SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

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

DATE: 01-09-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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

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

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

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

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV415280 Hearing: Demurrer	Bijan Haghighi vs City of Mountain View et al	See Tentative Ruling. Court will prepare the final order.
LINE 2	23CV415280 Hearing: Demurrer	Bijan Haghighi vs City of Mountain View et al	See Tentative Ruling. Court will prepare the final order.
LINE 3	20CV364915 Mtn: Summary Judgment/Adjudication	Kevin Lanfri vs Goodwill of Silicon Valley et al.	See Tentative Ruling. Court will prepare the final order.
LINE 4	20CV371010 Mtn: Summary Judgment/Adjudication	Piedmont Capital Management, L.L.C. et al vs Thanh Nguyen	See Tentative Ruling. Court will prepare the final order.
LINE 5	21CV385612 Mtn: Summary Judgment/Adjudication	Indradevi Joseph vs Xilinx, Inc. et al.	See Tentative Ruling. Court will prepare the final order.
LINE 6	17CV315638 Mtn for Atty Fees after Mtn to Enforce	Richard Kwok vs IGA Homes, Inc et al	See Tentative Ruling. Plaintiff shall submit the final order.

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LINE 7	19CV340430 Mtn Claim of Exemption	WELLS FARGO BANK, N.A. vs ROGER SMITH, Jr.	Defendant's claim for total exemption is denied in part and granted in part. Based on the financial information provided, Defendant is ordered to pay $120 per pay period. Plaintiff shall submit the final order.
LINE 8	19CV355963 Mtn to Dismiss the Action for Delay in Service	Domonick Ramos vs City of San Jose	See Tentative Ruling. Defendant shall submit the final order.
LINE 9	21CV382748 Mtn Withdraw of Atty	Jonnathan Lozada vs Baljinder Grewal et al	Counsel for plaintiff shall appear at the hearing. If moving party fails to appear the motion will be taken off calendar.
LINE 10	21CV392825 Mtn Reconsider	Danny Brown vs Ford Motor Company et al	The motion will be heard Feb. 26 at 10 am in Dept. 2.
LINE 11	2012-1-CV-234949 Mtn Vacate Renewed Judgment	L. Williams vs M. Ferris, et al	The Court agrees that Defendant cannot now contest amounts already ordered to which he did not timely contest. To this extent, the Court denies the Motion to Vacate. However, the Court may correct the amount of the renewed judgment. As the Court was not able to understand the accounting provided by Plaintiff, Plaintiff is ordered to appear at the hearing to explain the accounting, including the basis for the interest amounts of $147,482.31 and $71,714.17.
LINE 12	23CV417728 Hearing Compromise of Minor's Claim	Dilan Roldan Paz et al vs. Jesus Rodriguez	The GAL and counsel for GAL shall appear at the hearing so that the court can conduct voir dire and determine that the settlement is reasonable and knowing.

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Line 13	23CV417728 Hearing Compromise of Minor's Claim	Dilan Roldan Paz et al vs. Jesus Rodriguez	The GAL and counsel for GAL shall appear at the hearing so that the court can conduct voir dire and determine that the settlement is reasonable and knowing.

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Calendar Lines 1 and 2
Case Name: *Haghighi v. City of Mountain View, et al.*
Case No.: 23CV415280

According to the allegations of the second amended complaint ("SAC"), plaintiff Bijan Haghighi ("Plaintiff") is a close neighbor to Mountain View High School ("MVHS"). (See SAC, ¶ 17.) The Mountain View Los Altos School District ("District") Trustees voted to confirm Los Altos High School and MVHS school use policies including field light and sound events, band practice and pool usage that were the result of negotiations with a group called MVLA Neighborhood Cares. (See SAC, ¶ 18, exh. 2.) District has failed to take the necessary steps as promised to manage traffic and parking and respond to complaints within five days, instead actively ignoring and retaliating against Plaintiff's attempts at communication. (See SAC, ¶¶ 19-20.) On February 19, 2022, Plaintiff allegedly engaged in a third peaceful "protest" on the MVHS football field, interfering with games on the field, to which MVHS employee Achilles Walker ("Walker") and MVHS parent Christopher Toney ("Toney") approached Plaintiff in a threatening and aggressive manner, physically pushing and verbally abusing him without provocation or justification. (See SAC, ¶¶ 22, 113.) On February 28, 2022, Plaintiff initiated a formal mediation session with former MVHS principal Michael Jimenez in which they agreed that MVHS would put up A-frame signs indicating no parking on Bruckner Circle for football and soccer games, MVHS would provide flyers to Plaintiff regarding no parking on Bruckner Circle for MVHS activities, MVHS would share the schedule of outdoor band practices, MVHS will request that staff responsible for athletics and band activities be mindful of the neighbors, the MVHS band will practice in a particular area of the grass soccer field, Plaintiff will only communicate concerns with the MVHS principal and the parties agree to continue discussions of concerns. (See SAC, exh. 1.) On June 19, 2022, District and its construction contractor RGM Kramer Inc. ("RGMK") violated the construction ordinance by starting at 7am without the required permit on the Juneteenth national holiday, and the Mountain View Police Department failed to recognize the violation, to enforce it, or to issue a citation. (See SAC, ¶¶ 23-25.) RGMK additionally began construction activities before the allowed 7 am start time in violation of city ordinances on July 5, 2022, February 16, 2023, and May 18, 2023. (See SAC, ¶ 26.) Plaintiff also complains that the City of Mountain View ("City") removed parking restrictions on a large portion of Truman Avenue in January 2023 and has ignored Plaintiff's calls for enforcement, resulting in Plaintiff and his tenants being unable to park in front of Plaintiff's home. (See SAC, ¶¶ 28-30.) Plaintiff also believes the removal of parking restrictions has resulted in a great increase of serious safety risks. (See SAC, ¶¶ 31-34.) On September 22, 2022, District filed a petition for a workplace restraining order against Plaintiff based on Plaintiff's threatening behavior towards students, teachers and employees and trespass on MVHS property. On January 18, 2023, the Court [Hon. Lucas] issued the restraining order against Plaintiff.

On September 1, 2023, Plaintiff filed the 338 paragraph, 68 paged SAC against defendants City, Kimbra McCarthy ("McCarthy"), Jennifer Logue ("Logue"), Wahed Magee ("Magee"), Nena Bizjak ("Bizjak"), Aarti Shrivastava ("Shrivastava"), District, Nellie Meyer ("Meyer"), Kip Glazer ("Glazer"), Marti McGuirk ("McGuirk"), Walker, Toney, RGMK and Ken Judd ("Judd") (collectively "Defendants"), asserting causes of action for:

1) Fraudulent inducement (against District, Meyer and Glazer);
2) Negligence (against District, Meyer and Glazer);
3) Nuisance (against District, Meyer and Glazer);

4) Assault (against District, Walker and Toney);
5) Battery (against District, Walker and Toney);
6) Violation of Civil Rights (against District and Walker);
7) Intentional infliction of emotional distress (against District, Walker and Toney);
8) Negligence (against District and Walker);
9) Nuisance (against City, McCarthy, Magee, District, Meyer, RGMK and Judd);
10) Breach of mandatory duty under Government Code section 815.6 (against City, McCarthy, Magee, District and Meyer);
11) Negligence per se (against City, McCarthy and Magee);
12) Nuisance (against City, McCarthy and Magee);
13) Negligence (against City, McCarthy and Magee);
14) Negligent infliction of emotional distress (against City, McCarthy and Magee);
15) Declaratory relief (against City, McCarthy and Magee);
16) Violation of First Amendment retaliation (against City, McCarthy, Logue, Magee, District, Meyer, Glazer and McGuirk);
17) Defamation (against District, Meyer and Glazer);
18) Obstruction of justice (against District, Meyer, Glazer and McGuirk);
19) Civil conspiracy (against City, McCarthy, Logue, Magee, District, Meyer, Glazer and McGuirk);
20) Deliberate indifference (against City, McCarthy, Logue, District, Meyer and Glazer);
21) Violation of Equal Protection (against City, McCarthy and Magee);
22) Vicarious liability (against District);
23) Negligent retention and supervision (against District);
24) Gross negligence (against City, McCarthy, Magee, District, Meyer, Glazer, RGMK and Judd);
25) Administrative law challenge (against District, Meyer and Glazer); and,
26) Intentional misrepresentation (against City, McCarthy, Magee, Bizjak and Shrivastava).

Defendants District, Meyer, Glazer, McGuirk and Walker (collectively, "District defendants") demur to the first through third, sixth, seventh, ninth, tenth, sixteenth through twentieth and twenty-second through twenty-fifth causes of action of the SAC on the ground that they fail to state facts sufficient to constitute causes of action against them. Defendant Toney demurs to the fourth, fifth and seventh causes of action of the SAC on the ground that they fail to state facts sufficient to constitute causes of action against him.

I. TONEY'S DEMURRER TO SAC

Toney argues that: the SAC fails to allege facts against Toney because judicially noticeable facts establish the affirmative defense of defense of others; the fourth cause of action for assault fails to allege facts supporting damages or causation; the fifth cause of action for battery fails to allege facts regarding intent to harm and injury; and, the seventh cause of action for intentional infliction of emotional distress (IIED) fails to allege facts demonstrating extreme and outrageous conduct, or extreme or severe emotional distress.

Toney's request for judicial notice

Toney requests judicial notice of the following documents:

- The first amended complaint (attached as Exhibit 1);
- The SAC (attached as Exhibit 2);
- The docket in *Mountain View Los Altos Union High School District v. Bijan Haghighi* (Super. Ct. Santa Clara County, 2022, No. 22CH011105) (attached as Exhibit 3);
- The January 18, 2023 restraining order issued in *Mountain View Los Altos Union High School District v. Bijan Haghighi* (Super. Ct. Santa Clara County, 2022, No. 22CH011105);
- A copy of the official published schedule of MVHS girls soccer 2021-2022, confirming that a home playoff game against Burlingame occurred at 4:30 pm on February 19, 2022, when Plaintiff is alleged to have conducted his "protest," and that the game involved high school aged minor girls (attached as Exhibit 5); and,
- Information from the K- the 12 school shooting database (attached as Exhibit 6).

The request for judicial notice is GRANTED as to the first amended complaint, the SAC, the docket in *Mountain View Los Altos Union High School District v. Bijan Haghighi* and the restraining order. (See Evid. Code § 452, subd. (d).) The request for judicial notice is also GRANTED as to published schedule of the MVHS soccer indicating that Plaintiff's "protest" occurred during a MVHS girls soccer game against Burlingame on February 19, 2022. (See Evid. Code § 452, subd. (h).) The request for judicial notice as to the data on the K-12 school shooting database is DENIED.

All causes of action: affirmative defense of others

Defendant Toney asserts that the SAC fails to allege facts sufficient to constitute a cause of action against him because "the facts alleged by Plaintiff himself in his SAC, taken together with judicially noticeable facts, conclusively establish a defense of others affirmative defense." (Toney's memorandum of points and authorities in support of demurrer ("Toney's memo"), p.9:17-18.)

Civil Code section 50 states that "[a]ny necessary force may be used to protect from wrongful injury the person or property of oneself, or of a spouse, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest." (Civ. Code §50.) As quoted by Toney in his supporting memorandum, "[g]enerally speaking, the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury." (Toney's memo, pp.9:27-28, quoting *Vaughn v. Jonas* (1948) 31 Cal.2d 586, 600.) Toney argues that since Plaintiff was a trespasser on the field of play and represented a pattern of repeated wrongful conduct that resulted in a restraining order, that there was a real risk of violence perpetrated by Plaintiff, and Plaintiff does not allege any medical damage or physical harm, that these judicially noticeable facts establish that he reasonably believed that Plaintiff was going to harm others and that he used only the amount of force reasonably necessary to protect others. (See Toney's memo, pp.10:6-25, 11:1-2.) Recognizing that his argument hinges on the reasonableness of his belief that Plaintiff would harm others, and that he only used the amount of force reasonably necessary to protect others, Toney cites to *Burton v. Sanner* (2012) 207 Cal.App.4th 12, in which the court stated that "[t]he reasonableness standard is an objective standard." (*Id*. at

p.20.) However, the *Burton* court continued "[w]hen an alleged act of self-defense … is at issue, the question of what force was reasonable and justified is *peculiarly one for determination by the trier of fact*." (*Id*. (emphasis original; also stating that "[w]hether defendant, as a reasonable man, was justified in believing under all of the circumstances that he was threatened with imminent danger as to justify the use of a deadly weapon in self-defense was a question of fact for the jury").)

Here, while it is quite possible that Toney will prevail on establishing the affirmative defense and on the causes of action against him, the Court cannot conclude that, as a matter of law, the judicially noticeable facts demonstrate Plaintiff's reasonableness; rather, as the *Burton* court noted, this is a question that is peculiarly one for determination by the trier of fact. Accordingly, Toney's demurrer to the fourth, fifth and seventh causes of action on the ground that the allegations and judicially noticeable facts demonstrate that the affirmative defense of others precludes these causes of action is OVERRULED.

Fourth cause of action for assault

"The essential elements of a cause of action for assault are: (1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff reasonably believed she was about to be touched in a harmful or offensive manner or it reasonably appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm." (*So v. Shin* (2013) 212 Cal.App.4th 652, 668-669.) Toney asserts that the fourth cause of action fails to allege facts supporting any causation of Plaintiff's harm or that Plaintiff was harmed. In opposition, Plaintiff argues that "the nature of assault is the creation of apprehension, not necessarily physical injury… [and] Plaintiff's detailed account of the incident demonstrates how Toney's aggressive actions were a substantial factor in causing emotional and psychological distress, constituting harm under the broader understanding of assault in California law." (Pl.'s opposition to Toney's demurrer to SAC, p.2:20-25.)

However, the fourth cause of action fails to allege any facts supporting any emotional or psychological distress or causation of such harm. Accordingly, Toney's demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend.

Fifth cause of action for battery

"The essential elements of a cause of action for battery are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant's conduct; and (4) a reasonable person in plaintiff's position would have been offended by the touching." (*So*, *supra*, 212 Cal.App.4th at p.669.) Toney argues that the fifth cause of action fails to allege that he intended to harm Plaintiff or that Plaintiff was harmed. In opposition, Plaintiff argues that as to intent, the fifth cause of action alleges that Toney approached the Plaintiff in a hostile manner, and "describes actions that are inherently intentional in nature, fulfilling the requirement to establish intent for battery." (Pl.'s opposition to Toney's demurrer, p.4:3-6.) As to the argument regarding harm, Plaintiff again argues that Plaintiff experienced direct harm as a result of Toney's actions, including emotional distress and physical discomfort.

As with the fourth cause of action, the fifth cause of action fails to allege any facts supporting emotional or psychological distress or causation of such harm. Further, while the fifth cause of action alleges that Toney intentionally made contact that was harmful or offensive, it does not allege that Toney intended to harm Plaintiff. Accordingly, Toney's demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend.

Seventh cause of action for intentional infliction of emotional distress

The elements for intentional infliction of emotional distress are: "1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Davidson v. City of Westminister* (1982) 32 Cal.3d 197, 209.) "With respect to the requirement that a plaintiff show severe emotional distress, [the California Supreme C]ourt has set a high bar." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.) To plead "outrageous" conduct, the conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. (See *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) "Liability for intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (*Hughes*, *supra*, 46 Cal.4th at 1051.)

Toney argues that the seventh cause of action neither alleges extreme and outrageous conduct by the defendant with the intention of causing emotional distress nor extreme or severe emotional distress. In opposition, Plaintiff argues that the seventh cause of action alleges physical aggression and a premeditated effort to cause humiliation and fear, and that his emotional scars left by the public humiliation constitutes severe and extreme emotional distress. (See Pl.'s opposition to Toney's demurrer, p.5:5-22.)

The seventh cause of action alleges that Toney actively approached Plaintiff in a hostile manner, physically jostled him while he was on the football field in the middle of the soccer game, and yelled at him while he maintained a peaceful demeanor. (See SAC, ¶ 112.) The seventh cause of action also notes that this was the third game with which Plaintiff interfered. (See SAC, ¶ 113.) The SAC also alleges that Toney had a "position of authority" but also alleges that his position was a "parent of a student and soccer player at Mountain View High School." (See SAC, ¶¶ 14, 114.) These allegations fail to allege facts supporting extreme and outrageous conduct by Toney. It is unclear what is meant by "active approaching," as opposed to just approaching, but approaching a trespasser on the field during a soccer game in a hostile manner is less than a direct threat. Plaintiff appears to admit the alleged physical jostling did not result in any physical damages; however, he contends that it resulted in humiliation. The alleged physical jostling on a soccer field in the middle of a soccer game that did not result in any physical harm appears to be an annoyance if anything and any resulting humiliation of being jostled seems to be the type of indignity that does not exceed all bounds of that usually tolerated in a civilized community. The seventh cause of action's allegations do not specify the content of what Toney was yelling at Plaintiff, but insults or even threats are the types of trivialities that the California Supreme Court has deemed to be insufficient to constitute outrageous or extreme conduct. (See *Hughes*, *supra*, 46 Cal.4th at p.1051.) Further, as Toney argues, the seventh cause of action alleges that Plaintiff has "lasting emotional scars," but has

not alleged any facts detailing the emotional scars or facts supporting the existence of any resulting severe or extreme emotional distress.

Accordingly, Toney's demurrer to the seventh cause of action is SUSTAINED with 20 days leave to amend.

II. DISTRICT DEFENDANTS' DEMURRER TO SAC

Plaintiff's opposition violates Rule of Court 3.1113, subdivisions (d) and (f) and is considered in the same manner as a late-filed paper.

Rule of Court 3.1113, subdivision (d) states that "[e]xcept in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages." (Cal. Rule of Court 3.1113, subd. (d).) Rule of Court 3.1113, subd. (f) states that "[a] memorandum that exceeds 10 pages must include a table of contents and a table of authorities…. [and a] memorandum that exceeds 15 pages must also include an opening summary of argument." (Cal. Rule of Court 3.1113, subd. (f).) Rule of Court 3.1113, subd. (g) states that "[a] memorandum that exceeds the page limits of these rules must be filed and considered in the same manner as a late-filed paper." (Cal. Rule of Court 3.1113, subd. (g).)

Here, Plaintiff's opposition to District defendants' demurrer is 28 pages and contains neither a table of contents nor a table of authorities nor an opening summary of argument. The opposition is considered in the same manner as a late-filed paper.

First cause of action for fraud

The first cause of action alleges two counts against District, Meyer and Glazer. The elements of a cause of action for fraud are: (1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. (*Lazar v. Super. Ct. (Rykoff-Sexton, Inc.)* (1996) 12 Cal. 4th 631, 638.)

"[F]raud actions are subject to strict requirements of particularity in pleading." (*Furia v. Helm* (2003) 111 Cal.App.4th 945, 956; see also *Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268 (stating same); see also *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184 (stating that "[i]n California, fraud must be pled specifically; general and conclusory allegations do not suffice").) The specificity requirement has two purposes: to apprise the defendant of certain definite accusations against him so that he can intelligently respond to them, and also to weed out nonmeritorious actions on the basis of the pleadings. (See *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 838.) Minimally, a fraud cause of action 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. Super. Ct. (Rykoff-Sexton, Inc.)* (1996) 12 Cal. 4th 631, 645; see also *Tenet Healthsystem Desert*, *supra*, 245 Cal.App.4th at p.838 (stating same).)

District defendants argue that the first cause of action—both counts—fail to allege facts supporting fraud because: District cannot be liable as it is immune as a public entity; and, the first cause of action does not identify any misrepresentations by either Glazer or Meyer. In opposition, Plaintiff acknowledges that "Dr. Meyer and Dr. Glazer did not directly engage in

initial negotiations with the MVLA Neighborhood Cares Group… [and] may not have personally made the initial representations." (Opposition to District defs.' demurrer, pp.4:24-26, 5:3-4.) However, Plaintiff argues that they are nevertheless liable because "they assumed the responsibility of upholding the commitments made by their predecessors… [and] their inaction and refusal to honor these agreements reflect a continuity of the original intent to defraud and deceive." (*Id*. at pp.4:26-27, 5:4-7.) As to District, Plaintiff argues that Government Code section 818.8's absolute immunity does not apply because "it does not and should not shield entities from the consequences of active and intentional fraud… [t]o interpret it as such would be to provide a blanket immunity for any deceitful conduct so long as it is carried out by a governmental entity, which is neither the intent nor the letter of the law." (*Id*. at p.3:17-21.)

Despite an overly long opposition, Plaintiff does not provide any legal authority to support his assertions. Section 818.8 expressly states that "[a] public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional." (Gov. Code § 818.8.) It does not appear that section 818.8 could be interpreted in the manner that Plaintiff suggests. Moreover, Plaintiff fails to explain how one individual can be liable for another individual's inducement into an agreement. Plaintiff does not suggest that either Meyer or Glazer had an intent to induce Plaintiff to rely on the alleged misrepresentation or otherwise had knowledge of the misrepresentation at the time it was made—both elements of a fraudulent inducement cause of action.

Here, there does not appear to be any manner in which Plaintiff can amend the first cause of action so as to allege a viable cause of action against District, Glazer or Meyer. Plaintiff does not request leave to amend the cause of action. Even so, "[t]he plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.'" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341 (Sixth District, quoting *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636; see also *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (stating same); see also *LeBrun v. CBS Television Studios, Inc*. (2021) 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343.) "The plaintiff must clearly and specifically set forth the 'applicable substantive law'… and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action." (*Id*. (also stating that "[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint… [w]here the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend").)

District defendants' demurrer to both counts of the first cause of action is SUSTAINED without leave to amend.

Second and twenty-third causes of action for negligence

"The elements of a negligence cause of action are duty, breach, causation, and damages." (*Coyle v. Historic Mission Inn Corp*. (2018) 24 Cal.App.5th 627, 634.) Government Code section 815 states that "a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person… except as otherwise provided by statute." (Gov. Code § 815, subd. (a).) "In other words, direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714." (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183.) The second cause of action for negligence and the twenty-third cause of action for negligent retention and supervision are premised on Civil Code section 1714 and thus fail to allege the existence of a duty—the first element of a negligence cause of action.

The second cause of action also alleges "where applicable" liability "under Government Code § 815.6" (SAC, ¶ 81), which provides liability for failure to discharge a statutory duty. However, the second cause of action fails to allege any statute other than Civil Code section 1714, and thus, fails to allege any legal duty that can be a basis for liability for negligence.

The twenty-third cause of action also alleges that District "owed a common law duty to the Plaintiff to exercise reasonable care in the retention and supervision of its employees." (SAC, ¶ 272.) However, "[t]here is no common law governmental tort liability in California; and except as otherwise provided by statute, there is no liability on the part of a public entity for any act or omission of itself, a public employee, or any other person." (*Gibson v. City of Pasadena* (1978) 83 Cal.App.3d 651, 655; see also *Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457 (stating that "[i]n California, all government tort liability must be based on statute… Government Code section 815 'abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or state Constitution'").) Thus, Plaintiff's allegation that District has a common law duty also fails to state facts sufficient to allege the existence of a legal duty that may form the basis for a negligence cause of action.

In opposition, Plaintiff argues that "[m]y Second Cause of Action (and others similarly argued) clearly establishes a duty of care owed by the Defendants. This duty arises from their roles as managers and overseers of the high school and its activities, subject to California Civil Code § 1714(a), which obligates every person and entity to exercise ordinary care to prevent injury to others." (Pl.'s opposition to District's demurrer, p.6:9-12.) As stated above, section 1714 is not a basis for liability for public entities and thus, the second and twenty-third causes of action fail to state facts sufficient to constitute viable causes of action. As with the first cause of action, Plaintiff does not request leave to amend. Plaintiff neither shows in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading, nor provides factual allegations that sufficiently state all required elements of that cause of action, nor provides any legal authority showing the viability of the causes of action. (See *Ferrick*, *supra*, 231 Cal.App.4th at p. 1341 (Sixth District, quoting *Cooper*, *supra*, 70 Cal.2d at p.636; see also *Goodman*, *supra*, 18 Cal.3d at p.349 (stating same); see also *LeBrun*, *supra*, 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson*, *supra*, 230 Cal.App.4th at p.343.)

Accordingly, District defendants' demurrer to the second and twenty-third causes of action is SUSTAINED without leave to amend.

Third cause of action for nuisance

"[T]o recover damages for nuisance the plaintiff must prove the defendant's 'invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer substantial actual damage''… [and was] unreasonable." (*Haley v. Casa Del Rey Homeowners Assn*. (2007) 153 Cal.App.4th 863, 876-877.) "It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together." (*San Diego Gas & Electric Co. v. Super. Ct. (Covalt)* (1996) 13 Cal.4th 893, 937.) "The very existence of organized society depends upon the principle of 'give and take, live and let live,' and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another." (*Id*. at pp. 937-938.)

The third cause of action alleges that District, Meyer and Glazer are liable for nuisance due to their "failure to adequately address and manage the parking demands necessitated by the large events they conduct." (SAC, ¶ 83.) The SAC "acknowledges the public benefit of hosting large events at the high school" but asserts that "Defendant's failure to adhere to agreements and adequately mitigate disturbances has created an imbalance where the private harm substantially outweighs the public benefit." (SAC, ¶ 86.) District defendants argue that the third cause of action fails to state facts sufficient to constitute a cause of action because it fails to allege substantial and unreasonable damage. In opposition, Plaintiff argues that "Defendants' failure to adhere to agreements and adequately mitigate disturbances has created a situation where the private harm substantially outweighs any public benefit." (Pl.'s opposition to District defs.' demurrer, p.12:3-7.)

To the extent that the cause of action is premised on the "failure to adhere to certain agreements," the SAC does not allege—and Plaintiff apparently concedes—that Meyer and Glazer were the party to any such agreement. Accordingly, Meyer and Glazer are not individually liable for any purported nuisance for their failure to enforce such agreements.

To the extent that the third cause of action is premised on the alleged failure to adequately mitigate disturbances, Plaintiff complains that attendees of the MVHS night events seek parking spaces, stop to collect and discharge passengers, execute U-turns, obstruct driveways and occupy all available street parking. "Whether or not a use in itself lawful constitutes a nuisance depends upon a number of circumstances: locality and surroundings, the number of people living there, the prior use, whether it is continual or occasional, and the nature and extent of the nuisance and of the injury sustained therefrom." (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230; see also *San Diego Gas & Electric Co*., *supra*, 13 Cal.4th at p.938 (regarding the substantial damages element, stating that "[i]f normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncracies of the particular plaintiff may make it unendurable to him").)

Here, District defendants do not have the authority to enforce parking enforcement and local laws on the streets; in fact, the SAC already alleges that the Mountain View Police

Department has the duty to enforce such parking enforcement and enforcement of local laws. (See SAC, ¶¶ 278-279.) Moreover, the Court is persuaded that, as a matter of law, events at a high school such as high school sporting events are suitable to the nature of the locality of a high school. The third cause of action even concedes that there is a public benefit of large events at the high school. (See SAC, ¶ 86 (alleging that "Plaintiff acknowledges the public benefit of hosting large events at the high school").) The third cause of action complains of "a scarcity of parking for the plaintiff's guests" and the occupation of "all available street parking meant for the residents" (SAC, ¶ 83), however, despite an overly long opposition, Plaintiff does not cite to any legal authority suggesting that he has an exclusive possessory interest in the City street parking in front of his home. The third cause of action fails to allege facts supporting substantial actual damage for persons residing in the locality adjacent to or near adjacent to the high school; instead, the third cause of action alleges facts that the California Supreme Court has stated is the sort of "annoyance, inconvenience and interference… that each individual in a community must put up with… in order that all may get on together." (See *San Diego Gas & Electric Co*., *supra*, 13 Cal.4th at p.937.) The third cause of action fails to state facts sufficient to constitute a cause of action for nuisance.

Moreover, the third cause of action relies on the same facts of the second cause of action for negligence which itself alleges that the District defendants had a legal duty under "traffic regulations, and public nuisance statutes… taking reasonable measures to ensure that activities at the high school do not unduly interfere with the rights and quality of life of neighboring residents, such as Plaintiff… [requiring District defendants to "confer[] with the City's Police Department to coordinate efficient traffic and parking management and ensure security during large events." (SAC, ¶¶ 77-78.) The Sixth District has noted that where a nuisance cause of action "has no independent vitality, because it merely restates their negligence claims 'using a different label'… the trial court properly sustained defendant's demurrer to plaintiffs' nuisance cause of action."
(*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 543.) For this additional reason, the third cause of action fails to state facts sufficient to constitute a cause of action for nuisance.

Again, Plaintiff does not request leave to amend. Despite an overly long opposition, Plaintiff neither otherwise shows in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading, nor provides factual allegations that sufficiently state all required elements of that cause of action, nor provides any legal authority showing the viability of the causes of action. (See *Ferrick*, *supra*, 231 Cal.App.4th at p. 1341 (Sixth District, quoting *Cooper*, *supra*, 70 Cal.2d at p.636; see also *Goodman*, *supra*, 18 Cal.3d at p.349 (stating same); see also *LeBrun*, *supra*, 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson*, *supra*, 230 Cal.App.4th at p.343.)

Accordingly, District defendants' demurrer to the third cause of action is SUSTAINED without leave to amend.

Sixth cause of action for violation of civil rights

The sixth cause of action alleges that District and Walker violated Plaintiff's First Amendment rights when Walker interfered with Plaintiff's peaceful protest that occurred in the middle of a soccer game on the MVHS football field. (See SAC, ¶¶ 102-107.) The sixth cause of action does not allege that District defendants violated his First Amendment rights based on

the content of his speech, but rather asserts that "Defendant Walker's actions interfered with Plaintiff's exercise of his First Amendment rights while he was present in locations that, under these circumstances, should be considered as areas where he was lawfully permitted to express his views." (SAC, ¶ 104.) District defendants demur to the sixth cause of action, arguing that District defendants did not, as a matter of law, interfere with Plaintiff's First Amendment rights as MVHS is a non-public forum and Plaintiff did not have a right to engage at a protest at the public high school's athletic field in the middle of the soccer game.

Indeed, the United States Supreme Court stated that "[t]he public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" (*Hazelwood Sch. Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 267.) "If the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." (*Id*.) "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." (*Id*.; see also *Cornelius v. NAACP Legal Def. & Educ. Fund* (1985) 473 U.S. 788, 802 (stating same); see also *Frudden v. Pilling* (9th Cir. 2017) 877 F.3d 821, 830 (stating that "[u]nless a public school opens up its facilities for 'indiscriminate use by the general public,' 'no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community'").) "A school is not presumed to be a public forum." (*Vukadinovich v. Board of Sch. Trustees* (7th Cir. 1992) 978 F.2d 403, 409.) "Members of the public have no constitutional right of access to public schools." (*Id*.) In fact, the Third Circuit has held that a "public school's athletic field did not qualify as a public forum." (*Brody v. Spang* (3rd Cir. 1992) 957 F.2d 1108, 1119.)

The sixth cause of action "acknowledg[es] that a school is not typically considered a public forum," but alleges that because "the soccer game during which the incident occurred was open to the general public and was also broadcast on television… [which] suggests that the game, as well as the associated venues and activities, had transformed the school into a de facto public forum." (SAC, ¶¶ 103, 107 (alleging that "the soccer game was a public event open to the general community, distinguishing it from the normal closed environment of a high school").) In opposition to the demurrer, Plaintiff likewise argues that "[u]nder the First Amendment and the California Constitution, individuals have the right to free speech and assembly in public forums… [and] Plaintiff asserts that his peaceful protest occurred in an area that, under the specific circumstances of the public event, should be considered a public forum, thereby granting him the lawful right to express his views." (Pl.'s opposition to District defs.' demurrer, p.15:1-5.) Plaintiff further argues that "his protest did not disrupt the educational environment or the event itself." (Pl.'s opposition to District defs.' demurrer, p.15:19-20.) However, the SAC itself alleges that "Plaintiff had interfered with three games in total." (SAC, ¶ 113.) There are no allegations to suggest that District defendants by policy or by practice opened the MVHS football field 'for indiscriminate use by the general public' during high school athletic events or otherwise. The sixth cause of action's allegation that the soccer game transformed the school into a de facto public forum is a conclusion of law that is disregarded on demurrer. (See *Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority* (2022) 83 Cal.App.5th 1137, 1169 (stating that "[i]t is a conclusion of law to be disregarded when ruling on the sufficiency of a pleading"); see also *Czajkowski v.*

Haskell & White, LLP (2012) 208 Cal.App.4th 166, 173 (stating that "a demurrer does not admit the plaintiff's contentions nor conclusions of law or fact"); see also *Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 491 (stating that "a demurrer does not admit contentions or conclusions of law or fact").) Plaintiff also cites no legal authority in support of his position, nor states any other facts that suggests that Plaintiff's civil rights were violated, despite an overly long opposition.

As with the prior causes of action, Plaintiff does not request leave to amend as to the sixth cause of action. Plaintiff neither otherwise shows in what manner he can amend the sixth cause of action and how that amendment will change the legal effect of his pleading, nor provides factual allegations that sufficiently state all required elements of the sixth cause of action, nor provides any legal authority showing the viability of the cause of action. (See *Ferrick*, *supra*, 231 Cal.App.4th at p. 1341 (Sixth District, quoting *Cooper*, *supra*, 70 Cal.2d at p.636; see also *Goodman*, *supra*, 18 Cal.3d at p.349 (stating same); see also *LeBrun*, *supra*, 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson*, *supra*, 230 Cal.App.4th at p.343.)

Accordingly, District defendants' demurrer to the sixth cause of action is SUSTAINED without leave to amend.

Seventh cause of action for intentional infliction of emotional distress

District defendants demur to the seventh cause of action for intentional infliction of emotional distress, like Toney, arguing that the seventh cause of action fails to allege extreme and outrageous conduct by the defendant with the intention of causing emotional distress. In opposition, Plaintiff argues that the seventh cause of action alleges that Walker's "physical pushing, verbal abuse and public humiliation are indicative of conduct that is extreme, outrageous and beyond societal norms." (Pl.'s opposition to District defs.' demurrer, p.16:5-22.)

Again, "[l]iability for intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (*Hughes*, *supra*, 46 Cal.4th at 1051.) The seventh cause of action alleges that Walker, like Toney, actively approached Plaintiff in a hostile manner, physically jostled him while he was on the football field in the middle of the soccer game, and yelled at him while he maintained a peaceful demeanor. (See SAC, ¶ 112.) The seventh cause of action also notes that this was the third game with which Plaintiff interfered. (See SAC, ¶ 113.) As with Toney, these allegations fail to allege facts supporting extreme and outrageous conduct by Walker. It is unclear what is meant by "active approaching," as opposed to just approaching, but approaching a trespasser on the field during a soccer game in a hostile manner is less than a direct threat. Plaintiff appears to admit the alleged physical jostling did not result in any physical damages; however, he contends that it resulted in humiliation. The alleged physical jostling on a soccer field in the middle of a soccer game that did not result in any physical harm appears to be an annoyance if anything and any resulting humiliation of being jostled seems to be the type of indignity that does not exceed all bounds of that usually tolerated in a civilized community. The seventh cause of action's allegations do not specify the content of what Walker was yelling at Plaintiff, but insults or even threats are the types of trivialities that the California Supreme Court has deemed to be insufficient to constitute outrageous or extreme

conduct. (See *Hughes*, *supra*, 46 Cal.4th at p.1051.) As to District, the seventh cause of action alleges it is vicariously liable for Walker's actions; however, as the seventh cause of action fails to allege facts supporting extreme and outrageous conduct by Walker, it also fails to allege facts supporting extreme and outrageous conduct by District.

District defendants' demurrer to the seventh cause of action is SUSTAINED with 20 days leave to amend.

Ninth cause of action for nuisance

The ninth cause of action for nuisance is based on "[t]he continuous construction activities conducted by Defendants MVLA and RGMK at MVHS… including… the loud noise, traffic congestion and parking problems [which] constitute a nuisance as defined by California law." (SAC, ¶ 126.) Specifically, Plaintiff complains about "illegal construction on a public holiday" (SAC, ¶ 128) specified as "starting at 7am without the required permit on the Juneteenth national holiday on June 19, 2022" (SAC, ¶ 25), "illegal construction activity before 7am" (SAC, ¶ 128), specified as the arrival of construction workers "as early as 6am, parking their vehicles, and engaging in conversation and smoking on the street" (SAC, ¶ 133), "illegal parking by construction workers" (SAC, ¶ 128), "loud noise, traffic congestion, parking problems, and lack of any noise, parking or traffic mitigation planning." (SAC, ¶ 128.) The ninth cause of action also asserts that Government Code section 830.6 does not apply to this cause of action. (See SAC, ¶¶ 135, 138.)

As to the contractor's work on June 19, 2022, the Court considers whether the alleged nuisance is continual or occasional. (See *Hellman*, *supra*, 6 Cal.App.4th at p.1230.) The one-time occurrence does not, as a matter of law, constitute an occurrence that is substantial. (See *Haley*, *supra*, 153 Cal.App.4th at pp.876-877 (stating that "to recover damages for nuisance the plaintiff must prove the defendant's 'invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer substantial actual damage'… [and was] unreasonable").) As to the "illegal construction activity before 7am," the arrival of construction workers, parking and conversing also does not constitute "construction activity" as that term is defined in the Mountain View ordinance. (See Mountain View ordinance § 8.70, subd. (a) (defining the term "construction activity" which is prohibited before 7:00 a.m. as "any physical activity on the construction site or in the staging area, including the delivery of materials").) As to the "illegal parking by construction workers… loud noise, traffic congestion, parking problems," as with the third cause of action for nuisance, District defendants do not have the authority to enforce parking enforcement and local laws on the streets. In fact, the SAC already alleges that the Mountain View Police Department has the duty to enforce such parking enforcement and enforcement of local laws. (See SAC, ¶¶ 25, 278-279, exh. 5.) Moreover, Plaintiff does not cite to any legal authority suggesting that he has an exclusive possessory interest in the City street parking in front of his home. As to the alleged "lack of any noise, parking or traffic mitigation planning," this clearly is encompassed by the immunity provided by Government Code section 830.6, which states that "[n]either a public entity nor a public employee is liable under this chapter for an injury caused by the plan… of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity…." (Gov. Code § 830.6.) Despite an overly long opposition, Plaintiff does not even mention section 830.6 immunity in his opposition. The ninth cause of action fails to state facts sufficient to constitute a cause of action for nuisance.

Moreover, the ninth cause of action relies on the same facts of the second cause of action for negligence which itself alleges that the District defendants had a legal duty under "local noise ordinances, traffic regulations, and public nuisance statutes… taking reasonable measures to ensure that activities at the high school do not unduly interfere with the rights and quality of life of neighboring residents, such as Plaintiff… [requiring District defendants to "confer[] with the City's Police Department to coordinate efficient traffic and parking management and ensure security during large events." (SAC, ¶¶ 77-78.) The Sixth District has noted that where a nuisance cause of action "has no independent vitality, because it merely restates their negligence claims 'using a different label'… the trial court properly sustained defendant's demurrer to plaintiffs' nuisance cause of action." (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 543.) For this additional reason, the ninth cause of action fails to state facts sufficient to constitute a cause of action for nuisance.

Again, Plaintiff does not request leave to amend. Despite an overly long opposition, Plaintiff neither otherwise shows in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading, nor provides any factual allegations that sufficiently state all required elements of that cause of action, nor provides any legal authority showing the viability of the causes of action. (See *Ferrick*, *supra*, 231 Cal.App.4th at p. 1341 (Sixth District, quoting *Cooper*, *supra*, 70 Cal.2d at p.636; see also *Goodman*, *supra*, 18 Cal.3d at p.349 (stating same); see also *LeBrun*, *supra*, 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson*, *supra*, 230 Cal.App.4th at p.343.)

Accordingly, District defendants' demurrer to the ninth cause of action is SUSTAINED without leave to amend.

Tenth cause of action for breach of mandatory duty under Government Code § 815.6

The tenth cause of action for breach of mandatory duty under Government Code section 815.6 alleges that District and Meyer "had a duty to ensure that the construction activities conducted by [District] and its contractors complied with the local ordinances." (SAC, ¶ 152.) Specifically, the tenth cause of action asserts that District and Meyer violated Mountain View Ordinance § 8.70. (See SAC, ¶ 151.) District defendants demur to the tenth cause of action as to Meyer only, asserting that City Ordinance section 8.70 does not apply to an employee of a public entity.

City Ordinance section 8.70 provides that:

> a. **Hours of construction.** No construction activity shall commence prior to 7:00 a.m. nor continue later than 6:00 p.m., Monday through Friday. No work is permitted on Saturday unless prior written approval is granted by the chief building official. The term "construction activity" shall include any physical activity on the construction site or in the staging area, including the delivery of materials. In approving modified hours, the chief building official may specifically designate and/or limit the activities permitted during the

modified hours. No construction activity is allowed on Sunday or recognized holidays.

b. **Modification.** At any time before commencement of or during construction activity, the chief building official may modify the permitted hours of construction upon twenty-four (24) hours written notice to the contractor, applicant, developer or owner. The chief building official can reduce the hours of construction activity below the 7:00 a.m. to 6:00 p.m. time frame or increase the allowable hours.
c. **Sign required.** If the hours of construction activity are modified, then the general contractor, applicant, developer or owner shall erect a sign at a prominent location on the construction site to advise subcontractors and material suppliers of the working hours. The contractor, owner or applicant shall immediately produce upon request any written order or permit from the chief building official pursuant to this section upon the request of any member of the public, the police or city staff.
d. **Violation.** Violation of the allowed hours of construction activity, the chief building official order, required signage or this Section shall be a violation of this code.

(Mountain View Ordinance § 8.70.)

As previously stated, the SAC does not allege facts that support the tenth cause of action's legal conclusion that District defendants engaged in any illegal construction activity before 7am in violation of Mountain View Ordinance section 8.70, subdivision (a). Thus, the lone issue is with regards to the alleged work on the Juneteenth holiday.

As District defendants argue, section 8.70 does not provide for personal liability of a public entity's employees, but rather only the contractor, applicant, developer or owner. Despite its excessive length, the opposition does not specifically address the argument, and thus neither shows in what manner Plaintiff can amend his complaint and how that amendment will change the legal effect of his pleading, nor provides factual allegations that sufficiently state all required elements of that cause of action, nor provides any legal authority showing the viability of the causes of action. (See *Ferrick*, *supra*, 231 Cal.App.4th at p. 1341 (Sixth District, quoting *Cooper*, *supra*, 70 Cal.2d at p.636; see also *Goodman*, *supra*, 18 Cal.3d at p.349 (stating same); see also *LeBrun*, *supra*, 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson*, *supra*, 230 Cal.App.4th at p.343.) The tenth cause of action fails to state facts sufficient to constitute a cause of action against Meyer.

The demurrer to the tenth cause of action is SUSTAINED without leave to amend as to defendant Meyer.

Sixteenth cause of action for violation of First Amendment retaliation

"To state a First Amendment retaliation claim, a plaintiff must plausibly allege 'that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill

a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.'" (*Capp v. Cty. of San Diego* (9th Cir. 2019) 940 F.3d 1046, 1053.) The sixteenth cause of action alleges that District defendants "have ignored Plaintiff's informal and formal complaints, barred Plaintiff from communication, stopped responding to plaintiff, and summarily rejected Plaintiff's tort notice." (SAC, ¶ 217.) District defendants argue that Plaintiff cannot establish the first element of the cause of action because he lacked such First Amendment rights on public school property in the middle of the soccer field during a soccer game, and Plaintiff cannot establish that District defendants' alleged ignoring complaints, failing to respond to Plaintiff's complaints and rejecting Plaintiff's tort claim are sufficient to establish retaliation. (See District defs.' memorandum of points and authorities in support of demurrer to SAC, p.12:1-5.)

Here, with respect to the alleged ignoring complaints, failing to respond to Plaintiff's complaints and denying Plaintiff's tort notice, these cannot form the basis of a First Amendment retaliation claim because "[n]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues… [a] First Amendment retaliation claim therefore may not stem from government officials' refusal to listen or respond to petitions on public issues." (*Adams v. Ross Twp.* (W.D.Pa. Mar. 16, 2021, No. 2:20-cv-00355) 2021 U.S. Dist. LEXIS 49320, at *16; see also *Hamer v. El Dorado County* (E.D.Cal. Mar. 1, 2011, No. CIV S-08-2269 KJM EFB PS) 2011 U.S. Dist. LEXIS 20436, at *10 (stating that "the First Amendment does not impose any affirmative obligation on the government to respond to the petitions raised by individual citizens, does not guarantee that citizens' speech will be heard, and does not require that every petition for redress of grievances be successful"); see also *DeGrassi v. City of Glendora* (9th Cir. 2000) 207 F.3d 636, 647 (stating that "the First Amendment does not guarantee that citizens' speech will be heard").) Additionally, as to the alleged restriction in communication, the sixteenth cause of action does not specify what acts "barred Plaintiff from communication;" however, Plaintiff presumably refers to his protest in the middle of the soccer game. In opposition to the demurrer, Plaintiff refers to "the denial of a particular forum," but does not otherwise identify any bar from communication. (See Pl.'s opposition to District defs.' demurrer to SAC, pp.19:14-27, 20:1-26.) As previously stated above with respect to the sixth cause of action, the SAC does not allege facts demonstrating that District has intentionally allowed the athletic field for public discourse or otherwise opened it up for indiscriminate use by the public. (See *Hazelwood Sch. Dist.*, *supra*, 484 U.S. at p.267 (stating that "[t]he public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'… [i]f the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community… [t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse"); see also *Cornelius*, *supra*, 473 U.S. at p.802; see also *Frudden*, *supra*, 877 F.3d at p.830 (stating that "[u]nless a public school opens up its facilities for 'indiscriminate use by the general public,' 'no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community'"); see also *Vukadinovich*, *supra*, 978 F.2d at p.409 (stating that "[a] school is not presumed to be a public forum… [m]embers of the public have

no constitutional right of access to public schools"); see also *Brody*, *supra*, 957 F.2d at p.1119 (holding that a "public school's athletic field did not qualify as a public forum").) Additionally, to the extent that Plaintiff's communication was restricted on account of the January 18, 2023 restraining order after hearing which required Plaintiff to "only contact the District and/or its employees, contractors, agents, or officials in writing through legal counsel," prohibiting Plaintiff from "com[ing] onto District property, including the District office, any other office, or any school building or school ground" and mandating Plaintiff to "stay at least 100 yards away from… [a District] employee" (January 18, 2023 workplace violence restraining order after hearing in *Mountain View Los Altos Union High School Dist. v. Haghighi* (Super. Ct. Santa Clara County, 2022, No. 22CH011105), Plaintiff stipulated to the order. Moreover, "the First Amendment does not guarantee the right to harassment of another, even where the harassment is accomplished through speech that might otherwise be protected." (*Doe v. McLaughlin* (2022) 83 Cal.App.5th 640, 656; see also *Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1412 (stating that the statute authorizing restraining orders after hearing prohibiting harassment "was enacted 'to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution").) Further, the SAC also notes that Plaintiff was able to communicate to District through its online comments form on District's website. (See SAC, exh. 2.) The allegation that "Defendants have violated specific First Amendment protections by actively suppressing, chilling, and retaliating against Plaintiff's free speech rights" is a conclusion of law that is disregarded on demurrer. (See *Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority* (2022) 83 Cal.App.5th 1137, 1169 (stating that "[i]t is a conclusion of law to be disregarded when ruling on the sufficiency of a pleading"); see also *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 173 (stating that "a demurrer does not admit the plaintiff's contentions nor conclusions of law or fact"); see also *Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 491 (stating that "a demurrer does not admit contentions or conclusions of law or fact").) Plaintiff also cites no legal authority in support of his position, nor states any other facts that suggests that Plaintiff's First Amendment rights were violated or that District defendants retaliated, despite an overly long opposition.

As with the prior causes of action, Plaintiff does not request leave to amend as to the sixteenth cause of action. Plaintiff neither otherwise shows in what manner he can amend the sixteenth cause of action and how that amendment will change the legal effect of his pleading, nor provides factual allegations that sufficiently state all required elements of the sixteenth cause of action, nor provides any legal authority showing the viability of the cause of action. (See *Ferrick*, *supra*, 231 Cal.App.4th at p. 1341 (Sixth District, quoting *Cooper*, *supra*, 70 Cal.2d at p.636; see also *Goodman*, *supra*, 18 Cal.3d at p.349 (stating same); see also *LeBrun*, *supra*, 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson*, *supra*, 230 Cal.App.4th at p.343.)

Accordingly, District defendants' demurrer to the sixteenth cause of action is SUSTAINED without leave to amend.

Seventeenth cause of action for defamation

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.) However, as District defendants

argue, the seventeenth cause of action fails to allege the actual "false statements of fact" that are the basis of the cause of action or facts that make clear what the asserted actionable defamatory statement was, such as stating when they were made, what was said or written, who heard or read the statement and how that particular statement caused actual damages. In opposition, Plaintiff asserts that "[w]hile it may not list every alleged false statement verbatim, it provides a tangible example of the type of defamatory content allegedly disseminated by the Defendants." (Pl.'s opposition to District defs.' demurrer to SAC, p.21:13-16.) However, Plaintiff has provided no example of any false statement, verbatim or otherwise. District defendants' demurrer to the seventeenth cause of action is SUSTAINED with 20 days leave to amend.

Eighteenth cause of action for obstruction of justice

The eighteenth cause of action is for "obstruction of justice." There is no civil cause of action for obstruction of justice. Obstruction of justice is a crime. (See *People v. Hill* (1997) 58 Cal.App.4th 1078, 1089 (stating that "[t]he purpose of [Penal Code] section 135 is to prevent the obstruction of justice"); see also *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 765 (noting "[t]he common law crime of the obstruction of justice").) Further noting that "no civil right can be predicated upon a mere violation of a criminal statute," the *Agnew* court concluded that there was no civil action for obstruction of justice. (*Agnew*, *supra*, 172 Cal.App.2d at p.765 (stating that "[a]kin to perjury and subornation of perjury, this too is one of the offenses partaking of the nature of the common law crime of obstruction of justice [citation] and subject to the same rule foreclosing the maintenance of a civil action for injury arising out of perjury, subornation of perjury and forged documentary evidence").) Penal Code section 135 also does not state that a violation of section 135 is liable for a cause of action or refer to a remedy or means of enforcing its substantive provisions. (See *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597 (stating that "[a] statute may contain 'clear, understandable, unmistakable terms,' which strongly and directly indicate that the Legislature intended to create a private cause of action… the statute may expressly state that a person has or is liable for a cause of action for a particular violation… [o]r, more commonly, a statute may refer to a remedy or means of enforcing its substantive provisions, i.e., by way of an action").)

District defendants' demurrer to the eighteenth cause of action is SUSTAINED without leave to amend.

Nineteenth cause of action for civil conspiracy

The nineteenth cause of action alleges that "Defendants' conspiracy and coordinated efforts were intended to, and did, impede and obstruct the fair and impartial administration of justice in Plaintiff's legal proceedings and violate Plaintiff's constitutional rights… [and were] part of a deliberate and unlawful scheme to retaliate against Plaintiff and obstruct justice." (SAC, ¶¶ 243-245 (also alleging that "Defendants' acts of conspiracy were not acts in furtherance of their rights to petition or free speech, but were part of a concerted effort to retaliate against the Plaintiff and obstruct the administration of justice").) As District defendants argue, there can be no civil conspiracy for the obstruction of justice as there is no cause of action for obstruction of justice. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 514 (stating that "[c]onspiracy is not an independent tort; it cannot create a duty or abrogate an immunity"); see also *Chavers v. Gatke Corp.* (2003) 107

Cal.App.4th 606, 611 (stating same); see also *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1291 (stating that "[c]ivil conspiracy is not an independent cause of action").)

The nineteenth cause of action also alleges that "Plaintiff acknowledges the objection concerning the lack of a statutory basis for a claim of civil conspiracy against a public entity… [h]owever, the Plaintiff asserts that the civil conspiracy alleged here is… [based on] violations of California Civil Code sections 1708 and 1714." (SAC, ¶ 247.) In opposition, Plaintiff again argues that "Defendants' conduct violates specific statutory duties imposed by California Civil Code sections 1708 and 1714, relating to willful and negligent acts causing harm." (Pl.'s opposition to District defs.' demurrer to SAC, pp.22:26-27, 23:1-3.) However, as stated above, neither Civil Code section 1708 nor section 1714 may form a basis of liability against District defendants. (See *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183 (stating that "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714… [o]therwise, the general rule of immunity for public entities would be largely eroded by the routine application of general tort principles"); see also *Summerfield v. City of Inglewood* (2023) 96 Cal.App.5th 983, 999 (stating same); see also *City of Rialto v. United States DOD* (C.D.Cal. Aug. 16, 2005, No. EDCV 04-00079-VAP (SSx)) 2005 U.S.Dist.LEXIS 26941, at *26 (stating that "section 1714 cannot be the basis for this claim… [n]or can section 1708, which suffers from the same deficiencies in this context as section 1714: it neither declares public entities liable nor imposes a duty of care specifically on public entities").)

District defendants' demurrer to the nineteenth cause of action is SUSTAINED without leave to amend.

Twentieth cause of action for deliberate indifference

The twentieth cause of action alleges that "[t]he negligence, apathy, and deliberate indifference demonstrated by Defendants [District], Meyer and Glazer have been key contributory factors to the violation of Plaintiff's civil rights, constituting a breach of their duties as outlined under 42 U.S.C. § 1983." (SAC, ¶ 254.) "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" (*Manta Management Corp. v. City of San Bernardino* (2008) 43 Cal.4th 400, 406; see also *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2022) 77 Cal.App.5th 517, 533.) "To state a claim under section 1983, a plaintiff must allege two essential elements: 1) that a right secured by the Constitution or laws of the United States was violated, and 2) that the alleged violation was committed by a person acting under the color of state law." (*Schulthies v. AMTRAK* (N.D.Cal. 2009) 650 F.Supp.2d 994, 998; see also *Brown v. Contra Costa County* (N.D. Cal. Oct. 9, 2012, No. C 12-1923 PJH) 2012 U.S.Dist.LEXIS 145431, at *25 (stating same).) "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." (*Bd. of the Cnty. Comm'rs v. Brown* (1997) 520 U.S. 397, 410.)

Here, the SAC has not alleged facts supporting a cause of action that could be a basis for a section 1983 cause of action. The twentieth cause of action points to breach of the neighborhood cares agreement and a mediated agreement (see SAC, ¶ 254); however, a section

1983 cause of action cannot be based on a breach of contract cause of action. (See *Lewis v. Washington* (W.D.Mich. Jan. 27, 2023, No. 1:22-cv-1218) 2023 U.S. Dist. LEXIS 14659, at *9 (stating that "[t]he Court has also construed Plaintiff's complaint to assert claims of negligence, violation of MDOC policy, and breach of contract… [s]ection 1983, however, does not provide redress for violations of state law"); see also *Gannett Fleming West, Inc. v. Village of Angel Fire* (D.N.M. 2004) 375 F.Supp.2d 1104, 1110 (stating that "a simple claim for breach of contract does not give rise to a § 1983 claim"); see also *Frenkel v. New York City Off-Track Betting Corp*. (S.D.N.Y. 2010) 701 F.Supp.2d 544, 556 (stating that "a contract dispute . . . does not give rise to a cause of action under section 1983").) The twentieth cause of action also cites to adequately failing to manage traffic and parking, negligence in managing traffic and parking related to the construction activities, violating construction regulations and retaliating against Plaintiff for seeking redress for his grievances (see SAC, ¶ 254); however, for reasons already stated, the SAC fails to allege facts supporting any liability based on the asserted conduct, and negligence or violation of City ordinances do not constitute right secured by the Constitution or laws of the United States. Additionally, as District defendants argue, the twentieth cause of action does not allege that a municipal actor disregarded a known or obvious consequence of his action.

Plaintiff does not request leave to amend and does not address District defendants' argument regarding the disregard of a known or obvious consequence or metal state. Despite an overly long opposition, Plaintiff neither otherwise shows in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading, nor provides any factual allegations that sufficiently state all required elements of that cause of action, nor provides any legal authority showing the viability of the causes of action. (See *Ferrick*, *supra*, 231 Cal.App.4th at p. 1341 (Sixth District, quoting *Cooper*, *supra*, 70 Cal.2d at p.636; see also *Goodman*, *supra*, 18 Cal.3d at p.349 (stating same); see also *LeBrun*, *supra*, 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson*, *supra*, 230 Cal.App.4th at p.343.)

Accordingly, District defendants' demurrer to the twentieth cause of action is SUSTAINED without leave to amend.

Twenty-second cause of action for "vicarious liability"

The twenty-second cause of action alleges that Walker was acting within the scope of his employment and/or agency and that District is vicariously liable for Walker's actions. (See SAC, ¶¶ 265-267.) As District defendants argue, the twenty-second cause of action does not allege any statutory basis for the cause of action. (See Gov. Code § 815; see also *Cavey v. Tualla* (2021) 69 Cal.App.5th 310, 327 (stating that "Section 815 eliminated all common law tort liability for public entities by providing such entities are not liable for an injury '[e]xcept as otherwise provided by statute'").) Here, the second-cause of action fails to allege any acts or omissions that would give rise to a cause of action against Walker or District. (See SAC, ¶¶ 265-268.) Further, vicarious liability is not a cause of action but is rather a theory of liability.

In opposition, Plaintiff argues that "[t]he complaint alleges that Defendant Walker, as an employee, agent, servant, and/or representative of [District], was acting within the scope of his employment when committing the wrongful acts that caused harm to the Plaintiff." (Pl.'s opposition to District defs.' demurrer to SAC, p.25:24-26.) However, Plaintiff does not

suggest of which wrongful acts he complains. District defendants' demurrer to the twenty-second cause of action is SUSTAINED with 20 days leave to amend.

Twenty-fourth cause of action for gross negligence

The twenty-fourth cause of action alleges that District defendants "had a duty to exercise more than ordinary care in carrying out its responsibilities" (see SAC, ¶¶ 285-286) based on Education Code section 44807 and Civil Code section 1714 (see SAC, ¶ 317).

As previously stated, the California Supreme Court has stated that "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714." (*Eastburn*, *supra*, 31 Cal.4th 1175, 1183.) Thus, Plaintiff's allegation that the twenty-fourth cause of action is based on section 1714 is without merit.

As to Education Code section 44807, that provision states that "[e]very teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess… [a] teacher, vice principal, principal, or any other certificated employee of a school district, shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning." (Ed. Code § 44807.) However, section 44807 does not impose a duty on the school district or its employees to members of the public. (See *Torsiello v. Oakland Unified Sch. Dist*. (1987) 197 Cal.App.3d 41, 45-46 (stating that "[t]he duty imposed by the section's phrase, 'on the way to and from school,' is with the pupil and not with the teacher… [o]bviously this section does not impose a duty on the teacher or the district to supervise the pupils on their way home… [t]he section refers to the behavior of school children and not to their safe conduct to and from school… [t]he duty imposed on teachers under section 44807 is a duty to hold students strictly accountable for their behavior and conduct going to and from school… [t]he concept of holding students strictly accountable implies that their conduct manifests some degree of impropriety"); see also *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 939 (stating that "Education Code section 44807 and its forerunners were designed primarily to safeguard students… the Legislature most certainly did not design Education Code section 44807 to protect against the risk of injury to members of the general public").)

Plaintiff does not request leave to amend and, in opposition, does not address Education Code section 44807. Despite an overly long opposition, Plaintiff neither otherwise shows in what manner he can amend the twenty-fourth cause of action and how that amendment will change the legal effect of his pleading, nor provides any factual allegations that sufficiently state all required elements of that cause of action, nor provides any legal authority showing the viability of the twenty-fourth cause of action. (See *Ferrick*, *supra*, 231 Cal.App.4th at p. 1341 (Sixth District, quoting *Cooper*, *supra*, 70 Cal.2d at p.636; see also *Goodman*, *supra*, 18 Cal.3d at p.349 (stating same); see also *LeBrun*, *supra*, 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson*, *supra*, 230 Cal.App.4th at p.343.)

District defendants' demurrer to the twenty-fourth cause of action is SUSTAINED without leave to amend.

Twenty-fifth cause of action for "administrative law challenge"

The twenty-fifth cause of action alleges that "[p]ursuant to California Government Code section 815.6, Defendants [District], MEYER, and GLAZER, in their capacity as a public body and officials, had a mandatory duty to act in accordance with their expressed promises and duties outlined in the Mediated agreement and Administrative Regulation AR 7325." (SAC, ¶ 322.) Section 815.6 states that "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Gov. Code § 815.6.) As used in in section 815.6, Government Code section 810.6 defines "enactment" as "a constitutional provision, statute, charter provision, ordinance or regulation." (See *Dateline Builders v. City of Santa Rosa* (1983) 146 Cal.App.3d 520, 528 (stating that "Builders argues that the Plains Agreement was an 'enactment' within the meaning of the statute... [w]e do not agree as Government Code section 810.6 defines an enactment as a constitutional provision, statute, charter, provision, ordinance or regulation").) "A 'contract cannot give rise to 'a mandatory duty imposed by an enactment.'" (*Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1091-1092 (also stating that "[b]ecause the Development Agreement is not 'a constitutional provision, statute, charter provision, ordinance or regulation' (§ 810.6), it does not amount to an 'enactment' that gives rise to a mandatory duty under section 815.6"); see also *Dateline Builders*, *supra*, 146 Cal.App.3d at p.528; see also *Lawson v. Super. Ct. (Center Point, Inc.)* (2010) 180 Cal.App.4th 1372, 1395, fn. 22 (stating that "[a] contract cannot give rise to 'a mandatory duty imposed by an enactment,' as required by Government Code section 815.6, because, as we have discussed, the term 'enactment' is limited to 'a constitutional provision, statute, charter provision, ordinance or regulation'"); see also *Fitzpatrick v. City of Los Angeles* (C.D.Cal. Sep. 16, 2022, No. EDCV 21-6841 JGB (SPx)) 2022 U.S.Dist.LEXIS 178427, at *23 (City of Los Angeles Unpaid Parking Tickets Vehicle Seizure Policy ("VSP") was not an "enactment," as defined by Cal. Gov. Code § 810.6").) Here, as District defendants argue, neither the mediated agreement nor AR7325 constitutes an "enactment" as defined by sections 810.6 and 815.6. Moreover, the twenty-fifth cause of action does not allege facts supporting that AR 7325 imposed a mandatory and not discretionary duty, and that the enactment of AR 7325 intended to protect against the risk of injury suffered by Plaintiff. (See *Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1458 (Sixth District case stating that "Government Code 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty . . .; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability . . .; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered").)

Plaintiff does not request leave to amend. Despite its excessive length, in opposition to the demurrer, Plaintiff neither mentions the mediated agreement nor AR 7325, apparently conceding the issue. (See Pl.'s opposition to District defs.' demurrer to SAC, pp.6:1-26, 7:1-7, 9:17-26.) Instead, Plaintiff again cites to Civil Code section 1714 (see Pl.'s opposition to District defs.' demurrer to SAC, pp.6:9-12, 7:1-2, 8:24-26, 9:1-6), which, as previously stated, cannot serve as a statutory basis for the cause of action against a public entity. (See *Eastburn*,

supra, 31 Cal.4th 1175, 1183 (stating that "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714").) Plaintiff fails to otherwise show in what manner he can amend the twenty-fifth cause of action and how that amendment will change the legal effect of his pleading, nor provides any factual allegations that sufficiently state all required elements of that cause of action, nor provides any legal authority showing the viability of the twenty-fifth cause of action. (See *Ferrick*, *supra*, 231 Cal.App.4th at p. 1341 (Sixth District, quoting *Cooper*, *supra*, 70 Cal.2d at p.636; see also *Goodman*, *supra*, 18 Cal.3d at p.349 (stating same); see also *LeBrun*, *supra*, 68 Cal.App.5th 199, 207 (also stating that "[t]he burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff"); see also *Larson*, *supra*, 230 Cal.App.4th at p.343.)

District defendants' demurrer to the twenty-fifth cause of action is SUSTAINED without leave to amend.

To be clear, in any proposed third or subsequent amended complaint filed by Plaintiff in this case, it shall not include any causes of action against the demurring defendant(s) to which the Court sustained the demurrer without leave to amend, unless Plaintiff properly obtains leave from the Court to so include such cause(s) of action.

The Court will prepare the Order.

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Calendar Line 3
Case Name: *Lanfri dba Rex Cleaners v. Goodwill of Silicon Valley, et al.*
Case No.: 20CV364915

This is an action for damages related to the remediation of perchloroethylene (PCE) at a location of a dry cleaning site. According to the allegations of the second amended complaint ("SAC"), plaintiff Kevin Lanfri dba Rex Cleaners ("Plaintiff") is located at 60 Race Street in San Jose ("Site") where it has been a dry cleaning business since 1950. (See SAC, ¶ 1, 25.) In October 2016, Plaintiff's environmental consultant initially detected hazardous substances contamination in the subsurface of the Site, detecting PCE and its degradation products, including trichloroethylene (TCE), in excess of the legal screening level for these chemicals. (See SAC, ¶ 33.) Upon discovery of contamination at the Site, Plaintiff retained environmental consultant Genesis Engineering & Redevelopment, Inc. ("Genesis") to perform an investigation pursuant to the requirements and oversight of the San Francisco Bay Regional Water Quality Control Board ("RWQCB"), employing standard industry methods and practices. (See SAC, ¶ 34.) In mid-2019, Genesis discovered contamination at the 46 Race Street property, two parcels away from the Site, where defendant Goodwill of Silicon Valley ("Goodwill") previously operated a dry cleaning facility until 1975. (See SAC, ¶¶ 5, 35.) Plaintiff asserts that Goodwill released hazardous substances, including PCE, which migrated to Plaintiff's Site. (See SAC, ¶ 36.) Subsequently, from 1979 to 1990, defendant Hansel & Freeland, Printers, Inc. ("HFP") operated a lithography and letterpress printing facility at 46 Race Street, and Plaintiff asserts that HFP also released hazardous substances, including PCE, which migrated to Plaintiff's Site. (See SAC, ¶¶ 6, 32.)

On April 16, 2021, Plaintiff filed the SAC against defendants Goodwill, HFP, Alicia C. Dusseault (nee Forbrich) and Natasha M. Forbrich-Guzzo as co-trustees of The Falko Forbrich Family Trust, Natasha Marie Guzzo, Natasha Marie Guzzo as trustee of the NM & JPG Trust, Falko Properties, LLC, Estate of Falko Norfried Forbrich, deceased, and Vic Manufacturing Company ("Vic") (collectively, "Defendants"), asserting causes of action for:

1) Contribution under the Hazardous Substance Account Act, California Health & Safety Code section 25300, et seq. (against all defendants);
2) Continuing trespass (against all defendants);
3) Continuing nuisance (against all defendants);
4) Negligence (against all defendants);
5) Strict products liability based on defective design (against Vic);
6) Strict products liability based on failure to warn (against Vic); and,
7) Declaratory relief (against all defendants).

Defendant Goodwll moves for summary adjudication of the first and seventh causes of action.

DEFENDANT GOODWILL'S MOTION FOR SUMMARY ADJUDICATION

Defendant's burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material

fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

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

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

Goodwill's request for judicial notice

In support of its motion, Goodwill requests judicial notice of the following documents:

- The Corporation Grant Deed, document number 5621399, dated April 26, 1977, transferring the 46 Race Street property to Falko Forbrich (attached as Exhibit 1);
- The first amended complaint (attached as Exhibit 2);
- Goodwill's demurrer to the first amended complaint (attached as Exhibit 3);
- The April 1, 2021 order regarding Goodwill's demurrer to the first amended complaint (attached as Exhibit 4);
- The SAC (attached as Exhibit 5);
- A June 30, 2016 directive from RWQCB to submit a Source Investigative Work Plan (attached as Exhibit 6);
- The Site Investigation Report for the 60 Race Street property, dated December 22, 2016, prepared by Genesis (attached as Exhibit 7);
- The Additional Site Investigation Report of the 60 Race Street property, dated July 17, 2017, prepared by Genesis (attached as Exhibit 8);
- The Supplemental Site Investigation Report of the 60 Race Street property, dated April 10, 2018, prepared by Genesis (attached as Exhibit 9); and,
- Plaintiff's Dry Cleaner Operations Questionnaire, posted on May 10, 2016 (attached as Exhibit 10).

The request for judicial notice is GRANTED as to the grant deed, the first amended complaint, the demurrer to the first amended complaint, the April 1, 2021 order regarding the demurrer to the first amended complaint, and the SAC. (Evid. Code § 452, subds. (d), (h).)

The request for judicial notice is DENIED as to the June 30, 2016 directive, the Site Investigation Reports and the questionnaire as these are not official acts or otherwise subject to judicial notice.

Plaintiff's tardy opposition

Code of Civil Procedure section 437c, subdivision (b)(2) requires the party opposing a motion for summary adjudication to file an opposition "not less than 14 days preceding the noticed or continued date of hearing." (Code Civ. Proc. § 437c, subd. (b)(2).) Plaintiff filed his opposition on January 2, 2024—7 days prior to the January 9, 2024 noticed hearing. However, as Goodwill has filed a reply brief and otherwise appears to respond to Plaintiff's arguments, the Court will consider Plaintiff's tardy opposition this time. The Court cautions that it is unlikely to consider any late filed papers by Plaintiff in the future.

First cause of action for contribution pursuant to the Hazardous Substance Account Act ("HSAA")—Health & Safety Code section 25300, et seq.

Goodwill moves for summary adjudication of the first cause of action, arguing that Plaintiff cannot establish a cause of action for violation of the HSAA because Goodwill's occupancy at the 46 Race Street property ended in 1975 and Goodwill sold the property in 1977 and the former HSAA under which Plaintiff sues only provides liability for acts occurring after January 1, 1982.

Indeed, it is undisputed that Goodwill ceased its dry cleaning operation in 1975 and sold the 46 Race Street property in 1977. (See Pl.'s separate statement of undisputed material facts in opposition to motion for summary adjudication, no. ("UMF") 5, citing Fox decl., ¶ 2, exh. 2; see also Goodwill's request for judicial notice, exh. 1.) Moreover, the Court takes judicial notice of the former section 25366, subdivision (a) of the HSAA which stated that "[t]his chapter shall not be construed as imposing any new liability associated with acts that occurred on or before January 1, 1982, if the acts were not in violation of existing state or federal laws at the time they occurred." (Stats. 1999 ch. 23, repealed by Stats. 2022 ch. 257; see also Health & Saf. Code § 78185, subd. (a) (identical statute of current HSAA, operative January 1, 2024.) Goodwill presents evidence that demonstrates that its acts with regards to PCE were not a violation of state or federal laws at the time they occurred since they were inspected, that inspection records do not show any violations, that it disclosed PCE at the site and approved its usage, and ultimately received a permit from the San Jose Fire Department. (See Barrett decl., ¶¶ 2-3, exhs. 1-2). Goodwill meets its initial burden as to the first cause of action.

In opposition, Plaintiff argues that Goodwill's motion "is flawed because it cites to the incorrect legal standard for summary judgment." (Pl.'s opposition to Goodwill's motion for summary adjudication ("Opposition"), p.9:13-14.) "Here, Goodwill is not attempting to obtain summary judgment by disproving an element of Rex Cleaners' HSAA claim." (*Id*. at p.9:14-15.) "Instead, Goodwill is attempting to obtain summary judgment by arguing to the Court that an applicable affirmative defense applies." (*Id*. at p.9:17-18.) According to Plaintiff, "[i]n order to meet its initial burden of production on the affirmative defense set forth in section 25366(a) of the HSAA, Goodwill needed to present affirmative and admissible evidence to establish 1) what its drycleaning operations consisted of between 1953 and 1977; 2) what state laws and federal laws regulated those drycleaning operations during that time period, and what

state and federal laws regulated contamination of the environment by hazardous substances during that time period; and 3) its drycleaning operations did not violate those state or federal laws." (*Id*. at p.10:9-14.) Plaintiff asserts that "Goodwill presents no admissible evidence to satisfy *any* of those elements." (*Id*. at p.10:16.)

However, "[o]n a motion for summary judgment, the issues are framed by the pleadings since it is those allegations to which the motion must respond." (*Scolinos v. Kolts* (1995) 37 Cal.App.4th 635, 640.) Goodwill's burden on its motion is not to establish the inapplicability or compliance with every state or federal law regarding all hazardous substances during Goodwill's entire occupancy at the 46 Race Street property, but rather to establish that the HSAA was not applicable to it and that it did not violate any laws regarding to its handling of PCE. Despite Plaintiff's argument to the contrary, Goodwill has presented evidence so showing.

As Goodwill has met its initial burden, the burden shifts to Plaintiff to show that a triable issue of material fact exists as to the cause of action. In opposition, Plaintiff does not cite to any evidence in his separate statement as to UMF 6, regarding Goodwill's compliance with state and federal laws regarding PCE. (See UMF 6.) Plaintiff cites to current or more recent laws regarding PCE (see Pl.'s additional material facts in support of opposition to Goodwill's motion for summary adjudication no. ("ADF") 8)—but does not provide any laws in effect during Goodwill's occupancy at the 46 Race Street property.

Plaintiff also presents evidence regarding Goodwill's operations and PCE usage (see ADFs 9-12); however, this evidence does not demonstrate that PCE was regulated during Goodwill's occupancy. Plaintiff also attaches the San Jose Fire Department inspections of the 46 Race Street property on November 1, 1974, March 10, 1975, April 9, 1975 and May 9, 1975 (see ADFs 34-39); however, these reports do not refer to any violations related to PCE usage. Instead, Plaintiff's own evidence demonstrates a lack of violation of any existing state or federal laws. The Fire Inspection records state that Goodwill needed to "cover hole in ceiling in cafeteria supervisors office," "discontinue using extension cord as permanent wiring in rehabilitation secretary office," "cover hole in ceiling in nurses room," or "provide occupant load sign for assembly room," but none of the reports indicate any violation of any code referencing PCE. Plaintiff, in fact, attaches a March 10, 1975 "report of inspection—dry cleaning plants" that does list PCE as the "type of solvent" and also an inspector's signature and initials approval of Goodwill's usage, along with approving the highest solvent concentration and its units in ppm within 10' and other ppm. (See Van der Hoven decl. in opposition to Goodwill's motion for summary adjudication, exh. J.) Neither the opposition nor the opposing separate statement explain how this report supports Plaintiff's argument that the records show a violation of state or federal laws related to PCE usage.

Plaintiff also attaches a March 24, 2023 letter from the RWQCB that stated its findings that "Goodwill and Landfri [sic] are jointly responsible for the investigation and the cleanup of the contamination to protect human health and the environment" (Benitez decl. in opposition to Goodwill's motion for summary adjudication ("Benitez decl."), exh. N), and a April 7, 2023 letter from the RWQCB "identif[ying] Goodwill of Silicon Valley's (Goodwill) formerly owned property as requiring regulatory cleanup oversight… [p]ursuant to the Porter-Cologne Water Quality Control Act… [which] authorizes the State Water Resources Control Board (State Water Board) to set up Cost Recovery Programs." (Benitez decl., exh. O (also stating that "Water Code section 13304 allows the Regional Water Board to recover reasonable

expenses for overseeing the investigation and cleanup of illegal discharges, contaminated properties, and other unregulated releases adversely affecting or threatening to adversely affect the State's waters").) Again, however, while this does indicate that Goodwill released PCE at the 46 Race Street property, and that Goodwill will be responsible for remediating the 46 Race Street property pursuant to the Water Code section 13304, it does not demonstrate a triable issue of material fact as to Goodwill's violation of state or federal laws in effect at the time of its occupancy at the 46 Race Street property as relating to the HSAA. Likewise, while the declaration of Plaintiff's expert, Mr. Van der Hoven, indicates that Goodwill released PCE and that such PCE migrated to Plaintiff's property, this is immaterial as to the applicability of the HSAA since the HSAA does not "impos[e] any new liability associated with acts that occurred on or before January 1, 1982, if the acts were not in violation of existing state or federal laws at the time they occurred."

Plaintiff cites to *United Artists Theatre Circuit, Inc. v. California Regional Water Quality Control Bd.* (2019) 42 Cal.App.5th 851, to support its position that Goodwill violated federal and state laws at the time they occurred; however, the *United Artists Theatre Circuit* court notes that "[i]n early 1978, the Environmental Protection Agency (EPA) published a list of toxic pollutants, including PCE… [and i]n 1980, the EPA recognized PCE as a potential human carcinogen and adopted water quality standards for PCE." (*Id*. at p. 862.) The *United Artists Theatre Circuit* court also stated that "[i]n 1980, the Legislature enacted Assembly Bill No. 2700 (1979–1980 Reg. Sess.) (Assembly Bill 2700), which amended provisions of the Health and Safety Code and the Water Code to expand the authority of the State Director of Health Services and of regional water quality control boards to address waste control and cleanup." (*Id*. at p.870.) Moreover, in *United Artists Theatre Circuit*, the drycleaner occupied the site until 1997. Former 25366, subdivision (a) of the HSAA was simply not at issue in *United Artists Theatre Circuit*. Moreover, as to the Water Code section 13304, subdivision (a), that statute required a person upon order of the regional board to clean up or abate the effects of waste. Here, Plaintiff presents no evidence that the regional board ordered Goodwill to clean up or abate the effects of waste at the time of Goodwill's occupancy of the property or on or before January 1, 1982. *United Artists Theatre Circuit* is neither applicable nor helpful to Plaintiff.

While Goodwill may still be jointly liable for the investigation and cleanup of the contamination pursuant to the Water Code or the RWQCB authority or some other statute, Plaintiff has failed to demonstrate a triable issue of material fact with respect to the first cause of action for violation of the HSAA. Accordingly, Goodwill's motion for summary adjudication of the first cause of action is GRANTED.

Seventh cause of action for declaratory relief

The seventh cause of action seeks a declaration "of Defendant's liability to Plaintiff for Response Costs and other damages incurred and to be incurred by Plaintiff in responding to the releases and threatened releases of hazardous substances, solid wastes, or hazardous substances and adverse environmental consequences at issue herein." (SAC, ¶ 114.) Response Costs apparently refers to the "assessment, investigation, evaluation, monitoring, mitigation, removal and/or remedial action costs and/or enforcement costs, attorney's fees, consultant fees and related costs" that are the alleged costs for violation of the HSSA. (SAC, ¶ 49.) The prayer of the seventh cause of action also seeks a declaration that Plaintiff is entitled to equitable indemnity and contribution from each Defendant for costs or damages that have been, or will

be, incurred by Defendants in response to the releases or threatened releases of hazardous substances at and in the vicinity of the Site. (SAC, prayer, seventh cause of action.)

Goodwill argues that the seventh cause of action seeking a declaration regarding Response Costs is merely restating its request for Response Costs in the first cause of action for violation of the HSAA, the Court already determined in its prior order that Plaintiff's contribution and equitable indemnity causes of action failed to allege facts supporting viable causes of action and Plaintiff omitted them in its SAC. (See Goodwill's memorandum of points and authorities in support of motion for summary adjudication, pp.7:1-28, 8:1-28, 9:1-15.) In opposition, Plaintiff concedes that if "this Court [were to] grant summary adjudication of Rex Cleaners' HSAA contribution claim, Rex Cleaners' Declaratory Relief claim would be extinguished by operation of law." (Opposition, p.19:3-6 (also stating that "Rex Cleaners does not oppose this point").) Plaintiff then argues that "Goodwill's second MSA argument has been waived… [because] Goodwill was required to raise this argument years ago when responding to Rex Cleaner's Second Amended Complaint ('SAC')." (*Id*. at pp.19:8-28, 20:1-5.)

As previously stated, the Court granted the motion for summary adjudication as to the first cause of action. Thus, as Plaintiff does not oppose the motion for summary adjudication of the seventh cause of action to the extent that it premised on the first cause of action and any Response Costs under the HSAA, there is no triable issue of material fact as to that issue.

As to Plaintiff's argument that any argument regarding the sufficiency of the allegations of the seventh cause of action was waived, Plaintiff is mistaken. As Plaintiff concedes, a party may move for a judgment on the pleadings if the complaint does not state facts sufficient to constitute a cause of action after the time to demur or answer has expired. (See Code Civ. Proc. § 438, subds. (c)(1), (f).) Moreover, "[w]hen a motion for summary judgment challenges the sufficiency of the pleadings rather than the evidence supporting the allegations contained therein, it is tantamount to a motion for judgment on the pleadings and may be treated as such by the trial court." (*Taylor v. Lockheed Martin Corp.* (2000) 78 Cal.App.4th 472, 479.) Thus, there is no waiver of any argument regarding the sufficiency of allegations of a cause of action, or the Court's prior determination regarding the sufficiency of those allegations. Here, Goodwill has presented evidence that the Court determined the insufficiency of allegations supporting the contribution and equitable indemnity causes of action, and that in response, Plaintiff omitted those causes of action from his SAC. Thus, to the extent that the seventh cause of action for declaratory relief is premised on the omitted causes of action, Goodwill meets its initial burden to demonstrate that it is without merit (see UMFs 1-6, second cause of action); and, in opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact as to the seventh cause of action.

Accordingly, the motion for summary adjudication of the seventh cause of action is GRANTED.

The motion is granted in its entirety. The Court will prepare the Order.

Calendar line 4
Case Name: *Piedmont Capital Management, LLC, et al. v. Thanh Nguyen*
Case No.: 20CV371010

Factual and Procedural Background

Cross-Complainant Thanh D. Nguyen ("Cross-Complainant" or "Nguyen") brings a First Amended Cross-Complaint ("FAXC") against cross-defendants Piedmont Capital Management LLC ("PCM") and Dennis Lanni ("Lanni")(collectively, "Cross-Defendants").

Nguyen defines himself as a consumer and debtor. (FAXC, ¶ 8.) PCM is a debt collector. (*Id.* at ¶ 9.) Lanni is or was an officer, director, employee, and/or authorized agent of PCM. (*Id.* at ¶ 10.)

On or around January 9, 2007, Nguyen incurred a financial obligation in the form of a Home Equity Line of Credit ("HELOC") issued by JPMORGAN CHASE BANK, N.A. ("Chase Bank"). (FAXC, ¶ 14.)

On or around May 31, 2009, Nguyen made his last payment to Chase Bank and no further payments were made. (FAXC, ¶ 15.)

On or around October 15, 2019, the debt was sold or resold to PCM for collection purposes. (FAXC, ¶ 18.) Because the debt was sold or resold after January 1, 2014, Cross-Defendants' collection of the debt is subject to the California Fair Debt Buying Practices Act. (*Id.* at ¶ 19.)

On September 21, 2020, PCM brought an initial action against Nguyen, asserting a single cause of action for breach of contract for Nguyen's failure to pay amounts due on the HELOC. (FAXC, ¶ 20, Ex. 1.)

The FAXC alleges that PCM's attempt to collect the debt from Nguyen is unlawful and barred by the applicable statute of limitations. (FAXC, ¶¶ 27, 29.)

On June 17, 2022, Nguyen filed his FAXC asserting PCM violated the following Acts when it filed its complaint against him:

1) California Fair Debt Buying Practices Act [against PCM];
2) Fair Debt Collection Practices Act ("FDCPA") [against Cross-Defendants]; and
3) Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") [against Cross-Defendants].

On March 3, 2023, PCM dismissed without prejudice its entire Complaint against Nguyen.

On August 8, 2023, Nguyen filed a motion for summary judgment as to the second and third causes of action in the FAXC. Nguyen states he will dismiss his first cause of action if the Court grants his motion to for summary judgment. In the alternative, Nguyen moves for summary adjudication of Cross-Defendants' affirmative defenses. Cross-Defendants oppose the motion.

Motion for Summary Judgment

Legal Standard

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

"'A defendant moving for summary judgment has the burden of showing that a cause of action lacks merit because one or more elements of the cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action.'" (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965 [internal citations omitted].) "Where the plaintiff has moved for summary judgment, [he] has the burden of showing there is no defense to a cause of action. That burden can be met if the plaintiff 'has proved each element of the cause of action entitling [him] to judgment on the cause of action.' If the plaintiff meets this burden, it is up to the defendant 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.'" (*Ibid.*) "The expiration of the applicable statute of limitations is one such complete defense." (*Ibid*.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id*. at p. 843.)

Cross-Complainant's Request for Judicial Notice

In support of his motion, Nguyen requests the Court take judicial notice of the following:

1) PCM's initial complaint filed on September 21, 2020 (Ex. A);
2) Nguyen's initial cross-complaint filed on October 27, 2020 (Ex. B);
3) Nguyen's amendment to his cross-complaint naming Roe 1 filed on April 19, 2022 (Ex. C);
4) Nguyen's FAXC filed on June 17, 2022 (Ex. D);
5) Answer to Cross-Complaint filed on July 29, 2022 (Ex. E); and
6) Amended Answer to Cross-Complaint filed on November 21, 2022 (Ex. F).

The request for judicial notice of Ex. A and Ex. F is GRANTED as to their existence. (*People v. Woodell* (1998) 17 Cal.4th 448, 455 [court may take judicial notice of court documents but cannot take judicial notice of the truth of hearsay statements in court files including pleadings].)

The request for judicial notice of Ex. D is GRANTED. (See Evid. Code, § 452, subd. (d).)

The request for judicial notice of Ex. B, Ex. C, and Ex. E is DENIED. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

Analysis

To obtain summary judgment, the moving party must submit evidence as to each cause of action. (See e.g., *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 714.) If there is one, single material fact in dispute, a motion for summary judgment must be denied. (*Versa Technologies, Inc. v. Superior Court of Los Angeles* (1978) 78 Cal.App.3d 237, 240.) Further, a court may not summarily adjudicate individual claims as to which no triable issue was raised unless it was requested in the notice of the motion. (*Homestead Sav. v. Superior Court* (1986) 179 Cal.App.3d 494, 498 [“‘moving party may argue that he should be entitled to a summary adjudication order on the remaining issues in the case as to which no “triable issue” was raised. But such relief will *not* be granted unless requested in the notice of motion’”][emphasis original].)

Here, Cross-Complainant’s notice of motion and memorandum of points and authorities in support of the motion for summary judgment indicate he is not moving for summary judgment as to the first cause of action. Moreover, his notice of motion states that he is moving for summary adjudication only as to Cross-Defendants’ affirmative defenses. Thus, Cross-Complainant has not met his burden and the motion for summary judgment must be denied as there remains triable issues of fact.

For the foregoing reasons, the motion for summary judgment is DENIED.[1]

Motion for Summary Adjudication

Legal Standard

A party may move for summary adjudication to decide whether there is no merit to causes of action, affirmative defenses, or claims for damages. (Code of Civ. Proc., § 437c, subd. (f)(1).) Summary adjudication is only proper if it completely disposes of a cause of action, affirmative defense, or claim for damages. (*Ibid*.)

When a plaintiff moves for summary adjudication of affirmative defenses, it is the plaintiff’s burden as moving party to show that “there is no merit to an affirmative defense as to any cause of action.” (Code of Civ. Proc., § 437c, subd. (f)(1); *North Coast Women’s Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1160.)

Analysis

Nguyen moves for summary adjudication of Cross-Defendants’ first and second affirmative defenses.

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[1] The Court declines to rule on Cross-Defendants’ objections to Cross-Complainant’s evidence as the Court did not rely on such evidence in determining the outcome of this motion. (See Code Civ. Proc., § 437c, subd. (q) [the court need rule only on objections to evidence material to the disposition of the motion].) However, counsel for Cross-Defendants is reminded to follow California Rules of Court, Rule 3.1354, subdivision (b) when submitting evidentiary objections in the future. (See e.g., *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 8-9 [trial court has discretion not to rule on objections interposed into the separate statement].)

Cross-Defendants' first affirmative defense states that Nguyen's claims are time barred by Government Code sections 12960 and 12965 and Code of Civil Procedure sections 337, 338, and/or 339. (Nguyen's Evidence, Vol. 1, Ex. F; RJN, Ex. F.) Cross-Defendants' second affirmative defense asserts litigation privilege. (*Ibid*.)

First Affirmative Defense

Nguyen first asserts that both the FDCPA and the Rosenthal Act require a claim to be brought within one year from the date on which the violation occurs. (Cross-Complainant's Memo, p. 34:11-13, citing 15 U.S.C. § 1292k, subd. (d); Civil Code § 1788.30, subd. (f).) Nguyen continues that his claims did not arise until PCM mailed the May 14, 2020 Acceleration of Debt Notice or filed the September 21, 2020 Complaint. (*Id.* at p. 34:15-18.) Therefore, Nguyen's October 27, 2020 Cross-Complaint was timely. (*Ibid.*) Cross-Defendants' do not address this argument in opposition and the Court may therefore treat it as waived and meritorious. (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"]; *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].) As such, the motion for summary adjudication of the first affirmative defense is granted.

Second Affirmative Defense

In support of his motion for summary adjudication of the second affirmative defense, Nguyen contends that is well settled that the California litigation privilege does not apply to federal causes of action, including the FDCPA and Rosenthal Act claims. (See Cross-Complainant's Memo, p. 35:15-16, 20-27.)[2] Again, Cross-Defendants do not address this argument in their opposition. Accordingly, the Court likewise treats it as waived and meritorious. (See e.g., *Sexton v. Superior Court*, 58 Cal.App.4th 1403, 1410 [failure to file opposition creates an inference that the motion is meritorious].) Thus, the motion for summary adjudication of the second affirmative defense is granted.

Based on the foregoing, the motion for summary adjudication is GRANTED.

Conclusion and Order

As a final point, Cross-Complainant's FAXC is based primarily on the assertion that PCM's initial complaint was time-barred. PCM dismissed its complaint against Nguyen nearly five months before Nguyen filed the instant motion. Moreover, PCM has indicated it will not seek to enforce the debt owed by Nguyen. (See Cross-Defendants' Opposition, p. 7:13-16; Lanni Decl., ¶ 6 ["At this point, we simply desire to forever withdrawal all disputes involving Defendant"].) While the Court has not addressed the merits of the statute of limitations

[2] Cross-Complainant cites to several cases including: *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 337 ["the [litigation] privilege cannot be used to shield violations of the [Rosenthal] Act"]; *Oei v. N Star Capital Acquisitions, LLC* (C.D.Cal. 2006) 486 F.Supp.2d 1089, 1098 ["well settled that the California litigation privilege does not apply to federal causes of action, including FDCPA claims"].

arguments,[3] and is not inclined to treat Cross-Defendants' opposition as a motion for judgment on the pleadings, the Court does take note of Cross-Defendants' attorney's fees argument. (See Opposition, p. 6:18-22 [asserting it has dismissed all claims against Nguyen and he is attempting to increase attorney's fees].)[4]

The motion for summary judgment is DENIED. The motion for summary adjudication is GRANTED.

The Court will prepare the final Order.

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Calendar Line 5
Case Name: Joseph v. Xilinx
Case No.: 21CV385612

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[3] In opposition, Cross-Defendants similarly assert failure to state sufficient facts arguments regarding Lanni. (See Opposition, pp. 6:23-7:6.) The Court will not address these arguments in this motion.

[4] The FAXC's Request for Relief, subdivision (j) seeks attorney's fees pursuant to 15 U.S.C. § 1692k, subd. (a)(3) (["in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the *defendant* attorney's fees reasonable in relation to the work expended and costs"][emphasis added].) Cross-Complainant's memo in support of his motion likewise request attorney's fees pursuant to section 1692k, subd. (a)(3). (See Cross-Complainant's Memo, pp. 31:15-32:4.) Given that Cross-Complainant did not prevail on his motion for summary judgment, the Court declines to award attorney's fees.

I. Statement of Facts.

Plaintiff Indradevi Sabrina Joseph ("Plaintiff") was an elite marketing specialist with unparalleled status in her field and had developed significant expertise in branding and marketing issues specific to semiconductor companies. (Second Amended Complaint ("SAC"), ¶¶1, 21 and 25.) As a marketing specialist, Plaintiff is typically tasked by a client with developing its marketing strategy and then tailoring a client-specific marketing plan that implements the marketing strategy to achieve the identified business goals by taking specified actions over a defined period of time. (SAC, ¶22.) Plaintiff frames this process as having three distinct stage: (1) deep analysis, (2) idea creation; and (3) the execution model. (*Id.*) The deliverables or work product a marketing specialist produces to clients typically include a well-defined marketing strategy and a marketing plan to implement the strategy. (SAC, ¶23.) Marketing professionals like Plaintiff promote and protect the confidentiality of their work by marking it as such; refusing to license, sell, or give away their work; and declining to generally publish the substance of their work beyond limited internal distributions to the client's decision-makers. (SAC, ¶24.)

Plaintiff spearheaded a marketing campaign for Tabula, a direct competitor of defendant Xilinx, Inc. ("Xilinx"), which resulted in Tabula raising over $300 million in funding. (SAC, ¶25.) Plaintiff won over various clients in the semiconductor industry. (*Id.*) Plaintiff's semiconductor clients raised a total of $1 billion, resulting in six corporate combinations and two initial public offerings ("IPOs"). (*Id.*)

In October 2016, Dennis Segers ("Segers"), Chairman of the Board of Directors for defendant Xilinx, began recruiting Plaintiff to join defendant Xilinx which was in dire need of a comprehensive rebranding and repositioning plan to boost the visibility of its products and jumpstart its stagnant sales. (SAC, ¶¶26 – 29.) Segers had worked with Plaintiff for approximately five years while he was CEO of Tabula and, under Segers's direction, Plaintiff created and directed Tabula's marketing strategy. (SAC, ¶30.) During this time, Plaintiff and Segers developed a close personal relationship with Plaintiff viewing Segers as a mentor, a role Segers gladly accepted. (*Id.*) Plaintiff seriously entertained the opportunity Segers presented because Plaintiff trusted Segers, Plaintiff would have a rare and desirable opportunity to develop and realize the complete rebranding and repositioning of defendant Xilinx, and Segers represented to Plaintiff that, as Chairman of the Board and possible candidate for CEO, Segers could ensure Plaintiff was compensated commensurate with the value of her skills and expertise. (SAC, ¶32.)

In a meeting on 18 October 2016, Segers asked Plaintiff to create a new rebranding and marketing strategy for defendant Xilinx. (SAC, ¶34.) Segers had designs on becoming defendant Xilinx's next CEO and, if the Board were to appoint him for that role, Segers told Plaintiff he wanted her to join defendant Xilinx's marketing department so that she could create the comprehensive marketing strategy he wanted her to create. (*Id.*) Plaintiff agreed to take up the task Segers asked of her and, soon after the meeting, Plaintiff began creating a rebranding and repositioning strategy specific to defendant Xilinx. (SAC, ¶35.) Plaintiff did not become a Xilinx employee or contractor in performing the task Segers asked of her. (SAC, ¶36.)

In April 2017, Xilinx announced a multi-year CEO succession plan which included Victor Peng ("Peng") being named as Xilinx's [CEO]. (SAC, ¶37.) After this announcement, Segers asked Plaintiff to continue her work developing a rebranding and repositioning strategy for Xilinx. (SAC, ¶38.) Segers informed Plaintiff that Peng's presentation to Xilinx's Board of

Directors regarding his 5-10 year outlook made clear that Xilinx's incoming CEO had absolutely no ideas on how to rebrand or reposition Xilinx for growth, instead repeating the same strategy Xilinx had used since 1984. (*Id.*) Segers incentivized Plaintiff to continue her work by promising that Xilinx would hire her in its marketing department and her compensation package would be rich enough to compensate her for all the professional services she would provide prior to commencing actual employment. (SAC, ¶39.) In reliance on Segers's promise and representations, Plaintiff agreed to continue her work on the comprehensive rebranding and marketing strategy Segers requested. (SAC, ¶40.)

On 23 June 2017, Plaintiff met with Segers in preparation for an introduction with Peng. (SAC, ¶41.) Plaintiff presented Segers with her analysis of Xilinx's market performance, market position, and examples of what branding and communication strategies appear to be working for comparable companies. (*Id.*) Plaintiff explained the thought process behind a proposed new "brand value" for Xilinx, moving from characterizing its products as "Programmable" to "Adaptable" and proposing taglines incorporating the brand value, e.g., "Adaptable Future," "Adaptable Tomorrow," and "Adaptable Intelligence." (*Id.*) At the conclusion of Plaintiff's presentation, Segers concluded Plaintiff's strategy was ready to be presented to Peng. (*Id.*)

On 31 July 2017, Segers introduced Plaintiff to Peng via email. (SAC, ¶42.) Plaintiff and Peng met in person for the first time on 8 August 2017 and Peng was very receptive to Plaintiff's rebranding and marketing strategy. (SAC, ¶43.) After this meeting, Peng met with Segers on 12 August 2017 and stated he was impressed by Plaintiff's rebranding and repositioning strategy and, based on Segers's recommendation/ encouragement, Peng would name Plaintiff as defendant Xilinx's Senior Vice-President of Marketing once the individual in that role resigned. (SAC, ¶44.) Thereafter, Segers called and texted Plaintiff to tell her the Senior Vice-President of Marketing position would be hers. (*Id.*)

Unknown to Plaintiff, this situation complicated Peng's hiring plans. (SAC, ¶45.) Peng facilitated Xilinx's August 2017 hiring of Peng's longtime friend and colleague, Emre Onder ("Onder"). (*Id.*) Peng implied to Segers during their 12 August 2017 meeting that he had already promised Onder the Senior Vice-President of Marketing role. (*Id.*)

On 24 August 2017, Plaintiff presented Peng an extensive analysis of the Xilinx marketing and investor relations program memorialized in two 50-plus page PowerPoint slide presentations. (SAC, ¶46.) Plaintiff also prepared detailed plans to overhaul each area of the Xilinx customer experience. (*Id.*) Plaintiff's analysis was so well received by Peng that he asked Plaintiff to help him work on rebranding messaging and direct upcoming events as he prepared to take over the CEO role. (*Id.*)

On 11 September 2017, Plaintiff presented her then current market analysis, rebranding strategy and repositioning to Xilinx executive staff and her work was well received by all. (SAC, ¶47.) Following this meeting, Peng verbally offered Plaintiff the position of Senior Vice-President of Marketing. (*Id.*) Plaintiff texted Segers letting him know and minutes later, Segers called to welcome Plaintiff to Xilinx. (*Id.*) After the 11 September 2017 meeting, Plaintiff and Peng were in frequent contact as Peng drew from Plaintiff's marketing expertise and the Xilinx-specific strategies she crafted. (SAC, ¶48.) Peng had no marketing experience and as the time for him to take over as CEO quickly approached, Peng needed to be a quick study. (*Id.*) Over time, Plaintiff saw her work product and strategies being incorporated wholesale into Peng's planning and presentations to the Board, Xilinx employees, and people outside of Xilinx. (*Id.*)

On 7 November 2017, Plaintiff prepared a presentation for Xilinx board members Louis Krakauer and Elizabeth Vanderslice on her view of the semiconductor marketplace. (SAC, ¶49.) The directors complimented Plaintiff telling her that they were impressed with her comprehensive analysis and the sophistication of her work. (*Id.*)

After working closely with Plaintiff for months, Peng appeared to finally understand the importance of Plaintiff's strategy to transform Xilinx's image and the perception of its products' capabilities was essential for Xilinx to compete. (SAC, ¶50.) On his own initiative, Peng hired an outside marketing agency, Nth Degree, so that Peng could be responsible for bringing some fresh branding and marketing issues to Xilinx's board and corporate leadership. (*Id.*) However, Peng quickly realized Nth Degree's ideas were not as innovative or effective as those conceptualized by Plaintiff following years of her studying the semiconductor industry. (*Id.*) On 11 November 2017, Peng chose a concept authored by Nth Degree even though it was a retread of a concept first used by Xilinx in 2014. (SAC, ¶51.) Afterwards, Plaintiff met with Peng and suggested Peng abandon Nth Degree's theme. (SAC, ¶52.) Plaintiff proposed the term, "Adaptable Intelligence," along with an "adaptability" theme instead of the "programmability" theme Xilinx has used since 1984. (*Id.*)

On 26 November 2017, Plaintiff introduced Peng to another branding approach she developed for a new product Xilinx had in development for several years, code-named "Everest:" Adaptive Compute Processing or "ACP." (SAC, ¶53.) Xilinx had invented Field Programmable Gate Arrays ("FPGA") and for over three decades had been known as the "FPGA Company." (*Id.*) Peng enthusiastically embraced the Adaptive Computing theme and informed Plaintiff he was "no longer stuck" on XPU ("Xilinx Processing Unit") which had been for several years as the internal name for Everest. (*Id.*) Peng asked Plaintiff to meet with Xilinx marketing staff to direct Everest's planned 2018 launch and related marketing plans. (*Id.*) It became clear to Plaintiff that Xilinx decision makers embraced her rebranding strategy. (SAC, ¶54.) On 26 November 2017, Plaintiff received an email from Steve Douglass, Xilinx's Vice President of Corporate Sales) asking Plaintiff to integrate her new branding, messaging, and graphical language into Peng's presentation for Xilinx's 2018 Worldwide Sales Conference. (*Id.*) On 27 November 2017, Plaintiff created and delivered to Peng the new tagline, "Designing Adaptable Futures." (SAC, ¶55.) Peng praised Plaintiff for her work. (*Id.*)

From October 2016 to the end of November 2017, Plaintiff had been spending more time working on the Xilinx rebranding and repositioning strategy and less time running her outside consultancy but at no time during this period did Xilinx compensate Plaintiff for her work. (SAC, ¶56.) Segers and Peng knew Plaintiff's work would have cost Xilinx millions of dollars had it hired outside agencies to do the same work. (SAC, ¶59.) The Xilinx Board's Compensation Committee met three times to approve the compensation package offered to Plaintiff to ensure that it recognized the substantial value of Plaintiff's ideas, proposed strategies, and creative work product. (SAC, ¶60.) Plaintiff's base salary for 2018 was to be $360,000. (SAC, ¶61.) Plaintiff was also entitled to an annual target bonus of 80%, equal to $288,000 based on a salary of $360,000. (*Id.*) Plaintiff also received a sign on bonus of $100,000. (*Id.*) Plaintiff's anticipated compensation also included restricted stock units ("RSUs"). (*Id.*) Plaintiff anticipated receiving an initial grant of $1.4 million which would begin vesting in annual installments over a four year period. (*Id.*) Plaintiff was also told she would be eligible for annual RSU refresh awards which would likewise vest over a four year period. (*Id.*)

On 11 December 2017, Catia Hagopian ("Hagopian"), then Vice President of Legal Affairs, emailed Plaintiff an offer letter. (SAC, ¶63.) At the time, Peng agreed Plaintiff's start

date would not be until after Peng was appointed CEO. (*Id.*) Plaintiff submitted a signed offer letter to Hagopian on 26 December 2017. (*Id.*)

On 7 January 2018, Peng communicated to Plaintiff, as well as Xilinx's executive and marketing department, that Plaintiff would be leading Xilinx's Corporate Strategy and Marketing effective immediately and reporting directly to Peng. (SAC, ¶69.) On 14 January 2018, Plaintiff shared with Peng her concepts for the new brand marks and the plan to change all Xilinx marketing materials based on the new designs Plaintiff proposed. (SAC, ¶70.) On 25 January 2018, Plaintiff shared the term, "Adaptable Intelligence," with Peng via text message. (SAC, ¶71.) On 26 January 2018, Peng held his first executive staff meeting as CEO where he asked Plaintiff to present her rebranding and repositioning strategies, including the new brand replacing "Programmable." (SAC, ¶72.) Over the next couple days, Plaintiff and Peng discussed possible taglines until they agreed on Plaintiff's "Adaptable Intelligence" idea, a term formally introduced to Xilinx during Peng's first internal all-hands meeting on 1 February 2018. (SAC, ¶73.) Plaintiff performed all the tasks detailed above at the request or direction of Peng before becoming an employee of Xilinx on 2 February 2018 and before receiving any compensation from Xilinx for her services. (SAC, ¶74.)

In November 2017, as Plaintiff was preparing to step into her role, Xilinx provided Plaintiff with salary and grade level information for employees in the Marketing Department as well as a number of other organizational materials. (SAC, ¶76.) From November 2017 through January 2018, Plaintiff regularly emailed Xilinx employees in the marketing, finance, and human resources departments regarding the organizational structure, budget, and salaries for the department Plaintiff would soon manage. (*Id.*) Through these materials and communications, Plaintiff discovered widespread sex-based pay disparities, sex discrimination, and sexual harassment within the marketing department. (SAC, ¶¶76 – 81.) Plaintiff also learned of a sex-based hostile working environment. (SAC, ¶82.) Retaliation against women who raised complaints was standard operating procedure within Xilinx. (SAC, ¶83.) Before and after her employment at Xilinx commenced on 2 February 2018, Plaintiff raised numerous complaints and disclosed conduct that was unlawful or reasonably believed to be unlawful with Segers, Peng, Hagopian and others at Xilinx. (SAC, ¶¶84 – 97.)

On 14 February 2018, Plaintiff presented her rebranding and repositioning strategy to the Xilinx Board of Directors. (SAC, ¶¶98 – 101.) The Xilinx Board praised Plaintiff at the conclusion of her presentation. (SAC, ¶102.)

On the morning of 20 February 2018, Plaintiff met with Marilyn Meyer ("Meyer"), the Senior Vice President of Human Resources, who interrogated Plaintiff about a 19 January meeting where Plaintiff acknowledged and stated her intent to correct sex-based pay disparities. (SAC, ¶103.) Meyer inquired whether Plaintiff had told the women in attendance at the 19 January meeting that they were underpaid and that there was pay inequity between female and male employees at Xilinx. (*Id.*) Plaintiff confirmed the statements, her belief that the statements were true, and told Meyer Xilinx should correct female employees' salaries and titles. (*Id.*) Meyer became enraged and made clear she would not address pay inequity. (*Id.*) Meyer also stated she would have to take action to protect the CEO and Chairman of the Board. (*Id.*)

On 23 February 2018, Peng terminated Plaintiff's employment. (SAC, ¶104.) Prior to Plaintiff's termination, Peng and his executive assistant requested Plaintiff provide electronic copies of her rebranding and repositioning strategy work product as well as other ancillary information necessary to execute on the marketing plan Plaintiff had drawn up and set in

motion for Xilinx. (SAC, ¶105.) Because she did not know Peng planned to terminate her, Plaintiff dutifully provided Peng with the requested materials. (*Id.*)

When Plaintiff asked Peng about her termination, Peng claimed a number of factors were recently taken into consideration specifically mentioning Plaintiff had made comments to many of the women that Xilinx was going to have to correct. (SAC, ¶106.) Plaintiff inquired whether the "comments" concerned Plaintiff's statements regarding the treatment of women. (*Id.*) Peng responded, "You've said things," and refused to elaborate further twice citing "legal reasons" for his unwillingness to elaborate further. (*Id.*)

On 13 June 2018, a now former Xilinx employee confirmed to Plaintiff that her protected conduct was the reason for her termination. (SAC, ¶109.) The former Xilinx employee asked Segers why Plaintiff was terminated and Segers responded, "[Plaintiff] said the females were underpaid, and one sued." (*Id.*) Segers also stated correcting pay disparities would cost Xilinx too much. (*Id.*)

Beginning in 2018, Xilinx products began to be marketed using Plaintiff's "Adaptable" term. (SAC, ¶112.) Xilinx used and continues to use Plaintiff's taglines, terms, ideas, concepts, and strategies (and derivative works of the same) in interviews, trade magazines, presentations, marketing, without Plaintiff's permission, and without crediting her for her work. (*Id.*) On 19 March 2018, Peng announced his CEO strategy based on a word-for-word copy of Plaintiff's strategy that she outlined in a 26 November 2017 message. (SAC, ¶114.) On 21 August 2018, Peng's presentation at a conference used Plaintiff's concepts and strategies prepared in November 2017 for Segers and Xilinx Board members. (*Id.*) Microsoft's Azure Cloud Unit indicated it switched to Xilinx based on Plaintiff's strategy. (*Id.*) Xilinx revenues and profits quickly and dramatically increased and reached heights significantly higher than envisioned by Peng. (SAC, ¶115.) The rebranding and repositioning of Xilinx by Plaintiff had a direct and exceptional impact on the value of Xilinx. (SAC, ¶116.)

On 9 August 2021[5], Plaintiff filed a complaint against defendant Xilinx.

On 20 September 2021, defendant Xilinx filed a demurrer to Plaintiff's complaint.

On 3 December 2021, prior to a hearing on defendant Xilinx's demurrer, Plaintiff filed a first amended complaint ("FAC") which asserted causes of action against defendant Xilinx for:

(1) Retaliation (Fair Labor Standards Act of 1938, as amended by the Equal Pay Act on 1963, 29 U.S.C. § 215(a)(3))
(2) Retaliation (California Fair Employment and Housing Act, Cal. Gov. Code § 12940, et seq.)
(3) Retaliation (California Whistleblower Protection Act, Cal. Lab. Code § 1102.5(b) & (c).)
(4) Retaliation (Cal. Lab. Code § 98.6(a))
(5) Retaliation (Cal. Lab. Code § 232.5(c))
(6) Fraud
(7) Conversion

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[5] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C)

(8) Common Law Copyright Infringement (Cal. Civil Code § 980 et seq.)
(9) Common Law Misappropriation of Business Ideas
(10) Unjust Enrichment
(11) Violation of the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.)

On 3 January 2022, defendant Xilinx filed a demurrer to Plaintiff's FAC.

On 3 May 2022, the court issued an order sustaining, without leave to amend, defendant Xilinx's demurrer to the second and fifth causes of action; sustaining, with leave to amend, defendant Xilinx's demurrer to the seventh and ninth causes of action; but otherwise overruling defendant Xilinx's demurrer to Plaintiff's FAC.

On 13 May 2022, Plaintiff filed the operative SAC which now asserts causes of action for:

(1) Retaliation (Fair Labor Standards Act of 1938, as amended by the Equal Pay Act on 1963, 29 U.S.C. § 215(a)(3))
(2) Retaliation (California Whistleblower Protection Act, Cal. Lab. Code § 1102.5(b) & (c).)
(3) Retaliation (Cal. Lab. Code § 98.6(a))
(4) Fraud
(5) Conversion
(6) Common Law Copyright Infringement (Cal. Civil Code § 980 et seq.)
(7) Unjust Enrichment
(8) Violation of the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.)

On 13 June 2022, defendant Xilinx filed a demurrer to Plaintiff's SAC.

On 1 September 2022, the court issued an order sustaining, without leave to amend, defendant Xilinx's demurrer to the fifth cause of action; but otherwise overruling defendant Xilinx's demurrer to Plaintiff's SAC.

On 22 September 2022, defendant Xilinx filed an answer to the SAC.

On 18 August 2023, defendant Xilinx filed the motion now before the court, a motion for summary adjudication of the fourth, sixth, seventh and eighth causes of action of the SAC. Plaintiff filed timely opposition papers, and defendant Xilinx filed untimely reply papers.[6]

II. Motions for Summary Judgment, or Summary Adjudication, in General.

[6] The court notes defendant Xilinx submitted two supplemental declarations with attached exhibits along with a reply memorandum. The court declines to address the declarations and exhibits as they constitute new evidence submitted for the first time in the reply papers. (See ***Jay v. Mahaffey*** (2013) 218 Cal.App.4th 1522, 1537—the general rule of motion practice is that new evidence is not permitted with reply papers; see also ***Nazir v. United Airlines, Inc.*** (2009) 178 Cal.App.4th 243, 253—improper to introduce new evidence in reply.) The court has not considered the supplemental declaration of attorney Patrick Hammon, the declaration of Hung Tan, or any arguments dependent upon such evidence. Even if the court considered this new evidence and arguments, it would not change the court's ruling on the motion for the reasons explained below.

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

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 question." (***Aguilar,*** *supra,* 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 Civ. Proc.***, § 437c, subdivision (p)(2); see ***Aguilar,*** *supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (***Aguilar,*** *supra,* at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (***Id.*** at p. 856.)

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

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (***California Bank & Trust v. Lawlor*** (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

III. Defendant Xilinx's Motion for Summary Adjudication Against Plaintiff Joseph.

Defendant Xilinx moves for summary adjudication of the fourth, sixth, seventh and eighth causes of action against plaintiff Joseph on the ground that no triable issues of material fact exist with respect to each of these claims.

A. Plaintiff's request for judicial notice is GRANTED.

In opposition, Plaintiff requests judicial notice of excerpts of the California legislative history regarding ***California Labor Code***, section 2870. **Evidence Code** section 452, subdivision (c), states that the court may take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." The request for judicial notice in support of Plaintiff's opposition to the instant motion is GRANTED insofar as the court notice of the legislative history documents in question, not necessarily the truth of any matters asserted therein.

B. Plaintiff's evidentiary objections.

In opposition, Plaintiff filed objections to evidence submitted by defendant Xilinx in support of its motion for summary adjudication. As the court did not deem the evidence material to its disposition, the court declines to rule on Plaintiff's evidentiary objections in support of her opposition to defendant Xilinx's motion for summary adjudication. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (***Code Civ. Proc.,*** §437c, subd. (q).)

C. Defendant's Xilinx's evidentiary objections.

In support, defendant Xilinx filed objections to evidence submitted by Plaintiff in opposition to Xilinx's motion for summary adjudication. As the court did not deem the evidence material to its disposition, the court declines to rule on defendant Xilinx's evidentiary objections in support of it motion for summary adjudication. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (***Code Civ. Proc.,*** §437c, subd. (q).)

D. Defendant Xilinx's Proffered Evidence.

In support of its motion for summary adjudication as to the fourth, sixth, seventh, and eighth causes of action of the SAC, defendant Xilinx proffers the following facts: As a condition of her employment with Xilinx, Plaintiff signed a Proprietary Information and Inventions Agreement ("PIIA") on 2 February 2018 via electronic signature through the company's online human resources onboarding system.[7] Although the human resources software did not print Plaintiff's electronic signature in the PIIA on the signature line provided, the signature and Plaintiff's name can be seen on page 5 of the document, above the final provision of the PIIA in all caps at Paragraphs J and K.[8]

At the time Plaintiff signed the PIIA, she also signed Exhibit C, titled "Prior Inventions," wherein she checked a box next to the statement "No Prior Inventions Exist."[9] Plaintiff's offer letter states, "This letter along with the Proprietary Information and Inventions Agreement sets forth the terms of your employment with us and supersedes any prior or contemporaneous negotiations, representations or agreements, whether written or oral, express or implied, on this subject."[10] "As a condition of your employment, you will be required to follow Company rules and regulations and to execute the enclosed Proprietary Information and Inventions Agreement."[11] "Once you have accepted this offer, the Staffing Department will send you the following documents for you to complete and return prior to your start date: …

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[7] See Separate Statement of Undisputed Material Facts in Support of Defendant Xilinx, Inc.'s Motion for Summary Adjudication ("Defendant's UMF"), Fact No. 1; Declaration of Dixie Low in Support of Defendant Xilinx, Inc.'s Motion for Summary Adjudication ("Low Decl."), ¶¶ 8-11, Exs. A-C; Declaration of Patrick Hammon in Support of Defendant Xilinx, Inc.'s Motion for Summary Adjudication ("Hammon Decl."), ¶2, Ex. A.)

[8] *Id.*, Fact No. 1; Low Decl., Ex. A. ("PIAA").

[9] *Id.*, Fact No. 2; PIAA.

[10] *Id.*, Fact No. 3; Low Decl., Ex. C ("Offer Letter"), Bates No. DEF063733.

[11] Ibid.

Proprietary Information and Inventions Agreement (please review and sign on pages 5 & 8) ….”[12]

The PIIA states, “All Proprietary Information and patents, copyright and other rights in connection therewith shall be the sole property of the Company. I hereby assign to the Company any rights I may have or acquire in such Proprietary Information.”[13] The PIAA, in section A, defines Proprietary Information as follows:

> “Proprietary Information” includes, but is not limited to, trade secrets, copyrightable subject matter, mask works, discoveries, ideas, techniques, know-how, confidential information, inventions (whether patentable or not), and/or any other information of any type relating to designs, configurations, toolings, documentation, recorded data, schematics, source code, object code, master works, master databases, algorithms, flow charts, formulae, circuits, works of authorship, mechanisms, research, manufacture, improvements, assembly, installation, marketing, forecasts, pricing, customers, the salaries, duties, qualifications, performance levels, and terms of compensation of other employees, and/or cost or other financial data concerning any of the foregoing or the Company and its Affiliates and their operations generally.[14]

Further, under section D, subsection (3), of the PIIA, Plaintiff agreed to the following:

> I will promptly disclose in writing to my immediate supervisor, with a copy to the Director of Intellectual Property for Xilinx, Inc., or to any persons designated by the Company, all “Inventions”, which includes all improvements, inventions, works of authorship, mask works, computer programs, formulae, ideas, processes, techniques, know-how and data, whether or not patentable, made or conceived or reduced to practice or developed by me, either alone or jointly with others, during the term of my employment.[15]

There is no evidence that Plaintiff ever made any such disclosure before her termination.[16] On 24 January 2018 and 25 January 2018, Plaintiff emailed with Cynthia Zamorski, the “Senior Legal Counsel” for defendant Xilinx’s “Commercial Group, Americas,” regarding whether Xilinx (not Plaintiff) could trademark “ACAP – Adaptive Compute Acceleration Platform.”[17] Plaintiff knew how to contact in-house counsel for defendant Xilinx if she had any questions about the PIIA or its implications.[18] Plaintiff did not have any ownership interest in the purported marketing concepts based on the PIIA’s assignment of any such interests to defendant Xilinx.[19] Defendant’s UMF also provides further legal argument regarding the interpretation and effect of the PIIA, discussed in the analysis below.

E. Plaintiff’s Proffered Evidence.

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[12] *Id.*, Fact No. 3; Low Decl., Offer Letter, Bates No. DEF063734.
[13] *Id.*, Fact No. 4; PIAA, Bates No. DEF063693.
[14] Ibid.
[15] *Id.*, Fact No. 5; PIAA, Bates No. DEF063694.
[16] *Id.*, Fact No. 5.
[17] *Id.*, Fact No. 6; Hammond Decl., ¶3, Ex. B.
[18] *Id.*, Fact No. 6.
[19] *Id.*, Fact No. 7; PIAA, ¶A, Bates No. DEF063693.

In opposition, Plaintiff provides a separate statement including a response to the facts proffered by Xilinx in Defendant's UMF, as follows:[20] Although the Offer Letter refers to the PIIA as being enclosed with the letter, it was not.[21] Plaintiff does not believe that she e-signed the PIIA submitted by Xilinx.[22] Plaintiff testified at her deposition that she did not see, or does not recall seeing, the PIIA during the onboarding process.[23] Neither the PIIA nor the other documents listed on page 4 of the Offer Letter were enclosed with the Offer Letter, and Plaintiff did not receive these documents prior to her start date.[24] At no time did Plaintiff assign her ownership interests in her pre-employment marketing analysis, ideas, planning, or strategies with respect to Xilinx.[25] Plaintiff's Response also provides further legal argument regarding the interpretation and effect of the PIIA, as discussed in the analysis below.

Plaintiff also provides additional facts in support of her opposition, as follows:[26] Plaintiff was not an employee of Xilinx when she worked on a set of tailored marketing plans for Xilinx; she started this work in October 2016 and completed it before February 2, 2018. Plaintiff took reasonable steps to maintain the confidentiality of her work product. Plaintiff did not provide slides of her presentations to Xilinx executive and board members, either electronically or physically. Plaintiff only confidentially disclosed her work and ideas to seven Xilinx representatives, and these disclosures occurred in 2017, well before Plaintiff's first of employment at Xilinx in February 2018.[27]

The Offer Letter to Plaintiff did not enclose a copy of the PIIA. Plaintiff did not receive the 5 documents listed on page 4 of the Offer Letter prior to the start date of her employment at Xilinx. Plaintiff was not provided with a hard copy of the PIIA. Xilinx did not give her an opportunity to review the PIIA before deciding whether she would execute the PIIA. If Plaintiff had been provided with the PIIA before she started employment at Xilinx, she would have reviewed it and consulted with counsel before signing it. If Plaintiff had been given a reasonable opportunity to review and consider the PIIA, she would have included on Exhibit C to the PIIA a disclosure of her tailored marketing plans for Xilinx that she had created at the request of Xilinx.[28]

On Plaintiff's first day of employment at Xilinx, she was advised that her personnel file was not complete and that she had to execute a number of documents immediately, but

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[20] See Plaintiff's Response to Defendant's Separate Statement of Undisputed Material Facts ("Plaintiff's Response").
[21] See Plaintiff's Response, Fact No. 1; Low Decl., Offer Letter; Declaration of Indradevi Sabrina Joseph in Support of Plaintiff's Opposition to Defendant Xilinx's Motion for Summary Adjudication ("Joseph Decl."), ¶17, Ex. 3.
[22] *Id.*, Fact No. 1; Declaration of Robert J. Yorio in Support of Plaintiff's Opposition to Defendant Xilinx, Inc.'s Motion for Summary Adjudication ("Yorio Decl."), ¶3, Ex. 2 ("Joseph Deposition"), Vol. VI., pp. 1042:14 to 1052:15.
[23] *Id.*, Fact No. 1; Declaration of Robert J. Yorio in Support of Plaintiff's Opposition to Defendant Xilinx, Inc.'s Motion for Summary Adjudication ("Yorio Decl."), ¶3, Ex. 2 ("Joseph Deposition"), Vol. VI., pp. 1043:3-21, 1046:6-21.
[24] *Id.*, Fact No. 3; Offer Letter, p. 4; Joseph Decl., ¶¶16-18.
[25] *Id.*, Fact Nos. 2, 4, 7.
[26] See Plaintiff's Additional Disputed Material Facts and Supporting Evidence (pp. 18-36 of Plaintiff's separate statement, "Plaintiff's AMF"); Joseph Decl.
[27] *Id.*, Fact Nos. 2-3.
[28] *Id.*, Fact Nos. 4-8.

Plaintiff was not informed that the PIIA was among the documents that needed to be executed. On her first day of employment, Plaintiff received a link to Xilinx's human resources software platform, but the link was to an incorrect position. Xilinx's Human Resources Manager, Andee Nieto, told Plaintiff that the reason for the incorrect job description was because Peng, Xilinx's CEO, did not want other applicants to know of the opening of Plaintiff's true position, Senior Vice President, Strategic Marketing and Corporate Communications.[29]

Ms. Nieto told Plaintiff that she was to complete the forms immediately and that they would then be removed from the system. Plaintiff does not recall seeing her 17 December 2017 Offer Letter in the documents available on the human resources link. Upon completion of the forms, Plaintiff was informed by Ms. Nieto that the information had been removed from Xilinx's system. Plaintiff was not provided with electronic or hard copies of the forms that were completed on her date of employment.[30]

On or about 15 February 2018, a Xilinx executive asked Plaintiff to complete a significant volume of documents pertaining to Plaintiff job title. Mr. Peng told Plaintiff that these documents, which included a change of control agreement, were necessary for SEC compliance. Plaintiff did not receive electronic or hard copies of the documents completed on 15 February 2018. Neither Plaintiff's Offer Letter nor a signed PIIA was filed by Xilinx with the SEC. Mr. Peng's employment agreement, which included a PIIA, was filed with the SEC.[31]

On 23 February 2018, Plaintiff attended an in person meeting with Mr. Peng, the subject of which was supposed to be preparation for the launch of a new Xilinx product family, code-named "Everest." In preparation for that meeting, Mr. Peng requested Plaintiff to immediately gather and bring to the meeting all hard and electronic copies of her rebranding and repositioning plan and strategies. Plaintiff complied with his request and brought that information to the meeting, with the electronic copies loaded on a USB drive. Mr. Peng took the materials from Plaintiff and placed them on his desk. He then advised Plaintiff that her employment at Xilinx was terminated immediately.[32]

On 26 February 2018, Mr. Peng sent an email to the Strategic Marketing and Communications department announcing Plaintiff's termination and the appointment of Emre Onder as interim leader of the department.[33]

F. Analysis.

1. Defendant Xilinx's motion for summary adjudication of the fourth cause of action [fraud] of Plaintff's SAC is DENIED.

"It is well established that the pleadings determine the scope of relevant issues on a summary judgment motion. [Citations.]" (***Nieto v. Blue Shield of California Life & Health Ins. Co.*** (2010) 181 Cal.App.4th 60, 70.) In her fourth cause of action, Plaintiff alleges the following in relevant part:

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[29] *Id.*, Fact Nos. 9-11.
[30] *Id.*, Fact Nos. 12-15.
[31] *Id.*, Fact Nos. 16-19, 24-25, Yorio Decl., ¶4, Ex. 3.
[32] *Id.*, Fact Nos. 20-23.
[33] *Id.*, Fact No. 26–the court is unable to locate the referenced supporting evidence in Plaintiff's papers. (See Yorio Decl., p. 2:14-15—there is no Exhibit 4 referenced in or attached to the declaration as filed with the court.)

> ¶156. At a date, time, and location known exclusively by Mr. Peng, he decided to terminate Ms. Joseph's employment at Xilinx.
>
> ¶157. …. By early 2018 (and before her employment at Xilinx), Ms. Joseph had completed almost all of the work necessary to develop the Company's rebranding strategy, and she had developed a plan to put that strategy into action. The Company, however, had paid her nothing to date for all this hard work. By February 2018, Ms. Jospeh had become Xilinx's Senior Vice President of Marketing….
>
> ¶158. … Mr. Peng devised a scheme to defraud Ms. Joseph ….
>
> ¶159. On February, 23 2018—the same day Mr. Peng intended to terminate Ms. Joseph—he contacted her and requested from her key information, work product, and ancillary materials pertaining to the rebranding and repositioning strategy and her plan to implement the strategy."
>
> ¶160. Mr. Peng's communications were misleading in that he concealed from Ms. Joseph the fact that he was seeking to obtain these materials from her prior to terminating her.

(SAC, ¶¶ 156-160.)

The general elements of a fraud claim are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (***Lazar v. Super. Ct.*** (1996) 12 Cal.4th 631, 638.) "The general rule for liability for nondisclosure is that even if material facts are known to one party and not the other, failure to disclose those facts is not actionable fraud unless there is some fiduciary or confidential relationship giving rise to a duty to disclose." (***La Jolla Village Homeowners' Assn. v. Superior Court*** (1989) 212 Cal.App.3d 1131, 1151.)

In support of its motion for summary adjudication, defendant Xilinx contends that the fourth cause of action for fraud can be disposed of by the PIIA because it seeks recovery based on a theory "that Xilinx supposedly wrongfully took, retained, or used Plaintiff's purported marketing concepts." (Mot., p. 8:2-9.) Defendant further argues the fraud claim fails because Plaintiff "extinguished any right she had in the supposed property she alleges she was deceived into providing her boss by virtue of the PIIA she executed." (*Id.*, pp. 18:27-19:1.) According to defendant Xilinx, "the crux of [Plaintiff's] claim is that she was induced to turn over access to the alleged marketing concepts by a request which omitted that she was about to be terminated. But … the alleged marketing concepts did not belong to Plaintiff in the first place [because] any right she had to it was extinguished on February 2, 2018, when she signed the PIIA." (*Id.*, p.19:3-7.) In sum, defendant Xilinx contends the PIIA is valid and enforceable, the marketing plans and material at issue are within the scope of the PIIA, and the PIIA has the effect of assigning Plaintiff's rights in the subject marketing plans and materials to Xilinx while extinguishing Plaintiff's ownership interests. (*Id*., pp. 14-21.)

Thus, as the court understands it, defendant Xilinx's position is that Plaintiff did not suffer any damage, i.e., if Plaintiff did not have an ownership interest in the marketing concepts, she did not lose anything of value. As the moving party, defendant Xilinx bears the initial burden of production to make a prima facie showing in support of this position, i.e., "one that is sufficient to support the position" of Xilinx. (***Aguilar***, *supra*, 25 Cal.4th at p. 851.)

Here, as set forth above, defendant Xilinx has proffered evidence that Plaintiff signed the PIIA as a condition of her employment.[34] Defendant Xilinx has also proffered evidence that under the PIIA, Plaintiff agreed to assign to Xilinx all "Proprietary Information" and "any rights [Plaintiff] may have or acquire in such Proprietary Information."[35] Further, the PIIA defines "Proprietary Information" to include "copyrightable subject matter," "ideas," and "marketing."[36] The PIIA also provides, "I agree that I have the right to resign and the Company has the right to terminate my employment at any time, for any reason, with or without cause."[37] In the court's opinion, this evidence is sufficient to meet defendant Xilinx's initial burden of establishing that it was not under a duty to inform Plaintiff that she was going to be terminated before requesting and retaining materials resulting from the work performed by Plaintiff for Xilinx.

Thus, the burden shifts to Plaintiff to make a prima facie showing of the existence of a triable issue of material fact with respect to her fourth cause of action for fraud. (***Aguilar***, *supra*, 25 Cal.4th at p. 850.) In opposition, Plaintiff argues that the PIIA is invalid and unenforceable, that the subject marketing plans and materials are outside the scope of the PIIA, and that the PIIA does not have the effect of assigning Plaintiff's rights subject marketing plans and materials to Xilinx and extinguishing Plaintiff's ownership interests. (Opp., pp. 9-20.) In short, Plaintiff's argument is that the PIIA is not effective and thus, she has an ownership interest in the marketing concepts. (*Ibid.*) It follows that a dispute exists with regard to whether Plaintiff has suffered damage.

Plaintiff first contends that there are triable issues of material fact as to whether she ever signed and initialed the PIIA. (Opp., p. 9:11-20.) Plaintiff argues that defendant Xilinx failed to provide a copy of the PIIA with her signature on it, but this contention is belied by the very evidence relied on by Plaintiff in support (the copy of the PIIA proffered by Xilinx), as she effectively acknowledges.[38] As addressed previously, while Plaintiff's electronic signature does not appear on the signature line provided at page 5 of the PIIA, her purported electronic signature can be seen on page 5 of the document, above the final provision of the PIIA in all caps at Paragraphs J and K.[39] Similarly, while Plaintiff suggests that the copy of the PIIA is insufficiently authenticated by the declaration to which the proffered PIIA is attached, she fails to support this position with admissible evidence or applicable legal authority. (Opp., p. 9:16-20.)

Plaintiff further contests whether her electronic signature appears on PIIA by asserting that she "did not see" the PIIA before defendant Xilinx terminated her. As addressed previously, Plaintiff disputes Defendant's UMF, Fact. No. 1 (containing the PIIA) in part with the assertion, "Plaintiff does not believe that she e-signed the PIIA submitted by Xilinx."[40] However, this contention does not appear to be supported by the evidence cited by Plaintiff.[41] Plaintiff testified in her deposition that she recalled executing a series of documents during her

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[34] Defendant's UMF, Fact No. 1.
[35] *Id.*, Fact No. 4; PIIA, ¶D, subd. (1).
[36] *Id.*, Fact No. 4; PIIA, ¶A.
[37] *Id.*, Fact No. 4; PIIA, ¶E.
[38] *Id.*, Fact No. 1; PIIA, p. 5.
[39] Ibid.
[40] Plaintiff's Response, Fact No. 1; Joseph Deposition, Vol. VI., pp. 1042:14 to 1052:15.
[41] Ibid.

onboarding process, but she "did not see" the PIIA as part of her onboarding.[42] In reference to the onboarding forms, Plaintiff further testified:

> I don't recall what were – what the standard – there were a couple of forms. It was a web form where I had to check a couple of boxes. And I read through it, it seemed standard. And I read through it, and clicked through and signed. … I don't recall what the documents looked like, but --- but there was nothing that stood out to me when I was going through that process.[43]

Based on Plaintiff's testimony, she does not remember and cannot identify which documents she did or did not sign when she clicked through the web form. Thus, the court is not convinced Plaintiff meets her burden as to whether she signed the PIIA.

Plaintiff next challenges the validity and enforceability of the PIIA by arguing that, even if it is presumed that her electronic signature does appear on the PIIA, the agreement is still not enforceable because defendant Xilinx only obtained Plaintiff's apparent consent through fraud. (Opp., pp. 10-15.) Plaintiff also argues defendant Xilinx should be prevented from enforcing the PIIA against her under the doctrine of equitable estoppel. (*Id.*, pp. 14-15—citing ***Feduniak v. California Coastal Commission*** (2007) 148 Cal.App.4th 1346, 1359.)

Parties seeking to avoid enforcement of an agreement on the basis of fraud generally rely upon two distinct fraud theories. (***Rosenthal v. Great Western Fin. Securities Corp.*** (1996) 14 Cal.4th 394, 415 (***Rosenthal***).)

> California law distinguishes between fraud in the "execution" or "inception" of a contract and fraud in the "inducement" of a contract. If brief, in the former case "the fraud goes to the inception or execution of the agreement, so that the promisor is deceived as to the nature of his act, and actually does not what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is *void*. In such a case it may be disregarded without the necessity of rescission." [Citation.] Fraud in the inducement, by contrast, occurs when "the promisor knows what he is signing but his consent is *induced* by fraud, mutual assent is present and contract is formed, which, by reason of the fraud, is *voidable*. In order to escape from its obligations the aggrieved party must rescind…." [Citation.]

(***Rosenthal***, *supra*, 14 Cal.4th at p. 415, italics original.)

> One party's misrepresentations as to the nature or character of the writing do not negate to other party's apparent manifestation of assent, if the second party had "reasonable opportunity to know of the character or essential terms of the proposed contract." (Rest.2d Contracts, §163, p. 443.) If a party, with such reasonable opportunity, fails to learn the nature of the documents he or she signs, such "negligence" precludes a find the contract is void for fraud in the execution. [Citation.]

(***Rosenthal***, *supra*, 14 Cal.4th at p. 415.)

"It has been pointed out that one who signs a contract without reading it cannot escape liability in the absence of fraud, mistake, undue influence, or duress." (***1 Witkin Sum. Cal. Law*** (6th ed. 2023) Pleading § 302—citing ***Greve v. Taft Realty Co.*** (1929) 101 Cal.App. 343.

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[42] Joseph Deposition, Vol. VI., p. 1043:13-21.
[43] *Id.*, at p. 1046:8-21.

351.) A party should not be allowed to avoid liability "where the failure to familiarize [themselves] with the contents of a written contract prior to its execution is traceable ***solely*** to [their] carelessness and negligence…." (***California Trust Co. v. Cohn*** (1932) 214 Cal. 619, 627, emphasis added.) But a different conclusion may be reached, "where such failure, and perhaps negligence, is induced… by the false representations and fraud of the other party to the contract…." (***Ibid.***)

Here, the evidence proffered by Plaintiff calls into question whether she had a reasonable opportunity to know the character or terms of the PIIA, and whether defendant Xilinx intentionally deprived her of such a reasonable opportunity. The Offer Letter refers to an enclosed PIIA, but it was not enclosed.[44] Plaintiff did not receive the PIIA or any of the documents listed on page 4 of the Offer Letter prior to her start date of employment.[45] Plaintiff did not receive a hard copy of the PIIA.[46] On her first day of employment, defendant Xilinx sent Plaintiff a link to onboarding documents for the incorrect job posting, purportedly on the direction of the CEO, Mr. Peng, with the stated objective of concealing Plaintiff's true role from others.[47] On her first official day of employment, defendant Xilinx told Plaintiff that she had to complete the forms on the incorrect job posting immediately.[48] Plaintiff was later informed that her on-boarding documents were removed from defendant Xilinx's system, and Xilinx did not provide Plaintiff with electronic or hard copies of the on-boarding documents.[49]

In the court's estimation, Plaintiff's evidence is sufficient to meet her burden as to whether she was intentionally deprived of a reasonable opportunity to know the character and essential terms of the PIIA. Any of the individual facts set forth above, taken in isolation, may not be sufficient to carry Plaintiff's burden. But taken as a whole, this evidence evinces a pattern of defendant Xilinx providing Plaintiff with inaccurate and/or incomplete information related to her onboarding, which included withholding the PIIA from Plaintiff. This evidence is also consistent with allegations in the fourth cause of action for fraud in the SAC, namely that Peng "devised a scheme" to defraud Plaintiff and intentionally mislead her so she would turn over copies of her work for defendant Xilinx without a discussion regarding her fair compensation. (SAC, ¶¶156-161.)

The court finds the existence of a triable issue of material fact as to whether the PIIA is enforceable, and thus, whether Plaintiff has suffered damage by virtue of an ownership interest in the marketing concepts.

As an alternative basis for summary adjudication, defendant Xilinx argues Plaintiff should be estopped from contending that she did not assign her rights to Xilinx. (Mot., pp. 21-22.) More specifically, Xilinx asserts it would be fundamentally unfair to allow Plaintiff to now claim that she had an ownership interest in the marketing concepts because she checked the box indicating "No Prior Inventions Exists" on Exhibit C to the PIIA.[50] In support, defendant Xilinx relies upon ***Spray, Gould & Bowers v. Associated Internat. Ins. Co.*** (1999) 71 Cal.App.4th 1260 (***Spray***), which sets forth the elements for an equitable estoppel claim:

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[44] Plaintiff's Response, Fact No. 1.
[45] Ibid.
[46] Plaintiff's AMF, Fact No. 6.
[47] *Id.*, Fact Nos. 10-11.
[48] *Id.*, Fact No. 14.
[49] *Id.*, Fact Nos. 14-15.
[50] Defendant's UMF, Fact Nos. 2, 4; PIIA, "Exhibit C."

> Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of the facts, and, (4) he must rely upon the conduct to his injury.

(***Id.*** at p. 1268, internal punctuation and citations omitted.)

In opposition, Plaintiff again challenges the validity of the PIIA and further contends that Exhibit C and paragraph D.6 of the PIIA do not automatically assign her ownership interests to Xilinx. (Opp., pp. 15-20.) Here, the court finds the evidence proffered by defendant Xilinx does not meet its initial burden for its estoppel position. Most notably, defendant Xilinx has not proffered evidence that Xilinx was ignorant that Plaintiff had developed marketing concepts for Xilinx before her first day of employment. Even if defendant Xilinx had met its burden as to its estoppel argument, Plaintiff has proffered evidence sufficient to meet her burden in response. For example, Plaintiff sets forth that she made a presentation of her ideas to Xilinx before she was hired.[51] Thus, Plaintiff has established a triable issue as to whether Xilinx was "ignorant of the true state of the facts" regarding her pre-employment development of Xilinx marketing concepts. (***Spray***, *supra*, 71 Cal.App.4th at p.1268.)

Accordingly, defendant Xilinx's motion for summary adjudication of the fourth cause of action [fraud] is DENIED.

2. Defendant Xilinx's motion for summary adjudication of the sixth cause of action [common law copyright infringement] of Plaintff's SAC is DENIED.

In her sixth cause of action, Plaintiff asserts a common law copyright infringement claim premised upon Civil Code section 980, subdivision (a)(1). (SAC, ¶¶185 and 187.)

> The inventor or proprietor of any invention or design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the invention or design and the representations or expressions thereof made by him remain in his possession.

(***Civ. Code***, § 980, subd. (b).)

> [T]he law makes a distinction between a general and a limited publication; decrees that only a general publication, and not a limited publication, results in loss of a copyright; defines a general publication as such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public; and defines a limited publication as one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public. Factors to be considered in determining whether a publication is general or limited are the intention of the owner, viz., whether his acts of publication are indicative of an intent that the subject of the copyright may be used by the general public; the character of the communication or exhibition effecting the publication; the nature of the subject of the copyright as related to the method of

[51] Plaintiff's Response, Fact Nos. 2, 4; Joseph Decl., ¶¶8-12.

> communication or exhibition in question; and the nature of the right protected. To ascertain the intention of the owner, an objective rather than a subjective test is applied. The court will look to what he does rather than to what he claims he intended the implications of his outward actions to the reasonable outsider are controlling

(***Read v. Turner*** (1966) 239 Cal.App.2d 504, 511—internal punctuation and citations omitted.)

In support of its motion for summary adjudication, defendant Xilinx contends that the sixth cause of action for common law copyright infringement, much like the fourth cause of action for fraud, can be disposed by the PIIA because it seeks recovery based on a theory "that Xilinx supposedly wrongfully took, retained, or used Plaintiff's purported marketing concepts." (Mot., p. 8:2-9.) Defendant Xilinx further argues the copyright claim fails because, to the extent that Plaintiff has any ownership interest in marketing concepts developed for Xilinx, such ownership interests "fail because they fall within the scope of her PIIA. (*Id.*, p. 8:18-23; 19-20.) Thus, defendant Xilinx's motion for summary adjudication of the sixth cause of action is based upon the same arguments and facts outlined previously concerning the validity, scope, and effect of the PIIA.

For the same reasons addressed above, the court finds that defendant Xilinx meets its initial burden as to the validity, scope, and effect of the PIIA, and Plaintiff meets her burden as to whether Xilinx intentionally deprived her of a reasonable opportunity to know the character and essential terms of the PIIA. As to defendant Xilinx's position regarding equitable estoppel, for the reasons discussed above, Xilinx does not meet its initial burden, and even if it does, Plaintiff meets her burden in reply.

Thus, defendant Xilinx's motion for summary adjudication of the sixth cause of action [common law copyright infringement] is DENIED.

3. Defendant Xilinx's motion for summary adjudication of the seventh cause of action [unjust enrichment] of Plaintff's SAC is DENIED.

In her seventh cause of action, Plaintiff asserts that defendant Xilinx was unjustly enriched at her expense because she disclosed her rebranding and repositioning strategy with Xilinx, and Xilinx did not fulfill its promises concerning compensation to Plaintiff. (SAC, ¶¶195 -198.)

> [T]here is no cause of action in California for unjust enrichment. The phrase "Unjust Enrichment" does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so. Unjust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself. It is synonymous with restitution.

(***Melchior v. New Line Productions, Inc.*** (2003) 106 Cal.App.4th 779, 793, internal punctuation and citations omitted.)

In support of its motion for summary adjudication, defendant Xilinx contends that the seventh cause of action for unjust enrichment can also be disposed of by the PIIA because it seeks recovery based on a theory "that Xilinx supposedly wrongfully took, retained, or used Plaintiff's purported marketing concepts." (Mot., p. 8:2-9.) Defendant Xilinx further argues the unjust enrichment claims fails because, under the PIIA, Plaintiff recognized she transferred her strategies or inventions to Xilinx and consequently has no claim to ownership to the same. (*Id.*, p. 20:7-16.) Thus, defendant Xilinx's motion for summary adjudication of the seventh cause of

action is again based upon the same arguments and facts outlined previously concerning the validity, scope, and effect of the PIIA.

For the same reasons addressed above in relation to the fourth cause of action, the court finds that, while defendant Xilinx meets its initial burden as to the validity, scope, and effect of the PIIA, Plaintiff meets her burden as to whether Xilinx intentionally deprived her of a reasonable opportunity to know the character and essential terms of the PIIA. As to defendant Xilinx's position regarding equitable estoppel, for the reasons discussed above, Xilinx does not meet its initial burden, and even if it does, Plaintiff meets her burden in reply. Therefore, defendant Xilinx's motion for summary adjudication of the seventh cause of action [unjust enrichment] is DENIED.

4. Defendant Xilinx's motion for summary adjudication of the eighth cause of action [UCL] of Plaintff's SAC is DENIED.

In her eighth cause of action, Plaintiff alleges that defendant Xilinx engaged in unlawful and unfair business acts and practices, including terminating her in retaliation for complaining about discrimination and taking possession and control of her rebranding and repositioning strategy. (SAC, ¶¶200-205.)

"***Business and Professions Code*** section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (***Korea Supply Co. v. Lockheed Martin Corp.*** (2003) 29 Cal.4th 1134, 1143.) "The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law….[¶] Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (***Ibid.***, internal punctuation and citations omitted.) "By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent." (***Blakemore v. Superior Court*** (2005) 129 Cal.App.4th 36, 48.)

In support of its motion for summary adjudication, defendant Xilinx contends that the seventh cause of action for UCL can be disposed of by the PIIA because it seeks recovery based on a theory "that Xilinx supposedly wrongfully took, retained, or used Plaintiff's purported marketing concepts." (Mot., p. 8:2-9.) Defendant Xilinx further argues the UCL claim fails because Plaintiff "does not own or have any right to the marketing concepts in the first instance." (*Id.*, p. 20:17-28.) Thus, defendant Xilinx's motion for summary adjudication of the eighth cause of action is again based upon the same arguments and facts outlined previously concerning the validity, scope, and effect of the PIIA.

However, as set forth above, the eighth cause of action is also premised upon defendant Xilinx's retaliation against Plaintiff for her complaints regarding discrimination. Since defendant Xilinx does not address the retaliation, Xilinx does not meet its initial burden by completely disposing of this cause of action. "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (***Code Civ. Proc.***, §437c, subd. (f)(1).) In order to seek partial summary adjudication, the parties would have to stipulate in writing. (***Code Civ. Proc.***, §437c,

subd. (t).) Further, even if defendant Xilinx had met its initial burden as to the eighth cause of action, Plaintiff meets her burden in reply.

Accordingly, defendant Xilinx's motion for summary adjudication of the eighth cause of action [common law copyright infringement] is DENIED.

IV. Order.

Defendant Xilinx's motion for summary adjudication of the fourth cause of action [fraud] is DENIED.

Defendant Xilinx's motion for summary adjudication of the sixth cause of action [common law copyright infringement] is DENIED.

Defendant Xilinx's motion for summary adjudication of the seventh cause of action [unjust enrichment] is DENIED.

Defendant Xilinx's motion for summary adjudication of the eighth cause of action [common law copyright infringement] is DENIED.

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Calendar Line 6
Case Name: Richard Kwok vs IGA Homes, Inc. et al
Case No.: 17CV315638

Plaintiff Kwok moves for attorney fees related to the motion to enforce the settlement agreement that Defendant RCA filed and lost. Under the settlement agreement, para. 11, the parties agreed that a prevailing party on any motion to enforce the settlement agreement could recover attorney fees. Plaintiff states that it spent 16.9 hours at $350/hour and requests $5,915.

Defendant objects and argues (again) that Plaintiff acted in bad faith by settling the case and then issuing a 1099-C to the detriment of Defendant. The Court can understand why Defendant believes Plaintiff acted in bad faith. Yet, Defendant signed the agreement and had counsel and it is clear from the agreement, as discussed already in the denial of the motion to enforce the settlement, that Plaintiff did not promise not to file a 1099-C. As such, Defendant is responsible to pay Plaintiff's attorney fees for the motion to enforce the settlement. Although the Court agrees that Plaintiff's rate is reasonable, the number of hours spent is excessive. As such, Defendant is required to pay attorney fees of $2,800 to Plaintiff ($350 x 8 hours).

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Calendar Line 8
Case Name: Domomick Ramos v. City of San Jose
Case No.: 19CV355963

City of San Jose (Defendant) moves to dismiss the action because Plaintiff failed to serve the summons and complaint within three years, as required by CCP §§ 583.210 and 583.250. Alternatively, Defendant moves to dismiss the complaint because Plaintiff delayed prosecution such that the case was not brought to trial within three years, pursuant to CCP §583.420(a)(2)(A).

CCP §583.210 states in relevant part: "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed." This requirement is mandatory and jurisdictional, and there are no exceptions except those expressly provided by statute. CCP § 583.250.

Plaintiff does not dispute that service was effectuated more than three years from the filing of the complaint. Plaintiff's opposition was late, but even when considered, its arguments cannot prevail. Plaintiff contends that because the case was stayed, the three-year limitations period has not run. As pointed out by Defendant, however, the bankruptcy stay only applies to proceedings against a debtor, not to proceedings initiated by the debtor. See *Higgins v. Superior Court* (2017) 15 Cal.App.5th 973, 979.

Moreover, even if the stay did apply, which it does not, it would not prevent dismissal. Though cited by neither party, CCP § 583.240 provides when a stay precludes the need to serve the summons and complaint. That provision states that "[i]n computing the time within which service must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed: (b) The prosecution of the action or proceedings in the action was stayed and the stay affected service." The question therefore, assuming a stay, is whether the stay "affected service," such that the time is excluded from the three-year limit.

Plaintiff claims "the trustee has control of the assets and before the debtor can proceed with prosecuting a pending lawsuit the debtor must secure an abandonment of the lawsuit as an asset of the bankruptcy court." Opp p2. He cites no support for this proposition, nor presents any facts demonstrating that the stay affected service. As such, the bankruptcy stay, even if in effect, is not relevant for purposes of calculating the time under §§ 583.210 and 583.250. See *Damjanovic v. Ambrose* (1992) 3 Cal.App.4th 503, 510 (finding burden is on plaintiff to show that the stay affected service). Because Plaintiff waited more than three years to serve Defendant with the summons and complaint, the action must be dismissed.

The motion is GRANTED. Defendant shall submit the final order.

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