SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: January 23, 2024 TIME: 9:00 A.M.

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:
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LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	23CV413383	Najid Opeyany vs Jerry Little et al	Defendants' Demurrer to Plaintiff's First Amended Complaint is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order. Please scroll down to lines 1-2 for full tentative ruling. Court to prepare formal order.
2	23CV413383	Najid Opeyany vs Jerry Little et al	Defendants' Motion to Strike Portions of Plaintiff's First Amended Complaint is DENIED as MOOT in light of the Court's SUSTAINING the demurrer. Please scroll down to lines 1-2 for full tentative ruling. Court to prepare formal order.
3	23CV416264	Salvador Perez vs GENERAL MOTORS, LLC.al	GM's demurrer is OVERRULED. Please scroll down to lines 3-4 for full tentative ruling. Court to prepare formal order.
4	23CV416264	Salvador Perez vs GENERAL MOTORS, LLC.	GMS's motion to strike is DENIED. Please scroll down to lines 3-4 for full tentative ruling. Court to prepare formal order.
5	23CV417702	Stencil Master, Inc. vs Gorilla Circuits	Defendant Gorilla Circuits' Motion to Compel Further Responses to Requests for Production (Set One) is GRANTED, IN PART. Please scroll down to line 5 for full tentative ruling. Court to prepare formal order.
6	23CV418763	Isabel Ibarra vs Township Building Services, INC	Township Building Services, Inc.'s Motion to Strike Plaintiff Isabel Ibarra's Complaint is CONTINUED to February 29, 2024 at 9 a.m. in Department 6. It does not appear that an amended notice of motion with this hearing date and time was served on Plaintiff. The California Code of Civil Procedure, Rules of Court, and Civil Local Rule in effect at the time this motion was filed require that the moving party serve a written notice of motion with the hearing date and time. (See Cal. Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if there is a claim that the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Under Civil Local Rule 8(C) in effect at the time this motion was filed, the moving party must file an amended notice of motion with the hearing date once that date is assigned by the clerk. It appears to the Court that this did not occur. The Court accordingly continues the hearing on this motion to February 29, 2024 at 9 a.m. in Department 6. Defendant is ordered to serve an amended notice of motion with this hearing date and time. Failure to file a proof of service demonstrating such service will result in the Court denying this motion without prejudice at the next hearing.
7	23CV425004	Brendon Beheshti as Trustee of Florida 403 Trust vs Julia Jackson	Defendant's Motion to Quash for lack of personal jurisdiction is GRANTED. Please scroll down to line 7 for full tentative ruling. Court to prepare formal order.

8	19CV352431	BANK OF STOCKTON vs CHRISTINA CALDERA et al	Bank of Stockton's Motion for Summary Judgment against Christina Caldera and for Default Judgment Against Jonathan Caldera is GRANTED. A notice of motion with this hearing date and time was served by U.S. Mail on September 23, 2023. No opposition was filed. It is also undisputed that a valid contract was formed and Defendants failed to make the required payments. Accordingly, judgment against Defendants is proper. Moving party to prepare formal order and judgment.
9	19CV355396	Jane Doe vs Keith Crawford et al	Equilibrium Dynamics' Motion for Summary Judgment is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on November 2, 2023. No opposition was filed. Moreover, what was said in the radio broadcast is not disputed, and no agent or employee of Equilibrium Dynamics publicly disclosed private facts about Plaintiff, Plaintiff has no evidence of an agreement between an agent or employee of Equilibrium Dynamics and Crawford to disclose Plaintiff's private information or intentionally inflict emotional distress, and there is no evidence that an agent or employee of Equilibrium Dynamics substantially assisted or encouraged Crawford. Crawford was the party disclosing private information, gratuitously repeating Plaintiff's full name, and deliberately disclosing her workplace and job title. Accordingly, summary judgment in favor of Equilibrium Dynamics is appropriate. Court to prepare formal order.
10	22CV398532	ALINE WHITMAN vs BRENT ROLES	Defendant's Motion for Summary Judgment or, in the alternative, Summary Adjudication is DENIED. Please scroll down to line 10 for full tentative ruling. Court to prepare formal order.
11	21CV381901	PHYSICIANS SURGERY SERVICES, LP vs Shultz & Associates	Plaintiff's Motion to Compel Responses to Requests for Production of Documents (Set One) and for Sanctions is CONTINUED to February 29, 2024 at 9 a.m. in Department 6. It does not appear that an amended notice of motion with this hearing date and time was served on Plaintiff. The California Code of Civil Procedure, Rules of Court, and Civil Local Rule in effect at the time this motion was filed require that the moving party serve a written notice of motion with the hearing date and time. (See Cal. Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if there is a claim that the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Under Civil Local Rule 8(C) in effect at the time this motion was filed, the moving party must file an amended notice of motion with the hearing date once that date is assigned by the clerk. It appears to the Court that this did not occur. The Court accordingly continues the hearing on this motion to February 29, 2024 at 9 a.m. in Department 6. Plaintiff is ordered to serve an amended notice of motion with this hearing date and time. Failure to file a proof of service demonstrating such service will result in the Court denying this motion without prejudice at the next hearing.

12	22CV398942	Myra Saludares vs Costco Wholesale et al	Plaintiff Mayra Saludares' Motion to Compel Further Responses to Special Interrogatory Nos. 5 ,7-14 and for Sanctions is set for an IDC at 9 a.m. on February 23, 2024 in Department 6. The parties are ordered to meet and confer in person or by video conference (email and/or telephone are not sufficient), narrow the scope of their discovery disputes currently set for hearing on this date and on February 8 and 14 in the light of the Court's entry of a protective order, and submit a joint statement listing the requests that still require the Court's intervention on or before February 21, 2024. The statement shall be served, filed, and emailed to Department6@scscourt.org. The Court reserves ruling on the request for sanctions, which will be determined in conjunction with the IDC.
13	22CV398942	Myra Saludares vs Costco Wholesale et al	Plaintiff Mayra Saludares' Motion to Compel Further Responses Request for Production Nos. 1-12, 14-19 and for Sanctions is set for an IDC at 9 a.m. on February 23, 2024 in Department 6. The parties are ordered to meet and confer in person or by video conference (email and/or telephone are not sufficient), narrow the scope of their discovery disputes currently set for hearing on this date and on February 8 and 14 in the light of the Court's entry of a protective order, and submit a joint statement listing the requests that still require the Court's intervention on or before February 21, 2024. The statement shall be served, filed, and emailed to Department6@scscourt.org. The Court reserves ruling on the request for sanctions, which will be determined in conjunction with the IDC.
14	22CV398942	Myra Saludares vs Costco Wholesale et al	Costco's Motion for Protective Order is GRANTED. The Court will enter the Santa Clara County's Model Protective Order. However, the Court cautions Costco to carefully examine paragraph 5.1 of that model order, titled "Exercise of Restraint and Care in Designating Material for Protection." Entry of this protective order is not a license to Costco making blanket designations or to producing clearly non-trade secret information such as the surveillance video and/or photos of the incident, as confidential. Review of Plaintiff's motions to compel make clear that there are many requests Costco could have easily responded to without entry of this protective order. The Court orders Costco to revisit its objections, meet and confer with Plaintiff to make clear what it will and will not produce and why, and to submit a joint statement listing the requests that still require the Court's intervention on or before February 21, 2024. The statement shall be served, filed, and emailed to Department6@scscourt.org. The Court reserves ruling on the request for sanctions, which will be determined in conjunction with the IDC. Costco shall submit the form of protective order provided with its motion to the Court on or before Friday, January 26, 2024.

15	22CV399041	Jane Doe vs The City of Sunnyvale et al	Defendant Lockwood's Motion to Compel Plaintiff's Deposition is MOOT. The parties agree that Plaintiff's deposition is now completed except for questions related to the *Pitchess* materials, which questions will be addressed at a further deposition in the spring the parties have already worked out. The parties each move for sanctions, which the Court declines to award to either side. Plaintiff should have moved for a protective order to obtain the protections she sought for her deposition; not showing up without doing so was not appropriate. However, Lockwood should have made the appropriate record of nonappearance and withdrawn this motion once the deposition was completed. This is not a case, like many, where the only reason the deposition was completed was because the motion to compel was filed. Accordingly, the cross motions for sanctions are DENIED. Court to prepare formal order.
16	23CV412732	ANGELICA GODINEZ MOLINA et al vs GENERAL MOTORS LLC, a Delaware Limited Liability Company	Plaintiff's Motion to Compel Further Responses to Requests for Production of Documents and for Sanctions is DENIED, except that GM is ordered to produce information sufficient to show the correspondence between its document production and Plaintiff's requests for production within 20 days of service of the formal order. Please scroll down to line 16 for full tentative ruling. Court to prepare formal order.
17	18CV338295	Yuritzi Martinez vs Centerplate of Delaware, Inc. et al	Plaintiff Yuritzi Jacobo Martinez' Motion to Enforce Stipulation Regarding Settlement With Defendant Epic Staffing Solutions, LLC is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on December 14, 2023. Defendant did not oppose the motion. According to the uncontroverted declaration of Joseph A. Lepera, the parties stipulated that the Court would retain jurisdiction to enforce their settlement pursuant to Code of Civil Procedure section 664.6. Their agreement provides that Defendant would pay a total of $75,000 comprised of one lump sum payment with monthly payments of the balance, the amounts of each to be decided by the parties. Defendant refused to pay in this way, instead insisting on monthly payments for just over three years. Plaintiff's motion is accordingly granted. Moving party to prepare formal order.
18	20CV370520	AMELIA GLISSMAN et al vs DILBER IRAHETA et al	This matter is continued to March 7, 2024 per stipulation.
19	22CV395955	Sonasoft Corporation vs Ankur Garg et al	Plaintiff's Motion to Enforce Settlement is DENIED. The Court carefully reviewed the settlement agreements and motions, and at no point did the parties stipulate that the Court would retain jurisdiction to enforce the settlement pursuant to Code of Civil Procedure section 664.6, much less communicate such stipulation to the Court. Such an express stipulation is required before the Court can enter judgment pursuant to the parties' settlement agreement terms. (See *Sayta v. Chu* (2017) 17 Cal.App.5th 960, 963.) Without such stipulation communicated to the Court, Plaintiff must proceed by way of a breach of contract claim. Court to prepare formal order.

20	22CV397100	Sushma Venkataramanappa vs Sudhir Pai et al	Defendant GVA Franchise, LLC's Motion to Set Aside Default is DENIED as untimely. It is clear from evidence submitted by Defendant that Defendant was aware of the default and failed to seek to have it set aside within six months of its entry—in this case the date it was filed. Relief under Code of Civil Procedure 473(b) or 473(d) is also DENIED. Given the length of time Defendant knew about the default, even if Defendant's counsel had submitted a proper declaration, which he did not, relief would be improper on this record. Court to prepare formal order.
21	23CV417677	1153 SAN RAFAEL, LLC vs AMERICAN ZURICH INSURANCE COMPANY	Petitioner's Motion for an order appointing umpire and setting deadline for completion of appraisal is GRANTED. The Court studied the correspondence attached to the Declaration of Gary A. Barrera and agrees that a proposed stipulation agreeing that Petitioner is claiming a certain valuation is not the same thing as a stipulation agreeing to that valuation. The statutory scheme was enacted to address these disputes, and the Court previously ordered the statutory process to go forward. The Court accordingly orders the parties to select an umpire from the following list: Hon. William J. Cahill (Ret.), Mike Cosley, Hon. Bonnie Sabraw (Ret.), Hon James Lambden (Ret.), or Hon. Rex Heeseman (Ret.). If the parties are unable to select an umpire from this list within 5 court days of entry of this formal order, 1153 San Rafael shall submit an ex parte application to the Court explaining that the parties failed to agree and requesting the Court to appoint an umpire from this list. The Court further orders the appraisal process be fully completed within 120 days from service of this formal order.
22	23CV418055	Kathleen Dutra vs Citibank, N.A	Citibank, N.A.'s Petition to Compel Arbitration is GRANTED. There is a binding arbitration agreement between the parties. (See Exhibit A at p. 52 "If arbitration is chosen by any party, neither you nor we will have the right to litigate that Dispute in court or have a jury trial on that Dispute.") The Court has reviewed Plaintiff's opposition to the Petition and understands her arguments. However, the law is strict that a court must send a dispute to arbitration where there is a valid written agreement between the parties to arbitrate as there is here. 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." (See also *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.) Accordingly, the petition is granted, this matter is ordered to arbitration and stayed pending the outcome of that arbitration. The April 16, 2024 case management conference shall remain as set for the Court to receive an update on the status of the arbitration. Court to prepare formal order. Parties ordered to appear for the hearing.
23	23CV420525	Mendel Saturnino vs Arleen Ruiz	Off calendar per stipulation.

24	23CV422217	Audrey Kallander vs Fourstar Group Inc.	Audrey Kallander's Motion to Approve Proposition 65 Settlement and Consent Judgment is CONTINUED to March 26, 2024 at 9 am in Department 6. It does not appear that an amended notice of motion with this hearing date and time was served on the necessary parties. The California Code of Civil Procedure, Rules of Court, and Civil Local Rule in effect at the time this motion was filed require that the moving party serve a written notice of motion with the hearing date and time. (See Cal. Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if there is a claim that the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Under Civil Local Rule 8(C) in effect at the time this motion was filed, the moving party must file an amended notice of motion with the hearing date once that date is assigned by the clerk. It appears to the Court that this did not occur. The Court accordingly continues the hearing on this motion to March 26, 2024 at 9 a.m. in Department 6. Plaintiff is ordered to serve an amended notice of motion with this hearing date and time. Failure to file a proof of service demonstrating such service will result in the Court denying this motion without prejudice at the next hearing.
25	23CV424294	Ajay Pentamsetty vs Parvinder Singh et al	Ajay Pentamsetty's Petition for Relief from Claim Requirement (Government Code §911.4) is GRANTED. Please scroll down to line 25 for full tentative ruling. Court to prepare formal order.

Calendar Lines 1 & 2
Case Name: *Najid Opeyany v. Redwood Electric Group, Inc. et.al.*
Case No.: 23CV413383

Before the Court is Defendants' Jerry Little and Redwood Electric Group Inc., (collectively "Defendants") motion to strike and demurrer to Plaintiff Najid Opeyany's, First Amended Complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from Redwood Electric's alleged wrongful termination of Plaintiff's employment. According to the FAC, Plaintiff is a general electrician of Afghan origin and the Muslim faith. Plaintiff was hired in February of 2021 and was fired three months later in April of 2021, at the age of 44. Plaintiff was again dispatched by his union to work for Redwood Electric in October of 2021, but he was not hired.

During his employment, Plaintiff's foreman, Mr. Little, inappropriately commented on Plaintiff's origin and/or religion on one occasion. Plaintiff reported the incident and Redwood Electric took disciplinary measures, made Mr. Little apologize, and subsequently transferred Plaintiff to another project with another foreman upon his request.

While at the new project, Plaintiff was warned by another employee that 'they get rid of people with gray hair first." Plaintiff considered this comment as a slight on his age and was offended. Days later a co-worker with gray hair was terminated in front of Plaintiff. Later, Plaintiff complained to his new foreman about the unsafe noise levels and asked for "PPE". He was informed that the company did not have any.

In April 2020, Plaintiff was told his services were no longer needed and was terminated. Plaintiff believed his termination was in retaliation for his prior complaints and due to his religion, race, national origin, and age.

Plaintiff filed his complaint on March 28, 2023, and subsequently amended it on August 15, 2023. The operative first amended complaint alleges (1) discrimination in violation of the FEHA; (2) hostile work environment harassment in violation of the FEHA; (3) retaliation in violation of the FEHA; (4) failure to prevent discrimination, harassment, and retaliation in violation of the FEHA; (5) violation of labor code § 1102.5; (6) violation of labor code § 6310; (7) negligent hiring, supervision, and

retention; (8) wrongful termination of employment in violation of public policy; (9) intentional infliction of emotional distress.

II. Meet and Confer

Before filing a demurrer or a motion to strike, the demurring or moving party is required to meet and confer with the party who filed the pleading demurred to or the pleading that is subject to the motion to strike for the purposes of determining whether an agreement can be reached through a filing of an amended pleading that would resolve the objections to be raised in the demurrer. (Code Civ. Proc, §§ 430.41)

It is evident from declaration of Mr. Stebbins that no meet and confer took place between the parties due to unresponsiveness of Plaintiff's counsel. While failure to meet and confer is not grounds to grant or deny a demurrer, the Court admonishes Plaintiff's counsel to comply with Court's rules and procedures. (Code Civ. Proc. § 439(a)(4).

III. Legal Standard

A. Demurrer

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

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling

on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be also considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendant demurs to each of the claims in the FAC on the grounds that each cause of action fails to allege facts constituting a claim.

B. Motion to Strike

Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof. (Code of Civ. Proc., § 435(b)(1); Cal. Rules of Court (CRC), Rule 3.1322(b).) The court may, upon a motion or at any time in its discretion and upon terms it deems proper: (1) strike out any irrelevant, false, or improper matter inserted in any pleading; or (2) strike out all or any part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court. (Code of Civ. Proc., § 436, subds. (a)-(b); *Stafford v. Shultz* (1954) 42 Cal.2d 767, 782 ["Matter in a pleading which is not essential to the claim is surplusage; probative facts are surplusage and may be stricken out or disregarded"].)

IV. Analysis

A. Demurrer

1. First Cause of Action: Discrimination in Violation of the FEHA.

Under the California Fair Employment and House Act ("FEHA"), it is unlawful for an employer, because of a protected classification, to discriminate against an employee "in compensation or in terms, conditions, or privileges of employment." (Gov Code § 12940, subd. (a).) Plaintiff claiming discrimination must allege facts establishing, (1) he is a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. (*Khoiny v. Dignity Health* (2022) 76 Cal.App.5th 390, 397; *Guz v. Bechtel National Inc*. (2000) 24 Cal.4th 317, 355.)

Defendant argues the FAC fails to allege facts (1) with the requisite specificity required for a statutory claim, (2) suggesting discriminatory motive based on Plaintiff's national origin, and (3) showing a causal link between Plaintiff's protected status and his termination. The Court agrees.

Plaintiff alleges his protected characteristics were substantial motivating reasons in Redwood Electric's decision to terminate his employment and not to retain, re-hire or otherwise employ him in any position. (FAC ¶ 25). However, Plaintiff fails to allege sufficient facts to show Redwood Electric's discriminatory motive with any specificity or that Redwood Electric's discriminatory motive (if any) was the reason for Plaintiff's termination.

Likewise, Plaintiff's alleged violation of Labor Code § 6310 is based on a single occasion where he complained about loud noise on the jobsite, asked for "PPE" and was told none was available. This is insufficient to plead Redwood Electric's violation of the FEHA, much less a retaliatory causal link.

Accordingly, Defendants' demurrer to the first cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

2. Second Cause of Action: Hostile Work Environment Harassment in Violation of the FEHA

To establish allege a claim for hostile work environment, Plaintiff must allege (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his protected status; (4) the harassment unreasonably interfered with his work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment. (*Ortiz v. Dameron Hospital Assn*. (2019) 37 Cal.App.5th 568, 581.) "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.'" (*Harris v. Forklift Sys*. (1993) 510 U.S. 17, 25, conc. opn. of Ginsburg, J.; Gov. Code, § 12923, subd. (a) [endorsing this language as reflective of California law].)

A single incident of harassment may be enough to constitute a hostile work environment if it "unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." (Gov. Code, § 12923, subd. (b).) However, several cases have held that isolated incidents, even if highly reprehensible, may be insufficient as a matter of law to establish

that the harasser's conduct was severe or pervasive enough to alter the work environment. (See *Brooks v. City of San Mateo,* 229 F.3d 917, 926 (9th Cir. 2000); *Serri v. Santa Clara Univ.*, (2014) 226 Cal.App.4th 830 (rejecting FEHA claim); *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121, 129-130 (1999) ("[N]ot every utterance of a racial slur in the workplace violates the FEHA.") The court is to examine the totality of the circumstances to determine whether there exists a hostile work environment. (Gov. Code, § 12923, subd. (c).

Plaintiff alleges he was "extremely offended" and felt "uncomfortable" by the comments about his national origin and termination of people with gray hair. Plaintiff also felt "mocked and embarrassed" when his foreman pointed out an error in front of other coworkers. (FAC ¶ 15.) However, Plaintiff fails to allege facts showing how these comments unreasonably interfered with the performance of his job.

Accordingly, Defendants' demurrer to the second cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

3. Third Cause of Action: Retaliation in Violation of the FEHA

"To establish a prima facie case of retaliation under the [Fair Employment and Housing Act] FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Meeks v. Autozone, Inc.* (2018) 24 Cal.App.5th 855, 878-879 (brackets omitted).) "An 'adverse employment action,' which is a critical component of a retaliation claim, requires a substantial adverse change in the terms and conditions of the plaintiff's employment." (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063 (quotation omitted).)

Plaintiff alleges that in or around April 2021, he was suddenly told that his services were not needed anymore and was terminated. In October of 2021, when he was again dispatched to Redwood Electric's jobsite, he was told that he would not be hired after all. Plaintiff then alleges in conclusory fashion that he "believed this was in retaliation for his prior complaints as well as because of his religion, race, ancestry, color, national origin, and age." (FAC ¶ 16, 17.) This is insufficient.

Accordingly, Defendants' demurrer to the third cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

4. Fourth Cause of Action: Failure to Prevent Discrimination, Harassment, and Retaliation in Violation of the FEHA

"The FEHA makes it a separate unlawful employment practice for an employer to 'fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.'" (Gov. Code § 12940, subd. (k).)" (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040.) To prevail on such a claim, a plaintiff must establish: (1) he was subjected to discrimination, harassment, or retaliation; (2) the defendant failed to take all reasonable steps to prevent discrimination, harassment, or retaliation; and (3) the defendant's failure caused the plaintiff to suffer injury, damage, loss, or harm. (*Caldera v. Department of Corrections & Rehabilitation*, (2018) 25 Cal.App.5th 31, citing *Lelaind v. City and County of San Francisco* 576 F. Supp. 2d 1079, 1103 (N.D. Cal. 2008).)

This cause of action is derivative of Plaintiff's discrimination and harassment claims, for which the Court sustained Defendants' demurrer. Accordingly, Defendants' demurrer to the fourth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

5. Fifth Cause of Action for Violation of Labor Code § 1102.5: Whistleblower Retaliation

Labor Code section 1102.5 provides whistleblower protections to employees who disclose wrongdoing. The California Supreme Court recently clarified that Labor Code section1102.6, and not the decision in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims. (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 712.) To support a claim for whistleblower retaliation, Plaintiff must show "by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee." (*Id.*) In another very recent case, the Supreme Court of California held that under Section 1102.5, the word "disclosure" also means to "make [something] openly known" or "open [something up] to general knowledge." (*People ex rel. Garcia-Brower v. Kolla's, Inc.* (2023) 308 Cal.Rptr.3d 388, 393.) Section 1102.5 also protects disclosures made to "another employee who has the authority to investigate … or correct the violation." (*Id.*)

Plaintiff alleges in conclusory fashion that Redwood Electric violated the FEHA, California Constitution, and Government Code section 12900 *et seq*. without alleging what these violations were, who Plaintiff reported the violations to, and how his reporting is linked to termination of his employment or Redwood Electric's refusal to re-hire him.

Accordingly, Defendants' demurrer to the fifth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

6. Sixth Cause of Action: Violation of Labor Code § 6310

Labor Code § 6310, subsections (a)(1)-(4) provide:

> No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following:
>
> (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, their employer, or their representative.
>
> (2) Instituted or caused to be instituted any proceeding under or relating to their rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of themselves, or others of any rights afforded to them.
>
> (3) Participated in an occupational health and safety committee established pursuant to Section 6401.7.
>
> (4) Reported a work-related fatality, injury, or illness, requested access to occupational injury or illness reports and records that are made or maintained pursuant to Subchapter 1 (commencing with Section 14000) of Chapter 1 of Division 1 of Title 8 of the California Code of Regulations, or exercised any other rights protected by the federal Occupational Safety and Health Act (29 U.S.C. Sec. 651 et seq.), except in cases where the employee alleges they have been retaliated against because they have filed or made known their intention to file a workers' compensation claim pursuant to Section 132a, which is under the exclusive jurisdiction of the Workers' Compensation Appeals Board.

Labor Code section 6310 is meant to address issues of physical safety and working conditions - the purview of the California of Occupational Safety and Health ("Cal/OSHA"). Plaintiff's alleged complaints seemed to be regarding harassment and discrimination on the basis of national origin. However, these allegations are vague, conclusory, and fails to connect any complaints to the cause of his termination.

Accordingly, Defendants' demurrer to the sixth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

7. Seventh Cause of Action: Negligent Hiring, Supervision, and Retention

A cause of action for negligent hiring, supervision, or retention of an employee requires: (1) the employer hired employee; (2) the employee was/became unfit or incompetent to perform the work for which he was hired; (3) the employer knew or should have known the employee was/became unfit or incompetent and that this unfitness or incompetence created a particular risk to others; (4) the employee's unfitness or incompetence harmed plaintiff; and (5) the employer's negligence in hiring/supervising/ retaining the employee was a substantial factor in causing plaintiff's harm. (CACI No. 426; see also *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1213-1214.) To establish a cause of action for negligent hiring, retention, or supervision, a plaintiff must show that the employer knew or should have known that hiring or retaining the employee created a particular risk or hazard and that particular harm occurs. (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902.)

Plaintiff alleges Redwood owed a duty of care to Plaintiff to hire persons who would not engage in harassing or discriminatory conduct. In one short sentence Plaintiff alleges "Redwood Electric breached these duties." (FAC ¶¶ 69-71.) This is insufficient to survive a demurrer.

Accordingly, Defendants' demurrer to the seventh cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

8. Eight Cause of Action for Wrongful Termination of Employment in Violation of Public Policy

Wrongful termination in violation of public policy, or a *Tameny* claim, is limited to claims "finding support in an important public policy based on a statutory or constitutional provision." *(Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.) An employee must show the employer violated

a policy that is (a) enumerated in a constitutional, statutory, or regulatory provision of state or federal law, (b) "public" in the sense that it "inures to the benefit of the public" (rather than an individual interest), (c) well established at the time of the discharge, and (d) substantial and fundamental. (*Stevenson v. Superior Ct.* (1997) 16 Cal.4th 880, 894; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 79).

Plaintiff alleges Redwood Electric terminated his employment in violation of "various fundamental public policies underlying state law," including but not limited to the California Constitution, the FEHA, Government Code sections 12900 *et seq*. and California Labor Code §§ 1102.5, 6310. (FAC ¶ 74.) This is insufficient.

Accordingly, Defendants' demurrer to the eighth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

9. Ninth Cause of Action: Intentional Infliction of Emotional Distress

Intentional Infliction of Emotional Distress

"The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009 (citation and ellipses omitted).)

Plaintiff fails to state facts showing an actionable violation of the FEHA and does not allege facts showing that Defendants' actions were "outrageous conduct beyond the bounds of human decency." (*Janken v. GM Hughes Electronics* (1996) 46 Cal. App. 4th 55, 80 ("personnel management decisions" cannot support a claim of intentional infliction of emotional distress even if undertaken with discriminatory motive).) Plaintiff alleges Redwood Electric disciplined Plaintiff's initial foreman, made him apologize, and transferred Plaintiff to another project with another foreman. Plaintiff also alleges that when he complained to his new foreman about the loud noise and requested "PPE", he was told that

no PPE was available. These allegations do not rise to the level of outrageousness needed to survive a demurrer.

Accordingly, Defendants' demurrer to the nineth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service date of the final order.

B. Motion to Strike

Based on the ruling on the demurrer, Defendants' motion to strike is DENIED as MOOT.

Calendar Lines 3 and 4
Case Name: *Salvador Perez v. General Motors LLC., et al.*
Case No.: 23CV416264

Before the Court is defendant General Motors LLC.'s ("GM") demurrer to plaintiff Salvador Perez's first amended complaint ("FAC") and motion to strike portions therein. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a lemon law case. On December 1, 2019, Plaintiff purchased a Chevrolet Silverado (the "Vehicle"), which was manufactured and/or distributed by GM. (FAC, ¶ 6.) In connection with the purchase, Plaintiff entered a warranty contract with GM. (FAC, ¶ 7.) During the express warranty period, defects, and nonconformities, such as transmission, suspension, electrical defects, manifested. (FAC, ¶ 11.) Plaintiff specifically alleges defects with the 8-speed transmission ("Transmission Defect"). (FAC, ¶ 60.) Plaintiff alleges GM and its representatives were unable to service or repair the Vehicle after a reasonable number of opportunities. (FAC, ¶¶ 39, 41 45.)

Plaintiff initiated this action on May 15, 2023 and on November 15, 2023, he filed his FAC, which asserts (1) violation of Civil Code section 1793.2, subdivision (d); (2) violation of Civil Code section 1793.2, subdivision (b); (3) violation of Civil Code section 1793.2, subdivision (A)(3); (4) breach of the implied warranty of merchantability; and (5) fraudulent inducement-concealment. On December 13, 2023, GM filed the instant motions, which Plaintiff opposes.

II. Demurrer

GM demurs to the fifth cause of action for fraudulent inducement-concealment on the ground that it fails to allege sufficient facts to state the cause of action. (Code Civ. Proc. § 430.10, subd. (e).)

A. Legal Standard

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

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

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

B. Analysis

1. Second Cause of Action: Fraudulent Inducement-Concealment

The elements of fraud based on concealment are: (1) the defendant concealed or suppressed a material fact, (2) the defendant was under a duty to disclose the fact to the plaintiffs, (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiffs, (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damages. (*Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1198 (*Jones*).)

As with fraudulent misrepresentation, the elements of concealment must be pleaded with specificity, but significantly less particularity is required in the case of fraudulent concealment because it is difficult to plead a negative, such as "how and by what means something didn't happen, or when it never happened, or where it never happened." (*Alfaro v. Community Housing Improvement System and Planning Assn*. (2009) 171 Cal.App.4th 1356, 1384.) Thus, when courts refer to the requirement of specificity with respect to allegations of fraudulent concealment, they are generally concerned that allegations regarding the facts giving rise to a duty to disclose material facts are pleaded with

particularity. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 132-133 (*Linear Technology*).)

2. Statute of Limitations

The statute of limitations for a fraud claim is three years. (Code Civ. Proc., § 338, subd. (d).) The statute specifically states, "the cause of action…is not deemed to have accrued until *the discovery*, by the aggrieved party, of the facts constituting the fraud or mistake." (*Ibid* [emphasis added].) A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute of limitations bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315. (*E-Fab*).) A demurrer is not sustainable if there is only a possibility the cause of action is time-barred; the statute of limitations defense must be clearly and affirmatively apartment from the allegations of the pleading. (*Id*. at 1315-1316.)

Plaintiff alleges he discovered the wrongful conduct "shortly before the filing of the complaint". (See FAC, ¶ 22.) The complaint was filed in May 2023. GM fails to identify any facts to show the claim accrued on the purchase date as opposed to Plaintiff's discovery date. GM relies entirely on ¶ 11, which alleges the defects manifested themselves during the limitations period but does not provide any specific dates. However, this is not sufficient to establish the claim is time-barred on its face as the exact date of Plaintiff's discovery is still to be determined. (*E-Fab, supra,* 153 Cal.App.4th at 1315-1316.) If the discovery date was shortly before Plaintiff filed the Complaint, then the claim is timely. (Code Civ. Proc., § 338, subd. (d).) Thus, the demurrer cannot be sustained on this basis.

3. Failure to Allege Sufficient Facts

GM argues the claim fails because Plaintiff fails to allege (1) fraud with the requisite specificity; and (2) a duty to disclose.

a. Requisite Particularity

Plaintiff's claim is based on the alleged concealment of material facts regarding the transmission defect when he purchased the Vehicle. Therefore, Plaintiff is not required to allege specific facts regarding affirmative misrepresentations. However, although the specificity requirement for a fraud claim based on concealment is relaxed, Plaintiff must still allege sufficient facts to support the claim. (*Jones,* 198 Cal.App.4th at 1198.) Similar to *Dhital v. Nissan N. Am. Inc.* (2022) 84 Cal.App.5th 828

(*Dhital*), Plaintiff alleges (1) concealment (¶¶ 34-35, 66-67, 70-71, 73, 75); (2) knowledge of falsity (¶¶ 59-60, 63-66, 68); (3) intent to induce reliance (¶¶ 70-71); (4) justifiable reliance (¶¶ 62, 66, 71); and (5) damages (¶¶ 75). Finding these allegations sufficient, *Dhital* explains:

> Plaintiffs alleged the CVT transmission installed in numerous Nissan vehicles (including the one plaintiffs purchased) were defective; Nissan knew of the defects and hazards they posed; Nissan had exclusive knowledge of the defects but intentionally concealed and failed to disclose that information; Nissan intended to deceive plaintiffs by concealing known transmission problems; plaintiffs would not have purchased the car if they had known of the defects; and plaintiffs suffered damages in the form of money paid to purchase the car.

(*Dhital,* 84 Cal.App.5th at 843-844.)

The California Supreme Court granted review of *Dhital* on February 1, 2023, and denied the request for depublication. Therefore, *Dhital* "may be cited for potentially persuasive authority only." (Cal. Rule 8.1115(e)(1).)

Nonetheless, the Court finds the analysis in *Dhital* persuasive. Plaintiff alleges his fifth cause of action with the requisite specificity. Thus, the demurrer cannot be sustained on this basis.

b. Duty to Disclose

"A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255 (*Collins*).) Where, as here, there is no fiduciary relationship, the duty to disclose generally presupposes a relationship grounded in "some sort of transaction between the parties." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 311 (*Bigler-Engler*).) Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement. (*OCM Principal*

Opportunities Fund, L.P. v. CIBC World Markets Corp. (2007) 157 Cal.App.4th 835, 859 (*OCM Principal*).)

GM relies on *Bigler-Engler*, noting the Court of Appeals reversed a verdict for fraudulent concealment against the manufacturer of a medical device because the manufacturer and the plaintiff (who was injured by using the device) did not have the required direct transactional relationship. (*Bigler-Engler*, supra, 7 Cal.App.5th at 314-15.) There, the plaintiff did not obtain the device directly from the manufacturer but from a medical group that sold and leased such devices. (*Id.* at 287, 314.) The Court of Appeals explained the lack of direct dealings between the plaintiff and the manufacturer was fatal to the plaintiff's argument that the manufacturer had a duty to disclose. (*Id.* at 312)

GM's argument and its reliance on *Bigler-Engler* is unpersuasive. First, *Bigler-Engler* is factually distinguishable. There, the plaintiff was a patient who sued a physician, the physician's medical group, and the manufacturer of the medical device the physician used. Here, Plaintiff purchased the Vehicle. And, although a manufacturer does not have a transactional relationship with the public at large, a vendor does have a duty to disclose material facts "not only to immediate purchasers, but also to subsequent purchasers when the vendor has reason to expect that the item will be resold." (*OCM Principal,* 157 Cal.App.4th at 859-60.)

Also, Plaintiff does allege a transactional relationship giving rise to Defendant's duty to disclose when he states that on or about December 1, 2019, he entered a warranty contract with GM. (FAC, ¶¶ 6, 7.) Thus, GM's demurrer to the fifth cause of action is OVERRULED.

III. Motion to Strike

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) On a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations.

(*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63, citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

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

"While under section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. [Citation.] Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike. [Citation.]" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281 (*Quiroz*).)

B. Analysis

GM moves to strike the prayer for punitive damages on the basis that is not stated with specificity. To properly plead a claim for punitive damages, a plaintiff must allege the defendant was guilty of malice, oppression, or fraud and the ultimate facts underlying such allegations. (Civ. Code, § 3294, subd. (a); *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) Malice is defined as, "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others."

(Civ. Code, § 3294, subd. (c)(1).) "Oppression" is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) "Despicable conduct," in turn, has been described as conduct that is "so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.4th 306, 331.) Finally, "fraud" is defined within the statute as "an intentional misrepresentation, deceit, or concealment of material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).)

Given the Court's above ruling, Plaintiff sufficiently alleges an entitlement to recover punitive damages. (See *Stevens v. Super. Ct.* (1986) 180 Cal.App.3d 605, 610 [pleading of fraud is sufficient for punitive damages.]; see also Civ. Code § 3294.) Thus, the motion to strike is DENIED.

Calendar line 5
Case Name: *Stencil Master, Inc. vs Gorilla Circuits*
Case No.: 23CV417702

Before the Court is Defendant Gorilla Circuits' Motion to Compel Further Responses to Requests for Production (Set One). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

Plaintiff Stencil Master, Inc. ("Stencil Master") filed this lawsuit on June 6, 2023 alleging Defendant Gorilla Circuits breached a written contract to pay for PCB stencils. Plaintiff seeks $152,854 plush 10% interest. Gorilla Circuits disputes that it ever agreed to pay a higher price for stencils and therefore that the money is owed.

In the present motion, Gorilla Circuits seeks to compel Stencil Master's further responses to Request for Production Nos. 1-9.

II. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) A party may move for an order compelling a further response to a document demand on the ground that (1) an objection is without merit or too general, (2) a statement of compliance with the demand is incomplete, or (3) a representation of inability to comply is inadequate, incomplete, or evasive. (Code Civ. Pro. §2031.210(a).) A party seeking to compel is required to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) This burden may be satisfied by a fact-specific showing of relevance. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448.) Information is relevant to the subject matter of the action if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.)

III. Analysis

Request No. 1: All documents and communications between Stencil Master and Gorilla Circuits concerning the agreement. Stencil Master's response that it "will produce the requested documents to the extent unobjectionable" fails to put Gorilla Circuits on notice as to what Stencil Master will and will not produce. This case concerns breach of an agreement where the price term is disputed. Thus, communications—both within Stencil Master and between Stencil Master and other parties—are relevant. Gorilla Master's motion is therefore GRANTED.

Request No. 2: All documents and communications between you and any person concerning the agreement. For the reasons stated above, Gorilla Master's motion is GRANTED.

Request No. 3: All documents and communications between you and Gorilla Circuits concerning any payment credits. While the documents sought by this request are relevant, the Court takes seriously Stencil Master's representation that it would "take weeks" to collect all past invoices from storage. As noted above, it is the Court's responsibility to manage discovery for both parties and to consider the context of the case. Gorilla Circuits fails to meet its burden to show why the spreadsheet Stencil Master agreed to produce with this information is insufficient. However, internal email and

other correspondence regarding payment credits just before and after Stencil Master's policy changed should be produced. Accordingly, Gorilla Circuit's motion to compel further documents in response to this request is GRANTED, IN PART.

Request for Production No. 4: All documents and communications concerning your calculation of damages in the complaint. This request seeks documents likely to lead to the discovery of admissible evidence, and Stencil Master's response that it "will produce the requested documents to the extent unobjectionable" fails to put Gorilla Circuits on notice as to what Stencil Master will and will not produce. Accordingly, Gorilla Circuit's motion to compel further documents in response to this request is GRANTED.

Request for Production No. 5: All documents and communications between you and Gorilla Circuits concerning the retrieval of frames or stencils. This request seeks documents likely to lead to the discovery of admissible evidence, and Stencil Master's response that it "will produce the requested documents to the extent unobjectionable" fails to put Gorilla Circuits on notice as to what Stencil Master will and will not produce. Accordingly, Gorilla Circuit's motion to compel further documents in response to this request is GRANTED.

Request for Production No. 6: All documents and communications between you and Gorilla Circuits concerning invoicing and accounting. While Stencil Master's response that it "will produce the requested documents to the extent unobjectionable" fails to put Gorilla Circuits on notice as to what Stencil Master will and will not produce, this request is already contained in the above requests. Accordingly, Gorilla Circuit's motion to compel further documents in response to this request is DENIED.

Request for Production No. 7: All invoices from you to Gorilla Circuits. This request is straightforward, yet Stencil Master does not answer whether it is going to produce these invoices or not even though in response to Request No. 3, Stencil Master makes specific representations regarding the difficulty in collecting past invoices from storage. In any event, the Court orders Stencil Master to produce (a) the above-described spreadsheet for invoices sent before its price and returns policy changed, (b) the actual invoices for the 6 months before that change, and (c) all invoices after the price

and returns policy change. Accordingly, Gorilla Circuit's motion to compel further documents in response to this request is GRANTED, IN PART.

Request for Production No. 8: All credit memorandums from you to Gorilla Circuits. This request is targeted, focused, and clear. Yet, Stencil Master again fails to state whether it will or will not produce the requested documents. Accordingly, Gorilla Circuit's motion to compel further documents in response to this request is GRANTED.

Request for Production No. 9: All agreements you allege or contend govern the parties' relationship insofar as the allegations in the complaint are concerned. This is a breach of contract case, and this request seeks production of the agreements Stencil Master contends governed the parties' relationship; in other words, the request is clearly relevant. Yet, Stencil Master again states: "The Responding Party will produce the requested documents to the extent unobjectionable. See 'Stencil Master_001-737'" without stating precisely what it is agreeing to produce. Gorilla Circuit's motion to compel further documents in response to this request is therefore GRANTED.

The Court does not find good cause to compel the production of metadata. Accordingly, the Court orders Stencil Master to (a) produce the above-ordered documents, including the complete email of any emails produced and not just one page, (b) verified supplemental responses stating that all requested documents located after a reasonable search have been produced, and (c) $5,850 in sanctions within 30 days of service of this formal order.

Calendar line 7
Case Name: *Brendon Beheshti v. Julia L. Jackson*
Case No.: 23CV425004

Before the Court is Specially Appearing defendant Julia L. Jackson's motion to quash service for lack of personal jurisdiction. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action for declaratory relief arising out of a contract for the purchase of real property. On September 25, 2022, plaintiff Brendon Beheshti as Trustee of Florida 403 ("403") and Defendant executed an agreement for purchase of real property located in Washington D.C. (the "Property"). (Complaint, ¶ 11.) Defendant sought to finance the purchase with a conventional residential loan and 403 agreed to apply and obtain a residential occupancy permit for the ground unit. (Complaint, ¶ 13.) At the time of the agreement, the parties contemplated obtaining a residential permit and agreed on a settlement date 30 days from the execution of the agreement. (Complaint, ¶ 14.) Defendant's obligation to consummate the transaction was a condition precedent to 403's obligation to deliver the Property with the requisite permit. (*Ibid*.)

403 was unable to obtain the permit by the agreed upon date because of the Washington D.C. building code. (Complaint, ¶ 15-16.) Defendant had not obtained financing, and the parties agreed to extend the settlement date to December 1, 2022. (Complaint, ¶ 17.) By November 29, 2022, Defendant still had not obtained financing. (Complaint, ¶ 18.) On January 17, 2023, 403 offered Defendant financing options on the condition that she remove the residential certificate of occupancy requirement and take the Property "as-is"; Defendant refused these offers. (Complaint, ¶ 20-21.)

In January 21, 2023, 403 executed a release of escrow and presented the release to Defendant. (Complaint, ¶ 22.) Defendant refused to agree to the release and continued to threaten litigation if 403 did not acquiesce to her demands. (*Id.*) In October 2023, Defendant demanded 403 keep the building vacant and threatened 403 with litigation. (Complaint, ¶ 25.)

On October 27, 2023, 403 initiated this action for declaratory relief. On December 11, 2023, Defendant filed the instant motion, which 403 opposes.

II. Evidentiary Objections

Defendant objects to portions of Beheshti's declaration ("Beheshti Decl.").

Defendant's objections to paragraphs 4, 9, 12, and 15 are SUSTAINED on hearsay grounds. Her objections to paragraphs 10 and 11 are OVERRULED.

III. Request for Judicial Notice

Defendant requests judicial notice of:

(1) Real Estate License Search Records from the Virginia Government Department of Professional and Occupational Regulation for Henry Yeh: Exhibit 1;

(2) Real Estate License Search Records from the Maryland Government Department of Labor for Annette Wagner: Exhibit 2; and

(3) Business Entity Search Records from the Maryland Business Express Government Website Federal Title & Escrow Co.: Exhibit 3

Evidence Code section 452, subdivision (c), permits the Court to take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of…any state of the United States." (See Evid. Code, § 452, subd. (c).) These items are Virgina or Maryland documents and records. These items are also offered to establish that Defendant's agents were not located in California, which Plaintiff does not dispute, and the items are also subject to judicial notice under Evidence Code section 452, subdivision (h). Thus, the request for judicial notice is GRANTED.

IV. Waiver of Jurisdiction Through General Appearance

Plaintiff contends Defendant made a general appearance because of footnote 2 in Defendant's moving papers, which states:

> Plaintiff filed a complaint for declaratory relief on October 27, 2023, requesting, among other things, that the court determine that the Sales Agreement was terminated or void by either party. Such a request, however, is now moot because a release of the Sales Agreement was entered into by the parties as of November 15, 2023… Given there is no longer any actual case or controversy, counsel for Defendant requested Plaintiff dismiss the current action, but Plaintiff refused to do so.

(Motion to Quash, p.5, fn. 2.)

A motion to quash pursuant to Code of Civil Procedure section 418.10, may not be used "as an alternative to a demurrer, nor may a party to an action challenge the subject matter jurisdiction of the court by a motion to quash and dismiss and thereby avoid making a general appearance in the action." (See *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1036-1037.) "Notwithstanding a "special appearance" designation on amotion to quash, if a movant seeks relief on any basis other than lack of personal jurisdiction, he or she makes a general appearance." (*Id*. at 1037.)

Defendant does not request any relief in the footnote but rather, provides background. Further, notwithstanding the footnote, Defendant's arguments and authorities are directed to lack of personal jurisdiction. The Court thus does not find Defendant made a general appearance.

V. Motion to Quash Legal Standard

A defendant may specially appear and file a motion to quash for service for lack of personal jurisdiction under Code of Civil Procedure section 418.10, subdivision (a)(1). "[W]here a defendant properly moves to quash service of summons, the burden is on the plaintiff to prove facts requisite to the effective service." (*Sheard v. Super. Ct.* (1974) 40 Cal.App.3d 207, 211.) "[T]he burden of proof is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence." (*Evangelize China Fellowship, Inc. v. Evangelize Ching Fellowship Hong Kong* (1983) 146 Cal.App.3d 440, 444.) The plaintiff must provide affidavits and other authenticated documents to demonstrate competent evidence of specific evidentiary facts that would permit a court to form an independent conclusion on the issue of jurisdiction. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 113 (*In re Automobile Antitrust Cases I & II*).) Allegations in an unverified complaint are insufficient to satisfy this burden of proof. (*Id*.)

Evidence of the jurisdictional facts or their absence may be in the form of declarations. "Where there is a conflict in the declarations, resolution of conflict by the trial court will not be disturbed on appeal if the determination is supported by substantial evidence. However, where the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is subject to personal jurisdiction is one of law. (*Elkman v. National States Ins. Co.* (2009) 173 Cal.App.4th 1305, 1312-1313 (*Elkman*); see also *Greenwell v. Auto-Owners Ins. Company* (2015) 233 Cal.App.4th 783, 789 (*Greenwell*), citing *Elkman*.)

Under the minimum contacts test, personal jurisdiction may be either general or specific. (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062 (*Snowney*).) Where general jurisdiction exists due to a non-resident defendant's "continuous and systematic" activities in a state, the defendant can be sued on causes of action not related to its activities within the state. (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.) Absent the showing adequate to confer general jurisdiction, a defendant may still be subject to specific jurisdiction, meaning "jurisdiction in an action arising out of or related to the defendant's contacts with the forum state." (*Healthmarkets, Inc. v. Super. Ct.* (2009) 171 Cal.App.4th 1160, 1167.)

If a non-resident defendant's contacts with California are not sufficient for general jurisdiction, it may still be subject to California's specific personal jurisdiction if a three-prong test is met. First the defendant must have purposefully availed itself of the state's benefits. Second, the controversy must be related to or arise out of the defendant's contacts with the state. Third, considering the defendant's contacts with the state and other factors, California's exercise of jurisdiction over the defendant must comport with fair play and substantial justice. (*Pavlovich v. Super. Court* (2002) 29 Cal.4th 262, 269.) The plaintiff bears the burden of establishing the first two requirements. If the plaintiff does so, the burden shifts to the defendant to show that California's exercise of jurisdiction would be unreasonable. (See *Greenwell, supra*, 233 Cal.App.4th at 792.)

A. Defendant's Evidence

Defendant declares she was not physically served or domiciled in California. (Jackson Decl., ¶ 2.) Defendant is and has been a Virginia resident for the past five years and has never lived in California. (Jackson Decl., ¶ 4.) Defendant is a dentist licensed to practice in Maryland, Virginia, and Arizona. (Jackson Decl., ¶ 5.) She does not own real property in California, has not visited California in over ten years, and has not voted or held a driver's license in California. (Jackson Decl., ¶¶ 6, 8.)

Defendant further swears the subject real estate transaction took place in the Washington Metropolitan area. (Jackson Decl., ¶ 3.) Defendant toured the property in Washington D.C.; did not travel to California to negotiate, finalize, or execute the sales agreement; was not personally involved in the negotiations; did not speak with Plaintiff prior to the execution of the sales agreement; and signed the agreement in Virginia on September 25, 2022. (Jackson Decl., ¶¶ 10-13.) Defendant's only contact

with California is related to the instant transaction because Plaintiff is a California resident. (Jackson Decl., ¶ 9.)

In January 2023, after communications with Plaintiff broke down, defense counsel sent a letter to Plaintiff asserting Plaintiff failed to comply with the terms of the agreement. (Jackson Decl., ¶ 17.) Plaintiff responded with a letter from his architect explaining the Property could not be converted to a residential property and another letter informing Defendant that he was suing her in California court. (*Ibid*.) Defendant hired a contractor to confirm the architect's assessment, and on November 15, 2023, the parties executed a release agreement, which terminated the sales agreement and released the parties "from any and all responsibility, liability, claim, and/or complaint in connection with said Contract of Sale." (Jackson Decl., ¶ 18.)

B. Plaintiff's Evidence

Plaintiff declares he received and signed Defendant's offer in Santa Clara County. (Beheshti Decl., ¶ 5.) When Washington D.C. did not approve the application for residential use prior to the agreed upon date (October 28, 2022), the parties agreed to extend the deadline to December 1, 2022. (Beheshti Decl., ¶ 7.) On November 30, 2022, Defendant's agent requested seller financing, and Plaintiff received the communication in Santa Clara County. (Beheshti Decl., ¶ 8.) Plaintiff then received and signed Defendant's agent's request to extend the settlement date in Santa Clara County. (Beheshti Decl., ¶ 10.) On December 30, 2022, Defendant's agents proposed another extension to February 17, 2023, which Plaintiff also received in Santa Clara County, but did not sign. (Beheshti Decl., ¶ 11.)

On January 21, 2023, a release agreement was presented to Defendant but she declined to sign it and instead countered with a proposed addendum, which Plaintiff received in Santa Clara County but did not sign. (Beheshti Decl., ¶ 13-14.) On October 20, 2023, defense counsel sent an email and a physical letter threatening litigation after finding out the trust entered negotiations with a commercial tenant and defense counsel demanded the Property be kept vacant, which communication Plaintiff received in Santa Clara County. (Beheshti Decl., ¶ 16-17.) On November 15, 2023, defense counsel informed Plaintiff that Defendant signed the release agreement. (Beheshti Decl., ¶ 18.)

C. Analysis

1. General Jurisdiction

"The standard for general jurisdiction is considerably more stringent than that for specific jurisdiction. A defendant is subject to general jurisdiction when it has substantial, continuous, and systematic contacts in the forum states, i.e., its contacts are so wide-ranging that they take the place of a physical presence in the state. In assessing a defendant's contacts with the forum for purposes of general jurisdiction, we look at the contacts as they existed from the time the alleged conduct occurred to the time of service of summons." (*Strasner v. Touchstone Wireless Repair & Logistics, LP* (2016) 5 Cal.App.5th 215, 222-223 (*Strasner*).)

Analysis of the above record makes clear Defendant does not have "substantial, continuous, and systematic contacts in California," a point Plaintiff appears to concede as he offers no argument to support general jurisdiction. (*Strasner,* 5 Cal.App.5th at 222.) The Court accordingly finds Defendant is not subject to general jurisdiction.

2. Specific Jurisdiction

"When determining whether specific jurisdiction exists, courts consider the relationship among the defendant, the forum, and the ligation." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (*Pavlovich*).) "A court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed himself or herself of forum benefits; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3) the assertion of personal jurisdiction would comport with fair play and substantial justice." (*Ibid*.)

"Where a nonresident defendant challenges a trial court's exercise of personal jurisdiction, the plaintiff bears the initial burden to demonstrate facts justifying the exercise of jurisdiction. To meet this burden, a plaintiff must do more than make allegations. A plaintiff must support its allegations with 'competent evidence of jurisdictional facts. Allegations in an unverified complaint are insufficient to satisfy this burden of proof.' If the plaintiff makes this showing by a preponderance of the evidence on the first two requirements (i.e., that the defendant has purposefully availed itself of the forum and the plaintiff's claims relate to or arise out of the defendant's forum related contacts), the burden shifts to the defendant to demonstrate that the exercise of jurisdiction would be unreasonable." (*Rivelli v. Hemm* (2021) 67 Cal.App.5th 380, 393 (*Rivelli*).)

a. Purposeful Availment

"An out-of-state defendant purposefully avails itself of a forum state's benefits if the defendant (1) purposefully directs its activities at the forum state's residents, (2) purposefully derives a benefit from its activities in the forum states, or (3) purposefully invokes privileges and protections of the forum state's laws by (a) purposefully engaging in 'significant activities' within the forum states or (b) purposefully creating 'continuing [contractual] obligations' between itself and the residents of the forum state. Purposeful availment can occur from afar; the out-of-state defendant's physical presence in the forum state is not required." (*Jacqueline B. v. Rawls Law Group, P.C.* (2021) 68 Cal.App.5th 243, 253 (*Jacqueline*).)

"As the name and definition of purposeful availment make plain, an out-of-state defendant's conduct toward the forum State or its residents is relevant to the jurisdictional analysis only if that conduct is purposeful, deliberate, and intentional. [Citations.] An out-of-state defendant's contact with a forum state that is 'random' 'fortuitous' or 'attenuated' is not enough. [Citations.] This is why the mere fact that the out-of-state defendant's conduct has some 'effect' on a California resident is not enough, by itself, to constitute purposeful availment [citations]; to count, that effect must be *intended* [citations]." (*Jacqueline B., supra,* 68 Cal.App.5th at p. 254.)

Plaintiff argues purposeful availment is established by Defendant's alleged efforts to extort payment, force continuing obligations, and infringe on his propriety interests. (Opp., 5:11-13.) Plaintiff directs the Court to Defendant's offer and the proposal by her realtor to another agent for ultimate transmission for ratification in California. (Opp., 6:10-12.)

First, the execution of an agreement with a resident of the forum does not, standing alone, establish that a defendant has sufficient minimum contacts with the forum to support the exercise of personal jurisdiction. (*Burger King Corp. v. Rudzewicz* (1985) 417 U.S. 462, 474 (*Burger King*). Therefore, Defendant's execution of the sales agreement with Plaintiff is not sufficient to support the exercise of personal jurisdiction.

Plaintiff relies on *Moncrief v. Clark* (2015) 238 Cal.App.4th 1000 (*Moncrief*), which involved the sale of farm equipment from an Arizona seller to a California buyer. (*Id.* at 1003.) The seller's attorney in Arizona contacted the buyer's counsel in California to facilitate the transaction and

represented to the buyer's attorney that the farm equipment would be sold free and clear, however, after purchase, the buyer found out a bank had acquired an interest in the equipment. (*Id*. at p. 1003-1004.) The appellate court determined the Arizona attorney was subject to personal jurisdiction in California because he targeted the buyer's counsel in California for the specific purpose of inducing his client [the buyer] to purchase the equipment, concluding that defendant's communications were purposely and voluntarily directed toward California such that he should have expected to be subject to jurisdiction there. (*Id*. at 1007.) *Moncrief* is distinguishable because the defendant there was the attorney who made false and misleading communications with someone in California. Here, Defendant is the client. Plaintiff cannot point to any acts or statements *by Defendant* towards him or California, only acts by her real estate agents and counsel. These communications to Plaintiff also related to the existing contract, not to induce Plaintiff to engage in further activities. And, Plaintiff does not allege fraud.

Plaintiff relies on *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 Cal.App.4th 969 (*Anglo Irish*) to argue that personal or direct contact is not required for purposeful availment. In *Anglo Irish*, the appellate court affirmed the denial of nonresident defendants' motion to quash on personal jurisdiction grounds, concluding that "by soliciting investors in California through personal visits by their employees and others, the defendants established sufficient contacts with California to justify the exercise of jurisdiction. (*Id*. at 974, 984.) *Anglo Irish* is also distinguishable because the individuals personally visited California on behalf of their employer for the purpose of engaging in economic activity with California residents and made the alleged intentional misrepresentations in California. Here, Plaintiff does not allege Defendant engaged in conduct but rather Defendant's realtor and attorney did. *Anglo Irish* does not provide a basis for Defendant's agent's actions to be imputed upon her, and Plaintiff does not provide any other authority to support his contentions Defendant's agents acting in their roles regarding the negotiation and purchase of the Property, should be imputed to Defendant such that personal jurisdiction over her would be justified.

Plaintiff analogizes to *Trimble Inc. v. PerDiemCo LLC* (2021) 997 F.3d 1147 (*Trimble*). In *Trimble,* the defendant was a Texas corporation and the assignee of eleven patents. (*Id*. at 1150.) In October 2018, defendant's sole owner, officer, and employee Robert Babayi sent a letter to plaintiff accusing it of infringing defendant's patent. (*Id*. at 1151.) Attached to the letter was an unfiled

complaint for the Northern District of Iowa and an offer to plaintiff for a nonexclusive license of the patents, which proposed the parties engage in negotiations, and an attached nondisclosure agreement. (*Ibid*.) The parties engaged in negotiations through December 2018, defendant communicated with plaintiff via letter, email, and telephone at least 22 times. (*Ibid*.) In the communications, defendant threatened to sue plaintiff for patent infringement in the Eastern District of Texas. (*Ibid*.) On January 19, 2019, plaintiff filed suit in the Northern District of California, where plaintiff is headquartered. (*Ibid*.) The federal court concluded there was personal jurisdiction over the defendant based on its reading of *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.* (1998) 148 F.3d 1355. Critically, the federal court's decision was based in federal law as the jurisdictional issue "intimately involved the substance of the patent laws". (*Id*. at p. 1152.) Patent law is not at issue in this matter, therefore, Plaintiff's reliance on *Trimble* is misplaced.

Further, as the U.S. Supreme Court stated in *Walden v. Fiore* (2014) 571 U.S. 277, "mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant *only insofar as it shows that the defendant has formed a contact with the forum State.* The proper question is not where the plaintiff experienced a particular injury or effect but *whether the defendant's conduct connects him to the forum in any meaningful way*. (*Id*. at 290 [emphasis added].)

Here, the property is in Washinton D.C., Defendant signed the sales agreement in Virgina, Defendant's agents were located in Virginia and Maryland, the addendums related to property in Washington D.C., not California, and the notice of default and the communication regarding Plaintiff's attempt to relist the Property pertained to the performance under the sales agreement and the Property, even though the communications were sent to Plaintiff, a California resident. (Jackson Decl., ¶¶ 9-13; Beheshti Decl., ¶ 3.) On this record, Plaintiff fails to demonstrate Defendant directed her alleged tortious conduct towards California and that her alleged conduct connects her to California in any meaningful way. (*Walden,* 571 U.S. at 290.)

b. Controversy Arising out of Defendant's Contacts with California

California uses a "substantial connection" test to determine if a controversy is related to a defendant's purported contacts with California which is satisfied if there is a substantial nexus or

connection between the defendant's forum activities and the plaintiff's claim. (*Snowney,* 35 Cal.4th at 1068.) The more significant the forum contacts are, the less related to the cause of action they need to be. (*Ibid*.)

Plaintiff contends the controversy arises out of Defendant's contacts with California in that Defendant's agent contacted him, a California resident, to create a contract for the purchase of the Property and her out-of-forum conduct infringed on his proprietary interests, which resided with him in California. The former is insufficient to support the exercise of personal jurisdiction. (*Burger King, supra,* 417 U.S. at p. 474.) And, Plaintiff fails to cite any authority stating a controversy arises in the forum state when a trustee is the resident of the forum state but the property at issue is in another state.

As the Court has stated above, Plaintiff fails to state any contacts by Defendant with California. She did not visit California to negotiate the sales agreement, any subsequent addendum, or execute the purchase of the Property. (Jackson Decl., ¶ 12.) None of her agents are in California. (Jackson Decl., ¶ 10-12.) Defendant's only connection to California is her agents' communications to Plaintiff, a California resident. For reasons stated above, this is insufficient to support the exercise of jurisdiction.

In his opposition, Plaintiff characterizes the October 20, 2023, Notice of Default as tortious. However, in the Complaint, he simply alleges, "…about October 20, 2023, Buyer demanded that Seller keep the building vacant and threatened Seller with litigation." (Complaint, ¶ 25.) Plaintiff's sole cause of action is for declaratory relief, in which he requests a judicial declaration that (1) the contract was terminated when settlement did not occur on December 1, 2022; (2) Defendant's refusal to execute a release was wrongful and she should have done so on January 21, 2023; (3) the contract term regarding the residential permit was a condition for Defendant's purchase, not a duty on the seller to modify the Property. (Complaint, ¶ 31-33.) Plaintiff's Complaint does not allege any tortious conduct by Defendant or her agents. Thus, even if Defendant's agents' communications could be imputed to her, these communications do not establish a "substantial connection" with Plaintiff's claim.

Plaintiff fails to show Defendant purposefully availed herself to the benefits of California or that the controversy arises from Defendant's contacts with California, and the Court thus does not need to reach the last prong of the specific jurisdiction analysis. (*Greenwell,* 233 Cal.App.4th at 792; see also *Pavlovich,* 29 Cal.4th at 269.) Plaintiff fails to meet his burden to demonstrate facts to justify the

exercise of jurisdiction and the burden does not shift to Defendant. (*Rivelli,* 67 Cal.App.5th at 393.) The motion to quash is GRANTED.

Calendar Line 10
Case Name: *Aline Whitman v. Brent Roles*
Case No.: 22CV398532

Before the Court is Defendant, Brent Roles' motion for summary judgment or in the alternative summary adjudication against Plaintiff Aline Whitman's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

A. Factual Background

This case arises from the non-judicial foreclosure of a real property located at 1226 Phyllis Avenue in Mountain View, California (the "Property".) By grant deed recorded on August 23, 2017, Madeleine Tashjian and Dutchints Development, LLC ("Dutchints") acquired title and interest to the Property. (Declaration of Brent Roles ["Roles Decl."], ¶ 2, Ex. 1; UMF No. 1.) In December 2017, Madeleine and Dutchints entered a loan agreement with a group of private lenders that was secured by a deed of trust recorded against the Property ("First DOT"). (Roles Decl. ¶ 3, Ex. 2; UMF No. 2.) In December 2017, Madeleine and Dutchints entered a subsequent loan agreement with Defendant for the amount of $430,000 ("Roles Loan") which was secured by a second deed of trust recorded against the Property ("Roles DOT"). (Roles Decl. ¶ 4, Ex. 3; UMF No. 3.)

In the summer of 2020, during the COVID pandemic, Plaintiff began renting the Property from Madeline Tashjian, who is her aunt. (UMF Nos. 6,7; Declaration of Katerina U ("U Decl.") ¶ 10, Ex. I, Whitman Depo. at 11:19-20).) As part of the parties' verbal rental agreement, Plaintiff was required to take care of the property, maintain it, and pay all necessary bills, including but not limited to utilities, gardening, cable and internet, and the property taxes. (Plaintiff's AMF No. 2 (U Decl. ¶ 10, Ex. I, Whitman Depo. at 11:21-12:9).) Plaintiff paid these costs directly, rather than to her landlord. (UMF No. 2; U Decl. ¶ 10, Ex. I, Whitman Depo. at 11:21-12:9).

On March 17, 2021, the senior lenders recorded a Notice of Default on the First Loan with the Santa Clara County Recorder. (Roles Decl. ¶ 5, Ex. 4; UMF No. 4.) On June 22, 2021, the Trustee issued a Notice of Trustee's Sale which was recorded with the Santa Clara County Recorder. (Roles Decl. ¶ 6, Ex. 5; UMF No. 5.) In September of 2021, Plaintiff (through her brother Vahe Tashjian) and Defendant began discussing an arrangement wherein Defendant would purchase the property and lease it

back to Plaintiff, with an option to purchase. (Plaintiff's AMF Nos. 3-4.) In these discussions, Vahe Tashjian was acting Plaintiff's agent. (Plaintiff's No. AMF 27.)

On December 29, 2021, Defendant was the highest bidder at the trustee's sale with a bid of $1,800,000. (UMF No. 11.) Immediately following the sale, Defendant left Vahe Tashjian a voicemail informing him he had won the bid and that he was going to honor their deal despite his godfather's recommendation to sell the Property. (Plaintiff's AMF No. 8; Tashjian Decl., ¶ 7).) Following receipt of this message, Vahe Tashjian accepted the deal on Plaintiff's behalf. Mr. Tashjian and Defendant continued to discuss the logistics of their plan. On or about January 3, 2022, Defendant requested Plaintiff's contact information for purposes of finalizing the lease-purchase agreement. (Plaintiff's AMF No. 10.) On January 4, 2022, Plaintiff tendered the $7,500 necessary to have an attorney prepare the contracts. (Plaintiff's AMF No. 11; U Decl. ¶ 10, Ex. I, Whitman Depo. at 27:2- 6.)

In furtherance of her intent to purchase the Property and to preserve her right to do so, Plaintiff submitted to the trustee her notice of intent to bid as an eligible tenant-buyer pursuant to the recently enacted Civil Code § 2924m. Receipt of Plaintiff's notice was confirmed by the trustee on January 13, 2022. (Plaintiff's AMF Nos. 12-13; Whitman Decl. ¶ 6.) Therefore, Plaintiff had until 5:00 pm on February 14, 2022, to submit her bid.

On January 13, 2022, Defendant submitted his affidavit to the trustee identifying himself as a prospective owner-occupant of the Property under Civil Code § 2924m. (UMF No. 21.) As a result, and unbeknownst to Plaintiff, the Trustee's Deed of Sale was recorded in the name of Defendant on January 31, 2022. (Roles' Decl. Ex. 7.) Nevertheless, the parties continued to discuss the steps necessary to finalize their lease-purchase agreement.

On February 2, 2022, Defendant served Plaintiff with a 90-day Notice to Quit to terminate her tenancy and demanded Plaintiff vacate the Property before May 3, 2022. Surprised by the Notice, Plaintiff contacted Defendant and was told to continue finalizing her financing for the purchase price. Consequently, Plaintiff continued to shore up the financing necessary to finalize her purchase and provided Defendant with proof of her loan pre-approval. (Plaintiff's AMF Nos. 16, 17; Whitman Decl. ¶ 10, Ex. P (pre-approval letter)).) However, Defendant changed their agreed purchase price from $2.3 million to $2.4M, irrespective of Plaintiff's loan approval for the original price. (Plaintiff's AMF No.

18.) Eventually, the parties agreed on the sale price, and on March 14, 2022, Defendant sent an email to the trustee notifying her of the agreement and sought to obtain releases from other bidders to complete the transaction. (Plaintiff No. AMF 26.)

B. Procedural Background

On May 6, 2022, Mr. Roles filed an unlawful detainer suit against Plaintiff. On, May 20, 2022, Plaintiff filed her operative complaint alleging (1) violation of Civ. Code §2924h(g), (2) violation of Civ. Code §2924m, (3) unjust enrichment, (4) cancellation of instrument, and (5) promissory estoppel. On December 19, 2022, the Court consolidated the two actions pursuant to the parties' stipulation.

Defendant now moves for summary judgment or, alternatively, summary adjudication as to every cause of action asserted by Plaintiff.

II. Legal Standard

A. Summary Judgment

Motions for summary judgment are governed by Code Civ. Proc. section 437c, which allows a party to "move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Cod of Civ. Pro. § 437c(a)(1).) The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) Code of Civil Procedure section 437c(c) "requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.) "The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67, citing *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 381-382.) Courts "liberally construe the evidence in support of the party opposing summary judgment and

resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389.)

As to each claim framed by the complaint, the defendant moving for summary judgment must satisfy the initial burden of proof by presenting facts to negate an essential element, or to establish a defense. (Code of Civ. Pro. § 437c(p)(2); *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520.) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. To establish a triable issue of material fact, the party opposing the motion must produce substantial responsive evidence. (Code of Civ. Pro. § 437c(p)(2); *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 166.)

B. Summary Adjudication

A party may move for summary adjudication as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty if that party contends there is no merit to the cause of action, defense, or claim for damages, or there is no duty owed. (Code of Civ. Pro. §437c(f)(1).) "The aim of the procedure is to discover whether the parties possess evidence requiring the weighing procedures of a trial. (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1057 (*Marron*).) "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment" (Code Civ. Proc., § 437c (f)(2).)

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c (f)(2).) A party moving for summary adjudication bears the burden of persuasion that there are no triable issues of material facts. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) In analyzing motions for summary adjudication, the court must "view the evidence in the light most favorable to the opposing party and accept all inferences reasonably drawn therefrom." (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294.) A motion for summary adjudication must be denied where the moving party's evidence does not prove all material facts, even in the absence of any opposition (*Leyva v. Sup. Ct.* (1985) 164 Cal.App.3d 462, 475) or where the opposition is weak (*Salasguevara v. Wyeth Labs., Inc.* (1990) 222 Cal.App.3d 379, 384, 387).

III. Evidentiary Objections

Defendant objects to Plaintiff's additional material facts Nos. 5, 9, 10, 11, 14, 15, 18, 21, 22, 25, and 27 on the grounds that each statement is immaterial since the parties never entered into a written agreement.

Defendant also objects to Plaintiff's additional material facts Nos. 9, 11, 14, 22, on the grounds that the statements contain improper legal conclusion as to the terms "accepted" and "consideration."

Defendant further objects to Plaintiff's additional material fact No.18 as being speculative, and No. 21 as lacking personal knowledge.

The Court OVERRULES Defendant's objections.

IV. Analysis

The crux of Plaintiff's action is that Defendant submitted a false affidavit, qualifying himself as a prospective owner-occupant under Civil Code section 2924m, thus illegally restraining her ability to bid on the property as an eligible tenant-buyer. The central issues raised by Defendant's motion are that Plaintiff cannot establish (1) she was an eligible bidder or (2) he did not intend to reside at the property.

A. First Cause of Action: Violation of Civil Code § 2924h(g)

Civil Code section 2924h(g) provides: "It shall be unlawful for any person, acting alone or in concert with others, (1) to offer to accept or accept from another, any consideration of any type not to bid, or (2) to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage…."

Defendant contends Plaintiff's claims fail because, (1) there is no evidence that he spoke to any other potential bidders or that he discouraged anyone from bidding on the Property at the auction, (2) his owner-occupant affidavit was not false since he intended to reside at the Property, and (3) his affidavit, irrespective of its truth or falsity, did not prevent Plaintiff or anyone from bidding at the Trustee's sale because it was submitted after he was already deemed the highest bidder. However, Plaintiff alleges Defendant rigged the bidding process, during the 15-day extended bidding process, by falsely claiming status as a prospective owner-occupant and thus restrained her ability to submit a bid for the purchase of the Property. Plaintiff's allegation is not restricted to the date and events of the auction. (Complaint ¶¶ 21, 25.)

Under Civil Code section 2924m(c), if a foreclosure sale of a real property containing 1-4 residential units is completed and the prevailing bidder is a prospective owner-occupant as defined in section § 2924m(a)(1), then the sale is final, and that person will immediately take title to the property. (Civ. Code § 2924m(c)(1).) If the prevailing bidder is not a prospective owner-occupant, then a 15-day window opens after the sale. While the window is open, eligible third parties may submit bids or notices of intent to bid, and the sale will not be deemed final until the earliest of one of the conditions specified in section § 2924m(c)(1) through (c)(4) are satisfied. If no bids or notices of intent to bid are received by the foreclosing trustee by the 15th day, then the window closes. The sale is final on the 15th day after the foreclosure sale. (Civ. Code § 2924m(c)(2).) Therefore, Defendant's arguments that (1) he did not speak to any other potential bidders or discourage anyone from bidding on the Property at the Trustee's sale, and (2) his submitted affidavit did not prevent Plaintiff or anyone else to bid at the Trustee's sale are irrelevant.

According to Defendant's evidence, on December 29, 2021, his $1,800,000.000 bid was the winning bid at the trustee's sale. At the time of the bidding, he intended to occupy and reside at the property. On January 13, 2022, 15 days later, he submitted his qualifying affidavit to the trustee declaring (1) he was the successful bidder at the auction, (2) he would occupy the property as his primary residence within sixty days from the recording of the deed, (3) he would maintain his occupancy for at least one year, and (4) his bid for $2.2 million. (Brent Roles Decl. ¶¶ 7, 8, 9, 11, 12, Ex. 6.) The evidence further shows that because of Defendant's affidavit, the trustee recorded the deed on January 31, 2022, naming him the grantee and the amount paid as $1,800,000.00. (Brent Roles Decl. ¶ 12, Ex. 7.)

Focusing on Defendant's undisputed bidding conduct, the following troubling issues surface:

- Why did Defendant place a regular bid at the auction, despite his claim that he intended to buy the property for his primary residence from the start?
- Why place a second bid on the Property when Defendant was already the winning bidder at the auction?
- Why did Defendant file an affidavit subjecting himself to the restrictions imposed on prospective owner-occupants when he had already won the Property as the highest bidder with no restriction?

- Why did Defendant outbid himself by submitting a second bid for $400,000.00 higher?
- Why is the recorded consideration for the Property $1.8 million when Defendant's bid as owner-occupant was for $2.2 million? [1]

Even assuming the validity of Defendant's affidavit, based on this undisputed conduct alone, a trier of fact can reasonably infer Defendant filed his affidavit to obtain the preferential status of an owner-occupant and raised his bid to further impede any other bids that may have been placed by other eligible bidders matching his original winning bid. This alone raises a triable issue of fact as to whether Defendant violated Civil Code section 2924h(g), Defendant fails to meet his burden, and his motion for summary judgment or in alternative summary adjudication as to Plaintiff's first cause of action is DENIED.

B. Second Cause of Action For Violation of Civil Code § 2924m

Defendant argues Plaintiff cannot prove her status as an eligible tenant-buyer or that Defendant was not a proper owner-occupant entitled to preference.

1. Eligible Tenant-Buyer

Civil Code section 2924m is a recently enacted statute that changes the procedures for non-judicial foreclosures. Prior to Section 2924m, delivery of the trustee's deed to a bona fide purchaser was conclusive, and the buyer title took free and clear of any other claims. Under Section 2924m, sales of properties with one to four residential units are not immediately final; the sale only becomes final after 15 days unless an eligible bidder, as defined by the statute, submits a notice of intent to bid an amount exceeding the highest bid at the sale. An eligible bidder then has an additional 30 days to submit a formal bid with a tender of payment by cash or cashier's check. Section 2924m thus gives certain classes of potential purchasers preferential treatment because it allows them to meet or exceed the highest bid at a foreclosure sale.

As applied to a natural person, the operative Civil Code Section 2924m at the relevant time defined an "Eligible Bidder" as: (a) an eligible tenant buyer and (b) a prospective owner-occupant. (Civ. Code § 2924m(a)(3).) An eligible "tenant-buyer" is a person occupying the property as their primary

[1] This raises issues regarding appropriateness of Trustee's recording and the validity of the recorded $1.8 million purchase price when Defendant's owner-occupant bid was for $2.2 million. However, neither party raises this issue.

residence under a rental or lease agreement, entered as the result of an arm's length transaction with the mortgagor or trustor, and who is not the mortgagor or the child, spouse, or parent of the mortgagor or trustor. (Civil Code §2924m, subd.(a)(2).)

Defendant argues (1) Plaintiff's aunt was the Property owner and, as such, any transaction between the two was not at arm's length, (2) Plaintiff did not occupy the Property under a written lease agreement, and (3) Plaintiff did not pay rent, thus Plaintiff's Civil Code section 2924h(g), Civil Code section 2924m, unjust enrichment, and cancellation of instrument claims fail because Plaintiff was not an eligible tenant-buyer as defined by the statute. (U Decl., Ex. I, Whitman Depo. 11:16-20.) Plaintiff argues (1) the statue does not require a written lease agreement, (2) Plaintiff had a verbal rental agreement with her aunt, (3) Plaintiff paid for insurance, landscaping, utilities, and maintenance of the property as valuable consideration for rent. (U Decl. Ex. I, Whitman Depo. 11-12.)

First, in interpreting section 2924m, the Court is guided initially by the language of the statute and the directive to give effect to the intent of the Legislature as apparent from the legislative history. "The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] … Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" (*In re Luke W.* (2001) 88 Cal.App.4th 650, 655.)

The language of section 2924m(a)(2)(B) does not contain a requirement for a written lease agreement. This suggests the Legislature intended to allow at-will or short-term tenants, under a verbal agreement, the opportunity to bid on the property they were occupying prior to the recording date of the Notice of Default. The Court finds the intent of this section would not be served by imposition of a written lease requirement on tenant-buyers, since such requirement would decrease the number of properties subject to the statute and thereby render the statute less effective at achieving the remedial

results sought by the Legislature in enacting it. Here, it is evident from Plaintiff's deposition testimony that she had a verbal rental agreement with her aunt for occupancy of the Property. (U Decl., Ex. I, Whitman Depo. 11-12.)

Second, for purposes of this statute, section 2924.15(a)(2)(a)(ii) defines arm's-length transaction as "a lease entered into in good faith and for valuable consideration that reflects the fair market value in the open market between informed and willing parties." While Defendant points to Plaintiff's deposition testimony that she does not pay rent to her aunt, he ignores the remainder of her testimony that she pays for all the necessary expenses to maintain the Property, including the property taxes. (U Decl., Ex. I, Whitman Depo. 11-12.) Defendant fails to submit any evidence of the fair rental value of the Property, at the relevant times or any evidence that Plaintiff's consideration was below the fair rental value.

The Court thus finds Defendant fails to meet its burden, and triable issues of facts exist as to whether Plaintiff was an eligible tenant-buyer.

2. Prospective Owner-Occupant

Defendant argues he was a prospective owner-occupant who won the bid at the trustee's sale on December 29, 2021, and submitted $1,800,000.00 in cash. A prospective owner-occupant is a person who will occupy the property as their primary residence within 60 days of the trustee's deed being recorded and will maintain that primary occupancy for at least one year. (Civil Code §2924m, subd.(a)(1).)

Defendant testifies that on January 13, 2022, in compliance with section 2924m, he submitted an affidavit to the trustee qualifying himself as an owner-occupant. In his affidavit, Defendant submitted a new bid for $2.2 million Dollars ($400,000.00 above his initial winning bid), declares his intent to occupy the Property as his primary residence within sixty days of the trustee's recording of the deed, and declares to maintain his occupancy for at least one year. (Roles Decl., Ex. 6.) However, the recorded trustee's deed shows the amount Defendant paid was his initial $1,800,000.00 bid. (Roles Decl., Ex. 7.)

Defendant further testifies that he intended to live at the Property from the inception of the trustee's sale. Yet, on January 4, 2022, while exchanging text messages with Plaintiff's brother, he considered entering into a lease-purchase agreement with Plaintiff. Once the negotiations became unsatisfactory to Defendant, he decided that residing at the Property was his best option and submitted

his affidavit. (Roles Decl., ¶¶ 9, 11.) Defendant argues (1) this brief negotiation over a possible lease agreement with Plaintiff does not mean that his later decision to live at the Property was false, and (2) his commencement of an unlawful detainer action objectively supports his intent to reside at the Property.

Plaintiff asserts (1) Defendant did not intend at the time of the trustee's sale nor does he currently intend to reside at the Property, and (2) Defendant's submission of his false affidavit was a ploy to restrain and deter her bidding as an eligible tenant-buyer. In support of her argument, Plaintiff submits the following evidence:

- Copies of several text communications between her brother (Plaintiff's acting agent) and Defendant dated from September 29, 2021 through January 12, 2022, discussing Defendant's purchase of the Property and Plaintiff's option to lease to purchase. Defendant expressed his desire to buy the Property and lease it back to Plaintiff well before the trustee's sale in October of 2021. However, due to a pending bankruptcy petition, the parties could not swiftly memorialize their agreement. Text messages show that the parties eventually agreed to have Defendant's attorney draft the lease-purchase agreement, and on January 4, 2022, Defendant sent wire transfer information for Plaintiff to deposit $7500.00 in his account for the anticipated legal fees and costs. (Plaintiff's Appendix of Evid., Exs. K, L, M, N, O.)
- Certified audio transcript of Defendant's phone message informing her that he won the bid and got the house. Defendant states his willingness to "do our deal" and urged quick action due to his godfather's insistence on repayment of the funds he had loaned for the purchase of the Property. (Plaintiff's Appendix of Evid., Ex. G.)
- Copy of Defendant's March 14, 2022, email sent to Teri Snyder (trustee), two months after submission of his owner-occupant affidavit, informing her of his agreement to sell the Property to Plaintiff for an agreed price; explaining that this would be a win-win situation since Plaintiff is a tenant wanting to remain on the property while he wanted a condo that was closer to his daughter. Understanding the legal ramification of the sale, Defendant asked for contact information of potential bidders on the Property to obtain their release. (Plaintiff's Appendix of Evid., Ex. C.)

This is sufficient evidence to at a minimum establish a triable issue of fact as to the falsity of Defendant's owner-occupant affidavit and his intent to reside at the Property in compliance with Civil Code section 2924m.

3. Plaintiff's Standing to Maintain a Private Action

Defendant argues Plaintiff does not have standing to maintain a private action under Civil Code section 2924 *et seq*. since she is not a member of the group the statute is designed to protect. Defendant bases this argument on the contested status of Plaintiff as an eligible tenant-buyer. The Court has already found that triable issues of fact exist regarding Plaintiff's status. Thus, so too here.

Accordingly, Defendant's motion for summary judgment or in alternative summary adjudication as to Plaintiff's second cause of action is DENIED.

C. Third Cause of Action: Unjust Enrichment

This claim is based entirely on the same facts underlying Plaintiff's first and second causes of action. (Complaint ¶¶ 31- 36, 42, 46.) Defendant accepts these claims as derivative of Plaintiff's statutory claims. (Motion, 11:12-14.) Thus, for the reasons stated above, Defendant's motion for summary judgment or in alternative for summary adjudication as to Plaintiff's third cause of action is DENIED.

D. Fourth Cause of Action: Cancellation of Instrument

"'To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud; and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alteration of one's position. [Citation.]'" (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1193-94, quoting *U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 778.)

Plaintiff contends Defendant's bid-rigging and false affidavit of "owner-occupant" led to the Trustee's Deed Upon Sale to be recorded in his favor, and if left outstanding, it will continue to cause her serious injury by divesting her of her interest in the Property. Defendant seeks judgment on this claim on the grounds that (1) Plaintiff has no valid interest in the property since she is not an eligible tenant-buyer, (2) Plaintiff did not attend the Trustee's sale and never submitted a bid to the Trustee or provided the funds for purchase of the Property, and (3) he was the only and highest bidder at the

auction and his purchase was perfected upon submission of his affidavit of owner-occupant to the trustee.

As indicated above, there are triable issues of fact regarding Plaintiff's status as an eligible tenant-buyer and the deceptiveness of Defendant's declarations to the trustee. To address Defendant's remaining argument about Plaintiff's failure to bid and tender, the Court considers and interprets the applicable language of the statute.

The rights and procedures outlined in section 2924m are purely legislative creations and thus must be strictly construed. (See, e.g., *Landstar Global Logistics, Inc. v. Robinson & Robinson, Inc.* (2013) 216 Cal.App.4th 378, 390 [statutory provisions governing enforcement of judgments must be strictly construed because they are "purely legislative creations"]; *Vershbow v. Reiner* (1991) 231 Cal.App.3d 879, 882 [statutes concerning pre-judgment attachment "are subject to strict construction because they are purely the creation of the Legislature"]; *C. I. T. Corp. v. Commercial Bank of Patterson* (1944) 64 Cal.App.2d 722, 727 ["In a supplemental brief filed by appellant bank subsequent to the oral argument the contention is made that the Trust Receipt Law has been legislatively approved by codification; that it is a creature of statute and should therefore be strictly construed. As a general principle we agree with this contention"].) As set forth above, section 2924m(c)(2) requires that an eligible tenant buyer "submit[] to the trustee either a bid … or a nonbinding written notice of intent to place such a bid. The bid or written notice of intent to place a bid shall be sent to the trustee by certified mail, overnight delivery, or other method that allows for confirmation of the delivery date and shall be received by the trustee no later than 15 days after the trustee's sale." (Civ. Code § 2924m(c)(2).) The section further expressly requires an eligible bidder to tender a bid which includes the full amount of the last and highest bid at trustee's sale or higher in cash or cashier's check within 45 days of the date of sale. (Civ. Code §§ 2924m(c)(3), (4).)

It is undisputed that (1) in compliance with the statute, Plaintiff timely submitted her notice of intent to bid; receipt of which was acknowledged by the trustee on January 13, 2022 (Plaintiff's Appendix of Evid. Ex. H) and (2) Plaintiff did not submit a bid to the trustee to purchase the property. However, as an eligible tenant-buyer, Plaintiff would have had until February 14, 2022 to submit and

fund her bid, and it is undisputed that the Trustee's Deed Upon Sale was recorded on January 31, 2022, which rendered futile any subsequent effort by Plaintiff to bid for the purchase of the Property.

The Court finds triable issues of fact exist as to whether Defendant's affidavit of owner-occupant contained false information rendering the Trustee's Deed of Sale void or voidable and therefore DENIES Defendant's motion for summary judgment or in alternative summary adjudication of Plaintiff's fourth cause of action.

E. Fifth Cause of Action: Promissory Estoppel

Promissory estoppel is a doctrine that employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) The elements of a promissory estoppel claim are: (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1672.)

Plaintiff alleges Defendant breached his promise to give her a lease with an option to purchase. Defendant moves for a judgment on this claim arguing that (1) he never spoke to Plaintiff, (2) while he negotiated with Plaintiff's brother, he never agreed to lease the Property with an option to buy, and (3) any verbal agreement for lease to purchase of the Property is barred under the statute of fraud codified in Civil Code section 1624(a)(3). In support of his position, Defendant points to Plaintiff's deposition testimony attesting she never "spoke" to Defendant, never met him in person, never received a lease agreement, never prepared or saw a draft lease, never signed a written lease, and has no knowledge of the lease terms. (U Decl., Ex. I, pp. 14-15)

Defendant sidesteps Plaintiff's repeated testimony that her brother, Mr. Vahe Tashjian, acted on her behalf in discussing the lease and purchase of the Property with Defendant and making the necessary financial arrangements with the trustee and lenders. (Plaintiff's Appendix of Evid., Ex. 3, Vahe Tashjian Declaration.) Defendant also evades his own email communication with the trustee on March 14, 2022, whereby he informed her of his agreement to sell the Property to Plaintiff for an agreed price; explaining that this would be a win-win situation since Plaintiff is a tenant wanting to remain on the property while

he wanted a condo that was closer to his daughter. (Plaintiff's Appendix of Evid., Ex. C.) This email alone demonstrates Defendant's promise to Plaintiff to sell the Property at their agreed price.

Furthermore, Civil Code §1624 provides in pertinent part:

> (a) The following contracts are invalid, unless they, *or some note or memorandum thereof*, are in writing and subscribed by the party to be charged or by the party's agent:
>
> (3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged. (Emphasis added.)

Plaintiff also argues equitable estoppel is an exception to the bar posed by the statute of fraud. California law permits a plaintiff to estop a defendant from asserting the statute of frauds where such equitable relief is needed to prevent either unconscionable injury or unjust enrichment which would otherwise result from the application of the statute of frauds (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1259.) The Court has already found that a triable issue of material fact exists regarding the requisite "unjust enrichment" that stems from the alleged falsity of Defendant's owner-occupant affidavit.

Accordingly, Defendant's motion for summary judgment or in alternative for summary adjudication as to Plaintiff's fifth cause of action is DENIED.

Calendar lines 12-14
Case Name: *ANGELICA GODINEZ MOLINA et al vs GENERAL MOTORS LLC*
Case No.: 23CV412732

Before the Court is Plaintiff's Motion to Compel Further Responses to Requests for Production of Documents and for Sanctions. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

This is a lemon law case. On November 20, 2020, Plaintiffs Angelica Godinez Molina and Francisco Huerta Lopez purchased a 2021 Chevrolet Silverado 1500 for $25,000. They allege the vehicle contained defects and filed this lawsuit on March 8, 2023 asserting claims under the Song-Beverly Act.

Plaintiff now seeks an order compelling GM to produce documents relating to (1) GM's policies and procedures relied upon when handling vehicle repurchase or replacement requests and calculating repurchase offers (RFP Nos. 16 and 19-32); (2) the various codes used in documents produced in response to RFP Nos. 37-41; and (3) consumer complaints by owners of the same year, make, and model as Plaintiffs' vehicle regarding the same complaints Plaintiffs are making in this lawsuit (RFP Nos. 45-46. Plaintiff also seeks an order compelling GM to identify which of its documents are responsive to each request for production.

RFP Nos. 16, 19-32: DENIED. GM's production appears sufficient.

RFP Nos. 37-41: DENIED. Plaintiff fails to meet its burden to show that these codes are relevant or reasonably calculated to lead to the discovery of admissible evidence.

RFP Nos. 45-46: DENIED. While in certain instances documents regarding similar consumer complaints can be relevant, Plaintiff fails to meet its burden to show that is the case here.

Identifying documents already produced.: Code of Civil Procedure section 2031.280, subdivision (a) provides: "Any documents or category of documents produced in response to a demand for inspection . . . shall be identified with the specific request number to which the documents respond." This does not require the Responding Party to identify the documents by bates label in its verified responses, but it does require the Responding Party to identify how the requests for production and the produce documents correspond in some way, such as a table. (See *Pollock v. Superior Court* (2023) 93 Cal.App.5th 1348.) Accordingly, GM is ordered to provide information sufficient to show

the correspondence between its document production and Plaintiff's document requests within 20 days of service of this formal order.

The parties each had substantial justification for bringing this matter to the Court's attention, and their cross motions for sanctions are accordingly DENIED.

Calendar line 25
Case Name: *Ajay Pentamsetty vs Parvinder Singh et al*
Case No.: 23CV424294

Before the Court is Ajay Pentamsetty's Petition for Relief from Claim Requirement (Government Code §911.4). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

Petitioner alleges he sustained severe injuries after he was struck by a light rail vehicle owned and operated by Santa Clara Valley Transportation Authority ("VTA") on October 19, 2022. Petitioner submitted his claim to VTA nearly a year later, on September 6, 2023, which claim VTA rejected as untimely. Petitioner then filed this action on October 13, 2023. Because Petitioner failed to present his claim to VTA within the required six months from the date of injury, Petitioner now seeks relief from that requirement so that his case may proceed on the merits.

II. Legal Standard and Analysis

Before a suit for damages may be maintained against a public entity, a written claim must first be submitted to that public entity. (Gov. Code § 945.4.) A personal injury claim must be filed within six months of the accrual of the cause of action. (Gov. Code § 911.2) "When a claim. . . is not presented within that time, a written application may be made to the public entity for leave to present that claim." (Gov. Code § 911.4.) The application shall be submitted "within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim." (Gov. Code § 911.4(b).) If the application is denied or deemed denied, a petition may be made to the court for an order relieving the petition from Section 954.4." (Gov. Code § 946.6 (a).)

A court does not relieve a potential plaintiff of the claim requirements of Government Code section 945.4 as a matter of course. (*City of Fresno v. Superior Court* (1980) 104 Cal. App. 3d 25.) The plaintiff must first demonstrate by a preponderance of the evidence that the claim was presented within a reasonable time, and that the failure to file a timely claim was due to mistake, inadvertence, surprise, or excusable neglect. (*Id.*; *Moore v. State of California*1984) 157 Cal.App.3d 715, 721.) Lack

of reasonable diligence on the part of petitioner's counsel is imputed to petitioner. (*Munoz v. State* (1995) 33 Cal.App.4th 1767.)

Petitioner avers that it was reasonable to delay 11 months before presenting his claim to the VTA because he was physically or mentally incapacitated during the period when the claim should have been presented. There is no dispute that Petitioner suffered catastrophic injuries, including traumatic brain injury, a mangled left arm, and a broken left leg. These injuries required five surgeries which took place on October 19, 20, 23 and 28, 2022. These surgeries produced extensive wounds that required wound care over and above that caused by the initial injuries Petitioner suffered as a result of the incident.

Petitioner was transferred from the ICU to the Acute Rehabilitation Unit at Santa Clara County Valley Medical Center where he received extensive physical therapy, occupational therapy, and speech therapy until he was discharged on November 21, 2022—just over one month after the incident. Post discharge, he could not walk, change his dressings, or perform routine daily activities. Petitioner's mother travelled from India to care for him, which care was 24 hours. During this period, Petitioner was frequently working with doctors, receiving tests and labs, and preparing for additional surgeries.

Petitioner was again hospitalized from January 23-26, 2023 where he was supposed to receive reconstructive surgery but could not do so due to discovered abnormal gelatinous tissue. Petitioner was then in the hospital from February 8 through 23, 21023 because of this active infection. During this time, Petitioner was on an IV, unable to easily maneuver, and consulting with plastic surgeons, orthopedics, infection disease specialists, and wound care. The antibiotic care through a PICC line continued from March 2030, 2023.

From March 30 through April 4, 2023, Petitioner was again admitted to the hospital, this time for second stage reconstruction of his arm. Once discharged from this hospital stay, Petitioner continued with regular plastic surgery consults, orthopedic consults, infectious disease consults, and physical therapy in preparation for tendon transfer or neurotized muscle transfer.

Throughout this period of frequent hospitalization, Petitioner avers that he was under heavy pain management medication and "did not have the capacity to deviate [his] focus from the extensive

and constant medical care required of [him] by [his] catastrophic injuries and related complications. All of [his] physical and emotional energy was required and demanded of [him]."

Petitioner engaged counsel on July 11, 2023, after the six-month deadline had already passed. Petitioner swears that he did not remember the accident, so his counsel had to independently investigate the incident. Petitioner's counsel received materials from the VTA on July 20, 2023, which materials included a video of the incident; further VTA materials on August 1, 2023 revealing the identities of the VTA vehicle operators at the time of the incident; the Traffic Collision Report from the Santa Clara County Sheriff's office on August 8, 2023; and 1,200 pages of medical records on August 8, 2023. Counsel felt it necessary to thoroughly review these materials before submitting Petitioner's claim to VTA approximately a month later on September 6, 2023.

Citing to *Drummond v. County of Fresno* (1987) 193 Cal. App. 3d 1406, VTA argues this record is insufficient to warrant relief from the six-month rule. There, the court of appeal affirmed the trial court's denial of relief from Section 954.4, where a petitioner rendered a quadriplegic by the alleged incident failed to present his claim to the public entity within 8 months. The trial court reasoned that the petitioner there had failed to show he could not have contacted an attorney earlier even though that petitioner was deeply distracted by the fact of having become a quadriplegic.

The Court finds *Drummon* distinguishable. There, a doctor testified that the petitioner had the ability to contact a lawyer within the statutory deadline. Moreover, a close reading of *Drummon* makes plain that while the court of appeal did not believe it could find abuse of discretion on that record—a very high bar—that did not amount to a ratification of the trial court's action. *Drummon* states:

> Section 946.6 is a remedial statute intended to provide relief from technical rules which otherwise provide a trap for the unwary . . . ." (*Ebersol* v. *Cowan, supra*, 35 Cal.3d 427, 435.) The remedial policy underlying the statute is that wherever possible cases should be heard on their merit. (*Ibid*.) Thus, a denial of such relief by the trial court is examined more rigorously than where relief is granted and any doubts which may exist should be resolved in favor of the application. (*Viles* v. *State of California* (1967) 66 Cal.2d 24, 29 [56 Cal.Rptr. 666, 423 P.2d 818].) (*Drummond v. County of Fresno* (1987)193 Cal. App. 3d 1406, 1411.)

The Court then concludes:

> Although a remedial statute is involved, this court's review power must be kept in perspective: "[We] must be constantly aware of the different functions performed by the superior court and ourselves. Unless, ultimately, each case of this nature is to be decided by the Court of Appeal as if no trial court had ever acted on the petition, we must be careful to preserve the area of the superior court's discretion and we must do this in fact, as well as in words. It is easy enough to give the appearance that the respective functions of the two courts are being preserved: all we need do is label as an 'abuse of discretion' any ruling with which we happen to disagree. Admittedly, in this area, denials of relief 'are scanned more carefully than cases where the court granted the relief, to the end that wherever possible cases may be heard on their merits . . . .' [Citation.] Yet we cannot arbitrarily substitute our judgment for that of the trial court." (*Bennett* v *City of Los Angeles* (1970) 12 Cal.App.3d 116, 120 [90 Cal.Rptr. 479].) (*Drummond v. County of Fresno* (1987) 193 Cal. App. 3d 1406, 1412-1413.)

Further, contrary to VTA's assertion, *Draper v. City of L.A.* (1990) 52 Cal. 3d 502 supports granting Petitioner's request. There, an injured petitioner was in a coma for most of the six month statutory period, but another filed a claim on her behalf, which claim was timely but filed with the wrong public entity. The trial court and court of appeal found that this filing defeated that petitioner's claim for relief, since someone on her behalf was able to submit a claim, even if the claim had an error. The Supreme Court reversed, noting: "The rule that remedial statutes are to be liberally construed (*Bettencourt* v. *Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 273-274 [228 Cal.Rptr. 190, 721 P.2d 71]; *Viles* v. *State of California* (1967) 66 Cal.2d 24, 32-33 [56 Cal.Rptr. 666, 423 P.2d 818]) applies with particular force when, as here, strict application of a statutory requirement will result in barring the claim of an incapacitated plaintiff and ultimately deny her a day in court." (*Draper v. City of L.A.* (1990) 52 Cal. 3d 502, 507.) The Supreme Court ordered this reversal even though "It could be contended that the evidence plaintiff presented in her motion for relief under section 946.6 and her reply to the city's opposition to that motion was somewhat conclusory." (*Id.*)

VTA's citation to *Barragan v. County of Los Angeles*, 184 Cal. App. 4th 1373, 1384 is also misplaced. That case too supports granting the relief Petitioner seeks. That court finds that while the petitioner may have not been mentally and physically incapacitated

> the fact remains that Barragan suffered devastating injuries, the recovery from which dominated her waking hours during the six-month period. The issue in this case is whether these injuries, while not sufficient to establish incapacity, must be wholly disregarded in determining whether Barragan's neglect was excusable. They need not. Excusable neglect *can* be the result of disability. (*County of Alameda v. Superior Court, supra*, 196 Cal.App.3d at p. 625.) When a claimant is disabled, even if not so limited as to satisfy the incapacity basis for relief, that disability could justify a trial court in concluding that the claimant's failure to contact an attorney was itself excusable neglect. (*Martin v. City of Madera* (1968) 265 Cal.App.2d 76, 80 [70 Cal. Rptr. 908] [stating that, if the trial court had so found, it would unlikely have been reversed on appeal].)
>
> Thus, we conclude that there is no absolute rule barring excusable neglect when the claimant has failed to obtain counsel during the six-month period. If a claimant can establish that physical and/or mental disability so limited the claimant's ability to function and seek out counsel such that the failure to seek counsel could itself be considered the act of a reasonably prudent person under the same or similar circumstances, excusable neglect is established. We recognize, however, that every claimant is likely to be suffering from some degree of emotional upset, and it takes an exceptional showing for a claimant to establish that his or her disability reasonably prevented the taking of necessary steps. (*Bennett v. City of Los Angeles, supra*, 12 Cal.App.3d at p. 121 & fn. 2; see *Perez v. City of Escondido* (S.D.Cal. 2001) 165 F.Supp.2d 1111, 1112–1117 [finding that a mother who had failed to timely seek counsel acted diligently under the circumstances, when, after her son was shot by police in front of her daughter, she spent the months immediately following the shooting caring for her son's life and her daughter's emotional health].)

> We therefore conclude that a finding of excusable neglect was not barred, as a matter of law, by Barragan's failure to seek counsel within six months. Anticipating this result, the trial court indicated that, if there is not such an absolute bar, it would find that Barragan established excusable neglect. Such a finding is not an abuse of discretion. Barragan spent the first three months in the hospital, and the remainder of the six-month period confined to her bed at home. Depressed, in pain, and under the influence of medication, Barragan's attention was directed toward relearning the basic tasks of everyday life, such as eating, holding a toothbrush, and controlling her elimination of waste. During that six-month period, she was unable to even sit up without assistance, and did not so much as leave her bedroom to watch television. The trial court concluded that her failure to consult counsel—when she did not believe that she had a cause of action—was the neglect of a reasonably prudent person under the circumstances. This is not an abuse of discretion. We therefore conclude that excusable neglect has been established. (*Barragan v. County of Los Angeles* (2010) 184 Cal. App. 4th 1373, 1385-1386.)

So too here. Even if Petitioner was not incapacitated, the extent of his injuries, numerous surgeries and periods of hospitalizations, need for constant 24 hour care to conduct even the most basic daily activities, and haziness due to the emotional stress of his life changing injuries and pain management are sufficient for him to demonstrate by a preponderance of the evidence that his failure to earlier contact an attorney is due to excusable neglect.

VTA's additional argument that once contact on July 11, 2023, Petitioner's counsel not submitting his claim to VTA until September 6, 2023 is inexcusable neglect is also unpersuasive. The record shows Petitioner's counsel promptly sought, obtained, and reviewed relevant records to assess whether Petitioner had a claim. Because Petitioner has no memory of the incident, such actions were reasonable for counsel to take, as an officer of the court, before submitting the claim to VTA.

Petitioner's request is accordingly GRANTED.