SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Judge Sunil R. Kulkarni, Presiding
(covering for Judge Manoukian)

Courtroom Clerk: Hien-Trang Tran-Thien
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2320
Department20@scscourt.org

"Every case is important" . . . . . "No case is more important than any other."—United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

DATE: Thursday, December 21, 2023
TIME: 9:00 A.M.

If you are appearing remotely, please use the Zoom link below.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
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Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
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APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in court appearances as well.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if

any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	23CV418256	MEHBALIYEVA v. TAYCON PROPERTY MANAGEMENT and CITY OF MOUNTAIN VIEW.	Plaintiff had proper notice of the demurrer and of this hearing, but filed no opposition. Therefore, good cause appearing, the Court SUSTAINS the City of Mountain View's demurrer WITHOUT LEAVE TO AMEND. Prevailing party to prepare order.
LINE 2	23CV418564	Miller v. Baker	In light of the 12/5/23 notice of settlement, this demurrer is TAKEN OFF CALENDAR. The 4/30/24 CMC is VACATED; instead, the Court sets a dismissal review hearing for 4/11/24 at 10 am in Dept 20.
LINE 3	21CV386407	MULENGA v. MENDEZ et al.	See tentative ruling. The Court will prepare the final order.
LINE 4	22CV397119	Sutter's Place, Inc. dba Bay 101 v. S.J. Bayshore Development, LLC, et al.	See tentative ruling. The Court will prepare the final order.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 5	22CV397119	Sutter's Place, Inc. dba Bay 101 v. S.J. Bayshore Development, LLC, et al.	Bayshore had an obligation to provide discovery, even while Bayshore's motion to stay was pending. It appears that Bayshore has not provided full responses to all written discovery. (If that is not correct, then the parties should appear to explain the situation.) Therefore, the Court GRANTS Werner's motion to compel as follows: within 30 days of this order, Bayshore must provide complete and code-complaint responses to Werner's First Set of Special Interrogatories and Form Interrogatory 17.1. No objections are permitted except privilege. The Court DENIES the motion to the extent it seeks actual production of documents and a privilege log, as the motion seeks further responses only. Because Bayshore lacked substantial justification for not providing those code-compliant responses, and keeping in mind Werner's partial success on this motion, the Court orders Bayshore to pay monetary sanctions to Werner in the amount of three thousand dollars ($3,000). The Court will prepare the final order.
LINE 6	22CV406392	Patterson v. Lo	See tentative ruling. The Court will prepare the final order.
LINE 7	21CV382651	Gilbert v. Stanford et al.	The Court (Judge Kulkarni) is not issuing a tentative ruling at this time because it has some Stanford-related disclosures to make at the hearing. Therefore, the Court asks the parties to appear (remotely is fine) at the hearing.
LINE 8	22CV398744	Garcia v. PSI	See tentative ruling. The Court will prepare the final order.
LINE 9	19CV344014	JEFFRY KLAWITER and MARY KLAWITER v. Ford Motor Co. et al.	The Court (Judge Kulkarni) should not hear this reconsideration motion—Judge Manoukian should. Therefore, the Court CONTINUES this motion to 2/1/24 at 9 am in Dept 20.
LINE 10	20CV368062	Buck v. Blu Homes et al.	See tentative ruling. The Court will prepare the final order.
LINE 11	21CV386271	Cordova v. Robinson	Good cause appearing, the Court GRANTS this unopposed motion. (It appears that Defendant had proper notice of this motion and hearing date.) Prevailing party to prepare order including Defendant's trust as part of judgment.
LINE 12	22CV393993	Arver v Chae et al.	Good cause appearing, the Court GRANTS plaintiff's counsel's unopposed motion to withdraw, and will sign the previously-submitted order.
LINE 13	23CV410259	Doe v. HOMAYOUNFAR et al.	The Court agrees with Defendants that it has no jurisdiction over this reconsideration motion because Plaintiff already filed a notice of appeal of the motion. (The Court GRANTS judicial notice of the notice of appeal.) The Court therefore DENIES the reconsideration motion.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 14	23CV410259	Doe v. HOMAYOUNFAR et al.	Good cause appearing, the Court GRANTS Defendants' motion for attorney fees in its entirety, as it is unopposed. (Plaintiff had notice of this motion and hearing date, but chose to appeal the underlying anti-SLAPP order and not to file papers opposing this fee request. Also, Plaintiff wanted a 30-day extension to file a motion to strike this request, but Plaintiff never filed such a request within the 30-day window.) The Court has reviewed the information provided about billing rates and time, and finds this information credible. Prevailing party to prepare order.
LINE 15	23CV415921	MELISSA & DOUG, LLC v TOYS N MOTION LLC et al.	Good cause appearing, the Court will enter the unopposed judgment as stipulated to by the parties (and which was filed with the Court on 11/3/23), with numerical detail as specified in the 11/3/23 motion. The Court will retain jurisdiction over the case under Code of Civil Procedure section 664.6. The Court therefore GRANTS the motion. Plaintiff to prepare order and judgment.
LINE 16	23CV418884	Bui v CITIBANK et al.	OFF CALENDAR, as this pro hac vice order already has been signed.
LINE 17	23CV418884	Bui v CITIBANK et al.	Good cause appearing, the Court GRANTS plaintiff's counsel's motion to withdraw and will sign the previously-submitted order.
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CASE NO.: 21CV386407

Chipongolo Mulenga v. County of Santa Clara, et al.

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

I. Statement of Facts.

Plaintiff Chipongolo Mulenga ("Plaintiff") is a Black woman who was born and raised in Zambia and immigrated with her family to the United States. (First Amended Complaint ("FAC"), ¶14.)

In May 2019, defendant County of Santa Clara ("County") hired Plaintiff as a Public Communications Specialist for the Public and Legislative Affairs Division ("Division") of the Registrar of Voters ("ROV"). (FAC, ¶15.) Defendant County originally hired Plaintiff as a temporary employee or what defendant County refers to as an extra help appointment. (*Id.*)

In August 2019, Plaintiff began reporting to defendant Evelyn Mendez ("Mendez") who recognized Plaintiff's value to the Division/ ROV. (FAC, ¶16.) For instance, during her time managing the ROV's social media, Plaintiff increased followership over six-fold. (*Id.*) As Plaintiff continued to demonstrate acuity, Plaintiff's supervisors tasked her with increased responsibility. (FAC, ¶17.)

In December 2019, ROV gave Plaintiff a provisional appointment promotion. (FAC, ¶18.) According to defendant Mendez and Assistant Registrar Virginia Bloom ("Bloom"), Plaintiff received this provisional appointment because the ROV was creating a permanent position for her. (*Id.*) Defendant Mendez explained that while the position had to be posted for other applicants, Plaintiff was guaranteed to be placed in the position. (*Id.*) Defendant Mendez repeated this guarantee regularly over the course of months, until June 2020. (*Id.*)

Defendant Mendez identified as Filipino and expressed an affinity for those who also identified as Filipino complimenting those she believed to be Filipino by saying, "It's because of the Filipino in you." (FAC, ¶19.) In contrast, defendant Mendez routinely referred to Plaintiff as a "princess" around the office. (*Id.*)

At a work event on or about 19 January 2020, a coworker's friend physically spun Plaintiff in a circle and exclaimed the coworker was right about Plaintiff's "nice ass" in front of Mendez and other coworkers before they both ran away. (FAC, ¶20) Although defendant Mendez told Plaintiff the coworker had engaged in similarly problematic behavior in the past, Plaintiff was forced to continue enduring the coworker's presence. (*Id.*) Plaintiff told defendant Mendez she was extremely uncomfortable in the workplace and suffered a deeply negative emotional impact from the humiliation of being reduced to a sexual object based on her gender in front of coworkers. (*Id.*) Plaintiff cried in front of defendant Mendez making clear she was deeply sensitive to gender-based offenses. (*Id.*)

Though defendant Mendez had knowledge of Plaintiff's heightened sensitivity to gender-based offenses, defendant Mendez in a derogatory and condescending way called Plaintiff a "princess" in the workplace on a routine basis. (FAC, ¶21.) On multiple occasions, defendant Mendez told Plaintiff she was "such a princess" for wearing heels in the workplace. (*Id.*) On or about 12 February 2020, defendant Mendez handed each person in the Division a box of chocolates. (*Id.*) The box of chocolates defendant Mendez gave to Plaintiff was different from the others in that it had a picture of Plaintiff's face imposed on a white cartoon princess. (*Id.*) Defendant Mendez called Plaintiff a princess while handing Plaintiff the box of chocolates. (*Id.*) Plaintiff showed defendant Mendez an expression of sadness, discomfort, and offense making clear to defendant Mendez that her repeated insults were deeply offensive and disrespectful to Plaintiff. (*Id.*) Plaintiff did not observe defendant Mendez referring to anyone else as a "princess." (*Id.*)

Toward the end of 2019, defendant County selected Plaintiff to participate in a promotional video to explain the vote-by-mail process. (FAC, ¶23.) The video, filmed and edited by the County's professional videographer, featured Plaintiff as the sole spokesperson for defendant County. (*Id.*) Plaintiff and the videographer were proud of the finished product, but defendant Mendez told Plaintiff she did not approve stating the portions of the video featuring Plaintiff were "too dark." (*Id.*) When the videographer and Plaintiff inquired why the video needed to be

changed, defendant Mendez said to Plaintiff, "You are too dark." (*Id.*) Plaintiff's face expressed shock, embarrassment, and pain at what defendant Mendez said. (*Id.*) The videographer and graphic designer, also present, stood silent and appeared uncomfortable with what defendant Mendez said. (*Id.*) Defendant Mendez repeated her statement to Plaintiff that, "You are too dark." (*Id.*) Undeterred, defendant Mendez said to Plaintiff, "You need to be lightened up." (*Id.*) The graphic designer adjusted the color of the video which had the effect of making Plaintiff's skin appear significantly lighter than her natural skin tone. (*Id.*) When presented with this edited video, defendant Mendez continued to characterize it as "too dark" and insisted it be further "lightened up." (*Id.*) The graphic designer adjusted the color to the point Plaintiff's skin color did not resemble her own and significant portions of footage featuring Plaintiff were cut entirely. (*Id.*) With these additional edits, defendant Mendez finally approved. (*Id.*)

In or around February 2020, Plaintiff offered to give defendant Mendez a ride to the Airbnb where defendant Mendez was staying. (FAC, ¶24.) Defendant Mendez expressed skepticism about whether Plaintiff and Plaintiff's family could own modestly nice vehicles. (*Id.*)

Defendant Mendez also persistently and regularly spoke critically of one of the only other Black women at ROV accusing the person of "making everything about race." (FAC, ¶25.)

In the wake of George Floyd's ("Floyd") murder, defendant County posted social media in memoriam to Floyd on the day of his funeral that expressed a commitment to "stand with the Black community" and a "promise to uphold the principle that every person is equal." (FAC, ¶27.) On 10 June 2020, Plaintiff emailed defendant Mendez seeking approval to re-share the County's post to the ROV's social media platforms. (*Id.*) Plaintiff went to defendant Mendez's office and expressed how the County's post resonated powerfully with her as a Black woman. (*Id.*) Visibly unmoved, defendant Mendez responded she would not allow the County's post to be re-shared without consulting Assistant Registrar Bloom. (*Id.*) Plaintiff was taken aback as defendant Mendez routinely permitted Plaintiff to re-share County's social media posts on a number of occasions without Bloom's involvement. (*Id.*) Later that same day, Plaintiff continued asking defendant Mendez about the Floyd tribute post, but Mendez continued to disapprove. (FAC, ¶28.) Despite emotional pleas by Plaintiff, defendant Mendez rolled her eyes and scoffed as she said, "Well, if we're going to post about that, we might as well post about Filipino Independence Day." (FAC, ¶30.) To end the conversation, defendant Mendez said she would talk to the Registrar of Voters, Shannon Bushey ("Bushey"), about the post. (*Id.*)

Approximately one week later, Plaintiff asked defendant Mendez whether she had spoken with Bushey but defendant Mendez said, "No, I forgot." (FAC, ¶31.) Around the same time, the same Black woman defendant Mendez consistently expressed disdain for shared a plan to commemorate Juneteenth by organizing a youth rally against injustice called, "Hyped to Breathe." (*Id.*) When defendant Mendez learned of this, she scoffed at the idea and said, "She makes everything about race," while rolling her eyes in disgust. (*Id.*) Defendant Mendez grouped Plaintiff and this other Black woman together by consistently referring to the other Black woman as Plaintiff's "friend." (FAC, ¶40.)

Approximately one week after Plaintiff's conversation with defendant Mendez about the George Floyd social media post, Plaintiff delivered a presentation to a group of high-level managers at the ROV, including Bushey, but defendant Mendez was not in attendance. (FAC, ¶33.) Plaintiff was shocked when defendant Mendez called her immediately after the meeting to state that Plaintiff would not be allowed to give any future presentations, public or internal. (*Id.*) Asked why, defendant Mendez stated, "[Assistant Registrar Bloom] doesn't want you doing any more presentations." (*Id.*)

Despite consistent assurances through May 2020 that Plaintiff would receive a permanent appointment, defendant Mendez abruptly stopped discussing Plaintiff's promotion after Plaintiff's attempt to share County's post regarding Floyd and equality. (FAC, ¶34.) On 14 July 2020, defendant Mendez summoned Plaintiff to a conference room where she told Plaintiff she would "be going back to extra help." (*Id.*) Stunned, Plaintiff asked why and defendant Mendez responded that it was because the permanent position was "frozen" for budget reasons related to Covid-19. (*Id.*) Defendant Mendez stated, "You should look for a job with one of the vendors." (*Id.*)

Approximately one month before Plaintiff was officially demoted on 14 September 2020, the claimed budgetary constraints eased enough to allow the hiring of Ryan Aralar ("Aralar"), a Filipino man, into the exact same position that Plaintiff held. (FAC, ¶36.) Plaintiff was excluded from the hiring process and did not learn of

Aralar's hiring until after the fact nor was Plaintiff told that defendant Mendez was even considering hiring. (*Id.*) Defendant Mendez regularly told Filipino jokes to Aralar in the office and talked with him about their shared culture and similar upbringing. (*Id.*)

Although Plaintiff had a year and a half of experience at Division and Aralar had no prior elections or spokesperson experience, defendant Mendez told Plaintiff she was no longer permitted to be interviewed by the media about the election because she was "inexperienced" and media interviews would be handled by Aralar. (FAC, ¶37.)

After hiring Aralar, defendant Mendez became openly hostile toward Plaintiff. (FAC, ¶38.) Defendant Mendez incessantly berated Plaintiff in email and to other colleagues falsely accusing Plaintiff of failing to read her emails or being capable of understanding them and falsely claiming Plaintiff did not respond to defendant Mendez's inquiries. (*Id.*) Mendez's attacks were so unwarranted that Aralar approached Plaintiff to apologize and offer his support. (FAC, ¶39.) Aralar shared Mendez's instruction that Plaintiff was to be excluded from staff meetings and Aralar was taking the lead on presentations Plaintiff had been barred from doing. (*Id.*) Aralar stated defendant Mendez planned to promote him from a temporary position into a provisional one. (*Id.*)

On 8 January 2021, Plaintiff exchanged emails with Bushey in which they arranged to meet on 15 January 2021 to discuss defendant Mendez's discriminatory actions. (FAC, ¶42.) On 10 January 2021, Plaintiff sent an email to defendant Mendez to address the fact that Mendez "singled her out" with condescending and unfair aggressions in front of coworkers which made Plaintiff feel uncomfortable and demanded she has "a right to be treated equally." (*Id.*) In a reply email, defendant Mendez immediately terminated Plaintiff claiming there were "performance issues we should've probably discussed a while ago." (FAC, ¶44.) Defendant Mendez disregarded County policy of progressive discipline by never issuing any kind of warning prior to termination. (*Id.*) Defendant Mendez hedged by transitioning her termination justification to "budget cuts beyond our control." (*Id.*) Defendant Mendez concluded by demanding Plaintiff turn in her badge and laptop no later than the following day making clear the termination was effective immediately. (*Id.*)

Plaintiff kept her appointment with Bushey on 15 January 2021 and explained how Mendez discriminated against her based on race and retaliated against her for demanding equal treatment. (FAC, ¶45.) Bushey stated Mendez's words "could be perceived as retaliation," but Bushey could not do anything because Plaintiff had been terminated and was no longer a County employee. (*Id.*)

On information and belief, Plaintiff alleges Aralar was issued a pay raise on Plaintiff's final day of work and, soon thereafter, was promoted to a provisional appointment setting Aralar up for the same permanent appointment created for Plaintiff. (FAC, ¶46.)

On 30 July 2021[1], Plaintiff filed a complaint against defendants County, Office of the County Executive, ROV, and Mendez asserting causes of action for:

(1) Race, Color, Ancestry, National Origin, Gender, and/or Sex Discrimination – Violation of Government Code §12940, subd. (a)

(2) Retaliation – Violation of Government Code §12940, subd. (h)

(3) Retaliation – Violation of Labor Code §1102.5

(4) Failure to Take All Reasonable Steps to Prevent Racial Discrimination and Retaliation – Violation of Government Code §12940, subd. (k)

(5) Intentional Infliction of Emotional Distress

On 19 November 2021, defendant County (erroneously sued as the Office of the County Executive, Registrar of Voters (Santa Clara County)) and defendant Mendez filed a demurrer and motion to strike Plaintiff's complaint.

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[1] 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)

On 2 March 2022, the court issued an order sustaining defendants County and Mendez's demurrer to the fifth cause of action with leave to amend. The court also granted defendant County's motion to strike Plaintiff's claim for punitive damages as well as striking the ROV as a named defendant.

On 22 March 2022, Plaintiff filed the operative FAC which continues to assert the same five causes of action asserted in the original complaint.

On 25 April 2022, defendants County and Mendez filed an answer to Plaintiff's FAC.

On 31 January 2023, defendants County and Mendez filed the motion now before the court, a motion for summary judgment/ adjudication of Plaintiff's FAC.

II. Analysis.

A. Defendant County's motion for summary adjudication of the first cause of action [Discrimination] is DENIED.

It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, … color, national origin, ancestry, … sex, [or] gender … of any person, … to discharge the person from employment …, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(Govt. Code, §12940, subd. (a).)

The specific elements of a prima facie case [for discrimination] may vary depending on the particular facts. [Citations omitted.] Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations omitted.]

(*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).)

California uses the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination based on a theory of disparate treatment. (*Guz*, *supra*, 24 Cal.4th 317, 354; see *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L. Ed. 2d 668, 93 S. Ct. 1817] (*McDonnell Douglas*).) "This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz*, *supra*, 24 Cal.4th at p. 354.)

Under the *McDonnell Douglas* test, the plaintiff has the initial burden of establishing a prima facie case of discrimination. (*Guz*, *supra*, 24 Cal.4th at p. 354.) To meet this burden, the plaintiff must, at a minimum, show the employer took actions from which, if unexplained, it can be inferred that it is more likely than not that such actions were based on a prohibited discriminatory criterion. (*Id.* at p. 355.) A prima facie case generally means the plaintiff must provide evidence that (1) the plaintiff was a member of a protected class, (2) the plaintiff was qualified for the position he or she sought or was performing competently in the position held, (3) the plaintiff suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests a discriminatory motive. (*Ibid.*)

If the plaintiff establishes a prima facie case, then a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of material fact the employer took its actions for a legitimate, nondiscriminatory reason. (*Guz*, *supra*, 24 Cal.4th at pp. 355–356.) If the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must challenge the employer's proffered reasons as pretexts for discrimination or offer other evidence of a discriminatory motive. (*Id.* at p. 356.)

…

"A defendant employer's motion for summary judgment slightly modifies the order of these [*McDonnell Douglas*] showings. If, as here, the motion for summary judgment relies in whole or in part on a showing of nondiscriminatory reasons for the discharge, the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination. (See *Aguilar v. Atlantic Richfield Co.*[, *supra*,] 25 Cal.4th [at pp.] 850–851 … ; cf. *Guz*, *supra*, 24 Cal.4th at p. 357.) To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. (*Aguilar*, at pp. 850–851; *Guz*, at p. 357.) In determining whether these burdens were met, we must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing her evidence while strictly scrutinizing defendant's." (*Kelly*, *supra*, 135 Cal.App.4th at pp. 1097–1098.)

(*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004-1005.)

1. Legitimate, non-discriminatory reason.

In moving for summary adjudication of Plaintiff's first cause of action for discrimination, defendant County proffers evidence to establish that it had a legitimate and nondiscriminatory reason for terminating Plaintiff's employment. "[T]he employer's burden is satisfied if he simply 'explains what he has done' or '[produces] evidence of legitimate nondiscriminatory reasons.'" (*Board of Trustees v. Sweeney* (1978) 439 U.S. 24, 25.) To that end, defendant County proffers the following: County hired Plaintiff as an at-will, extra-help Public Communication Specialist for the ROV in May 2019.[2] County hires extra-help employees "on a time-limited basis, based on a need to meet a peak-load or other unusual work situation"—for example, "when the work load within a department is of too great a volume to be expeditiously handled by the regular employees."[3] Extra help employees are presumptively limited to working 1,040 hours in a fiscal year unless the County Board of Supervisors authorizes a different limit.[4] The ROV routinely makes heavy use of extra help employees because it requires a much larger workforce during the run-up to administering each election than it needs outside of election season.[5] After each election, the ROV generally undergoes a massive downsizing and release the vast majority of the extra help employees it hired to assist in administering the election.[6]

In December 2019, Plaintiff applied for her same position, Public Communication Specialist, in a non-extra help capacity and was subsequently hired into that position in a provisional capacity.[7] Provisional positions are temporary appointments to a vacant, existing job position for which there is no County-established pool—or "list"—of candidates who have qualified for the position through an examination.[8] No employee can stay in a provisional position more than 90 days after an eligible "list" is established for the vacant position, or for more than one year in any two-year period.[9]

In April 2020, citing budget concerns, the County announced a hiring freeze, which required all departments to obtain approval, in the form of an "exemption," from a centralized County committee before filling job vacancies.[10] The hiring freeze was lifted effective 30 April 2021.[11] By June 2020, the ROV had made multiple requests for exemption so it could hire for the position Plaintiff was filling provisionally, all of which were denied.[12] In June 2020, Plaintiff received an email sent by the County Executive to all County employees advising them of the County's

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[2] See Defendants' Separate Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Defendants UMF"), Issue No. 1, Fact No. 2.

[3] See Defendants' UMF, Issue No. 1, Fact No. 6.

[4] See Defendants' UMF, Issue No. 1, Fact No. 6.

[5] See Defendants' UMF, Issue No. 1, Fact No. 8.

[6] See Defendants' UMF, Issue No. 1, Fact No. 8.

[7] See Defendants' UMF, Issue No. 1, Fact No. 10.

[8] See Defendants' UMF, Issue No. 1, Fact No. 12.

[9] See Defendants' UMF, Issue No. 1, Fact No. 13.

[10] See Defendants' UMF, Issue No. 1, Fact No. 14.

[11] See Defendants' UMF, Issue No. 1, Fact No. 14.

[12] See Defendants' UMF, Issue No. 1, Fact No. 15.

budget deficit which was not "improving" and his recommended budget which "use[d] reserves, one-time resources, and [proposed] the deletion of some positions, the majority of which were vacant, to balance the budget for now."[13]

In June 2020, the County established a "list" for the position Plaintiff occupied provisionally which barred a provisional employee like Plaintiff from holding the provisional position more than 90 days from the date the list was established---i.e., after 10 September 2010.[14] In July 2020, Mendez met with Plaintiff to inform her that her provisional position was going to end because of budget concerns but that Plaintiff would stay in the same position in an extra help capacity.[15] Plaintiff reached out via email to Carmelita Aldana ("Aldana"), the ROV's human resources contact, and to Lourdes Gomez ("Gomez"), a union representative.[16] Aldana confirmed that County had created a list for Plaintiff's position, thus starting the 90 day clock and that ROV had requested and had been denied an exemption from the hiring freeze which left two alternatives with respect to Plaintiff: rehire her as an extra help employee or release her from County employment.[17] Gomez confirmed Aldana's and Mendez's explanations were correct noting that converting Plaintiff to extra help would "keep [her] employed."[18] Plaintiff's change back to extra-help was effective 14 September 2020.[19]

After the November 2020 election was over, Mendez began receiving pressure from Registrar of Voters Bushey and Assistant Registrar of Voters Bloom to either justify her extra help employees' continued employment or let people go which prompted Mendez to regularly ask her team to advise what they were working on.[20] On 11 January 2021, Mendez emailed Plaintiff stating Plaintiff had "performance issues … specifically regarding time management, quality, and turn-around time of projects" and that ROV had been "hit with budget cuts beyond our control," in the "worst budget crisis the County has ever faced."[21] Mendez stated the Division would "need to adjust staffing for the post-election schedule" and notified Plaintiff that Mendez was releasing Plaintiff from County employment and requested Plaintiff turn in her County equipment no later than 12 January 2021 at 5:00 pm.[22]

2. Substantial evidence of pretext or discriminatory animus.

"If the employer has met its burden by showing a legitimate reason for its conduct, the employee must demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action." (*DeJung v. Super. Ct.* (2008) 169 Cal.App.4th 533, 553 (*DeJung*), citing *Cucuzza v. City of Santa Clara* (2002) 104 Cal. App. 4th 1031, 1038 (*Cucuzza*) and *Guz*, *supra*, 24 Cal.4th at p. 357.)

"Speculation cannot be regarded as substantial responsive evidence." (*Cucuzza*, *supra*, 104 Cal. App. 4th at p. 1038.) "Further, an inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons." (*Guz*, *supra*, 24 Cal.4th at p. 360; see also *Guz*, *supra*, 24 Cal.4th at p. 361 (stating that "[t]he pertinent statutes do not prohibit lying, they prohibit discrimination… [and] there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions") (emphasis original).) "[E]ven where the plaintiff has presented a legally sufficient prima facie case of discrimination, and has also adduced some evidence that the employer's proffered innocent reasons are false, the fact finder is not necessarily entitled to find in the plaintiff's favor." (*Id*. at pp. 361-362.) "For instance, an employer would be entitled to judgment as a matter of law if the record conclusively

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[13] See Defendants' UMF, Issue No. 1, Fact No. 16.

[14] See Defendants' UMF, Issue No. 1, Fact No. 17.

[15] See Defendants' UMF, Issue No. 1, Fact No. 18.

[16] See Defendants' UMF, Issue No. 1, Fact No. 19.

[17] See Defendants' UMF, Issue No. 1, Fact No. 20.

[18] See Defendants' UMF, Issue No. 1, Fact No. 21.

[19] See Defendants' UMF, Issue No. 1, Fact No. 22.

[20] See Defendants' UMF, Issue No. 1, Fact No. 23.

[21] See Defendants' UMF, Issue No. 1, Fact No. 25.

[22] See Defendants' UMF, Issue No. 1, Fact No. 25.

revealed some other, nondiscriminatory reason for the employer's decision, if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." (*Id.* at p. 362.)

In employment discrimination cases under FEHA, plaintiffs can prove their cases in either of two ways: by direct or circumstantial evidence. [Citation.] When a plaintiff proffers circumstantial evidence, California courts apply the three-stage burden-shifting test established by the United States Supreme Court for trying claims of employment discrimination, including age discrimination, based on a theory of disparate treatment. [Citation.]

However, California has also adopted the rule that " 'the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.'..." (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144, 29 Cal.Rptr.3d 144 (*Trop*), quoting *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (*Trans World*).) The *Trans World* court reasoned that "[t]he shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court *despite* the unavailability of direct evidence.' [Citation.]" (*Trans World*, *supra*, 469 U.S. at p. 121, 105 S.Ct. 613, italics added.) Thus, there is no need to engage in this burden-shifting analysis where there is direct evidence of discriminatory animus. (*Trop*, *supra*, 129 Cal.App.4th at pp. 1144–1145, 29 Cal.Rptr.3d 144.)

Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. Comments demonstrating discriminatory animus may be found to be direct evidence if there is evidence of a causal relationship between the comments and the adverse job action at issue. (*Trop*, *supra*, 129 Cal.App.4th at pp. 1146–1149, 29 Cal.Rptr.3d 144.)

(*DeJung*, *supra*, 169 Cal.App.4th at pp. 549–550.)

The *DeJung* court explains, "proof of discriminatory animus does not end the analysis of a discrimination claim. There must also be evidence of a causal relationship between the animus and the adverse employment action." (*Id.* at p. 550.) In opposition, Plaintiff cites *Adams v. Home Depot USA, Inc.* (D.Or. Sep. 5, 2007, No. CV-05-1798-ST) 2007 U.S.Dist.LEXIS 103550 (*Adams*) for the proposition that direct evidence of animus untethered to any adverse employment action constitutes discriminatory animus.

Direct evidence of discrimination is "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude sufficient to permit the fact finder to infer that the attitude was more likely than not a motivating factor in the employer's decision." *Enlow*, 389 F3d at 812. Circumstantial evidence is "evidence that requires an additional inferential step to demonstrate discrimination." *Coghlan v. American Seafoods Co., LLC*, 413 F3d 1090, 1095 (9th Cir 2005).

The distinction between direct and circumstantial evidence is crucial, because it controls the amount of evidence that the plaintiff must present in order to defeat the employer's motion for summary judgment. Because direct evidence is so probative, the plaintiff need offer "very little" direct evidence to raise a genuine issue of material fact. But when the plaintiff relies on circumstantial evidence, that evidence must be "specific and substantial" to defeat the employer's motion for summary judgment.

(*Adams*, *supra*, 2007 U.S.Dist.LEXIS 103550, at *40.)

After determining that statements referring to the plaintiff as "Darkman" and a monkey were racial slurs, the *Adams* court rejected the defendant employer's argument that there was no nexus between these comments and the plaintiff's termination.

To withstand summary judgment, Adams must establish that these statements were made "by persons involved in the decision-making process" and "may be viewed as directly reflecting the alleged discriminatory attitude sufficient to permit the fact finder to infer that the attitude was more likely than not a motivating factor in the employer's decision." *Johnson v. The Evangelical Lutheran Good Samaritan Soc.*, 2005 U.S. Dist. LEXIS 35806, 2005 WL 2030834 (D Ore Aug 23, 2005), quoting Enlow, 389 F3d at 812 (internal quotation marks omitted). Home Depot argues that these comments were not made in connection with or tied to Adams' termination and were not made by Nickerson, the alleged decision-maker.

Contrary to Home Depot's position, the Ninth Circuit has recognized that a nexus to the particular employment decision is not always required. In *Chuang*, the decision-maker laughed after a co-worker remarked that "two Chinks" in the department were more than enough. Although the remark referred to someone other than the plaintiff and did not pertain to the particular employment decision at issue, the court found it constituted adequate evidence of discriminatory intent on the part of a decision-maker. In *Cordova v. State Farm Ins. Cos.*, 124 F3d 1145, 1149 (9th Cir 1997), the Ninth Circuit similarly held a decision-maker's alleged comments that a co-worker was a "dumb Mexican" and hired because he was a minority were strong evidence of discriminatory animus on the basis of national origin, even though the remarks were not about the plaintiff or the decision as to whether to promote her. In both of those cases, the court held that the egregious comments constituted direct evidence of a discriminatory motive underlying the employment decision.

(*Adams*, *supra*, 2007 U.S.Dist.LEXIS 103550, at *44-45.)

With *Adams* in mind, Plaintiff asserts in opposition that there is direct evidence here of the decision-maker's, defendant Mendez, animus toward Plaintiff. While not a racial slur like the one in *Adams*, Plaintiff points to the instance when Plaintiff appeared in a video explaining the vote-by-mail process in Santa Clara County. Asked by the videographer and Plaintiff why the video needed to be changed, defendant Mendez repeatedly told Plaintiff, "You are too dark."[23] Plaintiff's first cause of action for discrimination is not premised on race alone. Plaintiff's first cause of action is premised also upon being a person of color. A comment by defendant Mendez directed to Plaintiff that, "You are too dark" can be viewed on its face, without need for any inference or presumption, evidence of animus against a person of color. Here, it is defendant County who contends evidence of the context and surrounding circumstances in which defendant Mendez's statement was made creates the inference that the statement is not an expression of animus against Plaintiff as a person of color, but is more innocuously a reference to the brightness (or lack thereof) of the video image. In order to give more credit to defendant County's inference, the court must necessarily weigh the evidence and "[t]he trial court may not weigh the evidence in the manner of a fact finder to determine whose version is more likely true." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.)

Since defendant Mendez's statement itself is direct evidence of animus against a person's color, the court finds this to at least present a triable issue of material fact with regard to whether defendant County is liable for discrimination.[24] Accordingly, defendant County's motion for summary adjudication of the first cause of action of Plaintiff's FAC [discrimination] is DENIED.

B. Defendant County's motion for summary adjudication of the second cause of action [Retaliation] is DENIED.

It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: … For any employer … to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(Govt. Code, §12940, subd. (h).)

"To establish a prima facie case of retaliation, the plaintiff must show (1) he or she engaged in a protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) a causal link between the protected activity and the employer's action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation 'drops out of the picture,' and the burden

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[23] See Plaintiff's Separate Statement in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's SS"), Fact No. 39a.

[24] In opposition, Plaintiff proffered a variety of other circumstantial evidence of pretext and/or discriminatory animus. Since the court has already identified a triable issue, the court deems it unnecessary to analyze whether the other evidence proffered by Plaintiff would suffice to create a triable issue.

shifts back to the employee to prove intentional retaliation." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1065–1066 (*Yanowitz*).)

In moving for summary adjudication of Plaintiff's second cause of action for retaliation, defendant County contends Plaintiff cannot establish that she engaged in a protected activity because Plaintiff did not sufficiently articulate to her superiors (Mendez and Bushey) her belief that she was facing discrimination. "It is well established that a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1043.)

Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.

…

Nonetheless, we believe it is clear that "[a]n employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination." (*Wirtz v. Kansas Farm Bureau Services, Inc.* (D.Kan. 2003) 274 F. Supp. 2d 1198, 1212, fn. omitted.) It is not difficult to envision circumstances in which a subordinate employee may wish to avoid directly confronting a supervisor with a charge of discrimination and the employee engages in subtler or more indirect means in order to avoid furthering or engaging in discriminatory conduct. As the court explained in *Garcia-Paz*, in such circumstances "the thrust of inartful, subtle, or circumspect remarks nevertheless may be perfectly clear to the employer, and [there is] no evidence that Congress intended to protect only the impudent or articulate. ***The relevant question … is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.***" (*Garcia-Paz*, *supra*, 873 F. Supp. at p. 560.)

(*Yanowitz*, *supra*, 36 Cal.4th at pp. 1046-1047; emphasis added.)

According to defendant County, Plaintiff identifies only two instances of claimed protected activity: her 7 January 2021 email to Bushey and her 10 January 2021 email to Mendez.[25] In the 7 January 2021 email to Bushey, Plaintiff wrote, in relevant part, "I am writing this email because I have some concerns that I need to discuss with you and hopefully resolve. When you have a chance, please let me know what days and times you are available next week to meet with me."[26] In the 10 January 2021 email to Mendez, Plaintiff wrote, in relevant part:

I wanted to bring to your attention that in the past few months I have noticed that your responses to me through email have been very condescending, especially with other people copied in them. It appears ***I am being singled out*** because I have noticed others are not spoken to in the manner that I am, which leaves me to feel very uncomfortable. I deserve to work in a cordial, constructive, respectful environment, and lately it has not been the case. If there is an issue with my performance which warrants these types of responses it should've been discussed rather than manifest itself in a negative tone from you. I am consistently professional in my dealings and communications with all my colleagues and superiors and ask only the same of them. I have a ***right to be treated equally*** and with the same respect as my coworkers which is what I am asking of you. I am happy to run it up the chain to ensure I do not have to continue to endure these unfair aggressions.[27]

(Emphasis added.)

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[25] See Defendants' UMF, Issue No. 3, Fact No. 67.

[26] See Defendants' UMF, Issue No. 3, Fact No. 62.

[27] See Defendants' UMF, Issue No. 3, Fact No. 64.

On the issue of whether Plaintiff's communications sufficiently conveyed her reasonable concerns that the employer has acted in an unlawful discriminatory manner, the court finds the following passage from *Guyton v. Novo Nordisk, Inc.* (C.D.Cal. 2015) 151 F. Supp. 3d 1057, 1073 to be illustrative:

Guyton testified at his deposition that he communicated to his supervisor Sutton that "he felt like she was unfairly treating [him] and treating [him] different than other people in the district." Although Guyton concedes he did not specifically reference his age or race, a reasonable trier of fact could conclude, based on his reference to "unfairness" and "difference," that he was complaining of unlawful discriminatory treatment. See *Yanowitz*, 36 Cal.4th at 1047 ("The relevant question is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner," quoting *Garcia-Paz v. Swift Textiles, Inc.*, 873 F.Supp. 547, 560 (D. Kan. 1995)); see also *Mathieu v. Norrell Corp.*, 115 Cal.App.4th 1174, 1187, 10 Cal. Rptr. 3d 52 (2004) ("[R]esolving all conflicting inferences in favor of Mathieu, as we must, we conclude a triable issue of fact exists as to whether Norrell reasonably understood Mathieu's complaints to raise an issue of sexual harassment and thus constituted 'protected activity' within the meaning of FEHA").

Similarly here, Plaintiff's failure to specifically refer to her race, color, national origin, a reasonable trier of fact could conclude, based on Plaintiff's reference to "being singled out" and assertion of a "tight to be treated equally," that she was complaining of unlawful discriminatory treatment. At the very least, this issue is not one that the court will decide as a matter of law and instead should be left to the trier of fact to determine "whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner."

Accordingly, defendant County's motion for summary adjudication of the second cause of action of Plaintiff's FAC [retaliation] is DENIED.

C. Defendant County's motion for summary adjudication of the third cause of action [Labor Code §1102.5 Retaliation] is DENIED.

Labor Code section 1102.5, subdivision (b) states:

An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

"The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation." (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384.) To establish a prima facie case of retaliation, "a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Ibid.*)

Again, defendant County contends Plaintiff has not engaged in a protected activity to support a claim for a Labor Code section 1102.5 retaliation.

"An employee engages in activity protected by the statute when the employee discloses "'reasonably based suspicions' of illegal activity. [Citation.]" (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 87 [78 Cal. Rptr. 2d 16, 960 P.2d 1046].) "To have a reasonably based suspicion of illegal activity, the employee must be able to point to some legal foundation for his suspicion—some statute, rule or regulation which may have been violated by the conduct he disclosed. [Citation.]" (*Fitzgerald v. El Dorado County* (E.D.Cal. 2015) 94 F.Supp.3d 1155, 1172.)

…

If credited by a trier of fact, the evidence shows Ross engaged in protected activity because he disclosed information to a governmental or law enforcement agency and to people with authority over him which he reasonably believed disclosed a violation of or noncompliance with federal and state law applicable to criminal prosecutions and prosecutors. Although Ross did not expressly state in his disclosures that he believed the County was violating or not complying with a specific state or federal law, ***Labor Code section 1102.5, subdivision (b)***, ***does not require such an express statement. It requires only that an employee disclose information and that the employee reasonably believe the information discloses unlawful activity***. (Lab. Code, § 1102.5, subd. (b).)

(*Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 592 – 593; emphasis added.)

Pointing to the same two emails identified in the second cause of action, defendant County contends the content of those emails do not sufficiently amount to protected activity. Similar to the argument made with regard to the second cause of action, defendant County contends protected activity under Labor Code section 1102.5 must concern some legal violation, not just an internal personnel matter. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384-1385—"The disclosures involving the two teachers do not amount to whistleblowing as a matter of law because, although the disclosures were made by a government employee (Patten) to a government agency (Grant), the disclosures indisputably encompassed only the context of internal personnel matters involving a supervisor and her employee, rather than the disclosure of a legal violation.")

For the same reason discussed above, the court does not reach the conclusion advanced by defendant County, i.e., that Plaintiff's email to Mendez is made solely in the context of an internal personnel matter/ personal conflict between Plaintiff and Mendez. As the *Ross* court explained, Labor Code section 1102.5, subdivision (b), does not require the employee to expressly state the violation or non-compliance with a specific law.

Accordingly, defendant County's motion for summary adjudication of the third cause of action of Plaintiff's FAC [Labor Code section 1102.5 retaliation] is DENIED.

D. Defendant County's motion for summary adjudication of the fourth cause of action [Failure to Take All Reasonable Steps to Prevent Discrimination and Retaliation] is DENIED.

Defendant County moves for summary adjudication of Plaintiff's fourth cause of action on the basis that it is derivative of the first three causes of action and contend that if the first three causes of action fail, then so too does the fourth cause of action. A necessary prerequisite to a finding of liability for the failure to take all reasonable steps, however, is a finding that the plaintiff actually suffered unlawful discrimination, harassment, or retaliation. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 282 – 283; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1021.)

In light of the court's ruling above, defendant County's motion for summary adjudication of the fourth cause of action of Plaintiff's FAC [failure to take all reasonable steps to prevent discrimination and retaliation] is DENIED.

E. Defendants County and Mendez's motion for summary adjudication of the fifth cause of action [Intentional Infliction of Emotional Distress] is DENIED.

"The tort of intentional infliction of emotional distress (IIED) is comprised of three elements: (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 suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494 (*Cochran*); see also *Ross v. Creel Printing & Publishing Co., Inc.* (2002) 100 Cal.App.4th 736, 744 – 745; see also CACI, Nos. 1600 and 1602.)

In moving for summary adjudication of Plaintiff's fifth cause of action, defendants County and Mendez argue initially that if Plaintiff's claim for IIED is based upon the same conduct as her other claims, then the IIED claim should fail to the extent the other claims fail. However, in light of the court's ruling above, the court does not find this argument persuasive.

Defendants County and Mendez argue further that Plaintiff cannot establish extreme and outrageous conduct by defendants as a matter of law. "There is no bright line standard for judging outrageous conduct and its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values,

sensitivity threshold, and standards of civility. The process evoked by the test appears to be more intuitive than analytical." (*Cochran*, *supra*, 65 Cal.App.4th at p. 494; internal quotations omitted.)

"'Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" (*Christensen v. Superior Court*, *supra*, 54 Cal.3d at p. 903.) "[M]ere insulting language, without more, ordinarily would not constitute extreme outrage" unless it is combined with "aggravated circumstances." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499 [86 Cal.Rptr. 88, 468 P.2d 216] (*Alcorn*).) But "'[b]ehavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress.'" (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946 [160 Cal. Rptr. 141, 603 P.2d 58] (*Agarwal*), disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4 [88 Cal. Rptr. 2d 19, 981 P.2d 944].)

(*Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 147 (*Smith*).)

The *Smith* court, like the *Cochran* court, recognized that:

"whether conduct qualifies as extreme and outrageous is [**not**] always a question for the jury. …several courts have held that alleged conduct is not extreme and outrageous as a matter of law. (E.g., *Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 487 [132 Cal. Rptr. 3d 660] [upholding sustaining of demurrer because plaintiff could not allege facts showing outrageous conduct]; *Lawler v. Montblanc North America, LLC* (9th Cir. 2013) 704 F.3d 1235, 1245 [affirming summary judgment on IIED claim because conduct was not outrageous as a matter of law].) That said, whether conduct is outrageous is "'usually' a question of fact." (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 356 [192 Cal. Rptr. 3d 511].)

…

"'[w]here reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.' [Citations.]" (*Ibid.*)

(*Smith*, *supra*, 64 Cal.App.5th at pp. 147-148.)

In *Smith*, an African American plaintiff attended a company presentation about a new product where the presenter made three racially-based comments directed at the plaintiff. The trial court sustained defendant's demurrer to plaintiff's claim for intentional infliction of emotional distress without leave to amend but the appellate court in *Smith* reversed concluding plaintiff had sufficiently alleged a claim for intentional infliction of emotional distress.

[Plaintiff] Smith alleges that [defendant] Pumarol made three offensive comments to him in front of about 50 of his colleagues, including three of his supervisors. According to [plaintiff] Smith, after [defendant] Pumarol made the first comment, everyone except for African American employees laughed, yet [defendant] Pumarol made two more comments that [plaintiff] Smith found offensive. [Defendant] Pumarol allegedly said that he would not want [plaintiff] Smith's "'Banana Hands'" on his car and that he could not see [plaintiff] Smith, which [plaintiff] Smith construed as an unwelcome, racist comment about his dark complexion.

On these facts, a reasonable jury could find that [defendant] Pumarol "'act[ed] intentionally or unreasonably with the recognition that [his] acts [were] likely to result in illness through mental distress.'" (*Agarwal*, *supra*, 25 Cal.3d at p. 946.) The jury could thus reasonably find that [defendant] Pumarol's conduct was extreme and outrageous.

(*Smith*, *supra*, 64 Cal.App.5th at pp. 148-149.)

As pointed out above, "[M]ere insulting language, without more, ordinarily would not constitute extreme outrage" unless it is combined with "aggravated circumstances." (*Id.* at p. 147.) Such aggravated circumstances can be found "if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946.) Defendants County and Mendez contend that the alleged conduct at issue in

this case involves, at worst, only insulting/ offensive language or statements and are not accompanied by any aggravating circumstances.

Since the "aggravated circumstances" mentioned above are stated in the disjunctive, defendants County and Mendez would have to demonstrate Plaintiff cannot establish any of the three possible aggravated circumstances in order to meet its initial burden on summary adjudication. (See Code Civ. Proc., §437c, subd. (p)(2)—"A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action.")

Defendants County and Mendez argue "there is no evidence Mendez somehow abused her position to 'damage the plaintiff's interest,' particularly because Plaintiff did not experience discriminatory adverse employment actions, as set forth above," referencing defendant County's earlier argument regarding discrimination.[28] The court understands defendants to essentially argue that, in the absence of any discrimination, there can be no damage to plaintiff's interest. However, as discussed above, a triable issue of material fact exists with regard to whether Plaintiff has been subjected to discriminatory adverse employment actions. Consequently, defendants County and Mendez have failed to meet their initial burden of showing that the cause of action for IIED has no merit.[29]

Accordingly, defendants County and Mendez's motion for summary adjudication of the fifth cause of action of Plaintiff's FAC [IIED] is DENIED.

III. Order.

Defendants County and Mendez's motion for summary judgment or, in the alternative, summary adjudication of Plaintiff's FAC is DENIED.

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[28] See page 23, line 26 – 28 of the MPA ISO Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication.

[29] The court deems it unnecessary to determine whether Plaintiff can or cannot establish the other two "aggravated circumstances."

CASE NO.: 22CV397119

Case Name: Sutter's Place, Inc. dba Bay 101 v. S.J. Bayshore Development, LLC, et al.

ORDER ON CROSS-DEFENDANT LOREN VACCAREZZA'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

I. Statement of Facts.

Complaint

On 1 November 1992, plaintiff Sutter's Place, Inc. dba Bay 101 ("Bay 101"), as tenant, entered into a ground lease ("Ground Lease") for approximately 10 acres of raw land located on Bering Drive in San Jose ("Original Premises"). (Complaint, ¶4.) Pursuant to the Ground Lease, the lessor provided plaintiff Bay 101 with an option to purchase the Original Premises for $15,246,000. ("Original Option Agreement"). (Complaint, ¶¶4 – 5.)

On or about 15 November 1993, plaintiff Bay 101, as tenant, and Bumb & Associates, as landlord, entered into a lease ("Building Lease") whereby Bumb & Associates agreed to lease to plaintiff Bay 101 a to-be-constructed two-story, 75,000 square foot building at 1801 Bering Drive in San Jose and plaintiff Bay 101 agreed to assign the Original Option Agreement to Bumb & Associates. (Complaint, ¶8.) Bumb & Associates did not exercise the option to purchase [the Original Premises] during the option exercise period. (*Id.*)

The original term of the Ground Lease and Building Lease expired on 14 November 2017 and the ground lessor did not agree to extend or renew the Ground Lease. (Complaint, ¶9.) Consequently, plaintiff Bay 101 and Bumb & Associates were required to demolish the building at the Original Premises and relocate to a new location. (*Id.*)

Plaintiff Bay 101 and Bumb & Associates began searching for a new location. (Complaint, ¶10.) Bumb & Associates and The Flea Market, Inc. each acquired undivided interests as tenants in common in what became known as Bay 101 Technology Place located at 1788 North First Street in San Jose. (*Id.*) Bumb & Associates and The Flea Market, Inc. began the process to subdivide Bay 101 Technology Place into eight (8) parcels as part of a mixed-use commercial/ office/ hotel project. (*Id.*) The subdivision process was completed with the formation of Bay 101 Technology Place and the filing for a planned development permit. (*Id.*)

As part of a reorganization of Bumb & Associates from a general partnership to a limited liability company (LLC), additional LLC entities were formed to hold and develop investment properties, with defendant S.J. Bayshore Development, LLC ("SJBD") being formed as the entity to own Parcel No. 4 on that certain Parcel Map entitled, "Parcel Map Bay 101 Mixed Use Project," and all improvements thereon ("Premises"). (Complaint, ¶¶1 and 10.) For this new location, plaintiff Bay 101 and defendant SJBD began negotiating and drafting the terms of a new lease, new option agreement, and new purchase and sale agreement using, among others, the original Ground Lease and Original Option Agreement as templates. (Complaint, ¶10.)

The parties agreed plaintiff Bay 101 would again receive an option to purchase the Premises but the price would be determined by an appraisal. (Complaint, ¶11.) The parties agreed the option to purchase would begin on 1 September 2022 and terminate on 1 September 2024. (Complaint, ¶12.) The parties agreed the appraisal would be completed at least 90 days before plaintiff Bay 101 was entitled to

exercise the option to purchase. (Complaint, ¶13.) The parties also agreed on a 180-day closing, but inadvertently neglected to modify this term (from a 30-day closing) when redrafting the purchase and sale agreement. (Complaint, ¶¶14 – 15.)

On 12 July 2017, defendant SJBD, as landlord, and plaintiff Bay 101, as tenant, entered into a lease for the Premises ("Lease"). (Complaint, ¶¶1 and 16.) Timothy Bumb executed the Lease on behalf of plaintiff Bay 101 in his capacity as its President. (Complaint, ¶16.) Timothy Bumb and his brother, Brian Bumb, executed the Lease on behalf of defendant SJBD in their capacities as co-managers of T&B Management Group LLC, the manager of defendant SJBD. (*Id.*) Pursuant to the Lease, defendant SJBD granted plaintiff Bay 101 an option to purchase the Premises ("Option Agreement"). (Complaint, ¶17.) Under the Option Agreement, "In the event [plaintiff Bay 101] exercises its option to purchase the Option Property, [plaintiff Bay 101] shall concurrently execute and return with [plaintiff Bay 101's] notice to [defendant SJBD] of its unconditional exercise of option to purchase said Option Property, the purchase and sale agreement … attached hereto as ATTACHMENT C ("Purchase and Sale Agreement")… respectively." (Complaint, ¶18.)

On 26 January 2022 and again on 9 February 2022, plaintiff Bay 101 informed defendant SJBD about the [closing date] error and requested defendant SJBD agree in writing to reform the Lease and Option Agreement so that closing could occur 180 days after exercise of the option to purchase. (Complaint, ¶19.) On 9 February 2022, plaintiff Bay 101 also demanded defendant SJBD move forward with the selection of an appraiser. (*Id.*)

In a 14 February 2022 email, defendant SJBD conceded a scrivener's error in an exhibit to the Lease and the inconsistency between the Option Agreement and the Purchase and Sale Agreement, but asserted the error was with the Option Agreement [calling for a 180 day closing], not the [30 day closing in the] Purchase and Sale Agreement, and therefore refused to amend as plaintiff Bay 101 requested. (Complaint, ¶20.) Furthermore, defendant SJBD did not select an appraiser or indicate when it would do so. (*Id.*)

Between 8 March 2022 and 18 March 2022, counsel for plaintiff Bay 101 and defendant SJBD exchanged communications but defendant SJBD continues to refuse to agree to correct the scrivener's error in the Option Agreement or to select an appraiser, frustrating plaintiff Bay 101's ability to determine the purchase price for the Premises and exercise the option to purchase the Premises. (Complaint, ¶¶21 – 25.)

Plaintiff Bay 101 contends the Lease requires the following steps to occur prior to 1 September 2022 (the date plaintiff Bay 101 is entitled to exercise the option to purchase the Premises): (1) the parties select an appraiser; (2) the appraiser completes the appraisal; and (3) based on the appraisal price, plaintiff Bay 101 determines whether it wishes to exercise the option to purchase and whether it can obtain the financing necessary to obtain the Premises. (Complaint, ¶26.) Plaintiff Bay 101 also contends that should it exercise the option to purchase, plaintiff Bay 101 then has 180 days to obtain financing and otherwise complete all necessary steps for closing. (Complaint, ¶27.)

Defendant SJBD contends selection of an appraiser and completion of an appraisal does not occur until after plaintiff Bay 101 exercises the option to purchase; and in the 30 day period after exercise of the option, the parties must select an appraiser, the appraiser must complete the appraisal, plaintiff Bay 101 must obtain the necessary financing, and the parties must complete the closing. (Complaint, ¶28.) Defendant SJBD knows this sequence and timing is impossible. (*Id.*) Defendant SJBD knows the financing necessary to purchase the Premises, likely to be in excess of $70 million, cannot be obtained on such short notice or in such a short time period. (*Id.*)

On 15 April 2022[30], plaintiff Bay 101 commenced this action by filing a complaint against defendant SJBD asserting causes of action for:

(1) Reformation of Contract
(2) Declaratory Relief
(3) Declaratory Relief
(4) Breach of Lease
(5) Breach of the Implied Covenant of Good Faith and Fair Dealing

On 23 May 2022, defendant SJBD filed an answer to plaintiff Bay 101's complaint and also filed a cross-complaint against plaintiff Bay 101, Timothy Bumb, Ronald Werner ("Werner"), and Loren Vaccarezza ("Vaccarezza") asserting causes of action for:

(1) Rescission [against plaintiff/ cross-defendant Bay 101]
(2) Breach of Fiduciary Duty [against cross-defendant Timothy Bumb]
(3) Breach of Fiduciary Duty [against cross-defendants Werner and Vaccarezza]
(4) Professional Negligence [against cross-defendants Werner and Vaccarezza]
(5) Fraud (Concealment) [against cross-defendant Timothy Bumb]
(6) Fraud (Concealment) [against cross-defendants Werner and Vaccarezza]
(7) Constructive Fraud [against cross-defendant Timothy Bumb]
(8) Constructive Fraud [against cross-defendants Werner and Vaccarezza]
(9) Aiding and Abetting [against cross-defendants Timothy Bumb, Werner, and Vaccarezza]
(10) Reformation [against plaintiff/ cross-defendant Bay 101]
(11) Breach of Express Duty of Good Faith [against cross-defendant Timothy Bumb]
(12) Breach of the Implied Duty of Good Faith and Fair Dealing [against cross-defendant Timothy Bumb]

On 21 July 2022, cross-defendants Bay 101 and Timothy Bumb filed a demurrer and motion to strike SJBD's cross-complaint.

On 23 August 2022, cross-defendant Werner filed a demurrer to SJBD's cross-complaint.

On 31 August 2022, cross-defendant Vaccarezza filed a demurrer to SJBD's cross-complaint.

On 17 November 2022, the court (Hon. Kirwan) issued an order sustaining cross-defendants Bay 101 and Timothy Bumb's demurrer to SJBD's cross-complaint and deeming the motion to strike moot. The court (Hon. Kirwan) also issued a separate order sustaining, in part, and overruling, in part, cross-defendant Werner's demurrer to SJBD's cross-complaint. On 5 December 2022, the court (Hon. Kirwan) issued an order sustaining, in part, and overruling, in part, cross-defendant Vaccarezza's demurrer to SJBD's cross-complaint.

On 30 November 2022, defendant/ cross-complainant SJBD filed the operative first amended cross-complaint ("FAXC").

First Amended Cross-Complaint

The FAXC alleges the Bumb family has operated multiple successful businesses in the San Jose area for over six decades beginning with the San Jose Flea Market founded in 1960 by George Bumb, Sr., the patriarch of the Bumb family. (FAXC, ¶8.)

[30] 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).)

Richard Patch ("Patch") of the law firm of Coblentz Patch Duffy & Bass LLP ("Coblentz Firm") had long been acting as outside attorneys for defendant SJBD and the Bumb family businesses. (FAXC, ¶9.) Bumb & Associates, a California general partnership founded in 1981, converted to a Delaware LLC as part of a broader corporate reorganization in 2015 devised and implemented by attorney Patch. (*Id.*) As part of that same reorganization, a collection of LLCs, including SJBD, were formed to hold and develop various Bumb family assets under the Bumb & Associates umbrella. (*Id.*) The Bumb family then created T&B Management Group LLC ("T&B") to manage the various family entities ("Bumb Family Businesses"). (*Id.*) T&B is co-managed by Brian Bumb ("Brian")[31] and cross-defendant Timothy Bumb ("Timothy"), both sons of George Bumb, Sr. (FAXC, ¶10.)

Timothy is 92.1% owner and President of plaintiff Bay 101. (FAXC, ¶11.) When plaintiff Bay 101 had to find a new location in 2015, the Bumb family decided the parcel owned by SJBD would become plaintiff Bay 101's new location. (*Id.*) Unknown to the rest of the Bumb family, cross-defendant Timothy would take negotiation of plaintiff Bay 101's lease as an opportunity to put his own interests above those of the Bumb Family Businesses to which he owed duties as a co-manager of T&B. (*Id.*) To obtain the best possible lease for plaintiff Bay 101, cross-defendant Timothy enlisted the help of his son-in-law, cross-defendant Vaccarezza, and long time friend and Bumb family lawyer, cross-defendant Werner. (*Id.*) Cross-defendant Vaccarezza, positioned as SJBD's General Counsel, had an insider's advantage in negotiation of the lease and used the opportunity to benefit himself and his father-in-law, cross-defendant Timothy. (*Id.*) Cross-defendant Werner, having the trust of the Bumb family as its lawyer dating back to the 1980s, used this as an opportunity to benefit himself as 1.32% owner of plaintiff Bay 101. (*Id.*) With the help of cross-defendants Vaccarezza and Werner, cross-defendant Timothy was able to secure a lease beneficial to plaintiff Bay 101 and detrimental to SJBD knowing all along that SJBD would never be able to perform under the terms of the lease that cross-defendants conspired to draft. (*Id.*)

On 13 June 2016, the Bay 101 Technology Place Declarations of Covenants, Restrictions and Common Easement Areas ("CC&Rs") were recorded. (FAXC, ¶16.) The CC&Rs were negotiated by cross-defendant Timothy, on behalf of the original owner of Bay 101 Technology Place, and cross-defendants Werner and Vaccarezza, as counsel for the original owner. (*Id.*) The CC&Rs were executed by cross-defendant Timothy on behalf of the original owner and as co-manager of T&B. (*Id.*)

On 12 July 2017, SJBD entered into a lease with plaintiff Bay 101 for a parcel within Bay 101 Technology Place. (FAXC, ¶17.) The lease states, "Tenant [plaintiff Bay 101] shall have a minimum of 725 parking spaces on the Leased Premises or on a combination of the Leased Premises and other adjacent property either owned or controlled by Landlord [SJBD] for a term of the Lease." (*Id.*) Werner and Vaccarezza each participated in the drafting and negotiation of the lease.

Having executed the CC&Rs on behalf of T&B, Timothy knew at the time the lease was executed that SJBD did not have enough physical space to provide 725 parking spaces to plaintiff Bay 101. (FAXC, ¶24.) Werner and Vaccarezza also knew the CC&Rs did not grant plaintiff Bay 101 725 exclusive parking spaces nor did SJBD have enough physical space to provide 725 parking spaces to plaintiff Bay 101. (*Id.*) Cross-defendants further knew that parcel no. 7 at Bay 101 Technology Place would be condemned by the City of San Jose, further reducing the land owned by SJBD, giving SJBD even fewer parking spaces available to offer to plaintiff Bay 101. (*Id.*)

Cross-defendants knew the proposed lease would create a conflict of interest between SJBD and plaintiff Bay 101. (FAXC, ¶25.) Plaintiff Bay 101 has since attempted to commence the process of exercising an option in the lease to purchase the leased property from SJBD. (FAXC, ¶27.) In doing so,

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[31] "For the sake of clarity, we refer to the [parties] by their first names. We mean no disrespect in doing so." (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 551, fn. 2.)

plaintiff Bay 101 claims SJBD must now provide it with 725 parking spaces that cross-defendants Timothy, Werner, and Vaccarezza knew SJBD was not able to provide. Brian believed Werner and Vaccarezza represented SJBD when they negotiated and drafted the lease with plaintiff Bay 101. (FAXC, ¶18.) Werner and Vaccarezza were obligated to disclose any conflicts of interest to SJBD and obtain SJBD's written informed consent but failed to do so. (FAXC, ¶¶19 – 22.)

Assuming arguendo that the lease is valid, SJBD contends the lease contains an error due to mutual mistake and should be reformed. (FAXC, ¶35.) According to SJBD, a thirty-day close of escrow period correctly memorializes the intention of the parties with regard to plaintiff Bay 101's option to purchase the leased property. (*Id.*)

SJBD's FAXC continues to assert the same twelve causes of action asserted in its original cross-complaint.

On 23 January 2023, cross-defendant Vaccarezza filed an answer to SJBD's FAXC.

Also on 23 January 2023, cross-defendant Werner filed an answer to SJBD's FAXC.

On 21 February 2023, cross-defendants Bay 101 and Timothy jointly filed an answer to SJBD's FAXC.

On 31 August 2023, cross-defendant Vaccarezza filed the motion now before the court, a motion for summary judgment and/or adjudication of the claims asserted against him in cross-complainant SJBD's FAXC.

II. Analysis.

A. Cross-defendant Vaccarezza's motion for summary judgment/ adjudication.

1. Cross-defendant Vaccarezza's request for judicial notice is GRANTED.

In support of the motion for summary judgment/ adjudication, cross-defendant Vaccarezza requests judicial notice of the FAXC and two declarations from earlier summary adjudication motions. Evidence Code section 452, subdivision (d) states that the court may take judicial notice of "[r]ecords of any court of this state." This section of the statute has been interpreted to mean that the trial court may take judicial notice of the existence of the court's own records. Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Woodell* (1998) 17 Cal.4th 448, 455.) The request for judicial notice in support of cross-defendant Loren Vaccarezza's motion for summary judgment or, in the alternative, summary adjudication is GRANTED insofar as the court takes notice of the court records' existence, not necessarily the truth of any matters asserted therein.

2. Cross-complainant SJBD's evidentiary objections.

In opposition, defendant/ cross-complainant SJBD filed objections to evidence submitted by cross-defendant Vaccarezza in support of his motion for summary judgment/ adjudication. As the court did not deem the evidence material to its disposition, the court declines to rule on defendant/ cross-complainant SJBD's evidentiary objections in support of SJBD's opposition to cross-defendant Vaccarezza's motion for summary judgment/ 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).)

3. Cross-defendant Vaccarezza's motion for summary adjudication of the sixth cause of action [fraud (concealment)] of cross-complainant SJBD's FAXC is DENIED.

> [T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.

(*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248; see also *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606 (*Graham*).)

In relevant part, SJBD's FAXC alleges, rather generically, "Vaccarezza intentionally failed to disclose certain facts to [SJBD]." (FAXC, ¶59.) More specific allegations are found earlier in the FAXC where SJBD alleges, "Vaccarezza … participated in the drafting and negotiation of the [L]ease." (FAXC, ¶17.) "SJBD relied on the advice and representations of … Vaccarezza as to the content and meaning of the [L]ease." (FAXC, ¶18.) "At the time of its execution, SJBD believed that the [L]ease would be beneficial to both SJBD and [Bay 101], and in turn to the whole Bumb family." (FAXC, ¶19.) "However, while beneficial to [Bay 101], the [L]ease is not beneficial to SJBD." (FAXC, ¶20.) "Vaccarezza knew this" and did not inform "Brian or SJBD that [he] was not looking out for SJBD's best interests but were, instead, advocating for [Bay 101]." (*Id.*) "Vaccarezza … intentionally and fraudulently failed to disclose that [he was] actually representing the interests of [Bay 101], and not SJBD, in negotiating and drafting the [L]ease." (FAXC, ¶21.) "Vaccarezza … knew that … SJBD [did not] have enough physical space to provide 725 parking spaces to [Bay 101]." (FAXC, ¶24.) "[U]nbeknownst to SJBD at the time," Vaccarezza "further knew that Parcel No. 7 at Bay 101 Technology Place would be condemned by the City of San Jose, further reducing the land owned by SJBD, giving SJBD even fewer parking spaces available to offer [Bay 101]." (*Id.*) Vaccarezza "negotiated … a lease in favor of [Bay 101] that [he] knew contained terms that SJBD could not satisfy." (FAXC, ¶25.) "Also unbeknownst to SJBD, although Vaccarezza was employed by The Flea Market, Inc. and worked as general counsel for SJBD, Vaccarezza later admitted that he was conflicted and was representing the interests of [Bay 101] while also an employee of SJBD. … Vaccarezza [did not] disclose any conflict to SJBD, nor did [he] obtain SJBD's consent to the joint representation." (FAXC, ¶26.)

From these allegations, the court is able to discern at least three factual bases for concealment: (1) Vaccarezza failed to disclose to SJBD that it could not comply with a contractual term of the Lease obligating SJBD to provide Bay 101 with 725 parking spaces; (2) Vaccarezza failed to disclose to SJBD that condemnation would further hinder SJBD's ability to comply with a contractual terms of the Lease obligating SJBD to provide Bay 101 with 725 parking spaces; and (3) Vaccarezza failed to disclose a conflict of interest in jointly representing Bay 101 and SJBD without SJBD's consent.

a. Concealment.

In moving for summary adjudication of this sixth cause of action, cross-defendant Vaccarezza begins by asserting that he did not conceal any material fact from cross-complainant SJBD. Vaccarezza contends this assertion is supported by the further assertion that he did not negotiate the Lease. In this court's opinion, whether Vaccarezza negotiated the Lease is neither here nor there. By his own admission, Vaccarezza "acted on behalf of [SJBD]" in the review of a proposed lease with Bay 101.[32] Vaccarezza understood his "role was to review the draft Lease."[33]

It is not uncommon for a layperson or non-attorney to negotiate the terms of an agreement and thereafter engage an attorney to review the negotiated agreement and to advise of any legal pitfalls. The attorney's failure to disclose to the client that one of the terms of the contract, if entered into, would amount to a breach by the client is likely a negligent omission by the attorney. If the client could also establish that the attorney's non-disclosure was intentional and to induce the client to enter into the agreement to the client's harm, then there would be a basis for

[32] See ¶10 to the Declaration of Loren Vaccarezza in Support of Cross-Defendant Vaccarezza's Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Declaration Vaccarezza").

[33] See ¶12 to the Declaration Vaccarezza.

fraud. In such a scenario, the attorney's lack of involvement in the negotiation of the agreement does not save the attorney from liability. This scenario is, in essence, what SJBD alleges to have occurred here. Thus, it does not follow from Vaccarezza's lack of involvement in the negotiation of the Lease that he did not engage in concealment.

Vaccarezza argues further that there is no evidence that any particular lease term was excluded from or added to the Lease without SJBD's knowledge. The court views this as either a misunderstanding or mis-framing of the allegations concerning fraudulent concealment. The FAXC does not allege Vaccarezza's exclusion or addition of a term to the Lease without SJBD's knowledge. This second argument by Vaccarezza simply does not address the fraudulent concealment as alleged or otherwise show that SJBD's cause of action for fraudulent concealment has no merit. (Code Civ. Proc., §437c, subd. (p)(2)—"A … cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action.")

Finally, Vaccarezza understands he is being sued "because [the terms of the Lease] were not beneficial to SJBD." Vaccarezza contends, "[e]ven if true, that does not establish concealment."[34] Vaccarezza apparently places some significance on SJBD's allegation from paragraph 20 of the FAXC that, "while beneficial to [Bay 101], the [L]ease is not beneficial to SJBD." The court would agree with Vaccarezza that a particular Lease term's benefit (or lack thereof) is not determinative. However, as previously noted, it is cross-defendant Vaccarezza's initial burden on summary judgment or summary adjudication to affirmatively demonstrate that this sixth cause of action for fraudulent concealment has no merit. Vaccarezza has not met his burden by simply asserting that concealment is not established by SJBD's allegation that the Lease terms were not beneficial to SJBD.

b. Vaccarezza's knowledge that Lease terms were not beneficial to SJBD.

Despite citing the required elements for fraudulent concealment, Vaccarezza argues next that his knowledge that the Lease terms were not beneficial to SJBD is a requisite element for a claim of fraudulent concealment and asserts there is no evidence that he had such knowledge. To reiterate,

> The required elements for fraudulent concealment are (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact.

(*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606.)

A defendant's knowledge that a particular contract provision is not beneficial to the contracting party is not an element of a claim for fraudulent concealment. As currently constructed, the court does not follow or find any merit with Vaccarezza's argument. As noted above, one factual basis for concealment is Vaccarezza's failure to disclose to SJBD that it could not comply with a contractual term of the Lease obligating SJBD to provide Bay 101 with 725 parking spaces. In other words, Vaccarezza allegedly knew SJBD would be unable to comply with (or, stated differently, knew SJBD would be in breach of) a contractual obligation to provide 725 parking spaces to Bay 101. To overcome this basis for fraudulent concealment, Vaccarezza would have to affirmatively demonstrate that he, in fact, did not know SJBD would be unable to comply with or would be in breach of a contractual obligation to provide 725 parking spaces to Bay 101. [Presumably, the argument is that a defendant cannot conceal or suppress a material fact which the defendant himself is not aware of.] Vaccarezza has not met his burden in that regard.

c. SJBD cannot establish that the Lease terms were unfavorable.

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[34] See page 15, lines 21 – 22 of the Memorandum of Points and Authorities in Support of Cross-Defendant Loren Vaccarezza's Motion for Summary Judgment or Summary Adjudication ("Vaccarezza MPA ISO MSJ/MSA").

Finally, Vaccarezza contends summary adjudication of this sixth cause of action for fraudulent concealment is proper because SJBD cannot establish that the Lease terms were unfavorable to SJBD [or more detrimental to SJBD than to Bay 101]. Again, Vaccarezza's argument does not track the stated elements for a claim of fraudulent concealment. Vaccarezza's focus on the allegation that the Lease terms were "beneficial to [Bay 101] and "not beneficial to SJBD" has distracted Vaccarezza from a more pertinent analysis.

For the reasons stated above, cross-defendant Vaccarezza's motion for summary adjudication of the sixth cause of action [fraud (concealment)] of cross-complainant SJBD's FAXC is DENIED.

4. Cross-defendant Vaccarezza's motion for summary adjudication of the eighth cause of action [constructive fraud] of cross-complainant SJBD's FAXC is DENIED.

Constructive fraud is defined by Civil Code section 1573 to consist of, "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or, any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." (See also CACI, No. 4111.) "In addition to the traditional liability for intentional or actual fraud, a fiduciary is liable to his principal for constructive fraud even though his conduct is not actually fraudulent. Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship." (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562.) "[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent." (*Ibid.*)

In moving for summary adjudication of this eighth cause of action for constructive fraud, cross-defendant Vaccarezza argues simply that, "Because SJBD cannot establish concealment, SJBD cannot establish constructive fraud."[35] In essence, Vaccarezza relies on his arguments above made in connection with the sixth cause of action for fraudulent concealment.

In light of the court's ruling above, cross-defendant Vaccarezza's motion for summary adjudication of the eighth cause of action [constructive fraud] of cross-complainant SJBD's FAXC is DENIED.

5. Cross-defendant Vaccarezza's motion for summary adjudication of the fourth cause of action [professional negligence] of cross-complainant SJBD's FAXC is DENIED.

"In order to establish a cause of action for legal malpractice the plaintiff must demonstrate: (1) breach of the attorney's duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a proximate causal connection between the negligent conduct and the resulting injury; and (3) actual loss or damage resulting from the negligence." (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 699; see also *Hall v. Kalfayan* (2010) 190 Cal.App.4th 927, 933; see also CACI No. 600.)

a. Breach.

SJBD's fourth cause of action alleges, in relevant part, Vaccarezza was "negligent because [he] failed to use the skill and care that a reasonably careful attorney would have used in similar circumstances, including, but not limited to, breaching [his] fiduciary dut[y] to SJBD and intentionally failing to disclose certain facts to [SJBD], such as that the lease contained terms that were invalid, that SJBD could not fulfill, and/or that were not in the best interests of SJBD." (FAXC, ¶49.)

Thus, SJBD specifically pleads two non-exclusive examples of breach: (1) breach of fiduciary duty; and (2) failure to disclose facts. Yet, in moving for summary adjudication, Vaccarezza leads by asserting he did not breach his duty as an attorney because he did not negotiate the Lease. Vaccarezza next asserts he did not breach

[35] See page 19, lines 5 – 6, of the Vaccarezza MPA ISO MSJ/MSA.

his duty of care because there is no evidence he followed Timothy's instructions to include specific lease terms. Finally, Vaccarezza concludes by asserting he did not breach because he did not have any conflict of interest.

Vaccarezza does not address the breach based upon the alleged failure to disclose. Presumably, Vaccarezza is again relying on the arguments he asserted with regard to the sixth cause of action, above, for fraudulent concealment. However, as discussed above, Vaccarezza has not met his burden of demonstrating the concealment cause of action is without merit. Consequently, Vaccarezza does not sufficiently demonstrate this fourth cause of action for professional negligence is without merit[36] since concealment (failure to disclose) is one of the factual bases for breach.

b. Causation or damage.

Alternatively, Vaccarezza contends the cause of action for professional negligence fails because SJBD cannot establish Vaccarezza's negligence caused SJBD to suffer any damages.

> In a client's action against an attorney for legal malpractice, the client must prove, among other things, that the attorney's negligent acts or omissions caused the client to suffer some financial harm or loss. When the alleged malpractice occurred in the performance of transactional work (giving advice or preparing documents for a business transaction), must the client prove this causation element according to the "but for" test, meaning that the harm or loss would not have occurred without the attorney's malpractice? The answer is yes.

(*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1235.)

On this issue of causation and damages, the court observes a triable issue of material fact exists. In moving for summary adjudication, Vaccarezza asserts there were no terms in the Lease which were unfavorable to SJBD. One of the purportedly unfavorable terms relates to Article 17.1 of the Lease. "SJBD argues that the Lease terms do not benefit SJBD because, pursuant to Article 17.1 of the Lease, Bay 101 may sublet to a restaurant without SJBD's consent. However, there is no evidence that Article 17.1 was 'hidden' from SJBD or that Vaccarezza would have known that Article 17.1 was unfavorable to SJBD."[37] It is the court's opinion that this fact (and the underlying evidence) proffered by Vaccarezza does not speak to the issue of causation or damages, but even if it did, SJBD proffers evidence in opposition which does address the issue of causation and damages and presents at least a triable issue of material fact with regard to causation and damages.

Specifically, SJBD proffers the following: Vaccarezza was aware of Article 17.1 but did not discuss that provision with Brian.[38] Article 17.1 provides that Bay 101 has the ability to sublease the portion of the building designed to be a restaurant space, without an obligation to pay any of those proceeds to [SJBD], the landlord.[39] SJBD invested approximately $7 million to build out the restaurant space with the intent that the investment would be recouped through the rent provisions in the Lease.[40] Article 17.1 was not referenced in the Lease Term Sheet that Vaccarezza reviewed with Brian before the lease was signed.[41] Vaccarezza neither mentioned that provision nor explained Bay 101's rights with respect to subleasing the restaurant.[42] Had Brian been aware of Article 17.1

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[36] Additionally, Vaccarezza fails to completely dispose of the 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).)

[37] See Cross-Defendant Loren Vaccarezza's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, or in the Alternative, Summary Adjudication ("Vaccarezza UMF"), Issue No. 3, Fact No. 85.

[38] See Defendant and Cross-Complainant S.J. Bayshore Development LLC's Response to Cross-Defendant Loren Vaccarezza's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, or in the Alternative, Summary Adjudication ("SJBD Response"), Issue No. 3, Fact No. 85.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

and understood it would prevent SJBD from recouping its $7 million investment and otherwise earning revenues from the restaurant, Brian would not have agreed to that term.[43]

Accordingly, cross-defendant Vaccarezza's motion for summary adjudication of the fourth cause of action [professional negligence] of cross-complainant SJBD's FAXC is DENIED.

6. Cross-defendant Vaccarezza's motion for summary adjudication of the third cause of action [breach of fiduciary duty] of cross-complainant SJBD's FAXC is DENIED.

"[A] breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence." (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 (*Stanley*).) "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432; see also CACI, No. 4100.) "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' [Citations omitted.]" (*Stanley*, *supra*, 35 Cal.App.4th at p. 1086.) An attorney's fiduciary duty includes a duty of loyalty to the client.

> Our Supreme Court recently reaffirmed the long-standing definition of an attorney's duty of loyalty to his or her client, as follows: " 'One of the principal obligations which bind[s] an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client. [Citations.] This obligation is a very high and stringent one. It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. [Citation.] *By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests.* Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.' " [Citations omitted.]

(*Stanley*, *supra*, 35 Cal.App.4th at pp. 1089-1090; italics original.)

Vaccarezza moves for summary adjudication of this breach of fiduciary duty cause of action by arguing that he did not breach. "Whether an attorney has breached a fiduciary duty to his or her client is generally a question of fact." (*Stanley*, *supra*, 35 Cal.App.4th at p. 1087; see also *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890, disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239.)

SJBD's third cause of action alleges Vaccarezza, as an attorney representing SJBD, owed SJBD a duty of loyalty. (FAXC, ¶46.) Vaccarezza breached the duty of loyalty by acting against the interests of SJBD and in favor of Bay 101. (FAXC, ¶47.)

Vaccarezza acknowledges SJBD's allegation in the FAXC that Vaccarezza "admitted that he was conflicted and was representing the interests of [Bay 101] while also an employee of SJBD." (FAXC, ¶26.) However, in moving for summary adjudication, Vaccarezza contends that when he told Brian he "felt conflicted," it was not an actual "conflict" in the "conflict of interest" sense.[44] The underlying evidence to support this assertion is Brian's testimony regarding the circumstances of this alleged admission by Vaccarezza. Brian recounts the circumstances and states that Brian queried Vaccarezza "if he felt conflicted and [Vaccarezza] said he was."[45] In

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[43] See ¶10 to the Declaration of Brian Bumb in Support of Defendant and Cross-Complainant S.J. Bayshore's Opposition to Cross-Defendant Loren Vaccarezza's Motion for Summary Judgment.

[44] See Vaccarezza UMF, Issue No. 4, Fact No. 107.

[45] *Id*.

this court's opinion, this evidence is vague and does not lead the court to the conclusion that the admitted "conflict" is or is not a "conflict of interest" in the legal sense. More importantly, Vaccarezza has not met his burden of affirmatively showing that a breach of fiduciary duty cannot be established.

Vaccarezza argues additionally that he did not breach his fiduciary duty because he did not negotiate the Lease. As the court has already noted above, an attorney's lack of involvement in the negotiation of an agreement does not save the attorney from liability. Even if the court were to accept Vaccarezza's assertion that he did not negotiate the Lease terms, Vaccarezza has not met his burden of affirmatively showing that a breach of fiduciary duty cannot be established.

Accordingly, cross-defendant Vaccarezza's motion for summary adjudication of the third cause of action [breach of fiduciary duty] of cross-complainant SJBD's FAXC is DENIED.

7. Cross-defendant Vaccarezza's motion for summary adjudication of the ninth cause of action [aiding and abetting] of cross-complainant SJBD's FAXC is DENIED.

"Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574; see also *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879; see also *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325 – 1326.) "[W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749, superseded by statute on other grounds.)

Vaccarezza moves for summary adjudication of SJBD's ninth cause of action for aiding and abetting by, essentially, incorporating his arguments to the causes of action discussed above to assert that since he did not engage in any tortious conduct, he is not liable for aiding and abetting. In light of the court's rulings above, cross-defendant Vaccarezza's motion for summary adjudication of the ninth cause of action [aiding and abetting] of cross-complainant SJBD's FAXC is DENIED.

8. Cross-defendant Vaccarezza's motion for summary adjudication of cross-complainant SJBD's prayer for punitive damages is DENIED.

Pursuant to Civil Code section 3294, punitive damages may be recovered "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Vaccarezza moves for summary adjudication of SJBD's claim for punitive damages on the basis that there is no evidence that he acted with malice, oppression, or fraud. However, in light of the court's ruling above, Vaccarezza has not eliminated potential liability for fraud.

III. Order.

Cross-defendant Vaccarezza's motion for summary judgment or, in the alternative, summary adjudication is DENIED.

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Calendar Line 6

Case Name: *Paterson v. Lo et al.*
Case No.: 22CV406392

I. Factual and Procedural Background

Plaintiff Laura Paterson ("Plaintiff") brings this premises liability action against defendants Daniel Muk-Sing Lo ("Lo") and Shelia Lee ("Lee") (collectively, "Defendants").

On or around November 20, 2020, Plaintiff was walking on a public sidewalk immediately adjacent to Defendants' property ("the Property"). (Complaint, ¶ 6.) Defendants own, manage, and maintain the Property. (*Ibid*.) Defendants failed to inspect, maintain, monitor, and keep free from hazards an area of landscape adjacent to the sidewalk which had landscaping bender board protruding from the ground and encroaching onto the sidewalk in the area nearest the Property's driveway. (*Ibid*.)

The protruding bender board was a hidden and dangerous obstacle to Plaintiff and proximately caused Plaintiff to trip, fall, and sustain injuries to her health, strength, and activity. (Complaint, ¶¶ 6, 11.) Plaintiff additionally suffered severe injuries to her body which resulted in great mental, physical, emotional, and nervous pain and suffering. (*Id.* at ¶ 11.) Plaintiff was required to employ physicians and surgeons to examine, treat, and care for her and has incurred and will continue to incur medical and related expenses. (*Id.* at ¶ 12.) Plaintiff was prevented from attending her occupation and her earning capacity has been greatly impaired. (*Id.* at ¶ 13.)

On October 28, 2022, Plaintiff filed her Complaint, asserting the following causes of action against Defendants:

1) Negligence; and
2) Premises liability.

On August 21, 2023, Defendants filed a motion for summary judgment, currently before the Court. Plaintiff opposes the motion.

II. Motion for Summary Judgment

A. 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).)

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 v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id*. 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. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact 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." (*Ibid*.) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id*. at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar, supra*, 25 Cal.4th at p. 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.)

B. Plaintiff's Request for Judicial Notice

In support of her motion for summary judgment, Plaintiff requests the Court take judicial notice of the following:

1) Cupertino Municipal Code, section 14.08.020 (RJN, Ex. A);
2) Cupertino Municipal Code, section 14.08.010 (RJN, Ex. B); and
3) ASTM F1637-21 (RJN, Ex. C).[46]

The request for judicial notice of RJN Ex. A and Ex. B is GRANTED. (See Evid. Code, § 452, subd. (b); see also *The Kennedy Com. v. City of Huntington Beach* (2017) 16 Cal.App.5th 841, 852 [court may take judicial notice of a city municipal code].)

The request for judicial notice of RJN Ex. C is DENIED. Plaintiff asserts that judicial notice of Ex. C is proper under Evidence Code section 452, subdivisions (a) and (b). However, the contents and provisions of Ex. C are not laws of any state, a private act of the Congress of the United States, an act of the Legislature of this state, or a regulation or legislative enactment issued by or under the authority of the United States or any public entity in the United States.

C. Plaintiff's Objections

Plaintiff objects to the following:

1) Ex. D of the Rickett Declaration on the grounds it is incompetent evidence, lacks foundation, and is vague as to time. The objection is SUSTAINED. Neither the exhibit nor the Rickett Declaration states the date and time of the photograph or who took the photograph. (See *Fajardo v. Dailey* (2022) 85 Cal.App.5th 221, 228 (*Fajardo*) [trial court sustained objection to admissibility of photographs where defendant did not state who took photographs].)
2) Ex. H of the Rickett Declaration on the grounds it is incompetent evidence, lacks foundation, and is vague as to time. Plaintiff raises this objection as "anticipatory" as Defendant has not filed Ex. H with the Court. Given that the Court cannot rely on evidence not before it, it declines to rule on this objection. (See Code Civ. Proc., §

[46] ASTM International, formerly American Society of Testing and Materials, has established standards with respect to safe walking surfaces. (See e.g., *Paige v. Safeway Inc.* (2022) 74 Cal.App.5th 1108, 1112.)

437c, subd. (q) [the court need rule only on objections to evidence material to the disposition of the motion].)

D. Analysis

Defendants argue they are entitled to summary judgment of the complaint because Plaintiff cannot establish a claim for negligence or premises liability.

"Premises liability is a form of negligence . . . and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619.)

"The elements of a cause of action for premises liability are the same as those for negligence. Accordingly, the plaintiff must prove, a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury." (*Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1207 [internal citations and quotations omitted].)

1. Duty

"It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [overruled in part and superseded by statute on other grounds].) "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206 [internal citations omitted].) Further, where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it. (*Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 476 (*Moore*).)

"Although liability might easily be found where the landowner has actual knowledge of the dangerous condition, '[the] landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable.'" (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330.)

> [T]he plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence. Whether this condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury. There are no exact time limits. Rather, each accident must be viewed in light of its own unique circumstances.
>
> Thus, where . . . there is no direct evidence of the length of time the dangerous condition existed, the plaintiff can demonstrate the [defendant] had constructive notice of the dangerous condition by showing that the site had not been inspected within a reasonable period of time. In other words, the plaintiff may raise an inference that the condition existed long

> enough for the owner to have discovered it. It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care. Nevertheless, it is still the plaintiff who has the burden of producing evidence and who must prove that the owner had constructive notice of the hazardous condition.

(*Moore*, *supra*, 111 Cal.App.4th at p. 477 [internal citations and quotation omitted].)

While it would be Plaintiff's burden at trial to show Defendants had notice of the defect in time to correct it, Defendants bear the initial burden in moving for summary judgment to demonstrate that they did not have actual or constructive notice of the purported dangerous condition in time to correct it.

Here, Defendants assert they did not have actual or constructive notice of the defect. To support this assertion, they proffer evidence that they made no landscaping changes to the property for at least three years that would have alerted them to any protrusions by the bender board (Rickett Decl., Ex. C [Defendants' Responses to Special Interrogatories]); and that they received no other complaints about the bender board or knew of any other falls because of the board; therefore, they had no actual notice (Rickett Decl., Ex. G [Defendants' Declarations]); and that Plaintiff is unaware of any complaints or other falls due to the bender board (Ricket Decl., Ex. F, p. 21:6-11 [Plaintiff's deposition testimony stating she is unaware of anyone else who has fallen because of the board].)[47] While this evidence supports Defendants' contention that they did not have actual notice of the defect, Defendants do not proffer evidence addressing whether they had constructive notice of the defect. Accordingly, Defendants have failed to meet their initial burden of production to make a prima facie showing of the nonexistence of a duty.[48]

Even if Defendants had met their burden, Plaintiff proffers evidence that Defendants instructed their gardener to install the bender board, "roughly" around 2013 (Davis Decl., Ex. F, p. 14:5-21), and likely after February 2016 (*id.* at Exs. E; F, pp. 20:9-24:21). Plaintiff relies on the expert declaration of Greg Marell[49] who states that the board was installed by an unlicensed landscaper, the gardener who installed the board did not follow manufacturer instructions, and the installation did not meet safety industry standards. (Marell Decl., p. 4:8-20.) Finally, in deposition testimony, Defendants stated they did not inspect the bender board after installation, or they have no memory of inspection. (Davis Decl., Ex. F pp. 40:11-22; 57:18-59:10.)

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[47] Plaintiff's awareness of other falls due to the bender board is irrelevant to Defendants' actual or constructive knowledge of the bender boards. (See e.g., *Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 806 ["the *owner* must have either actual or constructive knowledge of the dangerous condition"][emphasis added].)

[48] Defendants also assert they have no duty to warn Plaintiff because any danger was open and obvious. (MSJ, p. 5:1-2, 18-19.) However, "[t]he modern and controlling law on this subject is that 'although the obviousness of a danger may obviate the duty to *warn* of it existence, if it is *foreseeable* that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it), there may be a duty to remedy the danger, and the breach of that duty may in turn form the basis for liability[.]" (*Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184 [emphasis original].)

[49] Greg Marell is a property safety and property inspection expert who conducts inspections and provides opinions on real property, homes, commercial buildings, construction defect claims, housing violations building code violations and other property condition and property safety matters. (Marell Decl., ¶¶ 2-3.) He holds several professional licenses. (*Id.* at p. 2, ¶ 3.)

Thus, Plaintiff meets her burden by raising a reasonable inference that the hazardous condition existed long enough for Defendants to have discovered it, they did not inspect it during this time, and they therefore owed her a duty of care.

2. Trivial Defect

Generally, a property owner cannot be held liable for damages, in an action for premises liability, caused by a minor, trivial, or insignificant defect in property. (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566.) This is the case even if the property owner had actual notice of the defect. (*Ursino v. Big Boy Rests.* (1987) 192 Cal.App.3d 394, 398.) The "trivial defect" doctrine originally shielded public entities from liability where conditions on public property created a risk of a minor or trivial nature. (*Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 27.) Private property owners may also rely on this doctrine. (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927.) Although sometimes referred to as the "trivial defect defense," it is not a true defense, rather an aspect of duty which the plaintiff has the burden of proof to establish. (*Stathoulis, supra*, 164 Cal.App.4th at p. 566.)

"In the sidewalk-walkway context, the decision whether defect is dangerous as a matter of law does not rest solely on the size of the [defect] in the walkway, since a tape measure alone cannot be used to determine whether the defect was trivial. Although a defect's size may be one of the most relevant factors to the court's decision, the court also must consider all of the circumstances surrounding the accident that might make the defect more dangerous than its size alone would suggest[.]" (*Fajardo, supra,* 85 Cal.App.5th at p. 227.)

In this case, Defendants' motion merely asserts that 1) there were no aggravating circumstances such as concerning weather or low visibility and 2) that there was nothing obstructing the visibility of the bender board. (MSJ, p. 9:5-7, citing UMF Nos. 3, 7.) To support the first assertion, Defendants provide evidence of Plaintiff's deposition where she states that it was a clear day, the ground was not wet, and it was sunny. (Rickett Decl., Ex. F, p. 13:9-14.) To support the second assertion, that nothing was obstructing the visibility of the bender board, Defendants again cite to Plaintiff's deposition where she states that she was scanning forward and looking around at the time of the accident. (See *Id.* at p. 22:9-13.) This evidence, however, does not support the contention that there was nothing obstructing the visibility of the bender board. Further, Defendants do not address the size of the defect. (See *Ursino, supra*, 192 Cal.App.3d at p. 397 [court should look at circumstances surrounding accident; however, "size may be one of the most relevant factors to the decision"].) Based on the foregoing, Defendants do not meet their burden as to trivial defect.

Even if Defendants had met their burden, Plaintiff provides evidence to create a triable issue of material fact. Specifically, Plaintiff proffers expert evidence that the bender board protruded approximately 4 inches above the ground and encroached one half inch onto the sidewalk. (Marell Decl., p. 3, ¶ 3.) Plaintiff's expert also states that any change in walkway levels greater than one-quarter of an inch is considered a tripping hazard. (*Id.* at p. 3, ¶ 5.) Further, the encroaching bender board was a violation of Cupertino's municipal code and caused Plaintiff to trip and sustain injuries. (*Id.* at p. 3, ¶¶ 4, 5.) Thus, there is a factual issue as to whether the defect is trivial.

3. Breach of Duty

Defendants additionally assert that Plaintiff cannot prove they breached a duty of care, as Plaintiff has failed to produce any evidence to support the claim that the bender board protruded into the sidewalk at any time. (MSJ, p. 4:10-14.)

"Summary judgment law in this state . . . continues to require a defendant moving summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. . . . [T]he defendant *must* 'support' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.'" (*Aguilar*, *supra*, 25 Cal.4th at pp. 854-855 [emphasis original]; see also *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891; *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 808.) Thus, Defendants' first argument is insufficient to meet their burden. Nevertheless, Plaintiff provides expert testimony that the bender board was protruding onto the sidewalk. (Marrel Decl., p. 3, ¶ 3.)

Defendants next assert that during discovery they have produced photographs from January 2021 that show no protrusion of the subject bender board into the sidewalk and that they made no landscaping changes to the Property in 2019, 2020, or 2021. (*Id.* at p. 4:16-21, citing UMF No. 10.) UMF No. 10 states that Defendants made no landscaping change to the Property in 2019, 2020, or 2021 and cites to the Rickett Declaration, Ex. C, Defendants' Responses to Special Interrogatories. However, the evidence cited in support of UMF No. 10 does not support the assertion that Defendants produced photographs showing no protrusion of the bender board onto the sidewalk. Instead, the evidence cited in support of UMF No. 10 shows Defendants responded to Special Interrogatories indicating they did not make changes to the Property in 2019, 2020, or 2021. Therefore, Defendants' second argument is likewise insufficient to meet their burden.

III. Conclusion and Order

The motion for summary judgment is DENIED. Since the Court finds the existence of triable issues of material fact, the Court declines to address Plaintiff's spoliation argument.

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Calendar Line 7

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Calendar Line 8

22CV398744
Garcia v. PSI

After reviewing the parties' papers, the Court GRANTS Defendant's motion to compel for the following reasons:

1. The Court finds that Plaintiff's former counsel received Plaintiff's deposition notice, and provided notice to Plaintiff. (Giorello Decl., Ex. D.)[50] Plaintiff or her counsel never objected to it, and Plaintiff didn't show up. The Court credits Exhibit D over Plaintiff's declaration, given that when Exhibit D was prepared, this motion had not been filed.

2. That Plaintiff may have been self-represented for a time and speaks primarily Spanish does not absolve her of responsibility to appear for deposition.

3. There was sufficient meet and confer before this motion was filed.

Plaintiff must sit for an in-person deposition within 30 days of date of service of this order. The Court will not condition this deposition on paying costs or changing the location, given that Plaintiff's former counsel waived all objections to the notice by not objecting to the notice. Similarly, whether or not the notice was defective as Plaintiff now claims, Plaintiff's past counsel waived all of her objections by not objecting to the notice.

The Court will not award terminating sanctions, as they would be too extreme—at least at this time. As for monetary sanctions, since the Court granted Defendant's motion, the Court will not assess sanctions against Defendant. As for sanctions sought against Plaintiff, the Court will award $2500 in sanctions ($5000, as requested by Defendant, is excessive), but this amount is payable only if Plaintiff does not show up for her deposition. If she does show up, then no sanctions need be paid.

Why is the Court doing this? Because while the Court credits Exhibit D, there may well have been a miscommunication between Plaintiff and her former counsel. The Court does not want to unduly sanction Plaintiff. But if Plaintiff doesn't show up again, then this amount of sanctions would be warranted. (The Court takes no position on whether terminating sanctions would be appropriate if Plaintiff again failed to show up for her deposition.)

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[50] Plaintiff's evidentiary objections to this exhibit are OVERRULED.

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20CV368062
Buck v. Blu Homes et al.

In this construction case, Plaintiff has settled with all defendants and co-defendants, and now seeks a judicial determination of good faith under Code of Civil Procedure section 877.6 The only party opposing this motion is Defendant ASR, which has not settled its cross-complaint against Plaintiff and Blu Homes.

Section 877.6, subdivision (a)(1) provides in relevant part: "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors." If the trial court makes a finding of good faith, then that determination "shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (§ 877.6, subd. (c).)

At the hearing on the section 877.6 motion, the party claiming the settlement was not in good faith has the burden of proof on this issue. (§ 877.6, subd. (d).) Generally, the party challenging the settlement must provide evidence supporting its position, as opposed to just argument. (See *City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1263.) A court also can rely on its own experience, and also that of experts in the field. (See *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs*. (1985) 38 Cal.3d 488, 500 (*Tech-Bilt*).)

In *Tech-Bilt*, "the California Supreme Court identified certain nonexclusive factors that a trial court must consider in determining whether a settlement was made in good faith within the meaning of section 877.6: '[1] a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, [2] the amount paid in settlement, [3] the allocation of settlement proceeds among plaintiffs, and [4] a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include [5] the financial conditions and insurance policy limits of settling defendants, as well as [6] the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants.' (*Tech–Bilt*, *supra*, 38 Cal.3d at p. 499, 213 Cal.Rptr. 256, 698 P.2d 159.)" (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 959–960.)

The key question is whether the settlement is "grossly disproportionate" to what a reasonable person, at the time of settlement, would estimate the settling defendant's liability to be. (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 499.) Or put more colorfully, the challenging party must prove that "the settlement is so far 'out of the ballpark' in relation to these [above-listed] factors as to be inconsistent with the equitable objectives of the statute [§ 877.6]." (*Id*. at pp. 499-500.)

Here, the Court believes the settlement is within the ballpark and not grossly disproportionate to a reasonable estimate of the settling parties' liability. The settlement amount seems appropriate, no fraud or collusion seems to exist to harm ASR, and the settlement amount appropriately accounted for the insurance policy Blu Homes had (Blu Homes went out of business during the litigation). The Court therefore GRANTS Blu Home's section 877.6 motion.

So what is the impact of this ruling on ASR's cross-claims? The Court doesn't think it has any impact. ASR's cross-claims are not based on equitable indemnity or contribution—rather, they are breach of implied warranty claims under the *Spearin* doctrine. There is not enough evidence for the Court to determine that these claims is a thinly-veiled attempt at recovering only attorney fees, as Blu Homes wants the Court to find. The *Bay Development* case cited by Blu Homes doesn't apply here because we don't have equitable indemnity claims.

Therefore, the Court GRANTS Blu Homes' section 877.6 motion and finds this was a good-faith settlement, but DENIES its request to dismiss ASR's cross-claims.

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