SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20 (will be heard in Department 6)
Honorable Evette D. Pennypacker, Presiding (for Hon. Socrates Manoukian)
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: May 21, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

THIS CALENDAR WILL BE CALLED IN DEPARTMENT 6. IF YOU PLAN TO ATTEND REMOTELY, PLEASE USE THE DEPT. 6 TEAMS LINK FROM THE COURT WEBSITE.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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

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

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

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

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

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
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FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

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Date: June 20, 2024
Time: 12-1:00
Place: Microsoft Teams: https://msteams.link/YGLE

LINE #	CASE #	CASE TITLE	RULING
1	23CV410186	John Kellerby et al vs Dr. Richard L. Cain Ph. D	Parties are ordered to appear for the debtor's examination.
2	2005-1-CV-039140	G. GRELLAS vs D. CHONG, et al	Parties are ordered to appear for the debtor's examination.
3	22CV408584	Dawn Schultz et al vs DOE 1 et al	Motion withdrawn by moving party May 9, 2024.
4	23CV426428	Harrison Wang vs Palo Alto Medical Group, Inc.	PAFMG's demurrer to the second cause of action in Dr. Wang's FAC is OVERRULED. Scroll to line 4 for complete ruling. Court to prepare formal order.
5	23CV427416	ANA ALVAREZ et al vs JOEL BARRIENTOS	Meta's demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Scroll to line 5 for complete ruling. Court to prepare formal order.
6	21CV388455	Ashish Sagar vs Javier Vasquez et al	Defendant Shah Karimi's motion for summary judgment is DENIED. Plaintiff's motion for attorneys' fees is DENIED. Scroll to line 6 for complete ruling. Court to prepare formal order.
7	22CV401891	Zowie Mason et al vs Aurelia Amezcua	Costco Wholesale Corporation's and Ricky Lazaro Reyna's motion for summary judgment is CONTINUED to September 10, 2024 at 9 a.m. so that Plaintiff may have the opportunity to take Aurelia Amezcua's deposition before the court rules on Defendants' motion. (Code Civ. Proc. §437c(h). Amezcua is being criminally prosecuted in Stanislaus County for the same accident at issue in Defendants' summary judgment motion. Accordingly, Plaintiffs have been unable to depose Amezcua, who has relevant personal knowledge concerning the crash. Amezcua is scheduled for preliminary hearing in the criminal case in July. The court continues the present motion to a time thereafter. This order will be reflected in the minutes.
8-9	23CV410044	Mark Smith vs Terry Drymonacos	It appears the motion to compel deposition and for protective order were previously addressed by Judge Manoukian and put over to this date for compliance. These matters are therefore off calendar.
10	23CV415868	Maxie Smith vs Harry Mehta	Defendant Harry Mehta's motion to compel Plaintiff's responses to form interrogatories (set one), special interrogatories (set one), and request for production of documents (set one) and request for sanctions is GRANTED. A notice of motion with this hearing date and time was served by U.S. mail on March 26, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Moreover, these discovery requests were served on September 11, 2023. When Defendant received no response, he sent a meet and confer letter to Plaintiff on October 19, 2023. To date, Plaintiff still has not served any responses to these discovery requests. Accordingly, Plaintiff is ordered to (1) serve verified, code compliant responses without objections to these discovery requests and (2) and pay Defendant $480 (reduced because no opposition filed) within 20 days of service of this formal order, which the Court will prepare.
11	21CV377917	Micro Space Innovations, LLC vs Calm Down Crazy, LLC	Jesse King's application for pro hac vice admission is GRANTED. Court to use order on file.
12	22CV399627	CALIFORNIA DRYWALL CO., a California corporation vs ATHISH RAO	California Drywall Co.'s motion for clarification is GRANTED. Moving party to prepare amended form of order.
13	22CV407215	Florentina Velazquez Diaz et al vs Alfredo Velazquez	The parties' motion to continue trial date and associated dates is GRANTED. Plaintiff to promptly submit form of order for the Court's signature.
14	22CV408499	Dagmar Horvath vs Mandy Brady	Defendant's motion for attorneys' fees is GRANTED. Scroll to line 14 for complete ruling. Court to prepare formal order.

15	23CV419028	Flavio Pando et al vs Wells Fargo Bank, N.A.	Defendant Cellular Sales Management Group, LLC's motion to compel arbitration and stay proceedings is GRANTED. Scroll to line 15 for complete ruling. Court to prepare formal order.
16	23CV425911	Joeanna DeFranco vs Target Corporation	Plaintiff's motion to set aside default pursuant to Code of Civil Procedure section 473(b) does not include any memorandum or declaration to support the relief sought. However, it is Plaintiff seeking to set aside default. The Court orders the parties to appear at the hearing and explain the basis for the relief sought. If Plaintiff fails to appear as ordered, this motion will be denied without prejudice.

Calendar Line 4
Case Name: *Harrison Wang, M.D. v. Palo Alto Foundation Medical Group, et al.*
Case No.: 23CV426428

Before the Court is defendant Palo Alto Foundation Medical Group's demurrer to plaintiff's first amended complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Factual and Procedural Background

Plaintiff Harrison Wang, M.D., an Asian-American male, is an experienced radiologist employed by and a shareholder of defendant Palo Alto Foundation Medical Group, Inc. ("PAFMG"). (First Amended Complaint ("FAC"), ¶¶5 and 13.) Defendant Sutter Bay Medical Foundation ("Sutter") was a joint employer of Dr. Wang along with defendant PAFMG. (FAC, ¶¶7 and 10.) Defendants Sutter and PAFMG (collectively, "Employers") do business at the same address. (FAC, ¶10.) While defendant PAFMG paid. Wang, defendant Sutter also participated in the supervision of Dr. Wang's work schedule, duties, assignments, review of performance and conduct, and controlled his workplace equipment. (FAC, ¶11.) Dr. Wang used defendant Sutter's email address, received workplace requests indicating defendant Sutter information and letterhead, and received workplace guidance and discipline from both defendants Sutter and PAFMG. (FAC, ¶12.)

Over the past several years, Dr. Wang repeatedly (dozens of times) expressed concerns to his supervisors that patients were undergoing unnecessary exposure to radiation during radiology procedures. (FAC, ¶¶14 and 17.) On several other occasions, Dr. Wang also complained that the wrong patients were being radiated and that the wrong part of a patient's body was radiated. (FAC, ¶¶15 and 17.) Dr. Wang's complaints were ignored by defendants. (FAC, ¶18.)

Throughout Dr. Wang's employment, he objected to performing a hysterosalpingogram ("HSG"), a procedure to view the inside of a women's uterus with a toxic dye, when there was a possibility that female patient could be pregnant. (FAC, ¶19.) During Dr. Wang's nine-year employment with defendants, Dr. Wang also repeatedly complained about the use of a poor-quality ultrasound device used to screen for breast cancer. (FAC, ¶20.)

Between approximately March 2020 and September 2023, Dr. Wang made complaints about Employers' failure to require patients to keep masks on during consumption of Barium for radiology

procedures. (FAC, ¶21.) Instead of taking corrective action, defendants retaliated against and reprimanded Dr. Wang. (FAC, ¶22.) Employers also ignored Dr. Wang's complaints about the failure to require patients be tested for Covid-19 prior to a radiology procedure. (FAC, ¶23.) During that same period, Dr. Wang's requested Protective Personal Protection equipment but Employers failed to provide such equipment. (FAC, ¶24.)

The primary reason Dr. Wang's warnings were unheeded was due to Dr. Wang's race and gender as an Asian-American man who was expected to comport with a stereotype of weakness, docility, and compliance. (FAC, ¶27.) Another Asian-American male doctor who fit this stereotype received better treatment than Dr. Wang. (FAC, ¶28.) Defendants failed to take any action to address Dr. Wang's complaints, but took immediate action when a white male made the same complaint. (FAC, ¶29.) During the pandemic, Dr. Wang's work environment included hurtful references by other employees and staff including, "China virus," "Goddamn China," and "Dammit China." (FAC, ¶¶31, 33, and 36.) Colleagues at work made inappropriate and offensive remarks based on sex, gender, and/or national origin. (FAC, ¶¶37-38.)

On 17 November 2023, Dr. Wang filed a complaint against defendant Employers.

On 23 January 2024, defendant PAFMG filed a demurrer to Dr. Wang's complaint which prompted Dr. Wang to file, on February 7, 2024, the operative FAC which asserts:

(1) Violation of Labor Code Section 1102.5

(2) Violation of Health & Safety Code Section 1278.5 (Patient Safety)

(3) Violation of Labor Code Sections 6310 – 6311 (Employee Safety)

(4) Gender & Race Hostile Work Environment Violation of Government Code Section 12940, et seq.

(5) Gender & Race Discrimination in Violation of Government Code Section 17290

(6) Retaliation under FEHA – Govt. Code 12940 et seq.

(7) Wrongful Termination in Violation of Public Policy

On March 6, 2024, defendant Sutter filed an answer to plaintiff Dr. Wang's FAC.

On March 26, 2024, defendant PAFMG filed the motion now before the court, a demurrer to the second cause of action of Dr. Wang's FAC.

II. PAFMG's demurrer to Dr. Wang's second cause of action is OVERRULED.

In his second cause of action, Dr. Wang invokes whistleblower protections under Health and Safety Code section 1278.5:

> The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those accreditation and government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations.

(Health & Saf. Code, §1278.5, subd. (a).)

> (1) A health facility shall not discriminate or retaliate, in any manner, against a patient, employee, member of the medical staff, or other health care worker of the health facility because that person has done either of the following:
>
> (A) Presented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity.
>
> (B) Has initiated, participated, or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity.
>
> (2) An entity that owns or operates a health facility, or that owns or operates any other health facility, shall not discriminate or retaliate against a person because that person has taken any actions pursuant to this subdivision.

(Health & Saf. Code, §1278.5, subd. (b).)

By its terms, Health and Safety Code section 1278.5 imposes liability against a "health facility" or an "entity that owns or operates a health facility." PAFMG contends it cannot be liable for a violation of Health and Safety Code section 1278.5 because it is not a "health facility" which is defined by that section to mean "a facility defined under this chapter, including, but not limited to, the facility's administrative personnel, employees, boards, and committees of the board, and medical staff." (Health & Saf. Code, §1278.5, subd. (i).)

Health and Safety Code section 1250, in turn, states:

> As used in this chapter, "health facility" means a ***facility, place, or building*** that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer, and includes the following types: …

(Emphasis added.)

PAFMG focuses the court's attention on that portion of the Health and Safety Code section 1250 which defines health facility as "a facility, place, or building" and asserts that it is none of these. Instead, defendant PAFMG declares it "is a group of clinicians." This is a factual assertion, not an allegation in Dr. Wang's FAC or from a judicially noticeable source. As PAFMG recognizes, Dr. Wang's FAC alleges only that defendant PAFMG is "a California corporation doing business at 325 Distel Circle in Los Altos, California." (FAC, ¶6.)

PAFMG appears to argue, alternatively, that plaintiff Dr. Wang does not allege PAFMG to be a "health facility." PAFMG ignores Health and Safety Code section 1278.5, subdivision (j), which defines "health facility" to specifically include "the facility's administrative personnel, employees, boards, and committees of the board, and medical staff." Thus, PAFMG's assertion that it cannot be liable because it consists of "a group of clinicians" [even if credited] is not persuasive. The Court cannot determine, as a matter of law, that a group of clinicians does not come within the statutory definition of a "health facility" as that term has been defined by Health and Safety Code section 1278.5, subdivision (j).

Accordingly, PAFMG's demurrer to the second cause of action in Dr. Wang's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

Calendar line 5
Case Name: *Ana Alavarez, et al. v. Joel Barrientos, et al.*
Case No.: 23CV427416

Before the Court is defendant Meta Platforms, Inc.'s demurrer. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for sexual harassment. Plaintiffs Olga Urtusuastegui and Ana Silvia Alvarez ("Plaintiffs") were employed by defendant Service By Medallion ("SBM"). (Complaint, ¶¶ 1-2.) SBM is a California corporation that provides commercial janitorial and building maintenance services. (Complaint, ¶ 3.) Joel Barrientos is employed by SBM as a supervisor at the jobsites where Plaintiffs worked. (Complaint, ¶ 4.) Meta Platforms, Inc. ("Meta") is a Delaware corporation doing business as Facebook. (Complaint, ¶ 5.) Plaintiffs worked at Meta's campuses in Mountain View and Sunnyvale, and Meta controlled these job sites and had the authority to stop illegal activities occurring there. (*Id.*)

Meta and SBM are business agents of each other. (Complaint, ¶ 6.) Meta knew or had reason to know that sexual harassment was occurring, but they turned a blind eye, refused to cooperate in the investigation, and denied access to critical information. (Complaint, ¶ 7.) Meta ratified and condoned and assisted in covering up the harassment and hostile work environment and allowed SBM and Barrientos to do whatever they wanted without any accountability. (*Id.*)

Plaintiffs each began working for Meta and SBM in or about November 2018, and they were assigned to perform janitorial work at Facebook. (Complaint, ¶¶ 17, 22.) Plaintiffs initially began working at Facebook's Mountain View campus and were later transferred to Facebook's campus in Sunnyvale. (*Id.*) Barrientos sexually harassed Urtusuastegui and Alvarez. (Complaint, ¶¶ 18, 23.)

Barrientos began harassing Urtusuastegui when she worked at the Mountain View campus, and continued harassing her when she was transferred to the Sunnyvale campus. (Complaint, ¶ 18.) Barrientos' sexual harassment of Urtusuastegui was regular and continuous and included making unwanted advances, sending texts and pictures of himself to her, putting his hands on her, and rubbing her breasts. (*Id.*) In or about October 2022, Barrientos sexually assaulted Urtusuastegui when he physically attacked her, groped her, and slapped her buttocks. (*Id.*)

Barrientos began harassing Alvarez after she was transferred to Facebook's Sunnyvale campus, and he harassed Alvarez regularly and continuously. (Complaint, ¶ 23.) Barrientos' sexual harassment of Alvarez included openly staring at her private area, asking her to walk in front of him so he could look at her buttocks, touching her breasts and shoulders, staring at her and biting his lips in a sexual way, and asking to see her naked body. (*Id.*) In or around October 2022, Urtusuastegui and Alvarez learned that Barrientos was harassing both of them. (Complaint, ¶¶ 18-19, 24.)

In or around October 2022, Urtusuastegui complained to SBM's site manager and human resources personnel about Barrientos. (Complaint, ¶ 20.) Urtusuastegui shared text messages from Barrientos and provided detailed accounts of his sexual harassment. (*Id.*) After weeks of silence, SBM personnel told Urtusuastegui that they closed the investigation and that they could not verify her story because Facebook denied them access to Facebook's internal security/surveillance cameras. (*Id.*)

In or around October 2022, Alvarez complained to SBM's site manager and human resources personnel about Barrientos. (Complaint, ¶ 25.) Alvarez gave detailed accounts of Barrientos' conduct and reported what was happening to plaintiff Urtusuastegui. (*Id.*) After weeks of silence, SBM personnel told Alvarez that the investigation was closed because there was not enough evidence against Barrientos and Facebook could not find anything from their cameras. (*Id.*)

Barrientos continues to work at the same Facebook campus with Urtusuastegui and Alvarez. (Complaint, ¶¶ 21, 26.) Meta aided and abetted SBM and Barrientos' sexual harassment by ratification and condonement, by failing to enforce compliance with applicable law, and by concealing evidence, refusing to cooperate in investigations, and denying access to critical information and data. (Complaint, ¶¶ 31-33.)

Plaintiffs filed their complaint on December 11, 2023 asserting (1) sexual harassment (against all Defendants); failure to prevent harassment (against defendants SBM and Meta); and (3) negligent hiring, supervision, and retention (against defendants SBM and Meta).

On April 8, 2024, Meta filed the demurrer now before the court, which Plaintiffs oppose.

II. Legal Standard

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn.

2.) A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (*Code Civ. Proc.*, §430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (*Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (*Yolo County Dept. of Social Services v. Municipal Court* (1980) 107 Cal.App.3d 842, 846-847.) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) "It admits the truth of all material factual allegations in the complaint …; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Id.* at pp. 213-214, internal punctuation and citations omitted.) "[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to." (*Cook v. De La Guerra* (1864) 24 Cal. 237, 239.)

Defendant Meta demurs on the ground that the complaint fails to state sufficient facts to constitute causes of action for: (1) sexual harassment; (2) failure to prevent harassment; (3) negligent hiring, supervision and retention. (Defendant Meta's Notice of Demurrer and Demurrer to Plaintiffs' Complaint ("Notice"), pp. 1, ln. 25 – 2, ln. 8.) Meta further contends that its demurrer should be sustained without leave to amend. (Notice, p. 2, lns. 9 – 13.)

III. Analysis

A. Meet and Confer

Plaintiffs first contend Meta failed to meet and confer as required. (Opposition, p. 2, ln. 1.) Under *Code of Civil Procedure* section 430.41, subdivision (a), the demurring party is required to meet and confer in person or by telephone with the party who filed the pleading in question for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised on demurrer. Counsel for Meta filed a declaration asserting compliance with Meta's meet-and-confer obligations. (Declaration of Christopher Reilly in Support of Defendant Meta' Demurrer ("Reilly

Decl.").) Attorney Reilly asserts that he spoke with Plaintiffs' counsel regarding an extension of the meet and confer period, resulting in a stipulation. It is unclear whether the attorneys met and conferred in person or over the phone regarding the substance of defendant Meta's demurrer. Nevertheless, "[a] determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (Code Civ. Proc., §§ 430.41, subd. (a)(4).) Thus, the court has considered the demurrer and motion to strike on their merits.

B. Aiding and Abetting

Meta contends the complaint's aiding and abetting theories fail and cannot be cured by amendment. (Meta's Memorandum of Points and Authorities in Support of Demurrer ("Meta's Memo"), p. 4: 5-10.) The complaint generally alleges that Meta aided and abetted SBM's and Barrientos's wrongful conduct. (See, e.g., Complaint, ¶¶ 31-36.) Each cause of action also alleges Meta's culpability based upon an aiding and abetting theory. (Complaint, ¶¶ 41, 57, 76.)

The first and second causes of actions assert violations of *Government Code*, section 12940, part of the Fair Employment and Housing Act ("FEHA," *Government Code*, § 12900 et seq.). "FEHA makes it an unlawful practice for 'any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.' (*Gov. Code*, §12940, subd. (i).)" (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 389 (*Alch*).) "Because FEHA provides no definition of aiding and abetting, courts have used the common law definition: 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 or encouragement to the other in accomplishing a tortious result and person's own conduct, separately considered, constitutes a breach of duty to the third person." (*Alch*, *supra*, 122 Cal.App.4th at p. 389, fn. 48, internal punctuation and citations omitted, quoting and citing *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326 (*Fiol*); *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846.)

"*FEHA* prohibits 'any person' from aiding or abetting workplace discrimination. (*Gov. Code*, §12940, subd. (i).) For that reason, individuals and entities who are not the plaintiff's employer may be liable under FEHA for aiding and abetting the plaintiff's employer's violation of FEHA. (See [*Alch*,

supra, 122 Cal.App.4th 339, 389-390] [holding talent agencies that did not employ the plaintiffs could be liable for aiding and abetting their employers' alleged 'systemic discrimination' in violation of FEHA].)" (*Smith v. BP Lubricants USA, Inc.* (2021) 64 Cal.App.5th 138, 146 (*Smith*).)

> FEHA does not provide a definition of 'aiding and abetting," [citation], but it has been interpreted as 'closely allied' with conspiracy. The common basis for liability for both conspiracy and aiding and abetting … is concerted wrongful action. Aiding and abetting thus involves two separate persons, one helping the other. It is unlawful, for example, for third parties such as customers or suppliers to induce or coerce prohibited discrimination or harassment.

(*Smith*, *supra*, 64 Cal.App.5th at p. 146, internal quotations and citations omitted.)

Citing *Smith*, Meta asserts that to state a claim for aiding and abetting, Plaintiffs must allege (1) SBM and Barrientos subjected Plaintiffs to harassment, (2) Meta knew SBM and Barrientos' conduct violated FEHA, and (3) Meta gave "substantial assistance or encouragement" to violate FEHA. (Meta's Memo, p. 4, lns. 13-16, fn. 3.) Meta argues the aiding and abetting causes of action fail because Plaintiffs' allegations concerning Meta relate to alleged conduct occurring after Barrientos' alleged harassment. (Meta's Memo, p. 4, 21-22.)

In opposition, Plaintiffs assert "[t]he liability for Meta of Barrientos' actions will revolve around their control or legal responsibility (such as contractual responsibility between Service by Medallion and Meta) with respect to vendors or contractual employees working on their campus." (Plaintiffs' Opposition, p. 9, lns. 17-19.) Plaintiffs point to language in FEHA referencing services provided pursuant to a contract:

> Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or

> supervisors, knows or should have known of the conduct and fails to take immediate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered.

(*Gov. Code*, § 12940, subd. (j)(1).)

Plaintiffs contend they and Barrientos were providing services pursuant to a contract, and they request leave to amend and time to obtain the contract between defendants SBM and Meta. (Plaintiff's Opposition, p. 10, lns. 11-15.) However, as Meta points out in reply, the complaint makes no reference to any contract between SBM and Meta. (Reply, p. 4, lns. 2-4, fn. 1.) A demurrer tests the legal sufficiency of the complaint; a court cannot consider matter not contained within the allegations of the complaint or matter not subject to judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 (*Donabedian*).) More importantly, the complaint does not allege instances of harassment that occurred after SBM requested assistance with their investigation, nor does it otherwise contain allegations that Meta knew or should have known of Barrientos' harassment before the alleged incidents. While the complaint alleges Plaintiffs and Barrientos continue to work on the same campus, and Plaintiffs are under daily fear of what Barrientos might do (see Complaint, ¶¶ 21, 26), the complaint does not allege Meta's knowledge of any harassment. Instead, the complaint states: "Facebook could not find anything on its cameras." (Complaint, ¶ 25.)

While Plaintiffs position is that Meta's failure to cooperate with SBM's investigation amounts to aiding and abetting for purposes of alleging a FEHA violation, they fail to support this position with authority. Moreover, there is authority that mere inaction does not constitute aiding and abetting. In *Fiol*, the court discussed a regulation adopted by the Fair Employment and Housing Commission that addresses aiding and abetting in the framework of prohibited and permitted practices. (*Fiol*, *supra*, 50 Cal.App.4th at p. 1325, fn. 5.) The *Fiol* court concluded the regulation was silent on the issue of whether the failure to prevent sexual harassment when it is the normal business duty to do so constitutes aiding and abetting, further stating: "To the extent the regulation provides that mere inaction may constitute aiding and abetting, we disagree." (*Ibid.*) "Mere knowledge that a tort is being committed

and the failure to prevent it does not constitute aiding and abetting. [Citation.]" (*Fiol*, *supra*, 50 Cal.App.4th at p. 1326.)

Accordingly, the complaint does not sufficiently allege a FEHA violation against defendant Meta under an aiding and abetting theory.

C. Failure to Prevent

Defendant Meta further contends that Plaintiffs' failure-to-prevent theories fail because the complaint does not allege that Meta itself subjected Plaintiffs to harassment. (Meta's Memo, p. 5, lns. 19-22.) In opposition, Plaintiffs point to the complaint's allegations that Meta "had the authority and power to stop any and all illegal activities and noncompliance with any applicable laws at the job sites…." (Plaintiffs' Opposition, p. 12, lns. 16-26, citing Complaint, ¶ 5.) Plaintiffs further argue that because the complaint alleges that SBM and Meta were business agents of the other, the court must accept these allegations as true and overrule the demurrer. (Plaintiffs' Opposition, p. 13, lns. 1-8.) However, the complaint provides no facts to support a theory that defendant Meta was SBM's agent, and even if it did, it still does not allege that Meta had knowledge of Barrientos' harassment before further harassment occurred, as discussed above. Thus, the complaint does not sufficiently state a cause of action against defendant Meta under a failure-to-prevent theory.

D. Negligent Hiring, Supervision, and Retention

Meta contends that Plaintiffs' negligent hiring, supervision, and retention claims fail to state a cause of action because the complaint does not allege that Meta breached any duty owed to Plaintiffs. (Meta's Memo, p. 6, lns. 22-28.) "Liability for negligent hiring … is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. Negligence liability will be imposed on an employer if it knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139, internal punctuation and citations omitted.)

Here, as discussed previously, the complaint lacks allegations that Meta knew of Barrientos' harassing behavior before he allegedly harassed Plaintiffs. In opposition, Plaintiffs assert the contract between SBM and Meta will be important to determine what these entities agreed would happen if

someone violated the law while working on a Facebook campus. Plaintiffs also argue, without citation, and again with reference to unalleged contracts, that the pleading requirements should be relaxed for information within Meta's control. These arguments improperly reference matter that is not in the complaint or judicially noticeable and must therefore be rejected. (*Donabedian*, *supra*, 116 Cal.App.4th at p. 994.)

E. Leave to Amend.

Plaintiff bears the burden of proving that an amendment would cure the defects identified in the demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; see also *Shaeffer v. Califa Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145.) Here, Plaintiffs request 60 days leave to amend, asserting it will take them time to obtain documents such as contracts and policies. However, Plaintiffs do not explain how these documents would cure the defects identified in the demurer, including the lack of allegations that Meta knew or should have known of a particular risk of harassment before it allegedly occurred, thus Plaintiffs fail to support their request for 60 days leave to amend.

This is, however, Plaintiffs' first complaint. Thus, Meta's demurrer is SUSTAINED with 20 days leave to amend.

Calendar Line 6
Case Name: *Ashish Sagar v. Javier Granillo Vasquez, et al.*
Case No.: 21CV388455

Before the Court is defendant Shah Karimi's motion for summary judgment. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Factual and Procedural Background.

On or about October 15, 2019, defendants Javier Granillo Vasquez; Shah Karimi (erroneously sued as Ahmad Shai Gardi; hereafter, "Karimi"); Paul Y. Chiu dba Grand Food Inc. ("Chiu"); Grub Market Inc.; Grand Food, Inc.; Rasier-CA LLC; and Uber Technologies, Inc. ("Uber") (collectively, "Defendants") operated Defendants' vehicle in such negligent manner as to cause a collision between plaintiff Ashish Sagar's ("Plaintiff") vehicle and Defendants' vehicle, all of which caused serious injuries to Plaintiff. (Complaint, ¶¶12 and 17.)

On September 10, 2021, Plaintiff filed a complaint against Defendants asserting a single cause of action for negligence. On March 3, 2022, defendants Vasquez and Grub Market, Inc. jointly filed an answer to Plaintiff's complaint. On March 29, 2022, Plaintiff dismissed defendants Rasier-CA LLC and Uber without prejudice. On April 19, 2022, defendants Grand Food, Inc. and Chiu jointly filed an answer to Plaintiff's complaint. On April 22, 2022, defendant Karimi filed an answer to Plaintiff's complaint and also filed a cross-complaint against Roe cross-defendants for (1) implied indemnity; (2) contribution and indemnity; and (3) declaratory relief.

On March 6, 2024, Karimi filed the motion for summary judgment of Plaintiff's complaint now before the Court.

II. Karimi's motion for summary judgment is DENIED.

Plaintiff's complaint asserts a sole cause of action for negligence. "The elements of a cause of action for negligence are well established. They are (a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917; citation and punctuation omitted; see also CACI, No. 400.)

Defendant Karimi moves for summary judgment by arguing that he did not breach his duty and did not cause the collision which injured Plaintiff.

A. Breach.

"Breach is the failure to meet the standard of care." (*Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 643 (*Coyle*).)

> "In most cases, courts have fixed no standard of care for tort liability more precise than that of a reasonably prudent person under like circumstances." (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 546–547 [25 Cal. Rptr. 2d 97, 863 P.2d 167].) This is because "[e]ach case presents different conditions and situations. What would be ordinary care in one case might be negligence in another." (*Eddy v. Stowe* (1919) 43 Cal.App. 789, 797 [185 P. 1024] (*Eddy*).)
>
> For example, in car accident cases, in some circumstances, the reasonably prudent thing is to stop the car; while in another case, under different circumstances, the reasonably prudent thing is to slow the car; yet, in a third case, under other circumstances, the reasonably prudent thing is to proceed at a higher rate of speed; and in a fourth case, in different circumstances, the reasonably prudent thing is to continue at the current speed and change nothing. (*Eddy*, *supra*, 43 Cal.App. at p. 797.)
>
> Thus, it is the jury that "has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct." (*Ramirez v. Plough, Inc.*, *supra*, 6 Cal.4th at p. 547.) In sum, it is the trier of fact who decides what the facts are and what reasonable care means within those facts.

(*Coyle*, *supra*, 24 Cal.App.5th 627, 639-640.)

Karimi asserts he was acting with ordinary care. To support this assertion, Karimi proffers the following facts: A sequence of impacts between vehicles occurred on 15 October 2019 at or near southbound Interstate 880 freeway located in Milpitas, California in Santa Clara County at approximately 8:10 a.m. (hereinafter, "Incident").[1] When the Incident occurred, Plaintiff was a passenger in the vehicle being operated by defendant Karimi.[2] A truck driven by defendant Vasquez

[1] See Separate Statement of Undisputed Material Facts in Support of Defendant Shah Karimi's Motion for Summary Judgment ("Karimi UMF"), Fact No. 1.
[2] See Karimi UMF, Fact No. 2.

struck the vehicle occupied by Karimi and Plaintiff from behind.[3] The impact of the truck driven by Vasquez into Karimi's vehicle was hard.[4] The sequence of the impacts stared with Vasquez's truck as it impacted the rear of Karimi's vehicle.[5] As a result of the impact between Vasquez's truck and Karimi's vehicle, Karimi's vehicle was pushed forward and came into contact with the rear of Zong Xiang Liu's vehicle.[6] As a result of the impact between Karimi's vehicle and Zong Xiang Liu's vehicle, Zong Xiang Liu's vehicle was pushed forward and came into contact with the rear of Yiping Kuang's vehicle.[7]

These facts do not address Karimi's conduct and do not lead to the conclusion that Karimi was acting with ordinary care. Even if Karimi's evidence were sufficient to meet his initial burden, Plaintiff disputes the sequence of events, explaining Karimi collided first with Zong Xiang Liu's vehicle.[8] Immediately prior to this initial collision, Karimi was going faster than the traffic conditions around him and attempted to change lanes and move around traffic.[9] Karimi was two to three feet away from Zong Xiang Liu's vehicle when he first noticed it was stopped.[10] Plaintiff recalled hearing Karimi gasp, slam on the brakes, and then heard and felt the impact with Zong Xiang Liu's vehicle.[11] Plaintiff's evidence creates a triable issue of material fact with regard to whether Karimi failed to meet the standard of care.

B. Causation.

> In order for a plaintiff to satisfy the causation element of a negligence cause of action, he or she must show the defendant's act or omission was a substantial factor in bringing about the plaintiff's harm. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 481 [50 Cal. Rptr. 2d 785].) "In other words, [the] plaintiff must show some substantial link or nexus between omission and injury." (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 778.) As summarized by the Supreme Court in *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200 [114 Cal. Rptr. 2d 470, 36 P.3d 11]: "'On the issue … of

[3] See Karimi UMF, Fact No. 3.
[4] See Karimi UMF, Fact No. 7.
[5] See Karimi UMF, Fact No. 12.
[6] See Karimi UMF, Fact No. 13.
[7] See Karimi UMF, Fact No. 14.
[8] See Plaintiff's Separate Statement of Undisputed Facts in Support of Plaintiff's Opposition to Defendant Karimi's Motion for Summary Judgment and Additional Material Facts ("Plaintiff's AMF"), Fact Nos. 23 – 24.
[9] See Plaintiff's AMF, Fact Nos. 18 and 20.
[10] See Plaintiff's AMF, Fact No. 22.
[11] See Plaintiff's AMF, Fact No. 23.

> causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.'" (*Id.* at pp. 1205–1206.)

(*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1104.)

"'Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. … Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact.'" (*Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 152; citation omitted.)

Based on essentially the same facts discussed above, Karimi asserts Plaintiff cannot establish that Karimi's conduct was the cause in fact of the Incident. However, the court views defendant Karimi's evidence and argument to be that defendant Vasquez's conduct was the sole cause of the Incident and Plaintiff's injuries, not that Plaintiff is unable to establish defendant Karimi's conduct was the cause of the Incident and Plaintiff's injuries. However, Plaintiff again proffers evidence in opposition which creates a triable issue of fact as to whether Karimi's conduct was the cause of the Incident and Plaintiff's injuries. Essentially, Plaintiff's evidence is that Karimi was driving too fast, changed lanes, and rear-ended Zong Xiang Liu's vehicle first before defendant Vasquez rear-ended the vehicle occupied by Karimi and Plaintiff. Given this factual dispute, the court cannot reach only one reasonable conclusion regarding causation, thus summary judgment would be improper.

Accordingly, defendant Karimi's motion for summary judgment is DENIED.

III. Plaintiff's request for attorney's fees is DENIED.

In opposition, Plaintiff requests the court to order Karimi to pay Plaintiff's attorney's fees of $3,000 pursuant to Code of Civil Procedure section 128.5, subdivision (a), which states, in relevant part, "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are

frivolous or solely intended to cause unnecessary delay." Plaintiff contends Karimi's motion for summary judgment was frivolous because there are obvious questions of material fact. For purposes of Code of Civil Procedure section 128.5, "frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. (Code Civ. Proc., §128.5, subd. (b)(2).)

Although Karimi did not prevail, the court does not find here that Karimi's motion for summary judgment was totally and completely without merit, i.e., "any reasonable attorney would agree such motion is totally devoid of merit,"[12] or that Karimi filed the motion for summary judgment for the sole purpose of harassing Plaintiff. Accordingly, Plaintiff's request for attorney's fees pursuant to Code of Civil Procedure section 128.5 is DENIED.

[12] *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199.

Calendar Line 14
Case Name: *Dagmar Horvath vs Mandy Brady*
Case No.: 22CV408499

Before the Court is Defendants' Motion for Attorneys' Fees Pursuant to Code of Civil Procedure section 425.16. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

On September 21, 2023, Hon. Socrates Manoukian issued an order granting Defendant's Anti-SLAPP motion. Plaintiff thereafter timely filed a notice of appeal. The parties agree that Defendant is entitled to fees under Code of Civil Procedure section 425.16. Plaintiff however requests that this motion be stayed, or, if not stayed, the amount of fees sought ($18,540) be reduced. Defendant opposes the motion.

II. Legal Standard and Analysis

Anti-SLAPP fee awards should include expenses incurred for all proceedings "directly related" to the special motion to strike and fees "addressing matters with factual or legal issues that are 'inextricably intertwined' with those issues raised in an anti-SLAPP motion." (*Henry v. Bank of Am. Corp.* (N.D.Cal. Aug. 23, 2010) 2010 WL3324890 *4.) To determine the correct award, the Court applies the lodestar method which is calculated by multiplying "the number of hours reasonably expended. . . by the reasonable hourly rate" of counsel. (*PLCM Group, Inc. v. Drexler* (2000) 17 Cal.4th 1084, 1095.) To determine reasonableness, the Court considers "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure." (*Id.* at 1096.)

A trial court "retains jurisdiction to entertain a motion for attorney fees despite an appeal[.]" (*Robertson v. Rodriguez* (1995) 36 Cal. App. 4th 347, 360, citing *Nazemi* v. *Tseng* (1992) 5 Cal. App. 4th 1633, 1639.) And, "a SLAPP plaintiff's perfecting of an appeal from a judgment awarding attorney fees and costs to a prevailing SLAPP defendant under subdivision (c) of section 425.16 does not automatically stay enforcement of the judgment. . . . [T]o stay enforcement of such a judgment, the SLAPP plaintiff must give an appropriate appeal bond or undertaking under the money judgment exception to the automatic stay rule. (*Dowling v. Zimmerman* (2001) 85 Cal. App. 4th 1400, 1406.) Accordingly, the Court can rule on Defendants' motion for fees now.

The Court studied the invoices attached to the Declaration of Breck E. Milde and finds the hours spent to be reasonable, despite Plaintiff's objection to the contrary. The rates charged are also reasonable for Santa Clara County and for this case type. The Court thus awards Defendant $18,540 in fees and costs incurred in connection with her Special Motion to Strike Plaintiff's Complaint.

Calendar Line 15
Case Name: *Flavio Pando et al vs Wells Fargo Bank, N.A. et al*
Case No.: 23CV419028

Before the Court is Defendant Cellular Sales Management Group, LLC's ("Cellular") motion to compel arbitration and stay proceedings. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiffs purchased cellular phones from Cellular on or around August 23, 2022. Plaintiffs allege that shortly after their purchase, they experienced a data breach that resulted in money being transferred from their bank accounts. One bank returned the money, the other did not. This suit followed.

The August 23, 2022 invoice includes the following language at page 3:

> Dispute Resolution. Both you and Cellular Sales agree that any and all disputes between us of any nature whatsoever including without limitation tort claims and regardless of whether based upon or arising out of this transaction will be governed by the Cellular Sales Dispute Resolution Agreement which can be accessed at www.cellularsales.com/disputeresolution or upon request at any Cellular Sales location (the "Dispute resolution Agreement"). YOU ACKNOWLEDGE THAT THE DISUTE RESOLUTION AGREEMENT PROVIDES THAT ANY AND ALL DISUTES BETWEEN US (OTHER THAN CERTAIN DISPUTE SUBJECT TO THE JURIDCTION OF SMALL CLAIMS COURT PURSUANT TO SECTION 9 OF THE RULES) SHALL BE RESOLVED THROUGH BIDING ARBITRATION (RATHER THAN ANY STATE OR FEDERAL COURT) ADMINISTERED BY THE AMERICAN ARBITRAITON ASSOCIATION IN ACCORDANDE WITH ITS CONSUMER ARBIRATION RULES (THE "RULES") AND THAT EACH OF US IS WAIVING ANY RIGHT TO PARTICIPATE IN ANY CLASS ACTION AGAINST THE OTHER AND WAQIVING THE RIGHT TO JURY TRIAL. (Motion at Exs. 1-2.)

II. Legal Standard and Analysis

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

Code of Civil Procedure section 1281.2 states: "the court shall order a matter to arbitration if it determines that there is an agreement to arbitrate and (1) the agreement has not been waived or (2) the agreement has not been revoked." (*Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) "[A] party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) There is a presumption against waiver, and "when allocation of a matter to arbitration. . .is uncertain, we resolve all doubts in favor of arbitration." (*Cinel*, 206 Cal.App.4th at 1389; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.)

"In determining a waiver, a court can consider (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been *substantially* invoked and the parties were *well into preparation of the lawsuit* before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party." (*St. Agnes medical Center v. PaciviCare of California* (2003) 31 Cal.4th 1187, 1196 (emphasis added; internal citations and quotations omitted).)

An arbitration agreement can be unenforceable if it is unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Unconscionability consists of

both procedural and substantive elements. The prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of procedural unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. (*Armendariz,* 24 Cal.4th at 114.) The procedural element tests the circumstances of contract negotiation and formation and focuses on "oppression" or "surprise" due to unequal bargaining power. (See *Armendariz,* 24 Cal.4th at 114.) "Oppression" occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form. (*Pinnacle Museum Tower Ass'n v. Pinnacle Mkt.Dev. (US), LLC* (2012) 55 Cal.4th 223, 247, citing *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179.) Substantive unconscionability relates to the fairness of the terms of the arbitration agreement and assesses whether they are overly harsh or one-sided. (*Armendariz, supra*, 24 Cal.4th at p. 114; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.)

The Court finds an agreement to arbitrate was formed here. First, Plaintiffs were given the agreement to review before agreeing to their purchase; this is not a "browsewrap agreement". Next, the text in the sales agreement clearly states that any claims arising out of the purchase must be arbitrated by both parties. Reference to additional details regarding the arbitrator's authority and the like contained in the Dispute Resolution Agreement accessible by asking for a copy or clicking a link does not change the nature of the initial agreement.

Having found an agreement to arbitrate was formed, it is Plaintiff's burden to persuade the Court that such agreement should not be enforced, and Plaintiff fails to meet that burden here. There is no evidence to support waiver, and Plaintiffs' unconscionability argument fails.

Accordingly, this case is ordered to arbitration and stayed pending the outcome of that arbitration. The August 6, 20-24 trial setting conference is VACATED. A status review regarding the arbitration is set for January 16, 2024 at 10:00 a.m. in Department 20.