SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: October 5, 2023 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

***New information* (please read)**: To set future motion hearings, you no longer need to file your motion before receiving a hearing date. Phone lines are now open for you to call and reserve a hearing date *before filing and serving* your motion. Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve your date. This will obviate the need to file and serve a separate amended notice at a later time. Please note: if your motion papers are not filed within five business days of reserving the hearing date, the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV373768	Jonathan Balon v. Intel Corporation	Click on LINE 1 or scroll down for ruling.
LINE 2	21CV376896	Lyndsey C. Guida v. Hyundai Motor America	OFF CALENDAR
LINE 3	21CV390666	Eric F. Hartman v. Koshy P. George et al.	Motion to be relieved as counsel (continued from September 5, 2023): The court orders defendants and their counsel to appear.
LINE 4	22CV394893	Rory Nichols v. Abhay Narayan et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	22CV408867	Raquel A. Perez v. Waichiro Miki et al.	Motion to be relieved as counsel: counsel and parties to appear. Current counsel for defendants needs to explain why this motion has remained on the court's calendar when substitute counsel stands ready to take over the case.
LINE 6	23CV414480	Joseph K. Wong et al. v. Ferrari Ottoboni Caputo & Wunderling, LLP et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 7	23CV414480	Joseph K. Wong et al. v. Ferrari Ottoboni Caputo & Wunderling, LLP et al.	Click on LINE 6 or scroll down for ruling in lines 6-7.
LINE 8	23CV415319	Lucile Salter Packard Children's Hospital at Stanford v. Foundation for Medical Care of Tulare and Kings Counties, Inc. et al.	Click on LINE 8 or scroll down for ruling.
LINE 9	2015-1-CV-281200	Thu Le v. Frank Nguyen et al.	Motion to be relieved as counsel: counsel and parties to appear.

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Calendar Line 1
Case Name: *Jonathan Balon v. Intel Corporation et al*.
Case No.: 20CV373768

I. BACKGROUND

This is an action by plaintiff Jonathan Balon ("Plaintiff" or "Balon") against his former employer Intel Corporation ("Defendant" or "Intel"). Balon filed his original Complaint on November 19, 2020 and stated four causes of action: (1) Age Discrimination (in violation of the FEHA, Gov. Code section 12900 et seq.); (2) Age Harassment; (3) Retaliation (in violation of the FEHA); and (4) Failure to Prevent Discrimination, Harassment, and Retaliation (in violation of the FEHA). Balon sought punitive damages in relation to all four causes of action.

Balon's original complaint alleged that he was hired by Intel on November 4, 2014 and was a vice president. He was terminated on August 18, 2020, when he was 51 years old. Prior to his termination, Plaintiff had no record of discipline and had received positive performance reviews. The complaint alleged that after the George Floyd protests in the summer of 2020, "a number of black Intel employees spoke with Plaintiff and informed him that they had each been the subject of widespread racial discrimination and harassment while working at Intel . . . . Plaintiff subsequently complained to Tom Lantzsch [a senior VP and Plaintiff's immediate superior] and Intel's Human Resources department in June 2020" about the reports he had received. Balon further alleged that after Intel failed to investigate these reports, he further complained to Lantzsch and Intel HR that "Intel had failed to adequately address the racial discrimination and harassment that Plaintiff had previously reported. Defendants retaliated against Plaintiff on the basis of his complaints of racial discrimination and harassment, which included but was not limited to Defendants' termination of Plaintiff's employment on August 18, 2020." This included Tom Lantzsch "making harassing and degrading age-related comments to Plaintiff." (Complaint at ¶¶ 5-12 generally.) Balon alleged that he complained about the age discrimination he and other employees suffered, but nothing was done. The second cause of action alleged harassment on the basis of age that was "severe or pervasive," such that Plaintiff "considered his work environment under Defendants to be hostile and abusive." (Complaint at ¶ 35.)

Intel brought a motion for summary judgment or summary adjudication against the original complaint, which was heard by this court (Judge Kirwan) on January 10, 2023. In a formal order issued on January 11, 2023 the court denied that motion in its entirety for failure to meet the initial burden.

Balon then brought a motion for leave to amend the complaint to add a fifth cause of action for wrongful termination in violation of public policy (at new paragraphs 62-73) along with new general allegations discussing the cause of action in a new paragraph 18. That motion was granted by the court (the undersigned) on April 11, 2023.[1] Balon filed the operative first amended complaint ("FAC") on April 18, 2023. According to the new paragraph 18, Intel stated that Balon was terminated: "because Plaintiff encouraged a 60-year-old fellow Intel employee (who Plaintiff suspected was the victim of age discrimination) to obtain legal counsel amidst that employee's employment dispute with Intel. California public

[1] The court, on its own motion pursuant to Evidence Code section 452, subdivision(d), takes judicial notice of the January 10, 2023 and April 11, 2023 orders.

policy clearly supports an employee obtaining counsel in connection with an employment dispute." The sole statute cited in paragraph 18 in support of this alleged public policy is Labor Code section 923.

Currently before the court is Intel's demurrer to the fifth cause of action for termination in violation of public policy, which Balon opposes. This case is currently set for trial on December 4, 2023.

II. INTEL'S REQUEST FOR JUDICIAL NOTICE

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evidence Code §450.) A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453(b) requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

In support of its demurrer, Intel has submitted a request for judicial notice of this court's April 11, 2023 order granting the motion for leave to file the FAC pursuant to Evidence Code sections 452(d) and (h). While it has limited relevance to the analysis of the FAC's fifth cause of action, the court has already taken judicial notice of the order in reciting the background of the case, *supra*, and so the court also GRANTS the request pursuant to Evidence Code section 452, subdivision (d) (court records).

III. INTEL'S DEMURRER TO THE FAC'S FIFTH CAUSE OF ACTION

A. General Standard

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.) Where a demurrer is to an amended complaint, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer."]; *Doe v. United States Youth Soccer Assoc*. (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

B. Intel's Grounds For Demurrer

Intel argues that the fifth cause of action fails to state sufficient facts to support a claim for essentially one reason: Balon lacks standing to assert the public policy of a right to counsel by a fellow employee. Although Labor Code section 923 sets forth an individual employee's right to counsel, Balon is not that individual employee, and so the facts alleged in the FAC do not establish any violation of Labor Code section 923.

C. Analysis

In California courts, the term "standing" is broadly defined as "the right to relief in court." (*The Rossdale Group, LLC v. Walton* (2017) 12 Cal.App.5th 936, 944-945 [internal quotation marks and citation omitted].) "In general terms, in order to have standing, the plaintiff must be able to allege injury—that is, some 'invasion of the plaintiff's legally protected interests.' [Citation.]" (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175.) When a plaintiff asserts a statutory claim, his or her right to relief, or "standing," depends upon the statute and "may vary according to the intent of the Legislature and the purpose of the enactment." (*Ibid*.) This is one of the reasons for the general rule that statutory causes of action must be pleaded with reasonable particularity. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

While employment in California is presumptively at will, one of the recognized exceptions to the general rule regarding an employer's right to terminate at will is that an employee may still recover tort damages from an employer if he or she was terminated in violation of fundamental public policy. (See *Tameny v. Atlantic Richfield Co*. (1980) 27 Cal.3d 167, 172.) Nevertheless, the California Supreme Court has also cautioned that "courts *in wrongful discharge actions* may not declare public policy without a basis in either constitutional or statutory provisions. A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes; so limited, the public policy exception presents no impediment to employers that operate within the bounds of law." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095, emphasis in original, overruled on another ground in *Green v. Ralee Engineering Co*. (1998) 19 Cal.4th 66, 80, fn. 6.)

"With regard to the requisite policy underlying a wrongful termination in violation of public policy claim, the Supreme Court 'established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be "fundamental" and "substantial."'" (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1139-1140, citing *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890.) "Whether the policy upon which a wrongful termination claim is based is sufficiently fundamental, well-established and tethered to a statutory or constitutional provision to support liability is a legal question that we review de novo." (*Id.*, at p. 1140, citation omitted.) As a legal question, it can be resolved by the court on demurrer.

The only statutory provision alleged by Balon to set forth the public policy for the fifth cause of action is California Labor Code section 923, which states:

> In the interpretation and application of this chapter, the public policy of this State is declared as follows:
>
> Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self–organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self–organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The longstanding and consistent interpretation of this statute by California courts is that it establishes a public policy that employees may discuss wages, organize, and engage in collective bargaining with their employers as members of unions, trade organizations, etc. (See *Nutter v. Santa Monica* (1946) 74 Cal.App.2d 292, 295-298; *Elsis v. Evans* (1958) 157 Cal.App.2 399, 408-410; *SEIU v. Hollywood Park* (1983) 149 Cal.App.3d 745, 759-760; *American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, 889.) Courts have also found "it to be within the intent and scope of the statute, by implication, though not expressly declared, that the individual employee has the right to designate an attorney or other individual to represent him in negotiating terms and conditions of his employment, and that his discharge for doing so constitutes a violation of Labor Code section 923." (*Montalvo v. Zamora* (1970) 7 Cal.App.3d 69, 75; see also *Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal.App.3d 1108, 1132 ["the statutory term 'terms and conditions of labor' says nothing about an employee's performance standard. Interpreted in its broadest form, we cannot discern in the wording of the statute any legislative intent to the effect that an employee has the right to have an attorney present at any time his boss discusses with him his good or poor performance . . . . We think 'terms and conditions of labor' refers precisely to that: terms and conditions. Performance on the job is quite another matter."]; *Gelini v. Tishgart* (1999) 77 Cal.App.4th 219, 228 ["We believe the fairest reading of the statutory terms, taken as a whole, is that the Legislature meant to protect individual workers only insofar as they band together to negotiate with their employer. The construction of section 923 by the courts, however, finds some support in the terms of the statute, and has placed employers on notice that the statute protects individual employees."]; *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1375 ["[S]ection 923 of the Labor Code . . . recognizes that an employee's right to discuss wages is of public importance. . . . [T]he general notion [is] that Labor Code section 923 is premised on rights that reach beyond the interests of a single employer or employee."].)

Having examined Labor Code section 923 and the California decisions interpreting it, the court finds no support for Balon's suggestion that his termination for allegedly urging another employee to obtain a lawyer during a dispute with Intel was a violation of section 923

or a violation of public policy. While it could potentially have been a violation of public policy if Intel had terminated that other employee whom Balon advised (David Ryan) for exercising a right to retain a lawyer, there is simply no precedent for extending this public policy to the expression of an opinion by *someone else* about the advisability of exercising that right. The court sees no legal basis for reading the public policy set forth in section 923 so broadly.

In short, the court finds that the allegations in the FAC at paragraphs 18 and 62-75 (the fifth cause of action) do not state sufficient facts to support a claim for wrongful termination in violation of public policy against Intel. The only person who could theoretically assert a violation of Labor Code section 923 in this scenario would be David Ryan, and even then, it would have to depend on whether Ryan did in fact attempt to hire an attorney, whether Ryan was terminated (at least in part) because of that attempt to obtain representation, and whether Ryan's dispute with Intel could be reasonably considered a negotiation of the terms and conditions of labor under section 923 in the first place.

The court SUSTAINS Intel's demurrer to the FAC's fifth cause of action.

A plaintiff bears the burden of demonstrating how an amendment would cure the defect identified by the demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) Balon has not met this burden, as the opposition does not identify any proposed amendment; it simply asserts that leave to amend should be granted if the court is inclined to sustain the demurrer. (See Opposition at p. 7:3-9.)

Nevertheless, although the court is skeptical that the fifth cause of action can be amended to state a claim for wrongful termination in violation of public policy, the court cannot foreclose the possibility that Balon may potentially identify a different public policy (*i.e.*, not Labor Code section 923) to support the claim. Accordingly, the court will GRANT 10 days' leave to amend the fifth cause of action.

The court notes that any amendment to allege a new basis for the fifth cause of action will moot Plaintiff's motion for summary adjudication as to that cause of action, filed on July 6, 2023 and currently set for hearing on November 9, 2023. (*See State Comp. Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1130-1131 ["Thus, once an amended complaint is filed, it is error to grant summary adjudication on a cause of action contained in a previous complaint."].)

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Calendar Line 4
Case Name: *Rory Nichols v. Abhay Narayan et al.*
Case No.: 22CV394893

The court GRANTS plaintiff Rory Nichols's motion to set aside the court's dismissal of the case on December 8, 2022. The court finds that the motion is timely (just barely) and that it is supported by a showing of "mistake, inadvertence, surprise, or excusable neglect" on the part of Nichols's counsel. (Code Civ. Proc., § 473, subd. (b).) When a motion to set aside is supported by a sworn attorney affidavit attesting to the attorney's neglect—and in this case, the court finds excusable neglect in counsel's failure to monitor the status of this case for nearly six months, owing, at least in part, to a cancer diagnosis and treatment—then relief is mandatory under section 473, subdivision (b).

Defendant Santa Clara Valley Transportation Authority ("VTA") opposes the motion in a brief that was due on September 21, 2023 (nine court days before the hearing) but not filed until six days later, on September 27, 2023. According to the VTA, plaintiff counsel's neglect of this case was not excusable. In the alternative, if the court grants relief, the VTA requests $1,900 in monetary sanctions for having had to prepare its opposition (tardy as it was). The court disagrees with the VTA and finds plaintiff's counsel's neglect to be excusable. In addition, the court disagrees with the VTA's decision to oppose this motion, which reflects a misapprehension of the applicable law. The request for sanctions is DENIED.

The court sets this matter for a case management conference on February 20, 2024 at 10:00 a.m.

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Calendar Lines 6-7
Case Name: *Joseph K. Wong et al. v. Ferrari Ottoboni Caputo & Wunderling, LLP et al.*
Case No.: 23CV414480

These are motions to compel arbitration by defendants Sterling Foundation Management, LLC ("SFM") and Sterling Donor Advised Fund ("Sterling DAF"). For the reasons set forth below, the court GRANTS the motions and orders that plaintiffs' claims against SFM and Sterling DAF proceed in arbitration. The court STAYS the court action as to the remainder of the case, under Code of Civil Procedure section 1281.2, until resolution of the plaintiffs' claims against SFM and Sterling DAF.

1. Background

According to the plaintiffs, "[t]his case is about a defective estate planning vehicle . . . that was supposedly designed to allow plaintiff Joseph Wong . . . to transfer assets into a charitable donor's fund which he could manage for growth and utilize in advertised beneficial ways while getting a tax deduction." (Opposition to Sterling Foundation Management's Motion to Compel Arbitration at p. 5:2-5.) Wong retained defendant John M. Wunderling and his law firm, defendant Ferrari Ottoboni Caputo & Wunderling, LLP ("FOCW") (collectively, the "Law Firm Defendants"), for tax law advice and to create his estate planning vehicle, plaintiff JW Arbor Fund, LLC ("JWAF"). (First Amended Complaint ("FAC"), ¶ 21.) He also hired SFM and Sterling DAF (collectively, the "Sterling Defendants") to help administer JWAF. (*Ibid.*) According to plaintiffs, the entire plan was faulty and "has exposed [Wong] to substantial liabilities and damages." (Opp. at p.5:7-9.)

Plaintiffs Wong and JWAF originally sued the defendants in Shasta County, where Wong lives. After the Law Firm Defendants moved to transfer venue to Santa Clara County (where Wunderlich and FOCW are located), the parties stipulated to transfer the case to this county. Meanwhile, the Sterling Defendants had filed motions to stay or to dismiss the case, or in the alternative, "to quash service of summons pursuant to forum selection clause" (as "specially appearing defendants") in Shasta County. Those motions were carried over to this court, where the Sterling Defendants continued to appear specially. But after plaintiffs and the generally appearing Law Firm Defendants stipulated to the filing of a first amended complaint, this court granted plaintiffs' request for leave to amend the complaint and allowed the Sterling Defendants to file amended motions and briefs to address the amended pleading, with a new briefing schedule. (See August 15, 2023 Order.) Those amended motions to stay/dismiss/quash have now morphed into the present motions to compel arbitration.

The FAC asserts six causes of action. Four of them are against the Law Firm Defendants for legal malpractice, breach of contract, breach of fiduciary duty, and declaratory relief (first, second, third, and sixth causes of action). Two are against the Sterling Defendants for negligence and breach of fiduciary duty (fourth and fifth causes of action).

2. The Arbitration Clause in the Operating Agreement

The basis of plaintiffs' causes of action against the Sterling Defendants is an "Amended and Restated Operating Agreement" (the "Operating Agreement") for JWAF, entered into by Wong and Sterling DAF. (FAC, ¶¶ 17, 72-83, 84-88, Exhibit 4.) Article 12 of the Operating Agreement sets forth the following arbitration clause:

ARTICLE 12
ARBITRATION

> Any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be settled by binding arbitration in Santa Clara County, California by, and in accordance with the Rules of Practice and Procedure for the Arbitration of Judicial Disputes of Endispute, Judicial Arbitration & Mediation Services, Inc. as then in effect. Judgment upon the award rendered by the arbitrator may be entered in any court in Santa Clara County, California.

(FAC, Exhibit 4, at p. 26.) Article 12 of the predecessor operating agreement from the previous year contains the same clause. (See FAC, Exhibit 3, at p. 25.)) Based on this language, the Sterling Defendants now seek to compel arbitration.

The court concludes that Article 12 is a clear agreement to arbitrate that governs the dispute between plaintiffs and the Sterling Defendants. Although SFM was not itself a signatory to the Operating Agreement, the FAC alleges that an "identity of interest" exists between SFM and Sterling DAF, subjecting SFM to all the rights and obligations of the Operating Agreement, including consent to the jurisdiction and venue of Santa Clara County. (FAC, ¶¶ 16-18.) Indeed, the Operating Agreement appears to be the basis upon which SFM has been named as a defendant, and *all* of the FAC's allegations against the Sterling Defendants are brought against the two of them as a single unit (identified simply as "Sterling"), including the allegations that: (1) "Sterling acted as professional manager with respect to the Sterling advised donor fund structure that [Wong] was sold by FOCW" (*id.* at ¶ 73), (2) "Sterling and [Wong] entered into the Amended and Restated Operating Agreement of JWAF" (*id.* at ¶ 78), (3) "Sterling executed [various resolutions] for JWAF" (*id.* at ¶¶ 79-80), (4) "Only in March 4, 2021 . . . did Sterling realize its error" (*id.* at ¶ 81), (5) "Sterling acted negligently" (*id.* at ¶ 82), and (6) "Sterling breached fiduciary duties owed to Plaintiff[s]" (*id.* at ¶ 87).

Because SFM is alleged to have such duties arising out of the Operating Agreement, it also necessarily has rights under the same agreement, under principles of equitable estoppel. As made clear in *MS Dealer Services Corporation v. Franklin* (11th Cir. 1999) 177 F.3d 942, 947, equitable estoppel principles allow a nonsignatory to compel arbitration if the signatory "'must rely on the terms of the written agreement in asserting [its] claims' against the nonsignatory" and "'when the signatory . . . raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'" (Quoting *Sunkist Soft Drinks v. Sunkist Growers* (1993) 10 F.3d 753, 757 and *Boyd v. Homes of Legend, Inc.* (M.D. Ala. 1997) 981 F.Supp. 1423, 1433.) (See also *Goldman v. KPMG LLP* (2009) 173 Cal.App.4th 209.) Both of these circumstances are present here between plaintiffs, SFM, and Sterling DAF: plaintiffs must rely on the Operating Agreement to assert their claims against SFM, and the FAC raises allegations of "substantially interdependent and concerted misconduct" by SFM and Sterling DAF. Both SFM and Sterling DAF therefore have standing to assert the arbitration clause in the Operating Agreement.

3. Arbitration is Compelled Under Both Federal and State Law

Plaintiffs argue that the Federal Arbitration Act (FAA) does not apply here, because the Operating Agreement between plaintiffs and the Sterling Defendants did not involve interstate

commerce. The court rejects this argument, finding that the agreement to manage JWAF, a Delaware entity, between Wong (from California), SFM (from Virginia), and Sterling DAF (from North Carolina) necessarily implicated interstate commerce, especially given the fact that the Operating Agreement explicitly governed the estate planning fund's "capital contributions," "allocations of profits and losses," "transactions between the company and the members," "transfer and assignment of interests," "accounting," and buying and selling of membership interests. (FAC, Exhibit 4.) This financial activity between members across state lines—at a minimum, between California and North Carolina—is a hallmark of interstate commerce.

Moreover, the court concludes that even if the FAA did not apply, the California Arbitration Act (CAA) would also mandate arbitration in this case. The result is the same, because California has a similarly strong public policy favoring enforcement of arbitration agreements. (See, e.g., *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125 (*OTO*) ["As with the FAA (9 U.S.C. § 1 et seq.), California law establishes 'a presumption in favor of arbitrability.'" (Quoting *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971.)].) Further, unless the parties' arbitration agreement explicitly incorporates the procedural provisions of the FAA, the court may apply the CAA, including section 1281.2 of the Code of Civil Procedure, to address the arbitration agreement. (See *Victrola 89, LLC v. Jaman Properties 8 LLC* (2020 46 Cal.App.5th 337, 342-350.) In this case, Article 12 of the Operating Agreement does not say anything about the FAA.[2]

4. Application of Code of Civil Procedure Section 1281.2

In this case, the parties point out that the Law Firm Defendants are not subject to an arbitration clause. Therefore, they are a "third party," under Code of Civil Procedure section 1281.2, subdivision (c). As noted, section 1281.2 generally provides, in relevant part:

> If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c), the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

Because of the presence of "third parties" who are not subject to the arbitration agreement here, plaintiffs urge the court to follow option (1) above and refuse to enforce the arbitration agreement, allowing all of the parties to proceed together with litigation. Although this is one of the permitted options, the court finds that it would run directly counter to the FAA (and therefore be preempted by it), as well as California's public policy favoring the enforcement of arbitration agreements. By contrast, the Sterling Defendants urge the court to

[2] The Operating Agreement indicates that even though the parties agree to the jurisdiction and venue of Santa Clara County in California, the governing law of the agreement is Delaware law. Nevertheless, none of the parties has cited any Delaware law concerning arbitration, much less pointed to any conflict between Delaware procedural law and California procedural law. (They cite only the FAA and CAA.) Accordingly, this court applies the California Code of Civil Procedure, to the extent that it is not in conflict with the FAA.

follow option (4) above—i.e., to order arbitration but immediately stay it until the conclusion of the litigation between plaintiffs and the Law Firm Defendants. The court finds this to be unsatisfactory, as well, for multiple reasons. First, this option, too, appears to run counter to the California public policy favoring arbitration—it allows the litigation to take precedence over "arbitration as a speedy and relatively inexpensive means of dispute resolution." (*OTO*, *supra*, 8 Cal.5th at p. 125.) Second, the court questions whether allowing the litigation to proceed first would actually save resources, given that the litigation still includes the Law Firm Defendants' cross-complaint against the Sterling Defendants. Based on a review of the allegations in this cross-complaint, the court finds that it substantially duplicates (and is derivative of) many of the same claims that plaintiffs have asserted against the Sterling Defendants that are subject to arbitration. As a result, allowing that cross-complaint to proceed in litigation would save nothing. Conversely, to avoid interfering with the arbitration, the court would have to *stay* the Law Firm Defendants' cross-complaint while allowing the rest of plaintiffs' case to go forward in the court action. That would essentially require splitting the case into three pieces (plaintiffs' court action against the Law Firm Defendants, the Law Firm Defendants' court action against the Sterling Defendants, and the plaintiffs' arbitration against the Sterling Defendants), which would be exceedingly unwieldy and inefficient. Third, staying the arbitration pending the litigation would also not solve the problem of the "empty chair" defense, highlighted at length by plaintiffs in their briefs. Plaintiffs argue that they would suffer "significant prejudice" if the litigation went forward first, without the Sterling Defendants, and the Law Firm Defendants were able to shift the blame to the absent defendants.

The court finds that all of the foregoing problems are avoided with option (3), which would allow the "speedy and relatively inexpensive means of dispute resolution" (arbitration) to go first, and then, if necessary, allow the litigation to proceed after the claims between plaintiffs and the Sterling Defendants have been adjudicated or otherwise resolved. The court expects that the arbitration would largely address—and potentially obviate—the derivative and duplicative allegations of the Law Firm Defendants' cross-complaint against the Sterling Defendants. For this reason, the court grants the Sterling Defendants' motions to compel arbitration and otherwise stays the court action under Code of Civil Procedure section 1281.2, until resolution of the plaintiffs' claims against SFM and Sterling DAF.

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Calendar Line 8
Case Name: *Lucile Salter Packard Children's Hospital at Stanford v. Foundation for Medical Care of Tulare and Kings Counties, Inc. et al.*
Case No.: 23CV415319

Defendant Foundation for Medical Care of Tulare and Kings Counties, Inc. ("Foundation") moves to transfer this case to the Tulare County Superior Court, arguing that venue in Santa Clara County is improper and that the only proper venue is in Tulare County. Plaintiff Lucile Salter Packard Children's Hospital at Stanford ("Hospital") opposes, arguing that venue is proper in either Santa Clara County or Tulare County. The court finds this motion to be somewhat vexing, because neither side appears to have presented a full picture of the relevant circumstances that would allow the court to make a knowledgeable decision on the question presented. The court believes that key pieces of information are missing. Because the burden of proof is ultimately on the moving party, the court finds that the burden has not been met, and it DENIES the motion.

1. Background

According to the complaint, this case arises out of medical services that the Hospital provided to a patient who "was formally referred to [the Hospital] by [the Foundation]," and whom the Hospital treated "over many months." (Complaint, ¶ 8.) Under a memorandum of understanding ("MOU"), the total amount owed for the Hospital's services was $7,710,213.93. (*Ibid.*) Defendant Health Payer Consortium, LLC ("HPC") then stepped in "as an intermediary to negotiate more favorable payment terms." (*Id.* at ¶ 9.) After extensive negotiations, the parties entered into an agreement ("Payment Agreement") under which HPC and/or the Foundation would pay the Hospital $5,120,066.65 (the complaint is ambiguous as to who exactly was responsible paying). (*Id.* at ¶¶ 11-13.)

After reaching this compromise, HPC apparently arranged for the payment to be made by wire transfer but then transferred the amount to the wrong account, pursuant to "Fraudulent Wire Instructions" received by HPC on September 4, 2022. As a result, the Hospital never received the payment. (Complaint, ¶¶ 15-23.)

The Hospital has now filed its complaint, alleging six causes of action against the Foundation (for breach of contract, breach of accord, account stated, common count – services rendered, common count – open book account, and negligence) and one cause of action against HPC (for negligence).

2. The Parties' Evidence

As noted above, there are two agreements at issue, the MOU and the subsequent Payment Agreement, yet the parties' briefing focuses almost entirely on the Payment Agreement. While the court understands that the agreement that was allegedly breached by the Foundation was the Payment Agreement—and that this latter agreement provides either a complete or partial factual basis for the first, second, third, fifth, and sixth causes of action—the fourth cause of action ("Common Count – Services Rendered") appears to be based solely on the Foundation's referral of the patient to the Hospital and the services rendered *under the MOU*. Thus, the MOU is directly relevant to the allegations in this case, and yet neither side attaches a copy of the MOU to its motion papers. The court is left to speculate about the terms

of, and the parties to, this document. Moreover, the Payment Agreement itself is purportedly a compromise of the payment obligations that originally arise out of the MOU, and so the MOU is potentially relevant to the other causes of action, as well.

If the MOU is indeed what the complaint alleges it is, then it effectively ends the inquiry on this motion to transfer, because the law is clear that a corporation or association "may be sued in the county where the contract . . . is to be performed, or where the obligation or liability arises . . . ," among other places. (Code Civ. Proc., § 395.5.) In this case, the fourth cause of action makes it clear that the Hospital's services were "performed" at the Hospital in Stanford, which is in Santa Clara County. That is presumably also where the "obligation or liability" arose under the MOU (although, again, the court does not have the MOU). Thus, venue in Santa Clara County is proper.

The Foundation argues in its motion that the complaint is factually incorrect—that it did not refer the patient to the Hospital, that it is not a party to the MOU, that it is not bound by the Payment Agreement (as a non-signatory), that HPC was not its "agent" in negotiating the Payment Agreement, and that it is merely a third-party administrator of healthcare claims for Kawaeh Health ("Kawaeh"), who was the actual insurer of the patient who was treated by the Hospital.[3] But these arguments are not supported by any actual evidence. Most critically, the Foundation completely fails to include any information or documentation regarding Kawaeh, its "client," including any contract between the Foundation and Kawaeh that would allow the court to evaluate the Foundation's role in this payment dispute more accurately. Instead, the court is left with: (1) the bare allegations of the complaint, (2) the attorney arguments in the Foundation's briefs, and (3) the perfunctory declaration of Brent Boyd, which disagrees with the allegations in the complaint without attaching any supporting evidence.

3. Conclusion

The moving party has the burden of showing that the plaintiff's venue selection is improper. (*Battaglia Enterprises, Inc. v. Superior Court* (2013) 215 Cal.App.4th 309, 313-314.) The motion must be supported by competent and credible evidence. (*Totor-Saliba-Perini Joint Venture v. Superior Court* (1991) 233 Cal.App.3d 736, 744.) In this case, the Foundation has failed to discharge its burden. *Again, the court has no competent information about Kawaeh or the MOU.* Although the Foundation's arguments in its briefs ultimately raise some doubts in the court's mind as to whether it is the correct defendant for the first five causes of action in the complaint, the court does not have sufficient evidence to find that venue is improper in Santa Clara County.

With the denial of this motion, the Foundation has 30 calendar days to "move to strike, demur, or otherwise plead if [it] has not previously filed a response" to the complaint. (Cal. Rules of Court, rule 3.1326.)

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[3] In addition, the Foundation claims that reinsurance coverage is provided by Voya Financial, Inc. (Declaration of Brent Boyd, ¶ 7.)