received, but no written response. The motion was filed and served by mail and electronically on July 31, 2024, on Plaintiff at the mailing and email address identified in Plaintiff's former counsel's order following a motion to withdraw. No opposition to this motion was filed by Plaintiff. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Plaintiff should have served a code-compliant response to the document request within 30 days of service of the discovery. Moving party meets its burden of proof. Good cause appearing, the motion is GRANTED. Plaintiff shall serve verified, code-compliant responses to the document request, without objections, and produce responsive documents within 30 days of service of this order. Monetary sanctions in the amount of $960 are awarded to Defendant, to be paid by Plaintiff within 30 days of service of this order (Code of Civil Procedure §§2031.210, 2031.250(a), 2031.210(c), 2023.010(b), (c) and (d), 2023.030, and 2031.320).<br><br>Moving party shall prepare a formal order. |

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## LAW AND MOTION TENTATIVE RULINGS

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| LINE 5 | 23CV425731 | Apolinar Quiroz vs Kevin Pearson et al | **Motion to Compel (Form and Special Interrogatories)**<br><br>Defendant Banksia Landscape, Inc.'s motion to compel further responses to its First Set of Employment Form Interrogatories and Special Interrogatories from Plaintiff Apolinar Quiroz, as Plaintiff failed to provide any responses to this discovery that was propounded on February 2, 2024. The motion, which also seeks sanctions, was filed and served by mail on Plaintiff on July 22, 2024 at the mailing address identified in Plaintiff's former counsel's order following a motion to withdraw. No opposition to this motion was filed by Plaintiff. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Plaintiff should have served a code-compliant response to the interrogatories within 30 days of service of the discovery. Moving party meets its burden of proof. Good cause appearing, the motion is GRANTED. Plaintiff shall serve verified, code-compliant responses to the form and special interrogatories, without objections, within 30 days of service of this order. Monetary sanctions in the amount of $960 are awarded to Defendant, to be paid by Plaintiff within 30 days of service of this order (Code of Civil Procedure §§2030.290, 2023.010(b), (c), (d), 2023.030, and 2030.290(c)).<br><br>Moving party shall prepare a formal order. |

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## LAW AND MOTION TENTATIVE RULINGS

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| LINE 6 | 24CV432694 | Midland Credit Management, Inc. vs James Huang | **Motion to Compel Arbitration**<br><br>Defendant James Huang's motion (petition) to compel arbitration of the claims within and issues raised by the complaint filed on March 7, 2024, by Plaintiff Midland Credit Management, Inc. This petition was filed on April 22, 2024. The default that was incorrectly entered was set aside on September 3, 2024. Plaintiff did not file any opposition to this petition. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Superior Ct.* (1997) 58 Cal.App.4th 1403, 1410). There is also good cause to grant this petition. There is a valid agreement to arbitrate between the parties and the dispute in question falls within the scope of those arbitration agreements. (*Bruni v. Didion* (2008) 160 Cal. App. 4th 1272, 1283). The Court finds no procedural or substantive unconscionability. The terms of the arbitration provision are equally applied. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83). Moving party meets his burden of proof. Good cause appearing, the motion to compel arbitration is GRANTED. The case is stayed pending the outcome of the arbitration. The matter is SET for Arbitration Status Review on April 3, 2025 at 10:30 a.m. in Department 18b, regarding the status of the arbitration.<br><br>Moving party to prepare formal order. |

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## LAW AND MOTION TENTATIVE RULINGS

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| LINE 7 | 21CV387882 | Jellyfish Seafood Bar, LLC vs Frank Vasquez et al | **Motion to Withdraw as attorney**<br><br>Motion of Attorney Eugene Flemate, Law Offices of Eugene Flemate to be relieved as counsel for Defendant Frank Vasquez. Notice of hearing was given to Defendant Vasquez by mail service on July 23, 2024, at his last known address and by email to two email addresses on July 18, 2024. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. The failure to oppose a motion leads to the presumption that Defendant client has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party has met his burden of proof. Good cause appearing, the motion is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court.<br><br>The Case Management Conference set for November 5, 2024, is VACATED. This matter is SET for a Case Management Conference on March 20, 2025, at 10a.m. in Department 18b.<br><br>Moving party to prepare the formal order after hearing, which shall include notification of the rescheduled Case Management Conference hearing date. |

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## LAW AND MOTION TENTATIVE RULINGS

| | | | |
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| LINE 8 | 21CV385105 | Ryoga Vee vs City of San Jose | **Motion for Leave to Amend Complaint**<br><br>Plaintiff's eleventh-hour motion for leave to amend his July 2, 2021 complaint to name eight officers as defendants (as Does 1-8) and add additional fact allegations. Plaintiff failed to name the Doe defendants within the mandatory three-year deadline—a deadline that expired on July 2, 2024. Plaintiff argues that he has only recently determined the identity of several of the police officers that he believes are responsible for deploying the offending less lethal munitions. Two officers were identified on April 10, 2024, and Plaintiff argues that the failure to name Doe defendants is as a result of mistake or neglect, that he had to review some 600 BWC (although the record is silent on when those BWC were received or why there was a delay in doing so during this three year case), and that the pandemic impacted discovery. Defendant opposes the motion. Plaintiff did not file any reply brief. Trial in this matter is set to commence in some 19 days, on November 4, 2024. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading." (Code of Civil Procedure, section 473 subd. (a)(1).) Judicial policy favors the liberal exercise of discretion to permit amendment of the pleadings so as to resolve all disputed matters between the parties in the same lawsuit. The court's discretion is typically exercised liberally so as not to deprive a party of the right to assert a meritorious cause of action or a meritorious defense. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) Leave to amend a pleading has been denied when the requested amendment was untimely or was prejudicial to the opposing party. (*Bank of America Nat. Trust & Savings Ass'n v. Goldstein* (1938) 25 Cal.App.2d 37, 46-47.) "Prejudice exists where the proposed amendment would require delaying the trial, resulting in added costs of preparation and increased discovery burdens." (*Miles v. City of Los Angeles* (2020) 56 Ca1.App.5th 728, 739. As to a possible meritorious claim, the Stinger Event, the Flashbang Event, and the Park Incident were not identified in Plaintiff's prelitigation claim to Defendant, and as such any proposed amendment with regards to those individuals is rejected. Although Plaintiff's arguments are weak with regards to amendment, in furtherance of justice, an amendment permitting the amendment of the Complaint to add Officer Neil Cossey as a Doe defendant, *as an employee of Defendant City only* (limited to the Third Street/San Fernando Street 40mm rubber projectile incident) is GRANTED. The motion in all other respects is DENIED.<br><br>Moving party to prepare the formal order. |

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## LAW AND MOTION TENTATIVE RULINGS

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| LINE 9 | 22CV407215 | Florentina Velazquez Diaz vs Alfredo Velazquez | **Motion to Deem Requests for Admission Deemed Admitted**<br><br>Defendant Alfredo D. Velazquez' motion for an order deeming all facts admitted in the Request for Admissions (Set Two) propounded to Plaintiff Ramon Diaz Arriaga for failure to serve responses. The Request for Admissions, set two, were served via FedEx on August 1, 2024, and Plaintiff Ramon Diaz Arriaga has not served any responses. No opposition was filed by Plaintiff Ramon Diaz Arriaga. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Defendant served requests for admission on Plaintiff Ramon Diaz Arriaga by FedEx on August 1, 2024. To date, Plaintiff Ramon Diaz Arriaga has not served any responses. A party served with requests for admission must serve a response within 30 days. (Code Civ. Proc. §2033.250.) When a party fails to respond, the Court must order the requests for admission deemed admitted. (Code Civ. Proc. §2033.280(c)). Such a "deemed admitted" order establishes that the non-responding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. Moving party meets his burden of proof. Good cause appearing, the Motion is GRANTED. Requests for Admission (Set Two) served on Plaintiff Ramon Diaz by Defendant, are deemed admitted against Plaintiff Ramon Diaz Arriaga.<br><br>Defendant shall prepare a formal order after hearing, that repeats the admissions to be admitted verbatim. |

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## LAW AND MOTION TENTATIVE RULINGS

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| LINE 10 | 22CV407215 | Florentina Velazquez Diaz vs Alfredo Velazquez | **Motion for Sanctions**<br><br>Defendants motion for terminating sanctions for his misuse of the discovery process or alternatively evidentiary and additional monetary sanctions of $4,095 against Plaintiff Ramon Diaz Arriaga. Notice of hearing was given to Plaintiff on September 18, 2024, by Federal Express. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendants have no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Code of Civil Procedure section 2031.310(i) provides: "if a party fails to obey an order compelling further [discovery] responses, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction." a sanction should not provide a windfall to the other party by putting that party in a better position than it would have been in if the party had obtained the discovery. (*Kwan Software Eng'g, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74-75.) The basic purpose of a discovery sanction is to compel disclosure of discoverable information. (*Rutledge*, 238 Cal.App.4th at 1193.) Sanctions may not be imposed solely to punish the offending party. (*Id.*; *Kwan*, 58 Cal.App.5th at 74-75.) Defendants repeatedly argue that they have "served" Plaintiff at his address, however there is no record before the court that Defendants made any effort to confirm Plaintiff's address or even request that information from Plaintiffs co-plaintiffs, that are represented by counsel. After reviewing the record and the briefing, the drastic remedy of terminating and evidentiary sanctions would be inappropriate. However, the Court awards additional monetary sanctions of $600 to be paid by Plaintiff Ramon Diaz Arriaga to Defendants within 20 days of the service of the formal order on this motion. Plaintiff is cautioned that further failure to comply with the Court's discovery orders may result in more severe sanctions.<br><br>Moving party to prepare formal order. |

**- oo0oo -**

**Calendar Lines 1 & 2**
**Case Name:** *Maciel v. Valencia*, et al.
**Case No.:** 23CV427676

Before the Court is Defendant SI 32, LLC's Demurrer and Motion to Strike to Plaintiff Debra Maciel's First Amended Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

## I. Background

This action arises out of Plaintiff Debra Maciel's ("Plaintiff") tenancy at 200 Winchester Circle, Apt. D-201, Los Gatos, California ("Subject Property") from March 20, 2018 to December 22, 2021. (First Amended Complaint ["FAC"] at ¶ 12.) The Subject Property was owned by Defendant SI 32, LLC ("Defendant SI 32") and managed by Defendants Greystar Management Services, LP, Julio Valencia, and Vanessa Gonzales. (FAC at ¶¶ 13, 14.) Plaintiff generally alleges that she was constructively evicted from the Subject Property. (*Id.* at ¶ 12.) The crux of her allegations are as follows:

> Substantial defective, dangerous, unsafe, uninhabitable, and harassing conditions existed at the Subject Property during Plaintiff's tenancy which constitute violations of applicable housing laws, including but not limited to, Defendants knowingly and negligently exposed Plaintiff to toxic mold in the Subject Property, Defendants knowingly and negligently refused to remediate toxic mold in the Subject Property, Defendants knowingly and negligently refused to provide code-compliant appliances to the Subject Property, knowingly and negligently exposed Plaintiff to unsanitary odors emanating into Plaintiff's unit on the Subject Property, Defendants knowingly and negligently refused to remediate unsanitary odors emanating into Plaintiff's unit on the Subject Property. Defendant permitted the Subject Property to deteriorate into a dilapidated, substandard, uninhabitable state in bad faith causing Plaintiff severe harm, including but not limited to, general and special damages, substantial loss of use of property damages, emotional distress and bodily injury, and Defendants constructively evicted Plaintiff from the unsafe dangerous, and uninhabitable Subject Property. Defendants' acts were "malicious" and "oppressive" as said act were performed with reckless disregard of the probability that Plaintiff would suffer emotional distress as a result of said acts as Defendants knew that they were exposing Plaintiff to toxic mold in the Subject Property and Defendants intentionally refused to remediate toxic mold requiring medical treatment for exposure to

> mold and their severe emotional distress after informing their landlord that toxic mold in the Subject Property was causing severe health problems and emotional distress while Defendants intentionally refused to remediate toxic mold in the Subject Property in reckless disregard of the probability that Plaintiff would continue to suffer severe health problems and emotional distress as a result of the mold exposure. Furthermore, Defendants JULIO VALENCIA, and individual, and VANESSA GONZALES, an individual, as employees and managing agents of Defendant GREYSTAR MANAGEMENT SERVICES, LP, exercised substantial independent authority and judgment in her decision making as a managing agents Defendant GREYSTAR MANAGEMENT SERVICES, LP so that her decisions determined corporate policies of Defendant GREYSTAR MANAGEMENT SERVICES, LP. Moreover, Defendants JULIO VALENCIA, an individual, and VANESSA GONZALES, an individual, as employees and managing agents of Defendant GREYSTAR MANAGEMENT SERVICES, LP were aware that Defendants were exposing Plaintiff to toxic mold in the Subject Property and Defendants intentionally refused to remediate toxic mold in the Subject Property even after Plaintiffs informed Defendants that the mold was causing their severe health problems and severe emotional distress and she had to seek medical treatment for exposure to mold and severe emotional distress. Even more malicious and oppressive, Defendant Greystar Management Services, LP, ratified the conduct of Defendants JULIO VALENCIA, an individual, and VANESSA GONZALES, an individual, as employees and managing agents of by continuing to permit Defendants JULIO VALENCIA, an individual, and VANESSA GONZALES, an individual, to be employed as an employee and managing agents during the time period of from March 20, 2018 until December 22, 2021 and continuing to exposing Plaintiff to toxic mold in the Subject Property during Plaintiff's tenancy.

(FAC at ¶ 17.) Plaintiff generally repeats these allegations with respect to her fourth cause of action for intentional infliction of emotional distress ("IIED") and seventh cause of action for private nuisance. (*Id.* at ¶¶ 31, 48.)

Plaintiff filed suit on December 13, 2023. Defendant SI 32 filed a Demurrer to the original Complaint on March 7, 2024, which was unopposed and sustained with 20 days leave to amend on April 30, 2024. Plaintiff filed her First Amended Complaint ("FAC") on May 21, 2024. In addition to IIED and private nuisance, Plaintiff has filed suit for negligence, breach of the implied warranty of habitability, breach of the implied warranty of quiet enjoyment, breach of contract, and breach of the covenant of good faith and fair dealing. Defendant SI 32 filed its

Demurrer and Motion to Strike on July 18, 2024. Plaintiff filed her Oppositions on October 4, 2024. Defendant filed its Replies on October 10, 2024. The Court considers the parties' arguments raised therein.

## II. DISCUSSION

### A. DEMURRER

#### 1. *PROCEDURAL MATTERS*

##### a. TIMELINESS

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).)[1] Even if a demurrer is untimely filed, the Court has discretion to hear the demurrer so long as its action ". . . 'does not affect the substantial rights of the parties.' [Citations.]" (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.)

As noted above, Plaintiff's First Amended Complaint was filed on May 21, 2024, and Defendant filed its Demurrer on July 18, 2024, almost a month past the responsive pleading deadline. Plaintiff's Opposition to Defendant's Demurrer is entirely based on the lack of timeliness. Plaintiff contends that she did not grant Defendant an extension of time, and that the Demurrer is untimely because it was filed nearly a month past the deadline. In Reply, Defendant contends "[t]he automatic 30-day extension brought the deadline for filing the Demurrer to July 21, 2024." (Reply at p. 2:18-19.)

Code of Civil Procedure section 430.41, subdivision (a)(2) provides that an automatic 30-day extension of time is granted by "filing and serving, on or before the date on which a demurrer would be due, a declaration stating under penalty of perjury that a good faith attempt to meet and confer was made and explaining the reasons why the parties could not meet and confer." No declaration for a 30-day extension of time has been filed by Defendant. Thus, Plaintiff is at least correct that no extension of time exists.

However, the Court certainly does not find Defendant's 28-day delay in bringing the Demurrer grossly untimely and may still consider the Demurrer within its discretion. Plaintiff

[1] All further undesignated statutory references are to the Code of Civil Procedure.

has not argued Defendant's lack of timeliness is prejudicial or substantially affects any of her rights. The Court, therefore, considers the Demurrer despite the untimeliness in accordance with section 430.40, subdivision (a) because no prejudice to Plaintiff can be discerned from the papers.

b. **MEET AND CONFER**

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (§ 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (§ 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (§ 430.41, subd. (a)(4).)

On June 10, 2024, Defendant's counsel, Craig Jones ("Mr. Jones"), sent a letter to Plaintiff's counsel addressing the bases for filing a demurrer and motion to strike. (Declaration of Craig S. Jones ["Jones Decl."] at ¶¶ 2, 3, Ex. A.) Although it is unclear from Mr. Jones' declaration whether the parties telephonically met and conferred, Mr. Jones indicated in the meet and confer letter that he is available by phone and provided his cell phone number. (Jones Decl., Ex. A at p. 2.)

Mr. Jones states that Plaintiff's counsel responded the same day indicating that he believed the allegations were sufficient and supported the request for punitive damages. (Jones Decl. at ¶ 4, Ex. B.) Plaintiff's counsel declined to amend the complaint. (*Id.*) Mr. Jones includes a copy of the letter he sent to Plaintiff's counsel but does not attach any proof of Plaintiff's counsel's response declining to amend the First Amended Complaint ("FAC").

The Declaration of James O'Brien on behalf of Plaintiff and in support of the Opposition, does not clarify whether the parties telephonically met and conferred or what counsel's specific response was to Mr. Jones' letter. Even if the failure to telephonically meet and confer is construed as insufficient, counsel for both parties have at least attempted to

confer and set forth their respective positions. Accordingly, the Court is not barred from reaching the merits of the Demurrer.

2. ***LEGAL STANDARD***

A demurrer must distinctly specify the grounds upon which a pleading is objected to; a demurrer lacking such specification may be disregarded. (§ 430.60.) Defendants object to the Complaint pursuant to Code of Civil Procedure section 430.10, subdivision (e).

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 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." (§ 430.10, subd. (e).) 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. (§§ 430.10, 430.50, subd. (a).)

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

A party against whom a complaint has been filed may also object by demurrer as provided in Section 430.30 to the pleading on the grounds that the pleading is uncertain. (§ 430.10, subd. (f).) "As used in this subdivision, 'uncertain' includes ambiguous and unintelligible." (*Ibid.*) A "[d]emurrer for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond; i.e. he or she cannot

reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him." (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

3. ***ANALYSIS***

Although Defendant's Notice of Demurrer indicates that it demurs to the first cause of action for negligence, fifth cause of action for breach of contract, and sixth cause of action breach of the covenant of good faith and fair dealing for failure to state a claim and uncertainty, the Memorandum of Points and Authorities only addresses the fourth cause of action for IIED and seventh cause of action for private nuisance with respect to these bases for the Demurrer. (See Notice of Demurrer and Memorandum of Points and Authorities ["MPA"].) Thus, the Court restricts its analysis to these two claims as the remaining causes of action are unaddressed.

Additionally, Plaintiff has failed to make any substantive arguments addressing these claims and only addresses Defendant's lack of timeliness in filing and serving the Demurrer in Opposition. (See, generally, Opposition.) Plaintiff has waived any substantive arguments to her own detriment. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["We are not bound to develop appellants' argument for them. The absence of a cogent legal argument or citation to authority allows this court to treaty the contention as waived."].) As noted above, the Court may still consider the untimely Demurrer and reach the merits. In the absence of any substantive arguments in Opposition, the Court evaluates the Demurrer using the allegations of the FAC. The Court first considers Defendant's uncertainty arguments and then considers the sufficiency of the fourth and seventh causes of action.

a. **UNCERTAINTY**

Defendant argues the FAC is uncertain because "Plaintiff's Complaint does not allege or identify any specific wrongful conduct by Defendant SI 32, the owner of the Subject Property which Plaintiff was leasing, and has instead lumped all of the 'Defendants' together without separate allegations as to what each of these named defendants may have done which resulted in the alleged constructive eviction of Plaintiff." (MPA at p. 3:21-26.)

Defendant cites California Civil Jury Instructions ("CACI") No. 3943 for the proposition that "[i]ntentional acts of employees/agents are generally not imputed to the

Principal unless the acts were committed by an officer, director, or managing agent had advance knowledge of the unfitness of the employee/agent with a knowing disregard of the rights or safety of others, that the conduct was authorized by an officer, director, or managing agent knew of the conduct and adopted or approved of the conduct after it occurred." (MPA at p. 11:19-23.) However, CACI No. 3943 is specific to "Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated" as opposed to generally imputing knowledge on to a principal for acts committed by its agent. Moreover, while CACI is the official jury instructions approved by the Judicial Council of California and attempt to accurately state existing law, the "articulation and interpretation of California law, however, remains in the purview of the Legislature and the courts of review." (California Rules of Court, rule 2.1050.)

In any event, "[i]nformation about a property owner known by an agent is imputed to the owner." (*Hall v. Rockcliff Realtors* (2013) 215 Cal.App.4th 1134, 1140.) "As against a principal, both principal and agent are deemed to have notice of, and ought in good faith and the exercise of ordinary care and diligence, to communicate to the other." (Civ. Code § 2332.) "[A] principal is responsible to third persons for the negligence of his agent in the transaction of business of the agency . . . ." (Civ. Code § 2338.) "In short, '[t]he acts of an agent are, in legal effect, the acts of the principal, and notice or knowledge of a fact to a principal or an agent is deemed as notice to the other party.'" (*Hall, supra,* 215 Cal.App.4th at p. 1140 [citations omitted].)

Here, Plaintiff alleges on information and belief that "Defendants, and each of them, were agents and/or employees of the other, and in doing the things alleged herein, Defendants were acting within the course and scope of their agency and/or employment." (FAC at ¶ 9.) Plaintiff further alleges that Julio Valencia and Vanessa Gonzalez were property managers and managing agents of Defendant Greystar Management Services, LP in relation to the Subject Property. (*Id.* at ¶¶ 4, 5, 17, 31, 48.) The facts alleged concerning the knowing and negligent exposure to toxic mold, dust, unsanitary odors, and dilapidated conditions of property as well as the refusal to remediate them are imputed to all Defendants, including Defendant SI 32, because of the agency relationship that is alleged between them. Thus, the Court

OVERRULES Defendant's Demurrer on grounds for uncertainty as to the fourth and seventh causes of action.[2]

b. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

Defendant argues Plaintiff's fourth cause of action for IIED fails to state facts alleging that Defendant intended to cause Plaintiff severe emotional distress or acted with reckless disregard of the probability of causing severe emotional distress. (MPA at p. 7:3-12.) Defendant further argues Plaintiff has not alleged any specific acts on the part of SI 32, LLC as the owner that caused emotional distress. (MPA at p. 7:22-26.)

A cause of action for IIED must allege "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1581.) With respect to pleading severe distress, "The complaint must plead *specific facts* that establish severe emotional distress resulting from defendant's conduct." (*Michaelian v. State Comps. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1114, italics added; *Bogard v. Employers Casualty Co.* (1985) 164 Cal.App.3d 602; *Pitman v. City of Oakland* (1988) 197 Cal.App.3d 1037, 1047.) "Severe" means substantial or enduring as distinguished from trivial or transitory. (*Girard v. Ball* (1981) 125 Cal.App.3d 772, 787.)

Here, Plaintiff's allegations in the FAC are that Defendants knowingly and negligently exposed her to toxic mold, dust, and unsanitary odors. (FAC at ¶¶ 17, 31.) Plaintiff alleges that Defendants refused to remediate or make repairs with respect to the toxic mold, dust, and unsanitary odors. (*Ibid.*) Plaintiff further alleges that Defendants "permitted the Subject Property to deteriorate into a dilapidated, substandard, uninhabitable state" ultimately causing Plaintiff emotional distress and bodily injury. (*Ibid.*) The Court finds the FAC sufficiently states the first element for IIED that Defendants engaged in outrageous conduct through the

[2] Although raised in the Notice, the MPA to the Demurrer itself does not make any specific arguments with respect to the first, fifth, and sixth causes of action. Thus, the Court declines to address them.

exposure and refusal to remediate these conditions, and at least acted with reckless disregard in causing harm to Plaintiff.

However, Plaintiff does not allege specific facts to establish intent to cause emotional distress and merely alleges this element in a conclusory manner. (*Michaelian, supra,* 50 Cal.App.4th at 1114 [noting that the complaint must state *specific* facts alleging emotional distress].) In the absence of such facts, Plaintiff has failed to state a claim for IIED and the Demurrer to the fourth cause of action is SUSTAINED.

Plaintiff bears the burden of proving an amendment would cure the defect identified on demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; see also *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 112 fn. 8 (*Medina*) ["As the Rutter practice guide states 'It is not up to the judge to figure out how the complaint can be amended to state a cause of action. Rather, the burden is on the plaintiff to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the pleading.'"]; *Drum v. San Fernando Valley Bar Ass'n*. (2010) 182 Cal.App.4th 247, 253 [citing *Medina*].)

"[W]here the plaintiff requests leave to amend the complaint, but the record fails to suggest how the plaintiff could cure the complaint's defects, 'the question as to whether or not [the] court abused its discretion [in denying the plaintiff's request] is open on appeal … .' (Code Civ. Proc., § 472c, subd. (a).) Because the trial court's discretion is at issue, we are limited to determining whether the trial court's discretion was abused as a matter of law. Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found 'only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case.'" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal App 4th 497, 507, disapproved on another ground in *Yvanova v. New Century Mortg. Corp., supra,* 62 Cal.4th at p. 939, fn. 13.)

Here, Plaintiff requests leave to amend but fails to state how exactly the Complaint can be amended. Nonetheless, the Court will exercise its discretion and grant 20 DAYS' LEAVE TO AMEND as to the fourth cause of action for IIED because a potentially effective

amendment with respect to the specific nature of the emotional distress suffered seems both apparent and consistent with Plaintiff's theory of the case.

Plaintiff is reminded that when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not add entirely new causes of action. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. Absent prior leave of court an amended complaint raising entirely new and different causes of action may be subject to a motion to strike. (See also *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1023 ["Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend."].) The Court's order does not authorize the addition of any new claims or parties.

**c. PRIVATE NUISANCE**

Defendant argues that Plaintiff's seventh cause of action for private nuisance relies on the same facts as the negligence claim and is, therefore, redundant. (MPA at p. 8:3-5.) Defendant also argues Plaintiff does not allege facts indicating that Defendant SI 32, LLC actively participated "in the creation of any alleged private nuisance, i.e. toxic mold or dust in the Subject Property." (MPA at p. 9:3-5.)

"Where negligence and nuisance of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim." (*El Escorial Owners' Assn'n v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1349 (*El Escorial*).) *El Escorial* involved a construction defect action. After conducting a trial, the trial court found that defendants were liable for negligence, but not nuisance. The appellate court agreed that plaintiff could not obtain recovery for construction defects under a nuisance cause of action. (*Id.* at p. 1348.) The court explained that the causes of action of negligence and nuisance were one and the same because: (1) the nuisance cause of action incorporated the facts and allegations of the negligence cause

of action; (2) plaintiff did not allege facts to describe the nuisance, but instead made conclusory allegations; and (3) while a cause of action alleging a nuisance usually requests an injunction, both causes of action merely sought the same monetary relief. (*Id.* at pp. 1348-1349.) However, the *El Escorial* court recognized that not every complaint has inappropriately alleged identical nuisance and negligence causes of action, and that there must be a case-by-case examination of the facts in order to determine whether certain claims of negligence are improperly litigated under the guise of a cause of action for nuisance. (*Id.* at p. 1348 [citing *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 104].)

As in *El Escorial*, here, the Court finds that Plaintiff's cause of action for private nuisance and negligence are so similar that they are essentially the same cause of action. First, the nuisance cause of action incorporates the facts and allegations of the professional negligence cause of action. Second, Plaintiff's prayer for damages at the end of the FAC do not ask for injunctive relief. As both causes of action rely on the same facts about lack of due care, Plaintiff's cause of action for nuisance is "merely a clone of the first cause of action using a different label." (*El Escorial, supra*, 154 Cal.App.4th at p. 1349.)

Nevertheless, as the two claims are one and the same, it would only be proper to dismiss the nuisance cause of action if Plaintiff were unable to establish the negligence claim. (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [noting that the nuisance claim "stands or falls with the determination of the negligence cause of action" (quoting *Pamela W. v. Millsom* (1994) 25 Cal.App.4th 950, 954, fn. 1)].) Since Defendant has not challenged the sufficiency of the negligence cause of action, it would be improper for the Court to dismiss the private nuisance claim based on the sufficiency of a cause of action not addressed by the Demurrer.

Additionally, Defendant's reliance on *Resolution Trust Corp. v. Rossmor Corp.* (*Rossmor*),[3] for the notion that "California cases refuse to impose liability 'where the landlord was not an active participant in causing the' alleged damages" is distinguishable. There, upon a judgment of nonsuit, the court considered whether the landowner caused or permitted the persistence of gasoline leaks found under a fuel dispenser of its lessee, a gasoline station.

[3] (1995) 34 Cal.App.4th 93, 100-101.

(*Rossmor, supra,* 34 Cal.App.4th at p. 98.) In discussing the torts of trespass and nuisance, the Court noted that "we have not found recent authority applying that rule to landowners when the nuisance is created by another. Some form of negligence by the landowner is required." (*Id.* at p. 100.) As stated, Defendant has not challenged the negligence cause of action on Demurrer. Nonetheless, the FAC sufficiently alleges that Defendants, including SI 32, knowingly and negligently exposed Plaintiff to toxic mold, dust, unsanitary odors, and dilapidated conditions of property, and allowed these conditions to persist by refusing to remediate or repair them. (*Id.* at p. 99 ["Failure to clean up contamination causing ongoing damage to property has been held to constitute such a nuisance."].) As stated, *Rossmor* was decided on appeal with respect to a judgment of nonsuit. The Court finds these allegations sufficient at this stage of the proceedings to survive Demurrer as the extent of Defendant's participation rests on both a factual inquiry and agency principles as discussed below.

Accordingly, Defendant's Demurrer to the seventh cause of action for private nuisance on the grounds of failure to state a claim is OVERRULED.

**B. MOTION TO STRIKE**

1. ***PROCEDURAL MATTERS***

a. **TIMELINESS**

"Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof." (Code Civ. Proc. § 435, subd. (b)(1); see also Cal. Rules of Court, rule 3.1322, subd. (b).) "The term 'pleading' means a demurrer, answer, complaint, or cross-complaint." (§ 435, subd. (a)(2).) Unless extended by stipulation or court order, a defendant's answer is due within 30 days after service of the complaint. (See § 412.20, subd. (a)(3).) The Motion to Strike, filed on the same day as the Demurrer, is untimely for the same reasons as the Demurrer; however, Plaintiff does not contend she has been prejudiced or that her rights have been substantially affected by Defendant's untimeliness. Therefore, the Court reaches the merits of the Motion to Strike.

b. **MEET AND CONFER**

A party moving to strike some or all of a complaint is required to engage in meet and confer efforts prior to the filing of a motion to strike. (§ 435.5, subd. (a).) "Any determination

by the court that the meet and confer process was insufficient shall not be grounds to grant or deny the motion to strike." (§ 435.5, subd. (a)(4).) For the same reasons stated above with respect to the Demurrer, although the parties have not telephonically met and conferred per code, they have attempted to confer and set forth their respective positions on the issues. Accordingly, even if the failure to telephonically meet and confer is insufficient, the court may nonetheless reach the merits of the Motion to Strike.

2. ***LEGAL STANDARD***

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (§ 436, subd. (a).) A court may also strike out all or any part of a pleading not drawn or filed in conformity with the laws of the State of California. (§ 436, subd. (b).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (§ 437, subd. (a).)

3. ***ANALYSIS***

"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 section 3294. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. 'Malice' is defined in the statute as conduct '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 for the rights and safety of others'. 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant thereby depriving a person of property or legal rights or otherwise causing injury.'" (*Turnman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 [internal citations omitted].)

"In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants' conduct may adequately

plead the evil motive requisite to recovery of punitive damages." (See *Monge v. Super. Ct.* (1986) 176 Cal.App.3d 503, 510.)

An employer shall not be liable for punitive damages based upon acts of an employee, unless the employer had advanced knowledge of the employee, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights and safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. (*White v. Ultramar* (1999) 21 Cal.4th 563, 571-572.) "With respect to a corporate employer, the advanced knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an *officer, director, or managing agent of the corporation*." (*Id.* at p. 572.)

Defendant argues Plaintiff's request for punitive damages must be stricken because the Complaint fails to state malice on the part of SI 32 specifically. (Motion to Strike at p. 4:5-18.) Additionally, Defendant argues Plaintiff's request is deficient in that Plaintiff's allegations group all Defendants into one category without any differentiation. (*Ibid.*) While the Court here has found that the allegations state the intent element or a reckless disregard for the probability of causing distress with respect to Defendant SI 32, LLC, the Court agrees that these allegations are, however, insufficient for stating a request for punitive damages. Although intent can be generally alleged in a conclusory manner for a claim like IIED, a request for punitive damages requires heightened specificity as noted above. (See *Unruh, supra,* 7 Cal.3d at 632.) While Plaintiff states that Defendants Vanessa Gonzalez and Julio Valencia are managing agents of Defendant Greystar Management Services, the FAC does not state that Defendant SI 32 had any advance knowledge of any alleged unfitness or that it specifically ratified any particular acts committed by them. The FAC only states that Defendant Greystar Management Services ratified the refusal to remediate the toxic mold, but not Defendant SI 32. (See FAC at ¶¶ 17, 31, 48.)

Additionally, "while principals may be liable for injuries caused by an agent under Civil Code section 2338, they do not necessarily face the same remedies as the agent. For example, 'punitive damages are not assessed against employers on a pure respondeat superior

basis.'" (*Rony v. Costa* (2012) 210 Cal.App.4th 746, 759 [citing *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11; *Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 895 ("It is well settled that while an employer may be held liable for an employee's tort under the doctrine of respondeat superior, he is not responsible for punitive damages where he neither directed nor ratified the act." [italics omitted]); see Civ. Code § 3294, subd. (b)].) "Rather, exemplary damages may be assessed against a principal only under specific statutory authority and in delineated circumstances." (*Rony, supra,* 210 Cal.App.4th at p. 759 [noting that "the Legislature knows how to impose remedies, including those that are punitive in character, on principals in the respondeat superior context."].)

Thus, while the facts of the FAC are sufficient to impute liability upon Defendant SI 32, they are insufficient for imposing punitive damages as there are no specific facts that SI 32 ratified any particular acts of the agent Defendants, such as the alleged refusal to remediate or repair the conditions of the Subject Property. Accordingly, Defendant's Motion to Strike is GRANTED. Much like the reasons stated above with respect to the Demurrer, the Court permits 20 DAYS' LEAVE TO AMEND as a potential amendment with respect to any particularized acts of Defendant SI 32 to meet the heightened pleading standard for punitive damages appears consistent with Plaintiff's theory of the case.

## III. CONCLUSION

Defendant's Demurrer to the fourth cause of action is OVERRULED for uncertainty but SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim. Defendant's Demurrer to the seventh cause of action for private nuisance is OVERRULED for both uncertainty and failure to state a claim. Defendant's Motion to Strike is GRANTED with 20 DAYS' LEAVE TO AMEND.

The Court will prepare the formal order.

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