SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

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

DATE: March 28, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: **Before 4:00 PM today you must notify the:**

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

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

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

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

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

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC et al	Parties are ordered to appear in Department 6 for the debtor's examination.
2	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC et al	Parties are ordered to appear in Department 6 for the debtor's examination.
3	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC et al	Parties are ordered to appear in Department 6 for the debtor's examination.
4	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC et al	Parties are ordered to appear in Department 6 for the debtor's examination.
5	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC et al	Parties are ordered to appear in Department 6 for the debtor's examination.
6	22CV400012	Pacific States Environmental Contractors, Inc. vs Steleco LLC et al	KOA's demurrer to DPR's Fifth and Sixth Causes of Action is SUSTAINED WITHOUT LEAVE TO AMEND. Scroll to line 6 for complete ruling. Court to prepare formal order.
7	22CV403929	Suemi Gonzales et al vs Santa Clara Valley Transportation Authority	Defendant's demurrer is SUSTAINED with 20 days leave to amend. Scroll to line 7 for complete ruling. Court to prepare formal order.
8	23CV427600	Oksana Stepaneeva vs Rochelle Deleersnyder et al	Dean Deleersnyder's demurrer is OVERRULED and the motion to strike is DENIED. Scroll down to line 8 for complete ruling. Court to prepare formal order.
9	23CV421610	Wells Fargo Bank, N.A. vs Erik Gilbert	Wells Fargo Bank, N.A.'s Motion for Summary Judgment is GRANTED. A notice of motion with this hearing date and time was served by U.S. mail on January 5, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also no issue of material fact that Defendant obtained a credit card from Plaintiff, agreed to repayment terms, and failed to make those payments. Accordingly, summary judgment in Plaintiff's favor is appropriate. Moving party to promptly prepare formal order and form of judgment.
10	20CV366946	Rajesh Raghani vs Samir Maharjan et al	Plaintiff Rajesh Raghani's Motion for Order Deeming Requests for Admission Admitted and for $760 in sanctions is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on January 17, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiff served Defendants requests for admission by email on November 30, 2023. To date, Plaintiff has received no response. A party served with Requests for Admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the Requests for Admission deemed admitted—as Defendant has done here, the Court must order the Requests for Admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Accordingly, Plaintiff's motion is granted, and the matters set forth in Plaintiff's requests for admission are deemed admitted. Court to prepare formal order.

11	20CV371800	Michelle Dang vs Michael Tran	Plaintiff's Motion for Order Deeming Truth of Facts Admitted Against Defendant Tran is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on March 5, 2024. Defendant did not file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiff served Defendants requests for admission by email on December 23, 2023. To date, Plaintiff has received no response. A party served with Requests for Admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the Requests for Admission deemed admitted—as Defendant has done here, the Court must order the Requests for Admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Accordingly, Plaintiff's motion is granted, and the matters set forth in Plaintiff's requests for admission are deemed admitted. Plaintiff's motion for sanctions is GRANTED, IN PART. While counsel's hourly rate is reasonable for this case type and the Silicon Valley market, this is an unopposed motion to compel where no responses were served. Thus, the number of hours reportedly spent is unreasonable. Defendant is therefore ordered to pay $1,560 to Plaintiff within 30 days of service of this formal order. Court to prepare formal order.
12	20CV371800	Michelle Dang vs Michael Tran	Plaintiff's Motion to Compel Defendant's Answers to Form Interrogatories (Set Three) is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on March 5, 2024. Defendant did not file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) On December 23, 2023, Plaintiff served Form Interrogatories (Set three) on Defendant. To date, Plaintiff has not received any responses despite efforts to meet and confer. Where, as here, a responding party fails to timely respond to Interrogatories, absent a demonstration that the failure to respond was due to mistake, inadvertence, or excusable neglect and responses have since been served, the responding party waives all objections to the interrogatories, including objections based on privilege or on the protection for work product. (Code of Civ. Proc. §2030.290(a).) Here, Defendant made no such effort or showing. Defendant is therefore ordered to serve code-compliant responses without objections within five days of service of this formal order. Plaintiff's motion for sanctions is GRANTED, IN PART. While counsel's hourly rate is reasonable for this case type and the Silicon Valley market, this is an unopposed motion to compel where no responses were served. Thus, the number of hours reportedly spent is unreasonable. Defendant is therefore ordered to pay $1,560 to Plaintiff within 30 days of service of this formal order. Court to prepare formal order.

13	18CV330775	Pacific Structures, Inc. vs Balfour Beatty Infrastructure, Inc. et al	The Court set this hearing regarding Balfour Beatty's ex parte application to reconsider the Court's February 26, 2024 order granting Philadelphia Indemnity Insurance Company's ex parte application to designate expert witness to permit the parties to be heard. Balfour Beatty's opposition to Philadelphia Indemnity's application was not in the court file at the time of the February 26, 2024 order. Having reviewed Balfour Beatty's opposition and the cases cited therein, the Court reverses its February 26, 2024 ruling and DENIES Philadelphia's request. If a party unreasonably fails to list an expert or submit a declaration for an expert when exchanging expert witness information, the trial judge must exclude the expert's testimony at trial unless that party obtains a court order after a motion filed under Code of Civil Procedure section 2034.610. (Code Civ. Proc. §2034.300; *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536.) To obtain such leave, the moving party must establish that at the time of the deadline for expert exchanges, (1) the party could not, with reasonable diligence, have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness or (2) the failure to previously identify the witness or additional testimony was due to mistake, inadvertence, surprise, or excusable neglect. Philadelphia has not and cannot meet either of these standards. Philadelphia admits it knew it would need a structural engineer if its summary judgment was not successful—it had already contacted such an expert before the Court issued its summary judgment ruling. A party cannot delay expert disclosure until it is convenient. (See, e.g., *Conttini v. Enloe Med. Ctr.* (2014) 401, 419-420.) Philadelphia's application is accordingly DENIED. Court to prepare formal order.
14	22CV405050	JORDAN THOLMER vs PETER HOFMANN et al	Defendant's Motion to Compel Arbitration is GRANTED. Scroll to line 14 for complete ruling. Court to prepare formal order.

Calendar Line 6
Case Name: *Pacific States Environmental Contractors, Inc. v. Steleco LLC, et al.*
Case No.: 22CV400012

Before the Court is cross-defendant KO Architect, Inc.'s ("KOA") demurrer to cross-complainant DPR Construction's ("DPR") second amended cross-complaint ("SACC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This matter arises out of the design and construction of a building located at 425-429 University Ave in Palo Alto (the "Property). Steleco LLC and Kipling Post LP were the owners (collectively, the "Owners") of the Property and KOA was the project architect. (SACC, ¶¶ 8-9.) The Owners filed a cross-complaint against DPR for breach of written contract, which alleges various construction deficiencies and damages for breach of contract. (SACC, ¶ 12.)

Plaintiff Pacific States Environmental Contractors, Inc. ("Pacific States") initiated this action against the Owners on June 14, 2022, asserting a claim for foreclosure of mechanics lien. On February 17, 2023, DPR filed its cross-complaint, and on May 24, 2023, it filed its FACC, which asserted: (1) breach of contract; (2) express contractual indemnity; (3) negligence; (4) breach of contract-third party beneficiary; (5) equitable indemnity; (6) contribution; (7) declaratory relief; and (8) foreclosure of mechanic's lien.

On November 22, 2023, the Court issued its order sustaining KOA's demurrer to the fifth and sixth causes of action with leave to amend and overruling as to the seventh cause of action. The Court also overruled the Owners' demurrer. On November 17, 2023, the Owners filed their cross-complaint asserting (1) breach of written contract; (2) petition to compel arbitration; and (3) declaratory relief. On December 15, 2023, DPR filed its SACC, asserting (1) breach of contract; (2) express contractual indemnity; (3) negligence; (4) breach of contract-third party beneficiary; (5) equitable indemnity; (6) contribution; (7) declaratory relief; and (8) foreclosure of mechanic's lien. On February 15, 2024, KOA filed the instant motion, which DPR opposes.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more

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

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

KOA demurs to the fifth and sixth causes of action on the ground they fail to allege sufficient facts to state a cause of action. (See Code Civ. Proc. § 430.10, subd. (e).)

III. Analysis

A. Fifth Cause of Action: Equitable Indemnity

Equitable indemnity principles govern the allocation of loss or damages among multiple tortfeasors whose liability for the underlying injury is joint and several. (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal. 3d 578, at pp. 583, 595, 597-598 (*American Motorcycle Assn*); *GEM Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal. App. 3d 419, 426 (*GEM Developers*).) The doctrine of equitable indemnity applies only among defendants who are jointly and severally liable to the plaintiff. (*BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (2004) 119 Cal.App.4th 848, 852 (*BFGC*).) "There must be some basis for tort liability against the proposed indemnitor. (*Ibid*.) Joint and several liability in the equitable indemnity context can apply to acts that are concurrent or successive, joint or several, as long as they create a detriment caused by

several actors. (*Ibid,* citing *Yamaha Motor Corp. v. Paseman* (1990) 219 Cal.App.3d 958, 964.) "The elements of a cause of action for equitable indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equally responsible." (*Expressions at Rancho Niguel Ass'n v. Ahmanson Developments, Inc.* (2001) 86 Cal.4th 1135, 1139.)

KOA again relies on *BFGC, supra,*119 Cal.App.4th at p. 851 in which a project owner sued its architect for breach of contract and professional negligence. (*Ibid*.) The architect filed a cross-complaint for equitable indemnity against the general contractors, alleging they negligently failed to comply with the terms of their contracts with the owner. (*Ibid*.) The court of appeal found there was no cognizable claim for equitable indemnity because there was no underlying tort liability against the indemnitor. (*Id*. at 852.)

DPR relies on *Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47 (*Willdan*), which involved an action by a city against its general contractor after the general contractor increased the projected cost of the project by over 6 million. (*Id*. at 50.) After the parties settled, the city sued the engineering consulting firm for breach of contract, express contractual indemnity, implied contractual indemnity, and negligence. (*Id*. at 51.) The firm filed a cross-complaint against the city for breach of contract and against other project consultants for indemnity and declaratory relief, later adding claims for indemnity and declaratory relief against the general contractor. (*Id*. at 52.) The trial court dismissed the firm's claims, finding the settlement agreement between the city and the general contractor precluded them. (*Ibid*.) The appellate court disagreed, held the firm's claims fell outside of the settlement agreement, and found that because *the city* alleged and tried both *breach of contract and professional negligence* against the firm, the firm's subsequent claim for indemnity against the general contractor was sufficiently supported. (*Id*. at 55-58.) DPR's reliance in *Willdan* is unpersuasive. No negligence or other tort claim is asserted *against DPR* such that KOA and DPR would be *joint tortfeasors* for which they would need to apportion tort liability.

DPR's other cited cases concern whether DPR can state and maintain a negligence claim against KOA. However this analysis is irrelevant because KOA does not challenge the negligence claim. Also irrelevant is whether a cross-complaint may seek equitable indemnity from third parties. The relevant

issue is whether DPR can seek equitable indemnity from KOA, where DPR's liability does not arise from tort. While the term "joint tortfeasors" can be defined liberally, DPR is not a tortfeasor *at all* as there are no tort claims asserted against it. (*Willdan, supra,* 158 Cal.App.4th at 56.) DPR fails to provide any authority, and the Court is not aware of any, that holds DPR's own tort claim against KOA would also support DPR's equitable indemnity claim against KOA where DPR is not itself a tortfeasor. Thus, DPR cannot maintain its claim for equitable indemnity. (See *BFGC, supra,* 119 Cal.App.4th at p. 852 [equitable indemnity applies only among defendants who are *jointly and severally* liable to the plaintiff] [emphasis added]; see also *GEM Developers, supra,* 213 Cal.App.3d at p. 426 ["[u]nder the equitable indemnity doctrine, defendants are entitled to seek apportionment of loss between wrongdoers in proportion to their relative culpability so there will be equitable *sharing of* loss between *multiple tortfeasors*."] [emphasis added]; see also *Heritage Oaks Partners v. First American Title Ins. Co.* (2007) 155 Cal.App.4th 339, 348 ["unless the prospective indemnitor and indemnitee are jointly and severally liable to the plaintiff there is no basis for indemnity"].)

"Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [citations omitted] (*Goodman*).) "Plaintiffs have the burden to show how they could further amend their pleadings to cure the defects. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 411 [citations omitted] (*Carter*).) DPR requests leave to amend but fails to show how it would do so. Moreover, it does not appear DPR can amend this claim to survive demurrer. Thus, KOA's demurrer for the fifth cause of action is SUSTAINED without leave to amend.

B. Sixth Cause of Action: Contribution

Civil Code section 1432, provides, "a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." (Civ. Code, § 1432.) "A right of contribution can come into existence only after rendition of a judgment declaring more than one defendant joint liable to the plaintiff." (*Coca Cola Bottling Co. v. Lucky Stores, Inc.* (1992) 11 Cal.App.4th 1372, 1278.) A claim for contribution accrues when the party seeking contribution has paid more than its fair share. (*Smith v. Parks Manor* (1987) 197 Cal.App.3d 872, 880.)

DPR alleges "Cross-Complainant is entitled to contribution from Cross-Defendants, and each of them, for the injuries and damages allegedly sustained by Plaintiff and/or Cross-Defendant, if any, as a result of any judgment or settlement awarded against Cross-Complainant." (SACC, ¶ 48.) DPR does not allege that a judgment has been entered against it. Therefore, DPR fails to allege it has satisfied more than its share of the claim and thus, DPR cannot state this claim under Civil Code section 1432. (See Civ. Code, § 1432.) DPR's reliance on *American Motorcycle Assn, supra,* 20 Cal.3d at pp. 582-584, is unavailing as the California Supreme Court's discussion pertained to comparative negligence, which is not at issue here. DPR fails to state how it would amend this claim, and it does not appear DPR can amend this claim to survive demurrer. Thus, KOA's demurrer to the sixth cause of action is SUSTAINED without leave to amend.

Calendar Line 7
Case Name: *Suemi Gonzales et.al. v. Santa Clara Valley Transportation Authority*
Case No.: 22CV403929

Before the Court is Defendant Santa Clara Valley Transportation Authority's ("SCVTA") demurrer to Plaintiffs' Suemi Gonzales, Benicio Henry Gonzales, Viviana Suemi Gonzales, Otis Henry Gonzales, And Alberto Henry Gonzales, All Minors, By And Through Their Guardian Ad Litem (Pending), Suemi Gonzales, first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from the tragic death of Mr. Henry Gonzales. On May 26, 2021, a mass shooting occurred at a SCVTA's railyard in San Jose. Mr. Henry Gonzales (Decedent) was employed by SCVTA and present on the day of the shooting. Mr. Gonzales witnessed the murder of his co-workers, and/or saw his co-workers within minutes after they were murdered, causing him to suffer severe emotional and psychological damage resulting in post-traumatic stress disorder ("PTSD"). Following the shooting, Mr. Gonzales took leave from his employment with SCVTA. Mr. Gonzales' emotional distress was exacerbated after he spoke with a third-party investigator. (FAC ¶¶ 7-9.)

The FAC alleges that in early August 2021, without determining Mr. Gonzales' ability or preparedness, SCVTA ordered Mr. Gonzales to return to work and to the very yard where the shooting occurred. On August 16, 2021, on his commute to return to work, Decedent took his own life. (FAC ¶¶ 10-11.)

On August 16, 2022, Plaintiffs filed their complaint. Their operative amended complaint was filed on December 12, 2023, alleging a cause of action for wrongful death. Mr. Gonzales left behind his wife, Suemi Gonzales, and his children, Benicio Henry, Vivian, Oris and Alberto.

II. Legal Standard

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

the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

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

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id*.)

III. Request for Judicial Notice

Defendant requests judicial notice of the following documents pursuant to Evid. Code § 452(h):

1. **Exhibit A:** September 2, 2021, VTA Board of Directors Meeting Minutes, publicly available at santaclaravta.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=2546&Inline=True.

2. **Exhibit B:** September 2, 2021, General Manager's Report PowerPoint Presentation, publicly available at http://santaclaravta.iqm2.com/Citizens/Detail_Communication.aspx?Frame=&MeetingID=3352&MediaPosition=&ID=1860&CssClass=.

3. **Exhibit C:** A recording of the September 2, 2021, VTA Board of Directors meeting available at santaclaravta.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=3352&Format=Minutes. The General Manager Report begins at the thirty-five-minute mark.

4. **Exhibit D:** Division of Workers' Compensation Electronic Adjudication Management System Report, Case No. ADJ15076647.

Defendant's request as to Exhibits A and C is GRANTED, IN PART. Evidence Code section 452, subdivision (h), permits the Court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Although under this standard it might be appropriate to take judicial notice of the existence of Exhibit A and C, it is not appropriate to take judicial notice of the facts contained therein. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063–1064 [recognizing that although public documents may be proper subjects for judicial notice, the truth of the matters stated in such documents is not], overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1262; accord, *Starkman v. Mann Theatres Corp.* (1991) 227 Cal. App. 3d 1491, 1501, fn. 5.)

Defendant's request as to Exhibit B is DENIED.

Defendant's request as to Exhibit D is GRANTED pursuant to Evidence Code section 452, subdivision (d).

IV. Analysis

A. Plaintiff's Untimely Opposition

Pursuant to Code of Civ. Proc. §1005, "[a]ll papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days, and all reply papers at least five court days before the hearing." Defendant's demurrer to the FAC was noticed for February 13, 2024. Although Plaintiffs' opposition was due no later than January 30, 2024, it was filed on February 5, 2024. However, trial Courts are authorized to consider late-filed opposition papers for good cause if there is no undue prejudice to the moving party. The circumstances surrounding an untimely opposition should be viewed under the strong policy of the law favoring the disposition of cases on the merits. (*Correia v. NB Baker Electric, Inc.,* (2019) 32 Cal. App. 5th 602, 602.)

Defendant fails to explain how it has been prejudiced by Plaintiffs' untimely opposition; especially considering the demurrer hearing was ultimately continued to March 28, 2024. Defendant filed its reply to Plaintiffs' opposition on February 7, 2024. Where a party provides a substantive response to a late filing, the party waives all defects in service. (*Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 10.) Defendant's request that the Court disregard Plaintiff's opposition is therefore DENIED.

B. Viable Claim Under FEHA

Plaintiffs' wrongful death claim is based on Defendant's alleged violation of Government Code section 12940(a), which provides that it is unlawful for an employer, because of mental disability, to "refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (§ 12940, subd. (a).)

To state a claim for discrimination under the statute, Plaintiff must plead he (1) was a member of a protected class; (2) was qualified for the position sought or was performing competently in the position already held; (3) suffered an adverse employment action, such as termination, demotion, or denial of an available job; and (4) some other circumstance suggests discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355; *Brown v. Los Angeles Unified School Dist*., (2021) 60 Cal. App. 5th 1092, 1105.) For an employer to discriminate against an employee "because of" his or her disability, the employer must know that the person is disabled. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008, (*Scotch*) ["An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer"] quoting *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236-237 [applying federal Americans with Disabilities Act].)

Plaintiff here fails to allege Defendant discharged, refused to hire, or took any adverse employment action against the Decedent under Government Code section 12940(a). Instead, the FAC alleges:

- On May 26, 2021, a mass shooting occurred at a Defendant's railyard in San Jose. At the time, the Decedent was employed by Defendant and witnessed the murder of his co-workers, and/or saw his co-workers within minutes after they were murdered. (FAC ¶ 7.)
- Following the shooting, the Decedent took leave from his employment with Defendant. (FAC ¶ 8.)
- Defendant knew or should have known, that witnessing these murders caused the Decedent to suffer severe psychological and emotional damage resulting in PTSD. This constituted a disability under FEHA. (FAC ¶ 8.)
- Decedent's disability required Defendant to engage an interactive process to determine whether a reasonable accommodation for his return to work existed. (FAC ¶ 8.)
- Defendant did not acknowledge the Decedent's emotional trauma, did not engage in the interactive process, and did nothing to accommodate his disability. (FAC ¶ 9.)
- Decedent's emotional and psychological damage was exacerbated after a conversation with a third-party investigator. (FAC ¶ 9.)
- In early August 2021, without determining the Decedent's ability or preparedness, Defendant ordered him to return to work and to the very yard where the shooting happened. (FAC ¶ 10.)
- On August 16, 2021, on his commute to return to work, Decedent took his own life. (FAC ¶ 11.)
- The Decedent would have been willing and able to perform his duties had Defendant engaged in the interactive process and found reasonable accommodation without hardship to its operation. (FAC ¶ 12.)
- Defendant's tortious conduct violated Section 12940(a) and was the proximate cause of the Decedent's death. (FAC ¶ 12.)

These allegations correspond more accurately with Gov. Code §§ 12940(m) & (n). Under section 12940, subdivision (m), it is an unlawful employment practice for an employer "to fail to make a reasonable accommodation for the known physical or mental disability of an applicant or employee." (Gov. Code § 12940(m); see also, *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1166-1167 (*Featherstone*).) Under section 12940, subdivision (n) it is an unlawful practice for an employer "to fail to engage in a timely, good faith, interactive process with

the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code § 12940(n).) A failure to accommodate claim requires the Plaintiff to plead (1) he had a disability covered by the FEHA, (2) he could perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the known disability. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192.)

This provision also requires the employer's actual or imputed knowledge of the employee's disability. "[T]he employee bears the burden of giving the employer notice of his or her disability." (*Featherstone, supra*, 10 Cal.App.5th at p. 1167.) Where an employee fails to give notice, knowledge of an employee's disability can be imputed to an employer when "the fact of disability is the only reasonable interpretation of the known facts." (*Scotch, supra*, 173 Cal.App.4th at p. 1008; see also *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 887 ["an employer 'knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. . . .'"].)

The FAC fails to allege facts to support that (1) Defendant had actual and/or imputed knowledge of the Decedent's mental disability, (2) the Decedent shared or notified anyone at SCVTA about his emotional distress, symptoms, or mental disability, (3) the Decedent requested accommodation for his disability, (4) Defendant's knowledge of Decedent's witnessing the shooting or death of his co-workers, and (5) Decedent's PTSD and mental disability was the only reasonable interpretation of the information he had shared with Defendant. Plaintiffs' contentions that Defendant knew or should have known are insufficient. Similarly, arguing that being at the scene of the shooting is enough to infer a resulting emotional disability of a witness, is an insufficient deduction and conclusion of fact.

Accordingly, Defendant's demurrer to Plaintiffs' FAC is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

C. Exclusivity of the Worker's Compensation Act's Remedies

According to judicially noticed Ex. C, Plaintiffs have applied for and are receiving worker's compensation benefits. Defendant asserts that Plaintiffs' wrongful death claim is collateral, or derivative

of the Decedent's worker's compensation claim and is thus barred by the exclusivity provision of the Worker's Compensation Act ("WCA").

Plaintiffs rely on *City of Moorpark v. Sup. Ct.* (1998) 18 Cal. 4th 1143 (*Moorpark*), in support of their argument that Worker's Compensation exclusivity does not bar FEHA wrongful discharge claims. The issue in that case was whether Labor Code section 132a provides the exclusive remedy for an employer's retaliatory discrimination against a worker who has been injured on the job. The Court ruled that an employer's discriminatory conduct, which is against fundamental public policy, is not protected by worker's compensation exclusivity. Nevertheless, the Court acknowledged that Labor Code section 3602 made the workers' compensation remedy exclusive for "personal physical injury or death" "sustained in and arising out of the course of employment." (*Shoemaker v. Myers* (1990) 52 Cal. 3d 1; *Moorpark, supra,* 18 Cal. 4th at p. 1154.) Accordingly, the court concluded that an injured worker could pursue a disability discrimination claim under the Fair Employment and Housing Act or a so-called *Tameny* wrongful termination claim (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167) even though the disability arose from an on-the-job injury. (*Moorpark, supra,* at p. 1158.)

Plaintiff's reliance on *Moorpark* is misplaced. Here, Plaintiffs allege the Decedent's emotional distress was caused by the May 26 shooting and not by Defendant's unlawful or discriminatory acts. (FAC ¶¶ 7-8.) Consequently, Plaintiff's wrongful death claim is derivative of this underlying injury, which is compensable by worker's compensation. Furthermore, Plaintiffs have not alleged any facts to support a permissible exception to application of the exclusivity rule.

Based on the foregoing, the Court finds Plaintiffs' wrongful death claim is barred by worker's compensation exclusivity. However, since the Court has given Plaintiffs leave to amend, they have an opportunity to allege facts additional facts to show applicability of a possible exception to the exclusivity rule.

VI. Attorneys' Fees and Costs Related to First Demurrer

The Court ordered Plaintiff to pay Defendant's attorney's fees and costs incurred in preparing and arguing its demurrer to Plaintiff's original complaint because Plaintiff filed the first amended complaint late, thereby necessitating Defendant's response to what became an inoperative complaint. As ordered, Defendant submitted a declaration detailing the fees and costs incurred. The Court finds the

billable rate and number of hours spent reasonable for this area and case type. The Court accordingly orders Plaintiffs' counsel to pay Defendant $16,170.80 in attorneys' fees and costs within 30 days of service of this formal order.

Calendar Line 8
Case Name: *Oksana Stepaneeva v. Rochelle Deleersnyder, et al.*
Case No.: 23CV427600

Before the Court is Defendant Dean Deleersnyder's ("Dean") [1] demurrer to Plaintiff Oksana Stepaneeva's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of an alleged fraudulent real property transaction. On December 14, 2021, Plaintiff entered a written Residential Purchase Agreement (the "Agreement") to purchase the real property at 374 Surber Dr. in San Jose (the "Property"). (Complaint, ¶ 7.) Defendant Rochelle Deleersnyder is real estate salesperson working with NRT West, Inc. dba Coldwell Banker (collectively "Coldwell") and defendant Nakul Kapoor is a real estate salesperson working with Intero Real Estate Services, Inc. (collectively "Intero"). (Complaint, ¶¶ 2, 3.) Coldwell and Intero were the designated listing agents for the Property on behalf of the sellers, and they prepared a disclosure packet for the prospective purchasers that was supposed to include all material information affecting the value, use, or desirability of the Property. (Complaint, ¶¶ 7, 8.)

Prior to Plaintiff's purchase, Coldwell and Intero employed Dean, Rochelle's spouse, to perform corrective repairs to the Property, despite the fact that he is not a general contractor, and they never disclosed that the corrective repairs were not performed by a general contractor. (Complaint, ¶ 9.) Plaintiff acquired the Property and thereafter learned there were substantial and material problems with the physical condition of the Property, such as:

(1) Pre-existing serious structural defects requiring substantial repairs;
(2) Roof rafters spreading in the ceiling structure, resulting in a sagging roof;
(3) Water intrusion from the roof issues, which impacted the flooring and caused mold on the kitchen windows;
(4) Serious electrical issues that required immediate replacement of a subpanel to avoid an imminent hazard; and

[1] As some Defendants in the matter share a surname, the Court will refer to each of them by their first names for purposes of clarity. No disrespect is intended. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 131, 1136, fn. 1.)

(5) That the attempted corrective repairs were inadequate, not performed by a general contractor, and only provided a sheen of completion masking the underlying problems with the improvements. (Complaint, ¶ 10.)

Defendants failed to make any disclosures regarding code violations relating to the Property or inform Plaintiff of the potential inability to maintain said use of the Property. (Complaint, ¶ 11.) Plaintiff alleges Rochelle and Dean were "double-dipping" on the transaction, i.e., receiving fees for real estate brokerage services and separately for construction services. (Complaint, ¶ 16.) Plaintiff has incurred expenses to immediately address some of the issues and will incur additional expenses to create a code-compliant dwelling on the Property. (Complaint, ¶ 17.)

Plaintiff initiated this action on December 12, 2023, asserting: (1) negligence; (2) fraudulent misrepresentation; (3) negligent misrepresentation; and (4) breach of statutory duties. On January 30, 2024, Dean filed the instant motions which Plaintiff opposes.

II. Procedural Issues

A. Defective Notice

Code of Civil Procedure section 430.60 requires "[a] demurrer [to] distinctly specify the grounds upon which any of the objections to the complaint…are taken. Unless it does so, it may be disregarded." (Code Civ. Proc., § 430.60; see also Cal. Rule of Court 3.1320(a) ("[e]ach ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint… or to specified causes of action…".)

Defendant's notice generally states the demurrer is pursuant to Code of Civil Procedure section 430.10 but does not identify the grounds for the demurrer. However, the notice states the demurrer is to the first cause of action for negligence and "Plaintiff has grossly failed to plead each element of negligence… No facts and/or evidence are provided…" (Demurrer, p. 2:1-8.) Thus, it is clear the demurrer is based on failure to state sufficient facts. (See Code Civ. Proc., § 430.10, subd. (e).) Dean also makes uncertainty arguments in his memorandum of points and authorities but fails to identify uncertainty as a basis for demurrer in his notice. However, Plaintiff responded to these arguments in opposition; thus, the Court will address them.

B. Untimely Opposition Timeliness

Code of Civil Procedure section 1005, subdivision (b), requires all opposing papers to be filed and served at least nine court days before the hearing. (Code Civ. Proc., § 1005, subd. (b).) The hearing date is March 28, 2024, therefore, Plaintiff's opposition was required to be filed and served by March 15, 2024. Plaintiff did not file and serve the opposition until March 18, 2024, thus it was untimely. The Court has discretion to consider late filed papers. (*Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168.) And, where a party provides a substantive response to a late filing, the party waives all defects in service. (*Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 10.) Here, there appears to be no prejudice to Dean, thus the Court will consider the opposition.

However, Plaintiff is admonished to comply with court rules and procedures with respect to future filings, as the Court may decline to consider future arguments not properly noticed and untimely papers. (Code Civ. Proc., § 430.60; *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765 ["[A] trial court has broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission."].)

III. Demurrer

A. Legal Standard

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

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the

complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Dean demurs to the first cause of action on the ground that it fails to allege sufficient facts. (Code Civ. Proc., § 430.10, subd. (e).)

B. Analysis

1. Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (*Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Ibid*.) "[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Dean appears to conflate uncertainty with the failure to plead sufficient facts to state a claim as the basis for demurrer. (*Buter v. Sequiera* (1950) 100 Cal.App.2d 143, 145-146 ["[a] special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading but is directed at the uncertainty existing in the allegations already made."].) It also does not appear that the Complaint is so unclear that Dean cannot reasonably respond to it. (*Khoury, supra,* 14 Cal.App.4th at 616 ["[a] demurrer for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond – i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against them."].) Thus, Dean's demurrer on the basis of uncertainty is OVERRULED.

2. Failure to State a Claim

"To support a negligence cause of action, a plaintiff must plead and prove: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, and (3) the breach was a proximate or legal cause of the plaintiff's injuries." (*Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341, 354.) The existence and scope of a duty of care is a question of law for the court even at the pleading stage. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531.) The existence of a duty of care in the absence of privity of contract is a policy question that depends on the balancing of several facts, including "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to [the plaintiff], (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397, quoting *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.)

i. Duty

To support its allegation that Dean owed Plaintiff a legal duty, Plaintiff relies on *Stewart v. Cox* (1961) 55 Cal.2d 857 (*Stewart*) and *Sabella v. Wisler* (1963) 59 Cal.2d 21 (*Sabella*). In *Stewart*, the plaintiffs sued their general contractor for negligent construction of their swimming pool, the company that did the plastering work, and the subcontractor who installed the concrete. (*Id*. at 860.) The first two parties were dismissed, and the plaintiffs recovered judgment against the third party. (*Ibid*.) The California Supreme Court applied the *Biakanja* factors and held that the concrete installer was liable for the negligence because his work was intended for the plaintiffs, the property damage was foreseeable, the transaction was intended to affect the plaintiffs, they were injured, and upon consideration of the evidence, the court determined Cox's negligence caused the plaintiffs injury. (*Id*. at 863.)

In *Sabella*, the plaintiffs sued the home builder and contractor for negligent construction because their home was constructed on insufficiently compacted filled land. (*Id*. at 23-24.) The California Supreme Court again applied the *Biakanja* factors, noting "the liability of a contractor should be determined by the consideration and weighing of the various factors bearing upon liability…rather than by resort to special rules or distinctions," and found that because the plaintiffs were members of the class of prospective home buyers, the home may be considered to be intended for them and thus, the

defendant owed them a duty of care in construction. (*Id*. at 28-29.) The court held the harm was foreseeable, the plaintiffs were seriously injured, there was a close connection between the defendant's conduct and the plaintiffs' injury, and the policy of preventing future harm supported a finding of duty. (*Id*. at 29.)

Plaintiff alleges Dean is an electrical subcontractor who was hired to perform corrective repairs on the Property, even though he is not a general contractor, and Plaintiff was not told the repairs were not performed by a general contractor. (Complaint, ¶¶ 4, 9.) Plaintiff further alleges the "attempted corrective repairs were not only inadequate and not performed by a general contractor, but [they] provided a sheen of completion masking the underlying problems with the improvements… the electrical work was not installed correctly prior to Plaintiff's purchase" and Dean "was aware at the time he performed corrective repairs to the Property of the need to perform such repairs…in a code-compliant manner, and that the failure to do so would constitute a breach of his duties to Plaintiff, as designed owner-to-be of the property." (Complaint, ¶¶ 10e, 24.)

Balancing the *Biakanja* factors, these allegations are sufficient to state a duty. (*Biakanja, supra,* 49 Cal.2d at p. 650.) Thus, the demurrer cannot be sustained on this basis.

ii. <u>Sufficient Facts</u>

Dean argues Plaintiff fails to allege sufficient facts but fails to provide authority to support a heightened pleading standard for negligence claims. As explained above, Plaintiff alleges sufficient facts that could support a finding of duty. She also alleges Dean breached his duty by performing non-code-compliant work; she incurred expenses to address the work and will have to spend further to create a code-compliant dwelling and as a proximate result of Defendants acts and failure to remedy the situation, she has suffered damages in excess of $200,000. (Complaint, ¶¶ 17-18, 24, 26.) These allegations are sufficient. Thus, the Dean's demurrer to the first cause of action is OVERRULED.

IV. Motion to Strike

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.)

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

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

B. Analysis

Dean seeks to strike the following portions of the Complaint on the grounds they are overly oppressive and meant to place Dean in a bad light:

1. ¶ 4 ["Plaintiff is informed and believe, and on such information and belief allege, that Defendant Dean Deleersynder is, and at all times herein mentioned was, licensed as a C-10 electrical subcontractor by the California Contractors State License Board, license number 959906"];
2. ¶ 9 ["Prior to Plaintiff's purchase… defendants employed Defendant Dean Deleersnyder to perform corrective repairs to the property, despite the fact that said Defendant was not

a general contractor; and never disclosed that corrective repairs were not performed by a general contractor."];

3. ¶ 15, ln. 6-9 ["Such requirements include that any material information that the "contractor" employed by the listing agent and broker "knew or should have known" are deemed to be known by a real estate sales professional who – in this case – employed her spouse [Dean] as the "contractor"]; and
4. ¶ 16 ["In effect, Defendants [Rochelle and Dean], collectively, were double-dipping on the transaction – receiving fees for both real estate brokerage services and separately for construction services."]

Dean fails to provide any specific argument as to how the allegations are oppressive or any authorities in support. Moreover, the allegations provide background as to Dean's role in this matter and are relevant to Plaintiff's claims. Thus, the motion to strike is DENIED.

Calendar Line 14
Case Name: *JORDAN THOLMER vs PETER HOFMANN et al.*
Case No.: 22CV405050

Before the Court is Defendant's Motion to Compel Arbitration. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an employment dispute. Plaintiff Jordan Tholmer was employed by Defendant Sierra Weatherization Company ("Sierra") as an Energy Specialist from Juen 2017 through his termination in or around February 2021. Defendant Peter Hofman is an owner, director, officer, or managing agent of Sierra.

Paragraph 6 of Plaintiff's Sierra employment agreement, which he does not dispute he signed at the time he was employed, is titled "Mutual Agreement to Arbitrate Claims" and states in the only boxed text in the agreement: "This dispute resolution agreement is a contract and covers important issues related to ES's [employee's] rights. It is ES's sole responsibility to read it and understand it. ES is free to seek assistance from independent advisors of ES's choice outside [Sierra] or to refrain from doing so if that is ES's choice." The agreement "is governed by the Federal Arbitration Act" and "applies to any dispute arising out of or related to ES's employment with [Sierra] or termination of employment, regardless of its date of accrual, and survives after the employment relationship terminates."

> The agreement also contains a clear delegation clause (except for class action claims):
>
> Except as otherwise stated in this Agreement, [Sierra] and ES agree that any dispute or controversy covered by this Agreement, or arising out of, relating to, or concerning the validity, enforceability or breach of this Agreement, shall be resolved by binding arbitration in accordance with the Employment Arbitration Rules of the American Arbitration Association ("AAA Rules") then in effect, and not by court or jury trial, to be held (unless [Sierra] and ES agree in writing otherwise) within 25 miles of where ES am [sic] or was last employed by [Sierra].
>
> It also contains a "Class Action Waiver", which is set out in bold text in paragraph 6.7:
>
> Both [Sierra] and ES agree to bring any dispute in arbitration on an individual basis only, and not as a class or collective action. Therefore, there is no right or authority

for any dispute to be brought, heard or arbitrated as a class or collective action, or as a member in any such class or collective action proceeding ("Class Action Waiver"). To the extent allowed by law, ES expressly waives any options or rights ES may have under the Private Attorneys General Act found in California Labor Code sections 2698 et. seq.

6.8 Notwithstanding any other provision of this Agreement or the AAA Rules, disputes regarding the validity, enforceability, or breach of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator.

6.9 In any case in which (1) the dispute is filed as a class or collective action and (2) a civil court of competent jurisdiction finds all or part of the Class Action Waiver unenforceable, the class and/or collective action to that extent must be litigated in a civil court of competent jurisdiction, but the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration.

II. Legal Standard

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

There is a presumption against waiver, and "when allocation of a matter to arbitration. . .is uncertain, we resolve all doubts in favor of arbitration." (*Cinel*, 206 Cal.App.4th at 1389; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.) "In determining a waiver, a court can consider (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation

machinery has been *substantially* invoked and the parties were *well into preparation of the lawsuit* before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party." (*St. Agnes medical Center v. PaciviCare of California* (2003) 31 Cal.4th 1187, 1196 (emphasis added; internal citations and quotations omitted).)

Even if the Court finds the Parties agreed to arbitrate these claims, the agreement is unenforceable if it is unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Unconscionability consists of both procedural and substantive elements. The prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of the procedural unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. (*Armendariz,* 24 Cal.4th at 114.)

The procedural element tests the circumstances of contract negotiation and formation and focuses on "oppression" or "surprise" due to unequal bargaining power. (See *Armendariz,* 24 Cal.4th at 114.) "Oppression" occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form. (*Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC* (2012) 55 Cal.4th 223, 247, citing *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179.)

Substantive unconscionability relates to the fairness of the terms of the arbitration agreement and assesses whether they are overly harsh or one-sided. (*Armendariz, supra*, 24 Cal.4th at p. 114; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.) Where there is a low degree of procedural unconscionability, a higher level of substantive unconscionability must be shown. (*Davis v. Kozak* (2020) 53 Cal. App. 5th 897, 910.)

III. Analysis

Plaintiff first argues the FAA does not apply to the agreement despite the express language stating it does because Sierra does not engage in interstate commerce. Contrary to Plaintiff's argument, Sierra included with its motion Sierra CEO Peter Hoffman's Declaration, which states at paragraph 7: "a) Sierra purchases a variety of supplies used for energy efficiency measures (e.g., weather stripping, insulation, HAVAC and plumbing supplies), many of which are produced outside the State of California, and shipped in-state to local distributors, and some of the products Sierra procures directly through means of interstate shipping from out of state suppliers (including those in South Carolina and Arizona)." The Court agrees that the level of interstate activity needed to trigger the FAA's application is minimal and that Sierra has met that minimal level here.

However, even if the Court were to apply California law and examine unconscionability and waiver, the Court would still find the arbitration agreement enforceable. While the Court agrees the agreement was take it or leave it in nature, and the California Supreme Court has found that such agreements are procedurally unconscionable in the employment context given the unequal bargaining power and need for employment, this level of procedural unconscionability is low. The only substantive unconscionability Plaintiff points to is the Class Action Waiver. And, as Defendant points out, that clause (a) states claims are waived only to the extent permitted by law and (b) is severable. Thus, the Court can stay Plaintiff's class claims and order the individual claims to arbitration.

Waiver also cannot be demonstrated here. In cases finding waiver, significant litigation activity took place, which significant activity is not present here.

Accordingly, except for class claims that cannot be sent to arbitration as a matter of law, this case is ordered to arbitration, and the civil action is stayed pending the outcome of that arbitration.