SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

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

October 10, 2024
9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

ORAL ARGUMENT

Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you will appear at the hearing to contest the tentative

If you fail to so notify the court or opposing side, the Court will not hear argument, and the tentative ruling will be adopted.

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

APPEARANCES

The Court strongly prefers in-person appearances.

If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

COURT REPORTERS

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

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	23CV411799	Margarita Hernandez vs Kimberly Salazar	The Court will review the subject documents *in camera* before ruling on Plaintiff's motion to quash. Plaintiff is ordered to provide the Court with a binder that contains copies of (a) the unredacted documents Defendant requests and (b) the redacted versions of the documents Defendant received. The binder shall be delivered to Department 6 no later than 4 p.m. Tuesday, October 15. The hearing on Plaintiff's motion to quash is continued to Thursday, October 31, 2024 at 9 a.m. in Department 6. These orders will be reflected in the minutes.
2	23CV428298	PISAMAI CUESTA et al vs ARSENIA NAUGHTON	Scroll to line 2 for tentative ruling. Court to prepare formal order.
3	18CV334861	Fernando Murrain vs Tesla, Inc. et al	Tesla's motion for summary judgment is GRANTED. Scroll to line 3 for complete ruling. Court to prepare formal order. Tesla to promptly prepare form of judgment.
4, 9	21CV385527	Michael Darden vs The Board of Trustees of the Leland Stanford University et al	Plaintiff's motion to compel Defendants' further supplemental privilege log and verification statement and request for monetary and terminating sanctions is DENIED. The Court reviewed the parties' submissions and finds that Defendant has now complied with the Court's discovery orders. Although the Court agrees with Plaintiff that it took significant efforts to gain such compliance, the Court already sanctioned Stanford for failure to comply, which sanctions have achieved the desired compliance. The basic purpose of a discovery sanction is to compel disclosure of discoverable information. (*Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1191.) Sanctions may not be imposed solely to punish the offending party. (*Id.*; *Kwan Software Eng'g, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74-75.) The basic purpose has now been met here. Thus, Plaintiff's motion is denied. Plaintiff's motion for the Court to declare defendants in contempt of the Court's third discovery order and to grant Plaintiff monetary, issue and termination sanctions and a crime/fraud exception judgment is DENIED. The relief Plaintiff seeks outlined in sections 1(a)-(c) at pages 2-3 of his opening brief were already addressed in Plaintiff's motion to compel defendants' further supplemental privilege log and verification statement and request for monetary and terminating sanctions. Again, the Court finds Defendants have now complied with the Court's discovery orders. If the Court understands Plaintiff correctly, Plaintiff also seeks to compel the documents listed on Defendant's privilege log because the Standford employee who verified that privilege log pursuant to the Court's order testified that she did not review any documents to make that verification. The Court did not receive the necessary deposition testimony to assess this allegation. However, even if the Court had, this is not what the crime/fraud exception means, and it would not support an order to compel all the documents listed on Defendant's privilege log. Based on this record, it appears Standford's counsel reviewed the documents, communicated their general content to the witness, and the witness confirmed the document contents constituted privileged communications. The Court finds no basis to compel production of the documents listed on the privilege log on this record. It appears to the Court that discovery has sufficiently proceeded for Plaintiff to oppose Defendant's summary judgment motion. The Court suggests the parties now focus their attention on that motion, which is set for November 21, 2024 at 9 a.m.—a date the Court does not intend to continue. Court to prepare formal order.

5	24CV436779	First Technology Federal Credit Union vs Justin Medel et al	Plaintiff's motion to have matters in requests for admission deemed admitted is GRANTED. A notice of motion with this hearing date was served on Defendant by regular mail on September 9, 2024. Defendant failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. Plaintiff served requests for admission on Defendant on July 10, 2024 and reached out to Defendant by letter after receiving no responses. To date, Defendant has still served no responses. A party served with Requests for Admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the Requests for Admission deemed admitted—as Defendant has done here, the Court must order the Requests for Admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Accordingly, Plaintiff's motion is granted, and the matters set forth in Plaintiff's requests for admission are deemed admitted. Defendant is also ordered to pay $900 in sanctions to Plaintiff within 30 days of service of the formal order. (Code Civ. Pro. §2023.010.) Moving party to prepare formal order.
6	19CV341666	RAM Concrete Construction, Inc. vs Everspring Construction Inc. et al	Plaintiff RAM Concrete Construction Inc.'s motion to enforce mechanic's lien pursuant to Code of Civil Procedure section 996.440 is GRANTED. The Court agrees with RAM Concrete's analysis of Code of Civil Procedure sections 685.010, 680.300, and 685.090 as further explained in *Big Bear Properties, Inc. v. Gherman* (1979) 95 Cal.App.3d 908, 913. Accordingly, American Contractors Indemnity Company is ordered to release the full amount of its bond, $728,345.91, to Plaintiff pursuant to Code of Civil Procedure section 996.440. Moving party to prepare formal order.
7	23CV427316	CAN CAPITAL, INC. et al vs SCOTT HELF et al	Willaim M. Kaufman, Alexandra P, Saddik, and Sweeney Mason LLP's motion to withdraw as counsel for SVG Contractors, Inc. and Scott J. Helf is GRANTED. A company, regardless of corporate form, cannot represent itself in civil litigation in California. (See *Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 ("[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent."); *Ferruzzo v. Superior Court* (1980) 104 Cal. App. 3d 501, 503 ("The rule is clear in this state that, with the sole exception of small claims court, a corporation cannot act in propria persona in a California state court."); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal. 3d 724, 727 ("the Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record in behalf of another person, including a corporate entity.") Accordingly, on February 27, 2025 at 10:00 a.m. in Department 6, SVG Contractors, Inc. is ordered to appear and show cause why its answer should not be stricken and default be entered against it for failure to obtain counsel. Court to use proposed orders on file.

8	21CV381901	PHYSICIANS SURGERY SERVICES, LP vs Shultz & Associates et al	Plaintiff's motion to compel Defendants to produce further responses to Plaintiff's form interrogatories (set one) is GRANTED. Defendants are ordered to produce supplemental, verified, code-complaint (i.e., substantive) responses to form interrogatory nos. 15.1, 16.1, and 17.1 within 20 days of service of the formal order. For form interrogatory no. 17.1, Defendants' supplemental response need only add a list of documents by bates number for each request for admission addressed in that interrogatory response. Interrogatory nos. 15.1 and 16.1 must be completely supplemented for each subsection. Plaintiff's motion to compel further responses to requests for admission (set one) is DENIED. Defendants adequately responded to these requests for admission. Defendants are also correct that if they are later found to have unreasonably denied these requests for admission, they may be ordered to pay attorneys' fees and costs Plaintiff incurs to prove the issue at trial. (*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 736.) The parties' cross motions for sanctions are DENIED. The Court finds each party had substantial justification for this motion practice. Defendants' asserted bases for not responding substantively to interrogatory nos. 15.1 and 16.1 and failure to agree to supplement 17.1 to list documents by bates number lacked merit. However, Plaintiff's motion to compel additional responses to the identified requests for admission was not well taken. Court to prepare formal order.
10	22CV403948	SJC Funeral Care, Inc. vs Claire Owens et al	Defendants' motion for attorney's fees is GRANTED. "A court must award costs in a judicial proceeding to confirm, correct or vacate an arbitration award. (Code Civ. Proc., § 1293.2; *Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 260 [104 Cal. Rptr. 2d 519].) Attorney fees are recoverable as costs if authorized by contract. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A).)" (*Corona v. Amherst Partners* (2003) 107 Cal. App. 4th 701, 707.) The parties do not dispute that this a judicial proceeding or that their lease agreement contains a fee shifting provision. Nevertheless, Plaintiff/Petitioner argues this attorney fee motion is premature because there is still pending litigation between the parties. However, the Court agrees with Defendants that petitions to confirm or vacate an award are treated as self-contained proceedings for which fees may be awarded. Had Plaintiff filed the petition to confirm as a separate action with no other claims, Plaintiff/Petitioner might still dispute the amount of fees, but it could not dispute that Defendants would be entitled to fees. Similarly here, the petition to confirm the arbitration award has now been litigated to conclusion, Defendants are the prevailing parties on that petition, and Defendants are therefore entitled to their costs, which include fees, spent litigating that petition. Having studied the declarations of Rachel Thomas, the Court concludes that the billable rates charged are appropriate and the amount of time spent on the petition proceedings in the trial court and at the court of appeal are reasonable. However, the Court finds the number of hours spent on the fees motion to be excessive and reduces the amount of fees sought accordingly for a total award of $201,526.58 in fees and costs. Court to prepare formal order.
11	23CV420449	Santa Clara Valley Transportation Authority vs Angelo Richard Di Salvo et al	Defendants' motion to consolidate is DENIED. Code of Civil Procedure section 1048(a) provides: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." While the undersigned Court is not the trial judge, the Court finds section 1048(a) is not met here. Real property is unique. The mere fact that these properties are adjacent and currently operate the same type of business and are the subject of eminent domain is insufficient to find a common question of law or fact. The Court agrees with SCVTA that the issues are different and combining these cases could cause confusion to the trier of fact. Court to prepare formal order.
12	24CV433970	Chicago Title Insurance Co. vs. DOES 1 through 50	Plaintiff's motion to serve the deposition subpoenas attached to the Declaration of Crhistopher R. Thomas is GRANTED. This order will be reflected in the minutes.

Calendar Line 2
Pisamai Cuesta & Madaleine Hayes v. Arsenia Naughton, Case No. 23CV428298

Before the Court is Cross-defendants' Pisamai Cuesta and Madeleine Hayes demurrer to Cross-complainant's verified cross-complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from alleged breach of a lease agreement. According to the cross-complaint, Naughton has owned a commercial property located at 222 Fields Avenue, Balibago, Angeles City, Philippines since 1960's ("Property".) The Property is approximately 296 square meters (3186.12 square feet) and contained two buildings. The smaller second building, approximately 398 square feet, was in the back of the first building. (Cross-complaint, ¶ 5.)

In May 2006, Cross-Defendants (collectively referred to as "Cuesta" in the Cross-complaint) and Naughton entered an agreement to lease the second building with a termination date of August 2022. On June 12, 2022, the parties renewed the lease for a period of ten years. (*Id.,* ¶ 8.)

On September 1, 2006, unbeknownst to Naughton, Cuesta represented that she was the lawful owner of the Property and entered an agreement with Derek Land Durbin ("Durbin") for a 15-year lease of the entire 296 square meters of the Property. After paying a $10,000 security bond and a $5000 surety bond, Durbin tore down both buildings on the Property to build a three to ten story structure. Cuesta allegedly received and kept the rental fees Durbin paid for the portion of the Property that Cuesta did not have authority to sub-lease. (*Id.* ¶¶ 6, 10.)

After the Cuesta-Naughton lease was renewed in 2022, Durbin contacted Naughton and informed her of his tenancy agreement with Cuesta and that when it was time for him to renew his lease he learned that Cuesta was not the true Property owner as previously represented to

him. In August 2022, Naughton entered an agreement with Durbin to the Property minus the 398 square feet that had been previously leased to Cuesta. (*Id.*, ¶ 9.)

This action was initiated on December 20, 2023, and on May 22, 2024, Naughton filed the cross-complaint alleging (1) breach of contract, (2) intentional misrepresentation, (3) negligent misrepresentation, (4) conversion, and (5) unjust enrichment.

II. Legal Standard

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

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

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that

plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id*.)

III. Cross-defendants' Objection to Extrinsic Evidence

Cross-defendants object, in their reply, to the admissibility of Exhibits A and E attached to Naughton's opposition. A demurrer is necessarily limited to the face of the pleadings and may not involve extrinsic evidence. A demurrer "tests the pleadings alone and not the evidence or other extrinsic matters." (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905.) "The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." (*McKenney v. Purepac Pharm. Co.* (2008) 162 Cal.App.4th 72, 79.) Extrinsic evidence may not properly be considered on demurrer. (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881; *Hibernia Savings & Loan Soc. v. Thornton* (1897) 117 C. 481, 482.)

Accordingly, Cross-defendants objection is SUSTAINED. The Court will not consider the newly submitted Exhibits A (titled photograph of large building) and E (titled 2022 third-party tenant lease agreement, Naughton and Durbin.)

IV. Analysis

A. Relief Against Cross-defendant Hayes

Cross-defendants contend the cross-complaint against Hayes should be dismissed because, while she is a named Cross-defendant, there are no allegations that she engaged in misconduct. The cross-complaint alleges facts against "Cross-defendant" and "Cross-defendants" interchangeably, which creates confusion, particularly when this alternating use takes place in the same sentence. Thus, on the surface, the Court agrees that it does not appear that any particular conduct is attributed to Cross-defendant Hayes.

Accordingly, Cross-Defendants' demurrer on this ground is SUSTAINED with 20 days leave to amend.

B. Breach of Contract

The breach of contract claim requires cross-complainant to allege facts to support the following elements: a valid and existing contract between the parties, plaintiffs' performance or excuse for non-performance; and defendant's conduct constituting a breach that causes damages. (*Reichert v. General Ins. Co*. (1968) 68 Cal.2d 822, 830.) "It is well settled that a written instrument which is the foundation of a cause of action may be pleaded in haec verba, rather than according to its legal effect, either by setting forth a copy in the body of the complaint or by attaching a copy as an exhibit and incorporating it by proper reference." (*Holly Sugar Corp. v. Johnson*, (1941) 18 Cal.2d 218, 225.)

Cross-defendants' sole ground for demurring to this cause of action is that the terms of the attached lease agreements are inconsistent with the allegations in the cross-complaint. Cross-defendants argue they had authority to sublease and renovate the premises because both contracts provided, (1) "the LESSEE could sublease the premise under the lease or any portion thereof in favor to anybody …." And (2) "the LESSOR and LESSEE [have] agreed upon … the construction of an[d] improvement of a three story up to ten story structure, to operate a Hotel, Bar and Restaurant." (Demurrer p. 8:15-20) The Court finds Cross-defendants' position unsupportive and unpersuasive.

"For purposes of a demurrer, we accept as true both facts alleged in the text of the complaint and facts appearing in exhibits attached to it. If the facts appearing in the attached exhibit contradict those expressly pleaded, those in the exhibit are given precedence." (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567 568.) Here, Naughton attaches the 2006 lease agreement as Exhibit-A and the 2022 lease agreement as Exhibit-D to the cross-complaint. These agreements specifically refer to the 398 square feet area as the subject of the lease—not the entire 3186.12 square feet. The crux of Naughton's cross-complaint is that Cross-defendants unlawfully subleased the entire property to Durbin.

Accordingly, Cross-defendants' demurrer to the first cause of action for breach of contract is OVERRULED.

C. Intentional Misrepresentation (Fraud) & Negligent Misrepresentation

The elements of a cause of action for fraud are (1) misrepresentation (false representation, concealment or non-disclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Hackethal v. National Casualty Co*. (1987) 189 Cal. App. 3d 1102, 1110.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. . . [P]laintiff must allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469.)

The elements of a negligent misrepresentation are "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. Negligent misrepresentation does not require knowledge of falsity, unlike a cause of action for fraud." (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252.) The same particularity requirements apply to both intentional and negligent misrepresentation. (*Foster v. Sexton* (2021) 61 Cal.App.5th 998, 1028.)

Here, the cross-complaint alleges:

- Cuesta leased only 398 square feet of the commercial property that is 296 square meters [3186.12 square feet] in total. Cuesta did not own, have legal title, or authority to sublease any portion of the commercial property other than the 398 square feet she had leased.
- In the 2006 lease agreement between Cuesta and Durbin, Cuesta falsely represented she was the lawful owner of the 296 square meters [3186.12 square feet] commercial space.
- Cross-defendants failed to inform Naughton about sub-leasing the entire property including the portion he did not have authority to lease out.
- For approximately 15 years, Durbin paid monthly rental fee to Cuesta unaware that Cuesta was not the legal owner of the commercial property.

- When it was time for Durbin to renew his lease, he learned that Cuesta was not the true owner of the commercial property as Cuesta had previously represented to him.
- In July 2022 Durbin contacted Naughton and informed her of his recent discovery about Cuesta's ownership representations and that he had demolished the two buildings that were located on the property to build a large night club.
- "At the time Cross-defendant made the false representation, Cross-Defendant had no intention of informing the third party (Durbin) of the true owner, but rather entered an agreement where the third party would rely upon the false representations." (Cross-complaint, ¶ 22.)
- "The Cross-defendants knew that third party (Durbin) would justifiably rely on Cross-defendant's promises and representations, and send funds to the Cross-defendants, …" (Cross-complaint, ¶ 23.)
- Had Naughton known of Cross-defendants fraudulent acts, she would have stopped the demolishing of the structure that was on the commercial property.

(Cross-complaint ¶¶ 6-10, 20, 22-24)

Cross-Defendants argue (1) allegations of misrepresentations to a third-party fail to satisfy the requisite element of a misrepresentation to Plaintiff, and (2) Naughton cannot truthfully plead reliance on allegedly false ownership statement since she has been the record owner for over 20 years.

It is not always necessary that a fraudulent misrepresentation be made to the intended actor. California follows section 533 of the Restatement Second of Torts in imposing liability for indirect fraud. The Restatement Second of Torts, section- 533 provides: "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved." (See also *Mirkin v. Wasserman* (1993) 5 Cal. 4th 1082, 1095.)

While the cross-complaint alleges the misrepresentations prevented Naughton from thwarting the building demolitions, it fails to allege facts showing Cross-defendants intended or had reason to expect their misrepresentations would be repeated or its substance communicated to Naughton. In fact, in the context of this case, assuming the allegations of the cross-complaint are true as the Court must on demurrer, it would seem more likely that the cross-defendants did not want Naughton to learn about their ownership representation to Durbin, and the Court sees this as a barrier to amendment.

However, as this is the first demurrer, and there may be additional facts not yet pleaded, Cross-defendants' demurrer to the second and third causes of action for Intentional & Negligent Misrepresentation is SUSTAINED, with 20 days leave to amend.

D. Conversion

The strict liability tort of conversion is an "act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (*Oakes v. Suelynn Corp.* (1972) 24 Cal.App.3d 271; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) To establish conversion, the plaintiff must allege the plaintiff's right of ownership to the personal property, defendant's control of the property in a manner inconsistent with the plaintiff's rights, and damages. (*Id.,* at p. 119.) "The tort of conversion applies to personal property not real property." (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1295; see *Munger v. Moore* (1970) 11 Cal.App.3d 1, 7, ["conversion is a tort that may be committed only with relation to personal property and not real property"].)

Here, the cross-complaint alleges Cross-defendants took Naughton's property and converted it for their own use by allowing Durbin to demolish the building, on the premises where Naughton had lived for many years with her family and had no intention of destroying. (Cross-complaint, ¶ 34.)

Naughton relies on *Welco Elecs. v. Mora* (2014) 223 Cal.App.4th 202 to support the conversion claim. *Welco* is inapposite. *Welco* established that money obtained using credit card information can be actionable as conversion, even though the funds are not taken directly from the plaintiff. While the *Welco* court discussed the evolution of the tort of conversion and its

application to intangible property rights, it did not expand the tort to apply to real property related rights.

In this context, Naughton's claim sounds in trespass, not conversion. However, Naughton alleges Cross-defendants have received and kept the rental fees Durbin paid for the portion of the Property Cuesta had no authority to sub-lease. As such, there is a reasonable possibility that the cross-complaint can be amended to state a conversion cause of action for these funds.

Accordingly, Cross-defendants' demurrer to the fourth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days.

E. Unjust Enrichment

There appears to be split of appellate authority as to whether California recognizes an independent cause of action for unjust enrichment. (See *Melchior v. New Line Productions, Inc*. 26 (2003) 106 Cal.App.4th 779, 793 ("There is no cause of action in California for unjust enrichment[;]" it "is general principle, underlying various legal doctrines and remedies, rather than remedy itself.") (internal quotations omitted); *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117 (same); *Elder v. Pacific Bell Telephone Co*. (2012) 205 Cal. App. 4th 841 ("This allegation satisfies the elements for claim of unjust enrichment: receipt of benefit and unjust retention of the benefit at the expense of another." (internal citations and quotations omitted); *Lectrodryer v. Seoulbank* (2000) 77 Cal. App. 4th 723 (affirming judgment for plaintiff on unjust enrichment claim).

However, this Court falls under the Sixth Appellate District, and that court of appeal unequivocally held in a 2020 decision:

> [Plaintiff's] complaint includes cause of action entitled unjust enrichment. Summary adjudication of that claim was proper because California does not recognize cause of action for unjust enrichment. (Melchior v. New Line Productions, Inc. (2003) 106 Cal.App.4th 779, 793 [131 Cal. Rptr.2d 347] [the phrase "unjust enrichment" does not describe theory of recovery; it is

> general principle underlying various legal doctrines and remedies].)

(*Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal.App.5th 323, 336.)

Accordingly, Cross-defendant's demurrer to this cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

Calendar Line 3
Fernando Murrain v. Tesla, Inc., et al., Case No. 18CV334861

Before the Court is defendant Tesla Inc.'s ("Tesla") motion for summary judgment, or in the alternative, summary adjudication against plaintiff Fernando Murrain. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action arising out of Plaintiff employment and subsequent alleged wrongful termination from SolarCity. According to the Complaint, Plaintiff started working for SolarCity in October 2013 until October 12, 2017. (Complaint, ¶¶ 33, 93-94.) In 2016, SolarCity was acquired by Tesla. (Complaint, ¶ 50.) In 2017, Plaintiff took family medical care leave to care for his wife, who was scheduled for major surgery related to her breast cancer. (Complaint, ¶ 51.) After his return, he was reprimanded for his performance by director Ginger Skinner ("Skinner") and later, he was demoted to his former position. (Complaint, ¶¶ 67-74.)

Prior to his leave, Plaintiff received at least a 3 out of 5 on his performance evaluations, however, in October 2017, he received a copy of a performance review in which Skinner gave him a 2 out of 5, which was the first negative performance review he had received during his employment. (Complaint, ¶¶ 86-88.) This review prevented Plaintiff from transferring out of Skinner's department. (Complaint, ¶ 89.) On October 12, 2017, a meeting was scheduled to address his review before it was submitted for finalization. (Complaint, ¶ 90.) However, at the meeting, Skinner informed Plaintiff that he was being terminated effective October 18, 2017. (Complaint, ¶ 91.) Plaintiff later learned that Tesla terminated approximately 400 employees on October 12-October 13, 2017. (Complaint, ¶ 93.)

On September 14, 2018, Plaintiff filed the Complaint, asserting claims for (1) California's Family Rights Act ("CFRA")-Interference, (2) CFRA-Retaliation, (3) Family and Medical Leave Act ("FMLA")-Interference, (4) FMLA-Retaliation, (5) Fair Employment and Housing Act ("FEHA")-Discrimination/Association with Disabled Person, (6) FEHA-Retaliation, (7) FEHA-Failure to

Prevent, (8) Americans with Disabilities Act ("ADA")-Discrimination/Association with Disabled Person, (9) ADA-Retaliation, and (10) Wrongful Termination in Violation of Public Policy.[1] On June 25, 2024, Tesla filed the instant motion, which Plaintiff opposed. On September 19, 2024, the Court continued the hearing on the motion to allow Plaintiff the opportunity to file a surreply, which he did on October 3, 2024.

II. Evidentiary Objections

Plaintiff submits objections to Skinner's declaration and Tesla submits objections to Plaintiff's declaration and Camillia Murrain's declaration.

The Court need not rule on Plaintiff's or Tesla's objections as they do not fully comply with California Rules of Court, rule 3.1354. (See *Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 [trial court has duty to rule on evidentiary objections presented in the proper form]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 9 [trial court not required to give party who fails to comply with formatting requirements of California Rules of Court, rule 3.31354 a second chance to file properly formatted objections.].) Objections that are not ruled on are preserved for appellate review. (See Code Civ. Proc., § 437c, subd. (q).)

With the surreply, Plaintiff also submits evidentiary objections to Tesla's responses to his separate statement. Not only do those objections also fail to comply with Rule 3.1354, but a separate statement is not evidence. (See *Grantt-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1378 ["a separate statement is not evidence; it refers to evidence submitted in support or opposition to a summary judgment motion"].) Thus, the Court need not rule on the objections.

III. Legal Standard

Any party may move for summary judgment. (Code of 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 of Civ. Proc., 437c, subd. (c);

[1] The CFRA is part of the FEHA.

Aguilar, supra, 25 Cal.4th at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, 25 Cal.4th at p. 843.)

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

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 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. 843.)

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

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

Pursuant to Code of Civil Procedure section 437c, Tesla moves for summary judgment against Plaintiff, or in the alternative, summary adjudication of each cause of action.

IV. Summary Judgment/Adjudication in FEHA Discrimination/Retaliation Cases

Special rules govern the allocation of the burden of proof on motions for summary judgment in wrongful termination and employment discrimination cases, under both federal and state law. State courts follow the approach taken by federal courts in these cases. (*Moore v. Regents of Univ. of Calif.* (2016) 248 Cal.App.4th 216, 233.) Because direct evidence of discrimination is seldom available, courts use a system of shifting burdens as an aid to the presentation and resolution of such cases both at trial and on a motion for summary judgment. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354-355 (*Guz*).) "California has adopted a three-stage burden-shifting test established by the United States Supreme Court for trying employment discrimination claims that are based on the disparate treatment theory. Under this '*McDonnell Douglas* test,' (1) the plaintiff must establish a prima facie case of discrimination; (2) if the plaintiff is successful, the employer must offer a legitimate nondiscriminatory reason for its actions; and (3) if the employer produces evidence on that point, the plaintiff must show that employer's reason was a pretext for discrimination." (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144 [citations omitted]; see also *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 (*King*).) CFRA retaliation claims are also subject to the *McDonnell Douglas* test. (See *Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 560 (*Bareno*).)

When the employer is the moving party, the initial burden rests with the employer to show that no unlawful discrimination occurred. (Code Civ. Proc., §437c(p)(2); See *Guz*, *supra* at pp. 354-355; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1523 [employee has no obligation to produce evidence until defendant "has established either the existence of a complete defense or the absence of an essential element of plaintiff's claim."].) The employer may do this by presenting admissible evidence either: negating an essential element of the employee's claim; or showing some legitimate, nondiscriminatory reason for the action taken against the employee. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202-203.) An example of negating an essential element would be establishing that no adverse employment action occurred.

An employer may also "move for summary judgment against a discrimination cause of action with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. A legitimate, nondiscriminatory reason is one that is unrelated to prohibited bias and that, if true, would preclude a finding of discrimination. The employer's evidence must be sufficient to allow the trier of fact to conclude that it is more likely than not that one or more legitimate, nondiscriminatory reasons were the sole basis for the adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 (*Featherstone*) [citations omitted].) The burden is then on the plaintiff employee to rebut with evidence raising an inference that intentional discrimination occurred. "The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive." (*Id*. at p. 1159.) Summary judgment for the employer should be granted where, "given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz*, *supra*, at p. 362.)

If the employer meets the initial burden, to avoid summary judgment the employee must produce "substantial responsive evidence that the employer's showing was untrue or pretextual" thereby raising at least an inference of discrimination. (*Hersant v. Cal. Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 (*Hersant*).) A plaintiff's "suspicions of improper motives . . . primarily on conjecture and speculation" are not sufficient to raise a triable issue. (*Kerr v. Rose* (1990) 216 Cal.App.3d 1551, 1564.) Evidence showing facts inconsistent with the employer's claimed reasons tends to prove the employer's discriminatory intent; that the stated reason was mere pretext. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735; *Reeves v. MV Transp., Inc.* (2010) 186 Cal.App.4th 666, 675. "Pretext" does not require proof that discrimination was the only reason for the employer's action. It is enough that discrimination was a determinative factor; i.e., that discriminatory intent was a substantial motivating factor in the employer's decision to take the adverse action. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 (*Harris*); *Mendoza v. Western Med. Ctr. Santa Ana* (2014) 222

Cal.App.4th 1334, 1341-1342) A "plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*King, supra,* 152 Cal.App.4th at p. 433; see also *Doe v. Dept. of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 733, quoting *King*.)

V. Analysis

Tesla's facts are as follows: Plaintiff was hired by SolarCity as a Field Energy Advisor in San Mateo. (Tesla's Separate Statement of Undisputed Material Facts ("UMF"), No. 1.) In 2015, Plaintiff accepted an offer to relocate to Utah and moved later that year. (Tesla's UMF, No. 2.) He lived in Utah from the time he relocated through the end of his employment. (Tesla's UMF, No. 3.) Skinner promoted Plaintiff to Contract Reassignment Supervisor in August 2015 and he reported to Amber Henwood Mantooth in the Salt Lake City office. (Tesla's UMF, No. 4.) On June 12, 2016, Plaintiff was promoted to Asset Control Manager in Salt Lake City. (Tesla's UMF, No. 5.)

Plaintiff requested and was approved for a baby bonding leave of absence under the FMLA, from April 11, 2016 to June 6, 2016. (Tesla's UMF, No. 6.) Plaintiff requested and was also approved for an FMLA leave of absence from March 9, 2017 to March 24, 2017 to take care of his wife, and he returned to work on March 27, 2024. (Tesla's UMF, No. 7.) Plaintiff was aware he needed to submit a medical certification by February 8, 2017 for his request to be approved, but Plaintiff failed to do so. (Tesla's UMF, No. 8.) Plaintiff was provided an extension to February 16, 2017, however approval of his request was delayed as a result. (Tesla's UMF, No. 9.) Plaintiff was absent from work beginning February 22, 2017, but he requested that his FMLA leave begin on March 9, 2017 and he used his paid time off to account for the time before his leave officially began. (Tesla's UMF, No. 10.) Plaintiff did not ask to have the paid time off before his leave officially began to be designated as protected family care leave. (Tesla's UMF, No. 11.) No one told Plaintiff that he would lose his job if he did not return to work or if he took additional time off. (Tesla's UMF, No. 12.) There are no other employees that he believes were treated better than him by Tesla because they did not take the same time off. (Tesla's UMF, No. 13.)

Skinner repeatedly flew from San Mateo to Utah during Plaintiff's time off, to directly manage his team. (Tesla's UMF, No. 14.) During this time, she discovered that Plaintiff was not managing, guiding, or directing his team at all. (Tesla's UMF, No. 15.) For instance, Plaintiff regularly approved timecards for one employee who consistently did not work a full workday. (*Ibid*.) Plaintiff was supposed to conduct one-on-one meetings with another employee, but he did not follow up with him, which resulted in that employee reading leisure books during work hours because he had no work assignments. (*Ibid*.)

After Plaintiff returned in April 2017, Skinner met with him in the Salt Lake City office to discuss issues with his performance that she had discovered while he was out. (Tesla's UMF, No. 16.) Skinner offered Plaintiff the option to return to his former position, rather than facing discipline for performance issues in his manager position and Plaintiff chose to return to his former position and again reported to Mantooth. (Tesla's UMF, Nos. 17-18.) Mantooth was his manager from April 2017 until his termination in October 2017. (Tesla's UMF, No. 20.) Skinner was still in Plaintiff's chain of command, but she was not his direct supervisor after he returned to his former role. (Tesla's UMF, No. 21.)

In the fall of 2017, Tesla underwent a companywide reduction in force ("RIF") as part of a general corporate restructure following its acquisition of SolarCity. (Tesla's UMF, No. 22.) The benchmark that was used to determine which employees would be laid off was based on the results from the 2017 Annual Performance Reviews. (Tesla's UMF, No. 23.) After all the annual reviews were submitted, unbeknownst to the reviewers, Tesla issued a directive that any employee who received a 2 or below out of 5 on their annual performance review would be terminated as part of the company-wide RIF. (*Ibid*.) Mantooth and Skinner gave Plaintiff a 2 on his 2017 Annual Performance Review. (Tesla's UMF, No. 24.) On October 18, 2017, Plaintiff was terminated as part of Tesla's RIF based on his 2017 Annual Performance Review. (Tesla's UMF, No. 25.) Plaintiff was terminated in the Salt Lake City office. (Tesla's UMF, No. 26.) He was one of several hundred employees in Tesla Energy (and one of five employees reporting to Skinner) who were terminated throughout 2017 as part of the corporate restructuring and RIF. (Tesla's UMF, No. 27.)

Plaintiff's additional material facts are as follows: When he was hired in 2013, among his hiring documents was one entitled, "**CALIFORNIA EMPLOYEES ONLY"**: At-Will Employment, Confidential Information, Invention Assignment and Arbitration Agreement (the "Arbitration Agreement"), which Plaintiff understood only applied to California employees. (Plaintiff's Additional Material Facts ("AMF"), No. 1.) Plaintiff lived and worked in California when he was hired and anticipated continuing to live and work there. (Plaintiff's AMF, No. 2.) In 2014, he was selected as a member of SolarCity's Contract Reassignment team, effective January 1, 2015. (Plaintiff's AMF, No. 4.) In Spring 2015, Plaintiff reached out to Skinner and Curtis Cook about his interest in a more senior and/or supervisory role and around that time, SolarCity notified Plaintiff that their overall group was relocating out of state. (Plaintiff's AMF, No. 6.) They were also notified that anyone who remained in California could retain their jobs but would not have an opportunity for future promotion within the company. (*Ibid*.) Accordingly, Plaintiff agreed to relocate to Salt Lake City, Utah as of September 1, 2015. (Plaintiff's AMF, No. 7.) In July 2015, while Plaintiff was still living and working in California, he was promoted to a supervisor position for SolarCity. (Plaintiff's AMF, No. 8.)

After he transferred to Utah, he continued to report to and take direction from his managers and directors in California including Skinner and Senior Vice President, Fiona Taylor ("Taylor"), who were based in California and worked from SolarCity's headquarters in San Mateo. (Plaintiff's AMF, Nos. 9-10, 23.) In Fall 2016, Tesla acquired SolarCity and began operating it as a wholly owned subsidiary. (Plaintiff's AMF, No. 11.) Plaintiff continued to report to Tesla/SolarCity management, who were in Santa Clara County (Tesla headquarters) and San Mateo. (Plaintiff's AMF, No. 12.) His personnel file was maintained in SolarCity's California offices, he continued to receive direction and management, his employment benefits and access to and receipt of his payroll and tax filings, all of his termination paperwork, and human resources and other personnel guidance emanated from Tesla/SolarCity's California headquarters. (Plaintiff's AMF, No. 13.)

Plaintiff was required to engage in regular conferences and weekly one-on-one meetings with Skinner and others concerning his team's work and direction in Utah. (Plaintiff's AMF, No.

14.) Skinner typically managed Murrain and his team from California. (Plaintiff's AMF, No. 17.) During Plaintiff's 2016 CFRA/FMLA leave, Skinner pressured Plaintiff to return to work as soon as possible. (Plaintiff's AMF, No. 18.) She attempted to negotiate his leave by offering him the option to take every other Friday off, rather than the uninterrupted leave he requested. (Plaintiff's AMF, No. 20.) Upon his return from leave to care for his wife due to her breast cancer and related surgery, Skinner began criticizing Plaintiff's performance and in one instance, while reprimanding him, she said, he was "always tired. Is it your family?" (Plaintiff's AMF, Nos. 21-22.)

On January 15, 2017, Skinner generated a "Talent Check" for Plaintiff for January 9, 2017 to January 15, 2017 and she evaluated his performance during that period. (Plaintiff's AMF, No. 26.) In his January 2017 evaluation, he received positive ratings for his performance and Skinner responded "Definitely" when prompted whether she would "always want [Plaintiff] on her team," and she responded, "Most Likely," when prompted whether she would recommend him for increased responsibilities within a year. (Plaintiff's AMF, No. 27.) On January 20, 2017, Plaintiff informed Tesla about his wife's cancer diagnosis and requested family care leave from February 22, 2017 to April 15, 2017 to provide her care following her double mastectomy, however, his leave was only approved from March 9, 2017 to March 24, 2017. (Plaintiff's AMF, Nos. 28-30.) Plaintiff took personal/sick leave from February 22, 2017 until March 8, 2017, which was characterized by Defendants as "Professional Time Off." (Plaintiff's AMF, Nos. 32-33.) After he returned, Plaintiff asked Skinner for assistance with his workload because his wife and young children still needed his care and assistance. (Plaintiff's AMF, No. 38.) While he was on leave, his workload increased, in part, because it was not addressed and Skinner instructed him to increase his relocation caseload, but she failed to inform him of substantial changes that were enacted in the relocation process during his leave. (Plaintiff's AMF, No. 40.)

On April 3, 2017, Skinner went to Utah to discipline Plaintiff, and she began a campaign against him, starting with unsubstantiated criticisms, threatening discipline. (Plaintiff's AMF, Nos. 41-42.) During the meeting, Skinner informed Plaintiff he could remain in his managerial position and be written up or be demoted to his prior position and report to his former manager

Mantooth. (Plaintiff's AMF, No. 47.) Plaintiff feared retaliation and further backlash from Skinner, and it was clear to him that he would have to accept the demotion if he wanted to remain employed. (Plaintiff's AMF, No. 48.) Plaintiff's functions were transferred to Michael Watts, his former subordinate and the person who replaced him in the managerial role. (Plaintiff's AMF, No. 50.)

In October 2017, Plaintiff received a copy of his Annual Performance Review and while he received positive ratings from Mantooth, Skinner overrode those ratings and issued Plaintiff a 2 out of 5. (Plaintiff's AMF, Nos. 51-54.) Taylor and Skinner had authority and discretion regarding who would be terminated in Fall 2017 and around September 27, 2017, they recommended retaining Plaintiff, however, on October 4, 2017, they decided to fire Plaintiff. (Plaintiff's AMF, Nos. 55-57.) Skinner's decision was based, in part, on Watts' report to her asserting that Plaintiff was bullying him, creating a hostile work environment, and that he told others he had retained a lawyer in case he was fired. (Plaintiff's AMF, Nos. 59-61.) Skinner conducted her own investigation based on Watts' information but did not elevate his reports to HR and Taylor was unaware of Watts' accusation. (Plaintiff's AMF, Nos. 62-63.) Skinner's reason for Plaintiff's termination was based on the managers' recommendation to do so, however, none of them made their recommendations based on the issues with Watts and no one spoke to Plaintiff about his interactions with Watts. (Plaintiff's AMF, Nos. 64-66.)

Robert Chavarry, the senior Human Resources Manager whose job duties "included managing and supervising a team of Human Resource generalists who covered the California market," accompanied Skinner to effectuate Plaintiff's termination. (Plaintiff's AMF, Nos. 68-69.) Plaintiff continued to receive his employment benefits, payroll, tax filings, and other personnel guidance from Defendants' headquarters in California. (Plaintiff's AMF, No. 71.) His personnel file was kept in California and when he requested a copy, the California offices provided it. (Plaintiff's AMF, Nos. 72-73.) Taylor and Skinner exercised their discretion to keep other employees who received ratings of 2 out of 5. (Plaintiff's AMF, No. 75.) At his termination meeting, Skinner informed Plaintiff that he was fired because of comments he made about Watts, and he was offered severance with an agreement that he would not pursue legal action.

(Plaintiff's AMF, Nos. 76-77.) During his 2016 and 2017 CFRA/FMLA leaves, Skinner interrupted his leave with work-related phone calls and communication. (Plaintiff's AMF, No. 79.) The Arbitrator's Arbitration Management Conference also determined that in the arbitration proceeds, "substantive and procedural law shall be controlled by California statutory and case law. (Plaintiff's AMF, No. 80.)

A. FEHA Application to Nonresidents

Tesla argues FEHA protections do not extend to Plaintiff, a Utah employee who was terminated in Utah. (MPA, p.5:15-17.)

State law embodies a presumption against extraterritorial application of its statutes. (*Diamond Multimedia, Sys., Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1059.) Applying this presumption, California courts have held that FEHA does not apply to non-residents employed outside the state when the tortious conduct did not occur in California. (*Campbell v. Arco Marine, Inc.* (1996) 42 Cal.App.4th 1850, 1860 (*Campbell*).) California Code of Regulations, Title 2, section 11008, provides, as relevant, "employees located outside of California are not themselves covered by the protections of the [FEHA] if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decisions makers or participant in unlawful conduct located in California." (Cal. Code Regs. Tit. 2, § 11008, subd. (d)(1)(c).) Thus, for a claim to fall within FEHA's reach, a plaintiff residing outside California is "required to plead at a minimum that he was either employed in California or that the discriminatory conduct occurred in California." (*Gonsalves v. Infosys Techs. Ltd.* (N.D.Cal May 6, 2010) 2010 U.S. Dist. LEXIS 44401, at *5.)

Tesla relies on *Campbell, supra*, 42 Cal.App. 4th 1850, in which the California Court of Appeal addressed FEHA's presumption against extraterritoriality. In *Campbell*, the plaintiff was a Washington state resident who was employed by a company based in California. (*Id*. at p. 1852.) The plaintiff alleged several incidents of sexual harassment against a colleague, which occurred on a ship that was out at sea during the time of all of the incidents, except one which occurred in Washington. (*Id*. at p. 1858.) The court reviewed the statute and its legislative history and concluded that the presumption against extraterritoriality extended to FEHA. (*Id*. at

pp. 1858-1860.) The court rejected the view that FEHA applies "to all California-based employers regardless of where the aggrieved employee resides and regardless of where the tortious conduct took place." (*Id*. at p. 1859.) Specifically, the court found the plaintiff's "relationship with California [was] slight," and while the company was based in California, "no one in its headquarters participated or ratified the conduct." (*Ibid*.) The court held that FEHA was "not intended to apply to non-residents, where… the tortious conduct took place outside of [California's] territorial boundaries." (*Id*. at p. 1852.)

In *Sims v. WorldPac, Inc.* (N.D.Cal. Feb. 22, 2013) 2013 U.S. Dist. LEXIS 24740 at *1 (*Sims*), a Washington resident brought a FEHA claim for age discrimination. (*Ibid*.) He specifically identified the individuals who "engaged in the alleged discriminatory conduct and retaliatory conduct." (*Id*. at *3.) The court denied the defendant's motion to dismiss on the basis of extraterritoriality because the individuals were based in California when they took those actions. (*Ibid*. ["Sims also alleges that Cushing was in California when he and Healy advised Sims that Sims would no longer be permitted to work from his home in Arkansas…Sims also alleges that Cushing made the decision to terminate him in California, and made all arrangements associated with his termination in California"].)

Plaintiff argues Skinner and Taylor worked at Defendants' California headquarters and they made the decisions which lead to adverse actions in California. (Opp., p.8:20-22.) He further argues he lived and working in California from 2013 to 2015 and he was promoted by Skinner and managed at least four subordinates who worked in SolarCity's headquarters. (Opp., p.8:26-p.9:1; Plaintiff's AMF, Nos. 1, 7-8.) It is undisputed that Skinner and Taylor were based in California and worked from the San Mateo headquarters. However, Plaintiff contends Skinner and Taylor made their decisions and/or ratified them in California. In support, Plaintiff relies on Taylor's testimony, which states,

> Q. And is that something that you would have to approve before that promotion could be affected?
>
> A. Yes, I think probably technically I would have the last like signoff for all the promotions on my team.

Q. Okay. How about for demotions on your team, would you technically have to sign off on those as well?

A. Yes.

(Taylor Depo., p.44:10-18.)

Additionally, Skinner testified as follows,

Q. What office would you go to regularly?

A. I would go to the San Mateo office. I tried to get to Utah for a full week – really, I tried to get to Utah for two weeks, so I'd spend one weekend, so ten working days, and ten working days in San Mateo. A lot of the time it was just one week I could get to Utah.

Q. Okay. So one week --

A. One week a month for sure, in general, and then a lot of the times, it was two weeks.

(Skinner Depo., p.36:19-37:3.)

While it appears that the two adverse employment actions (Plaintiff's demotion and his termination) occurred in Utah, Plaintiff's evidence establishes a triable issue of material fact as to whether the allegedly unlawful conduct was ratified by the decision makers (i.e., Skinner and Taylor) in California. Therefore, the Court cannot conclude, as a matter of law, that Plaintiff is precluded from FEHA protections and summary adjudication cannot be granted on this basis.

B. *McDonnell Douglas Test*

Tesla argues the second, fourth, sixth, eighth, and ninth causes of action fail because it can provide a legitimate, non-discriminatory reason for the adverse employment actions. (MPA, p.7:21-23.)

FEHA retaliation claims are analyzed under the *McDonnell Douglas* burden shifting framework. (See *Flait v. N. Am. Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476.) The framework also applies to CFRA retaliation claims and FMLA retaliation claims, as well as ADA retaliation and discrimination claims. (See *Bareno, supra,* 7 Cal.App.5th at p. 560 [CFRA retaliation claims]; *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 613 (*Nelson*) [FMLA retaliation claims];

Wilson v. Murillo (2008) 163 Cal.App.4th 1124, 1134 [ADA retaliation and discrimination claims].)

To establish a legitimate, nondiscriminatory reason for the employment actions, Tesla provides Skinner's declaration in which she states during Plaintiff's February 22, 2017 to March 26, 2017 leave, she became aware of numerous shortfalls in the way he had been managing, guiding and directing his team. (Skinner Decl., ¶ 4.) "Among other issues, I discovered that [Plaintiff] had regularly approved fraudulent timecards for an employee who consistently did not work a full day but whose timecard reflected a full day of work. I also learned of an employee under his supervision who performed no work during the workday, instead spent his time doing pleasure reading because he had no work assigned as a result of Fernando's failure to conduct one-on-one meetings with the employee. I also noted that Fernando had failed to properly escalate a number of important issues to my level as required and that he had been hoarding work." (*Ibid*.) After Plaintiff returned from leave, Skinner met with him to discuss the performance issues she discovered, informed him that she was going to formally write him up, and told him that he could return to his previous role, if he wanted to. (Skinner Decl., ¶ 5.)

Skinner also states,

> Fernando's 2017 Annual Performance Review covered the period from July 1, 2016 to June 30, 2017. Because Fernando reported to both [Mantooth] and to me during that period, we both prepared his review. Based on our assessment of his performance, Fernando received an overall rating of "2-Needs Improvement" out of a total score of 5 on his 2017 Annual Performance Evaluation and his 2017 Supplemental Performance Review for the portion of time that he was a Contract Reassignment Supervisor. He scored "2-Needs Improvement" on all categories: Mindset and Attitude; Innovation and Initiative; Collaboration and Leadership and High Productivity and Quality Results.

(Skinner Decl., ¶ 6.)

She further states, "the ratings and comments reflected on Fernando's Annual Performance Review and Supplemental Performance Review were solely the result of, and are

reflective of, Fernando's skills, abilities, and performance in his assigned roles during the reporting period. The fact that Fernando took an authorized leave to absence played no role in the assessment of his performance." (Skinner Decl., ¶ 7.) This is sufficient to satisfy Tesla's burden of showing there was a legitimate, non-discriminatory reason for his termination. (See *Nakai v. Friendship House Assn. of American Indians, Inc.* (2017) 15 Cal.App.5th 32, 38-39 ["A reason is 'legitimate' if it is 'facially unrelated to prohibited bias, and which if true, would thus preclude a finding of discrimination'"].) Thus, the burden shifts to Plaintiff to show Tesla's legitimate reason is merely pretext.

"Pretext may be inferred from the timing of the discharge decision, the identity of the decisionmaker, or by the discharged employee's job performance before termination. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 224 (*Hanson*).) However, suspicious timing is not alone sufficient to raise a triable issue. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 332 (*Arteaga*).) "In the classic situation where temporal proximity is a factor, an employee has worked for the same employer for several years, has a good or excellent performance record and then, after engaging in some type of protected activity…is suddenly accused of serious performance problems, subjected to derogatory comments about the protected activity, and terminated. In those circumstances, temporal proximity, together with *other* evidence, may be sufficient to establish pretext." (*Id*. at p. 353-354.) The plaintiff cannot "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," and hence infer "that the employer did not act for the [asserted] non-discriminatory reasons."'" (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389-390.)

Plaintiff argues his 2017 performance rating was not the sole or automatic criteria for deciding who would be subject to the RIF and instead the termination decisions were based on his Annual Performance Review *or* any subjective criteria imposed by individual managers, at their discretion. (Opp., p.10:31-11:3.) He provides Taylor's deposition, in which she testified

that while everyone who commented on performance for the reviews was a factor, she and Skinner made the decision about which employees to include in the RIF. (Plaintiff's Exh. H, Taylor Depo., p. 116:24-118:13.) According to communications on September 27, 2017, Skinner and Taylor considered Plaintiff an employee they planned to keep (thus, not included in the RIF). (*Id*. at pp. 179:4-24.) The reason to keep him stated, "his review was based on his performance as a manager from June 2016 to April 2017. And I submit that that was April 3rd of 2017 when that transfer was chosen. Fernando stepped down into a supervisor position in April of 2017. In his new position, which he has had for six months, he would be rated a three." (*Id*. at p. 179:24-180:4.) Plaintiff also relies on Chavarry's deposition, in which he was asked,

> Q. Okay. And so, in your best estimate, does that mean that the managers had some discretion in deciding whether or not an employee ranked as a 2 would be allowed to stay employed at Tesla either in – on the same team or reassigned or with a [Performance Improvement Plan ("PIP")]?
>
> A. Without remembering the specifics of the activity, I still think that the business would have retained discretion on the ultimate outcome based on the rating of what to do with the employee.

(Plaintiff's Exh. J, Chavarry Depo., p. 133:8-16.)

During her deposition, Skinner responded to the question what changed between their position on September 27, 2017 and their decision to fire Plaintiff on October 4, 2017,

> Right. Amber [Mantooth] and Dong and Misty informed me that Fernando's attitude was causing a toxic environment on the floor. That supervisor meeting where Mike [Watts] and Fernando were, he wouldn't stop being – had a vendetta against Mike. Amber had said, "I have tried and tried to talk to him. We've encouraged him to transfer. We encouraged him to move on. He won't do it. He hasn't done it, and we don't want to deal with his aggressive attitude, and we think he's bad for our department."

(Plaintiff's Exh. I, Skinner Depo., p.212:22-213:7.)

Plaintiff contends his 2 out of 5 rating was Skinner's rating alone, which means it was not the collective decision of Skinner, Mantooth, and HR. (Opp., p.11:26-30.) Plaintiff relies on Mantooth's deposition in which she stated Plaintiff reported to her prior to his termination and she gave him a 3 out of 5 rating for his performance. (Plaintiff's Exh. G, Mantooth Decl., p.91:9-23; p.111:10-113:15.) She further testified that she did not recall any complaints about Plaintiff from Watts, whether she documented any discipline based on Plaintiff's interactions with Watts, or whether she brought any complaints to HR about Plaintiff's performance. (Mantooth Depo., p.99:6-100:9.) She further testified that Skinner gave the 2 rating because it was based on performance from July 1, 2016 to June 30, 2017 and Plaintiff reported to Skinner for most of that time. (Mantooth Depo., p.103:24-104:6.) Mantooth assessed Plaintiff's performance in a Supplemental Performance Review, and she rated his performance as satisfactory (or a 3 out of 5). (Mantooth Depo., p.118:23-119:25.) She also testified that based on Plaintiff's performance alone, she did not think he should be terminated, however, there were "interpersonal exchanges," and "more of attitude and events that had happened," which led to the change from September 27, 2017 to October 9, 2017. (Mantooth Depo., p.131:12-132:11.)

Although Plaintiff suggests the inconsistencies with the 2017 rating demonstrates pretext, the inconsistencies have been explained through Tesla's evidence, namely that the ratings were provided by whoever Plaintiff reported to for the relevant period and then the review was calibrated. (Plaintiff's Exh. 74.)[2]

Plaintiff also argues pretext is established by the fact that Skinner was informed of the issues with one of his direct reports, Claus Nielsen prior to his leave. (Plaintiff's Surreply, p.4:12-14.)

> Q. Do you know the reason that [Claus] was terminated?
>
> A. Yes. I spoke to [Skinner] about it a number of times beforehand, and there was no action taken on it. He was – he made misogynistic comments in the workplace, and I was concerned about him.

[2] The numbered exhibits refer to documents that Tesla produced and the parties stipulated as to its authenticity. (See Peck Decl., ¶ 15.)

Q. Is that why he was terminated?

A. *I'm assuming so.*

Q. Do you know why?

A. That was – what was my biggest concern with him.

Q. Did anyone ever tell you the reason he was terminated?

…

A. No, I was on FMLA.

…

Q. Who did you report that he was making misogynist comments to?

A. Ginger Skinner.

…

Q. Was [Claus] having trouble performing his job duties before his termination?

A. Yes.

Q. Did [Skinner] ask you to have one-on-one meetings with [him] to help him improve his performance?

A. No.

Q. Did anyone ask you to have one-on-one meetings with [Claus] to improve his performance?

A. No ma'am. Not that I recall.

Q. When Claus was having performance issues, did you take his work from him and do it for him and stop assigning work?

A. Yes.

Q. Are you aware that when Claus did not have any work assigned to him, he was reading personal books while he was at work?

A. Yes. And [that] was discussed as well.

Q. I'm sorry?

A. Yes. That was discussed as well. I discussed that. Yes, ma'am.

Q. Discussed with whom?

A. Ginger Skinner.

Q. During the April 3rd meeting?

A. No, ma'am. This is beforehand. In my oral communications with her, I had a concern about [Claus] basically just working in general. He had – yeah, it got to be – I was concerned about him, and I voiced my concerns about him.

(Plaintiff's Depo., p. 92:25-97:2 [emphasis added].)

Plaintiff states after he wrote Nielsen up on December 19, 2016, he engaged in case review with him every two weeks, unless meeting with him was not feasible.[3] (Plaintiff's Decl., ¶ 27.) His December 9, 2016 email to Nielsen stated, "Thank you for meeting with me today. Attached is a write up of our discussion. Going forward we will review your cases every two weeks to make sure we are upholding the protocol process and are properly advocating for SolarCity and the client. Please provide a written response with your comments for my records." (Plaintiff's Exh. 46.) Plaintiff contends Skinner was on notice about Nielsen's issues at this time, but Nielsen was not terminated because of the comments he informed Skinner about, and it is unclear exactly when she was informed that Nielsen was reading during work hours because he did not have work assignments.

Plaintiff also testified that his other direct report I.K. Ubani was terminated for showing up to work late and leaving early, but Plaintiff was not aware that Ubani lied on his timecards. (*Id*. at p. 97:8-15.) Plaintiff further testified that he signed off on his timecards, but he was not aware that Ubani was not working his scheduled hours. (*Id*. at p. 97:16-21.) Plaintiff does not argue that Skinner had prior notice of this behavior.

Plaintiff further argues his purported behavior with Watts also constitutes pretext as Skinner knew of the conduct but failed to take any action until she spoke to Watts between September 26, 2017 and October 4, 2017. Plaintiff contends "in the months or weeks before making her termination decision, [Skinner] was aware of 'rumblings' concerning the alleged friction between Watts and Plaintiff, yet she failed to inquire about it." (Opp., p.13:14-16.) However, Plaintiff fails to provide any evidence in support of his assertion. Rather, Skinner's

[3] Based on the email, the date of the write up was December 9, 2016.

testimony establishes that she learned of the conflict between Plaintiff and Watts during the interim between September 27 to October 4, 2017. (See Skinner Decl., p. 212:18-213-7.)

Therefore, Plaintiff cannot show pretext based on Skinner's alleged knowledge of the conduct between Plaintiff and Watts. Moreover, Plaintiff fails to identify or provide any evidence that Skinner did not take action until after she learned of Plaintiff's protected act or characteristic. (See Opp., p.13:7-9; *Soria v. Univision Radio L.A., Inc.* (2016) 5 Cal.App.5th 570, 596-576.)

Plaintiff attempts to demonstrate pretext through the temporal proximity of the adverse action, namely his demotion, which occurred shortly after he returned from his leave in 2017. Plaintiff states he received positive performance ratings prior to his leave, and he received negative performance ratings after his leave. However, this overlooks the fact that Skinner discovered issues with Plaintiff's performance *while* she was filling in for him during his leave in 2017. It was that discovery that resulted in Plaintiff's subsequent demotion and his resulting termination, not his protected conduct of taking family leave. Plaintiff does not provide any evidence to controvert this beyond the timeline of events, which is insufficient to establish pretext, without more evidence. (See *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 868 ["temporal proximity…does not, without more, suffice…to satisfy the employee's burden to show a triable issue of fact on whether the employer's articulated reason was untrue or pretextual"].) Therefore, Plaintiff fails to provide "substantial responsive evidence that the employer's showing was untrue or pretextual" and as a result, he fails to raise at least an inference of discrimination or that he was terminated *because* he took family leave. (*Hersant, supra,* 57 Cal.App.4th at pp. 1004-1005.)

C. <u>Second Cause of Action-CFRA Retaliation (Gov. Code, § 12945.2)</u>

The CFRA, codified in Government Code section 12945.2, "is intended to give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security." (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 558.) Under the CFRA, it is unlawful, "for an employer to refuse to hire or to discharge, fine, suspend, expel, or discriminate against any individual because of…[a]n individual's exercise of

the right to family care or medical leave provided by the CFRA. (Gov. Code, § 12945.2, subd. (k)(1).) It is also unlawful "for an employer to interfere with, restrain, or deny the existence of, or the attempt to exercise, any right provided under" the CFRA. (Gov. Code, § 12945.2, subd. (t).)

"Violations of the CFRA generally fall under two types of claims: (1) interference… and (2) retaliation claims in which an employee alleges that [he] suffered an adverse employment action for exercising [his] right to CFRA leave." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487-488.) The elements for a retaliation claim are: "(1) the defendant was an employer covered by CFRA, (2) the plaintiff was an employee eligible to take CFRA leave, (3) the plaintiff exercised [his] right to take leave to a qualifying CFRA purpose, and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension because of [his] exercise of [his] right to CFRA leave." (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 885 (*Faust*).) *McDonnell Douglas* burden shifting applies in CFRA retaliation cases. (*Ibid*.; see also *Bareno, supra,* 7 Cal.App.5th at p. 560.)

For reasons stated above, Tesla submits evidence that supports a reasonable inference that it had a legitimate, non-discriminatory reason for terminating Plaintiff and Plaintiff fails to provide evidence to support a reasonable inference that the reason is pretextual. Thus, Tesla's motion for summary adjudication of the second cause of action is GRANTED.

D. <u>Fourth Cause of Action-FMLA Retaliation</u>

To make out a prima facie case of retaliation, the employee must show that he availed himself of protected rights under the FMLA, that he was adversely affected by an employment decision, and that there is a causal connection between the employee's protected activity and the employer's adverse employment action. (*Hodgens v. General Dynamics Corp.* (1998) 144 F.3d 151, 161.) The *McDonnell Douglas* burden shifting framework applies to FMLA retaliation claims. (See *Nelson, supra,* 74 Cal.App.4th at p. 613; *Skrjanc v. Great Lakes Power Serv. Co.* (2001) 272 F.3d 309, 315.)

For reasons stated above, Tesla submits evidence that supports a reasonable inference that it had a legitimate, non-discriminatory reason for terminating Plaintiff and Plaintiff fails to

provide evidence to support a reasonable inference that the reason is pretextual. Thus, Tesla's motion for summary adjudication of the fourth cause of action is GRANTED.

E. Fifth Cause of Action-FEHA Associational Discrimination (Gov. Code, § 12926, subd. (o))

Under Government Code section 12926, subdivision (o), association with a disabled person is a protected characteristic. (Gov. Code, § 12926, subd. (o) [defining protected characteristics including "physical disability, mental disability, [and] medical condition" to include "a perception that…the person is associated with a person who has, or is perceived to have, any of those characteristics"].) Thus, it incorporates associational disability into instances where FEHA includes the list of protected characteristics. (See Gov. Code, § 12940, subds. (a)-(d), (j)(1).)

To prevail on a FEHA disability discrimination claim, a plaintiff must show that "(1) they were a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action such a termination, demotion, or denial or an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz, supra,* 24 Cal.4th at p. 355.) "Adapting this framework to the associational discrimination context, the 'disability' from which the plaintiff suffers is his or her association with a disabled person." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1037.) As to a discriminatory motive, "the disability must have been a substantial factor motivating the employer's adverse employment action." (*Ibid*.)

For reasons stated above, Tesla submits evidence that supports a reasonable inference that it had a legitimate, non-discriminatory reason for terminating Plaintiff and Plaintiff fails to provide evidence to support a reasonable inference that the reason is pretextual. As a result, Plaintiff fails to establish his disability was a substantial factor that motivated the adverse employment action. Thus, Tesla's motion for summary adjudication of the fifth cause of action is GRANTED.

F. Sixth Cause of Action-FEHA Retaliation (Gov. Code, § 12940, subd. (h))

Government Code section 12940, subdivision (h), states it is unlawful "for any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).) "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) [they] engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)

For reasons stated above, Tesla submits evidence that supports a reasonable inference that it had a legitimate, non-discriminatory reason for terminating Plaintiff and Plaintiff fails to provide evidence to support a reasonable inference that the reason is pretextual. Thus, Tesla's motion for summary adjudication of the sixth cause of action is GRANTED.

G. <u>Seventh Cause of Action-Failure to Prevent Discrimination and Retaliation (Gov. Code, subd. (k))</u>

"The FEHA makes it unlawful for an employer 'to fail to take all reasonable steps to prevent discrimination and harassment from occurring.' ([Gov. Code,] § 12940, subd. (k).)" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003 (*Scotch*).) "An actionable claim under section 12940, subdivision (k)[,] is dependent on a claim of actual discrimination." (*Id*. at p. 1021.) A prerequisite to a finding of liability for the failure to take all reasonable steps is a finding that the plaintiff suffered unlawful discrimination, harassment, or retaliation. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 282-283; see also *Scotch, supra,* 173 Cal.App. at p. 1021.)

For reasons stated above, the Court grants summary adjudication of Plaintiff's discrimination and retaliation claims. As a result, there is no actionable claim under Government Code section 12940, subdivision (k). Thus, Tesla's motion for summary adjudication of the seventh cause of action is GRANTED.

H. Eighth Cause of Action-ADA Associational Discrimination[4]

Larimer v. International Business Machines (7th Cir. 2004) 370 F.3d 698 (*Larimer*) has been described as "the seminal authority on disability based associational discrimination under the ADA (42 U.S.C. § 12101, et seq.)" (*Rope v. Auto-Chlor System of Washington Inc.* (2013) 220 Cal.App.4th 635, 656.) In *Larimer*, the plaintiff was hired by IBM and nine months later, his wife (also an IBM employee) gave birth to premature twins who suffered from multiple serious medical conditions. One year after the plaintiff was hired and three months after his daughters were born, IBM terminated the plaintiff. He sued IBM for associational discrimination under the ADA, alleging it terminated him due to his association with his disabled daughter. (*Id*. at p. 699.) Summary judgment was granted in IBM's favor and the circuit court affirmed. (*Id*. at p. 703.) The court identified "[t]hree types of situations [which] are, we believe, within the intended scope of the rarely litigated…association section. We'll call them 'expense,' 'disability by association,' and 'distraction.' They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ('expense') his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ('disability by association') the employee's homosexual companion is infected with HIV and the employer fears that the employee will also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ('distraction') the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive to perform his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours." (*Id*. at p. 700.)

Plaintiff's associational discrimination claim is based on the expense and distraction situations. (Complaint, ¶ 169.)

[4] ADA discrimination claims are analyzed using the *McDonnell Douglas* burden shifting framework. (See *Yaronski v. Meadows At East Mountain-Barre for Nursing & Rehab., LLC,* (M.D.Pa. Mar. 31, 2023) 2023 U.S. Dist. LEXIS 57588, at *11 (*Yaronski*).)

In *Kelleher v. Fred A. Cook, Inc.* (2d Cir. 2019) 939 F.3d 465, an employee who had a daughter with a severe neurological condition was told he could not leave work immediately after his shifts and his request to work shortened shifts for one week was denied, and he was told his problems at home were not the company's problem. (*Id.* at pp. 466-467.) After he missed a day of work after his daughter suffered a nearly fatal seizure, he was demoted, another request for shortened shifts was denied, and he was terminated upon arriving to work 10 to 15 minutes late one day. (*Id*. at p. 467.) The court reversed the trial court's dismissal of the complaint and reasoned, "[although] the ADA does not require an employer to *provide* a reasonable accommodation to the nondisabled associate of a disabled person, an employer's *reaction* to such a request for accommodation can support an inference that a subsequent adverse employment action was motivated by associational discrimination. Thus, in this case, [the employer's] demand that the plaintiff 'leave his personal problems at home' after he requested one week of shortened workdays supported his claim that his termination was motivated by associational discrimination." (*Id*. at p. 469 [emphasis original].) Here, there is no such conduct. At most, Plaintiff states, "in the context of reprimanding his performance, Skinner said to Plaintiff that he was 'always tired. Is it your family?'" (Plaintiff's AMF, No. 22; Plaintiff's Depo., p.86:20-87:16.) However, according to the Plaintiff's own description, the statement was made in the context of his performance, not in relation to his leave, a request for leave, or any other request for accommodation. Moreover, as the Court stated above, Tesla sufficiently demonstrates a legitimate, non-discriminatory reason for the adverse employment actions and Plaintiff fails to raise a triable issue of material fact that the reason was pretextual. Thus, Tesla's motion for summary adjudication of the eighth cause of action is GRANTED.

I. <u>Ninth Cause of Action-ADA Retaliation</u>

42 U.S.C. § 12203, provides, "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act." (See 42 U.S.C § 12203, subd. (a).) ADA

retaliation claims are analyzed using the *McDonnell Douglas* burden shifting framework. (See *Yaronski, supra,* 2023 U.S. Dist. LEXIS 57588 at p. *11.)

As the Court stated above, Tesla sufficiently demonstrates a legitimate, non-discriminatory reason for the adverse employment actions and Plaintiff fails to raise a triable issue of material fact that the reason was pretextual. Thus, Tesla's motion for summary adjudication of the ninth cause of action is GRANTED.

J. Third Cause of Action-FMLA Interference (29 U.S.C. § 2615, subd. (a)(1))

The FMLA provides job security to employees who must be absent from work because of their own illnesses, to care for family members who are ill, or to care for new babies. (*Bachelder v. Am. W. Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112,1119 (*Bachelder*).) "Congress recognized that, in an age when all the adults in many families are in the work force, employers' leave policies often do not permit employees reasonably to balance their family obligations and their work life. The result, Congress determined, is 'a heavy burden on families, employees, employers, and the boarder society.'... In response to these problems, the Act entitled covered employees to up to twelve weeks of leave each year for their own serious illnesses or to care for family members and guarantees them reinstatement after exercising their leave rights." (*Ibid*. [citations omitted].)

There are five elements for a prima facie case of interference with such rights. The employee must establish: (1) they were eligible for the FMLA protections, (2) their employer was covered by the FMLA, (3) they were entitled to leave under the FMLA, (4) they provided sufficient notice of his or her intent to take leave, and (5) their employer denied them FMLA benefits to which they were entitled. (*White v. County of Los Angeles* (2014) 225 Cal.App.4th 690, 701.)

An interference claim under the FMLA does not involve the burden-shifting analysis articulated by the United States Supreme Court in *McDonnell Douglas.* (*Faust, supra,* 150 Cal.App.4th at p. 879.) As stated in *Bachelder,* "there is no room for a *McDonnell Douglas* type of pretext analysis when evaluating an 'interference' claim under this statute. (*Bachelder, supra,*

259 F.3d at p. 1131.) "A violation of the FMLA 'simply requires that the employer deny the employee's entitlement to FMLA." (*Faust, supra,* 150 Cal.App.4th at p. 879.)

Plaintiff alleges Defendants unreasonably delayed approval of his leave and discouraged him from taking the full amount of FMLA leave that he was entitled to. (Complaint, ¶ 143.) He further alleges Defendants failed to provide him the proper forms, notice, and information concerning his rights and responsibilities under FMLA. (Complaint, ¶ 144.) Defendants contacted and pressured him into returning before his leave ended and subjected him to harassment and intimidation regarding his leave request. (Complaint, ¶¶ 145-146.)

Tesla argues Plaintiff requested and was approved for baby bonding leave under the FMLA from April 11, 2016 to June 6, 2016. (Tesla's UMF, No. 5.) It further argues Plaintiff requested and was approved for FMLA leave from March 9, 2017 to March 24, 2017 to care for his wife. (Tesla's UMF, No. 6.) Tesla relies on the following portion of Plaintiff's deposition testimony,

> Q. The first part of the email says that [as read]: "We have been alerted by your Workday request that you need to take a leave of absence to care for a family member beginning March 9, 2017." Does that refresh your memory that you submitted a Workday request for a leave of absence?
>
> A. I don't know if it was a Workday request. I don't remember how I submitted it. But the document states that, so…
>
> Q. Did you understand that you needed to submit a medical certification to have your leave of absence approved?
>
> A. Yes.
>
> Q. Did you understand that you needed to submit a completed medical certification by February 8, 2017?
>
> A. No.
>
> Q. Look down in the "Action Items" section of the email, the first bullet point. It states: "To properly designate your leave of absence, we will need your family member's health care provider to complete the attached FMLA Medical

Certification- Family Member. We will need this back within 15 days, no later than 2/8/17." Does that refresh your memory…?

A. Yes.

Q. When you made your request for leave, did you ask [for] the leave [to] begin on March 9, 2017?

A. Yes.

Q. Did you use PTO to take time off of work from February 22, until March 8, 2017?

A. Yes.

Q. Did you miss the February 8 deadline for submitting this completed medical certification?

A. Yes.

(Plaintiff's Depo., p. 53:16-55:8.)

Plaintiff further testified that he was given an extension to February 16, 2017 to provide the certification and he missed that deadline as well. (Plaintiff's Depo., p. 55:19-56:2.) Plaintiff was given another extension through February 21, 2017, to provide the medical certification and he met that deadline. (Plaintiff's Depo., p. 56:12-57:2.) Plaintiff testified that he did not ask for his leave to begin earlier than March 9, 2017, and he did not recall asking anyone at SolarCity for the PTO time he took in February through March 8, 2017 to be designated as protected family care leave. (Plaintiff's Depo., p. 61:10-21.) He was informed that if he took leave before his medical certification was submitted, he could be considered to have abandoned his job. (Plaintiff's Depo., p. 61:23-62:20.) But no one told him that he would be terminated if he did not return to work at the end of his leave or if he took additional time off after his leave ended in March 2017. (Plaintiff's Depo., p.62:21-63:4.) Plaintiff's time off from February 22, 2017 to March 8, 2017 was not treated as FMLA/CFRA leave because Plaintiff failed to submit the medical certification in time for that period. Additionally, by his own admission, he did not ask for the leave to be designated as protected family leave.

29 C.F.R. § 825.300, subdivision (d), provides, "the employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA within five business days absent extenuating circumstances." (29 C.F.R. § 825.300, subd. (d)(1).) Plaintiff argues he provided the certification on February 21, 2017, one day before the first day he originally requested leave. However, this was after the deadline for Plaintiff's original request for time off. Moreover, Tesla had five business days to notify Plaintiff whether his leave would be designated, thus, Plaintiff cannot establish that Tesla failed to meet its notice obligation because it did not notify him by February 22, 2017.

29 C.F.R. §825.220, prohibits an employer "from interfering with, restraining, or denying the existence of (or attempts to exercise) any rights provided by the Act." (29 C.F.R. § 825.220, subd. (1).) Plaintiff argues Skinner frequently interrupted his CFRA/FMLA leave with work-related phone calls, electronic communications, and voice messages. (See Camillia Murrain Decl., ¶¶ 14, 18-19 [detailing conduct during Plaintiff's 2016 protected family leave].) Plaintiff also provides the following portion of his deposition,

> Q. In your lawsuit, you allege that [Skinner] tried to negotiate with you to take off less time for your second child's birth. What do you mean by this?
>
> A. She asked me if I could take – if I could come work – take every other Friday off and asked me if I could just come back a little sooner because she was without a manager in that position. And she was doing all of the work, basically.
>
> Q. Did you have any other discussions with her about your leave?
>
> A. No.
>
> Q. Did she tell you that you had to do that, or was she just making a request?
>
> A. She was making a request. I spoke to my wife, and we decided that it was not in our best interest. But then I came back early because of it.

(Plaintiff's Depo., p.49:4-21.)

However, Tesla argues Plaintiff's leave in 2016 was from April 11, 2015 to June 6, 2026 and his paystub shows that he did not return to work early. (See Kim Reply Decl., Exh. 13 [paystub showing hours worked from June 6, 2016, to June 11, 2016].) Tesla further argues Plaintiff's IT access was restricted while he was on protected leave. (See Kim Reply Decl., Exh. 12 [email from the benefits administrator to IT support requesting restoration of Plaintiff's access to all systems].) While Plaintiff contends the communications occurred via his personal phone, he fails to provide any evidence in support. Plaintiff fails to provide any evidence of communications during his 2017 leave. Plaintiff further argues, for the first time in his surreply, he was denied job restoration. (Surreply, p. 10:10-15.) However, he fails to provide any evidence in support. Moreover, Tesla has not had the opportunity to address this argument, thus the Court declines to consider it. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [issues raised for first time in reply brief are generally not considered, "because such consideration would deprive the respondent of an opportunity to counter the argument"].)

Based on the foregoing, Plaintiff fails to provide evidence to establish a triable issue of material fact that Tesla interfered with FMLA benefits to which he was entitled to. Thus, Tesla's motion for summary adjudication of the third cause of action is GRANTED.

K. First Cause of Action-CFRA Interference (Gov. Code, § 12945.2)

"The CFRA was enacted in 1991 as a state counterpart to the FMLA. Its purpose is to allow employees to take leave from work for certain personal or family medical reasons without jeopardizing their job security." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 919.) "[C]ourts use language from the FMLA and the CFRA interchangeably. (*Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1132, fn. 4 ["CFRA adopts the language of the FMLA and California state courts have held that the same standards apply"]; see *Pang v. Beverly Hosp. Inc.* (2000) 79 Cal.App.4th 986, 993 [CFRA incorporates federal regulations interpreting the FMLA "to the extent they are not inconsistent with [CFRA] or other state laws"])." (*Ibid*.)

For reasons stated above, Tesla's motion for summary adjudication of the first cause of action is GRANTED.[5]

[5] The Court notes the parties group their arguments as to the interference claims together in their papers.

L. Tenth Cause of Action-Wrongful Termination in Violation of Public Policy

"To establish a claim for wrongful discharge in violation of public policy, each of the following must be proved, (1) an employer-employee relationship, (2) termination or other adverse employment action, (3) termination of plaintiff's employment was a violation of public policy or more accurately, a 'nexus' exists between the termination and the employee's protected activity." (*Holmes v. General Dynamics* (1993) 17 Cal.App.4th 1418, 1426.) Protected conduct includes exercising a statutory right or privilege. (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 155.)

Tesla argues the tenth cause of action fails if all the other claims fail, and it appears Plaintiff agrees. (MPA, p. 10:22-25; Opp., p:1:fn. 1 ["Tesla asserts that Plaintiff's Tenth Cause of Action for Wrongful Termination is contingent upon his success with his First through Ninth Causes of Action: if Plaintiff prevails at MSJ/MSA on any of those claims, his Tenth Cause of Action also survives"].) Plaintiff's claim is based on the FEHA, FMLA, CFRA, and ADA. Tesla's motion for summary adjudication has been granted as to other causes of action. Therefore, Tesla's motion for summary adjudication of the tenth cause of action is GRANTED and thus, Tesla's motion for summary judgment is GRANTED.