SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: November 9, 2023 TIME: 9:00 A.M.

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

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

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

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV394345	Sophia Latessa v. Markai, Inc. et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 2	22CV394345	Sophia Latessa v. Markai, Inc. et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 3	21CV389929	Tianqing Li v. Phillip Mummah	Click on LINE 3 or scroll down for ruling.
LINE 4	22CV396511	Mertangel Corp. v. Howard Susman	Click on LINE 4 or scroll down for ruling.
LINE 5	18CV329892	Ronald J. Lamb v. David Ross et al.	Motion to vacate trial date and set order to show cause regarding dismissal: notice is proper, and the motion is unopposed. The motion is GRANTED. The court vacates the November 13, 2023 trial date and November 8, 2023 MSC. The court sets an order to show cause re: dismissal on December 7, 2023 at 10:00 a.m. in Dept. 10. Plaintiff's failure to appear on December 7 will likely result in dismissal of the case.
LINE 6	21CV385721	Priscilla Meza et al. v. Michaels Stores, Inc. et al.	Motion for pro hac vice admission of David Carr: parties to appear.
LINE 7	22CV395006	James C. McBurney et al. v. Advanced Molar Innovation, Inc. et al.	Motion to "coordinate" related cases: given the agreement of the parties, the later-filed case will be reassigned to the same department as the earlier-filed case. There will be a case management conference in both cases (22CV395006 and 22CV408867) on November 14, 2023 at 10:00 a.m. in Department 10.

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LINE 8	23CV415989	Feit Electric Co., Inc. v. Lumileds LLC	Motion for pro hac vice admission of Vincent J. Michalec: parties to appear. Notice is not proper, as there is no amended notice of hearing on file, as required by the local rules. Even though the motion is likely to be unopposed, it can only be granted on proper notice. The court is inclined to continue this hearing to December 14, 2023 at 9:00 a.m. , when the parties are set to return for another motion.
LINE 9	23CV415989	Feit Electric Co., Inc. v. Lumileds LLC	Motion for pro hac vice admission of Michael S. Weinstein: parties to appear. Notice is not proper, as there is no amended notice of hearing on file, as required by the local rules. Even though the motion is likely to be unopposed, it can only be granted on proper notice. The court is inclined to continue this hearing to December 14, 2023 at 9:00 a.m., when the parties are set to return for another motion.
LINE 10	23CV417184	Thomas Vo v. Technology Credit Union	Click on LINE 10 or scroll down for ruling.
LINE 11	23CV422606	Jane Doe et al. v. Union School District et al.	Click on LINE 11 or scroll down for ruling.

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Calendar Lines 1-2
Case Name: *Sophia Latessa v. Timothy Spencer et al.*
Case No.: 22CV394345

I. BACKGROUND

This is a contract and business dispute arising from an alleged joint venture partnership between Plaintiff Sophia Latessa ("Latessa") and Defendants Timothy Spencer, Chenyu Ren, and a Delaware corporation formed by Spencer and ren called "Markai, Inc." (collectively, "Defendants").

Latessa initiated this action by filing a complaint on February 4, 2022. Defendants filed demurrers and motions to strike as to the original complaint, the first amended complaint ("FAC"), and second amended complaint ("SAC"), which were sustained or granted in part. Latessa filed her operative third amended complaint ("TAC") on May 24, 2023. Defendants filed the present demurrer and motion to strike on June 27, 2023.

Defendants demur to the first, second, third, sixth, seventh, and eighth causes of action for failure to state facts sufficient to constitute any claim. (Code Civ. Proc., § 430.10, subd. (e).) Defendants also demur to the first and second causes of action for failure to specify whether the contract is written, oral, or implied by conduct. (Code Civ. Proc., § 430.10, subd. (g).)

II. FACTUAL ALLEGATIONS IN THE TAC

In late May 2021, Ren approached Latessa with the opportunity to apply for Stanford's Botha-Chan Entrepreneurship Innovation Program, with Spencer, Ren, and another student using a business plan for a potential venture called "Pongo." (TAC, ¶ 19.) Pongo was created by Ren and Latessa and focused on enabling vendors to allow their clients to make purchases with reward points. (*Id*. at ¶ 16.) Latessa agreed to submit a joint application to the program, and the application emphasized their roles as equal participants in the startup venture. (*Id*. at ¶ 20.)

Upon acceptance to the program, the parties allegedly formed a joint venture partnership and agreed to share equally in the risks, rewards, and management of the new business. (TAC, ¶¶ 1-2.) Throughout the program, the parties tried various business plans, but "reaffirmed their equal commitment to the joint venture . . . and confirmed that they were equally sharing in the risks and reward of the business." (*Id*. at ¶ 34; *see also id.* at ¶¶ 29-33.) Latessa gave up her employment offer with another company to commit to working with Ren and Spencer on the joint venture. (*Id*. at ¶ 31.)

In July and August 2021, Defendants secretly conspired to exclude Latessa from the business by incorporating Markai, Inc. ("Markai"), "behind her back" and "foist[ing] a minimal share" of equity in Markai on her. (*Id*. at ¶¶ 49, 55-57.) Defendants allegedly continued to pressure Latessa into signing a shareholder agreement and withheld documents for her review prior to signing. (*Id.* at ¶¶ 63-69.) On August 30, 2021, Defendants declared they would no longer work with Latessa, revoked all offers of equity in Markai, and cut off her access to the Markai accounts. (*Id*. at ¶ 70.)

Although Ren reassured Latessa by stating, "Obviously you are a founding member of this business [Markai] and will be represented as such," Defendants later removed Latessa's "co-founder" title from the Botha-Chan program presentation and the Markai website. (*Id*. at ¶¶ 57-58, 73-75.)

Latessa's TAC pleads the following:

1. Breach of Partnership Agreement;
2. Breach of Joint Venture Agreement;
3. Breach of Fiduciary Duty;
4. Intentional Misrepresentation;
5. Negligent Misrepresentation;
6. Conversion;
7. Unjust Enrichment; and
8. Accounting.

III. REQUEST FOR JUDICIAL NOTICE

The court GRANTS judicial notice of Defendants' Exhibits 1 and 2, which are redline comparisons of the SAC and TAC. (Evid. Code, § 452, subd. (d) [permitting the court to take judicial notice of its own records].)

The court GRANTS judicial notice of Defendants' Exhibit 3, which is Plaintiff Sophia Latessa's Responses to Defendant Timothy Spencer's Requests for Admission, Set One, dated July 8, 2022. (See *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 – 605 ["The court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, *only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court*."] [Emphasis added].)

IV. LEGAL STANDARD

As stated in the court's December 7, 2022 order and restated in its May 4, 2023 order, the legal standard to be applied to a demurrer is the following:

> The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros*. (1990) 221 Cal.App.3d 617, 621.) Consequently, "'[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice' [citation]." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732; see Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the [ ] allegations [in the challenged pleading] or the accuracy with which [the plaintiff] describes the defendant's conduct. [ ] Thus, [ ] the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

V. THE PRIOR ORDERS

A. The July 11, 2022 Order

In its July 11, 2022 order, this court (Judge Kirwan) overruled Defendants' demurrer to the breach of contract action under Code of Civil Procedure section 430.10, subdivision (e). The court noted that the parties appeared to disagree on the entity or project subject to the alleged partnership agreement. In particular:

> Defendants in their demurrer appear to draw a line of distinction between Defendant Markai, Inc. and the different rebranded or redirected iterations of the startup business venture under the Botha-Chan Entrepreneurship Innovation Program (*i.e.*, Pongo, Romeo, Echo, Markai, Inc.). (Demurrer, p.2.) In essence, Defendants appear to contend that Markai, Inc. as incorporated on August 20, 2021 (Complaint, ¶ 31), is not the same project or entity as Echo, which Plaintiff and Defendants Spencer and Ren agreed to rename to Markai on July 12, 2021. (*Id.* at 27.)

Said differently, Defendants appeared to view each iteration of the project as an entirely new venture, while Latessa viewed it as a continuation of a project subject to the same alleged partnership agreement. Nonetheless, the court reviewed the demurrer pursuant to the allegations of the Complaint, "understanding that the Complaint references the project Markai (formerly known as Echo) and its underlying iterations, not the [presently formed] Defendant Markai, Inc." of which Latessa was concededly not a part.

B. The December 7, 2022 Order

In its December 7, 2022 order, the court (Judge Kirwan) sustained Defendants' demurrer to the breach of contract causes of action (first and second) under Code of Civil Procedure section 430.10, subdivision (e). The court determined that the FAC's allegations that "the parties 'all had joint control over the Joint Venture and its business operations' and 'agreed to share equally in the risks and rewards of their new business'" were too vague and conclusory to be enforceable or survive a demurrer. Rather, the FAC alleged unenforceable, nonbinding "agreements to agree." (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150 [citing *Bustamante v. Intuit* (20026) 141 Cal.App.4th 199].)

C. The May 4, 2023 Order

In its May 4, 2023 order, the court (the undersigned) again sustained Defendants' demurrer to the breach of contract causes of action because "the new allegations in the SAC [were] still insufficient to show the existence of a contract." (May 4, 2023 Order at p. 10:15-16.) The court noted that Latessa had amended the SAC to remove "problematic language in the FAC that gave rise to the court's prior determination," but that this was improper under the "sham pleading" doctrine. (*Id.* at p. 10:17-23.) In addition, the court found that the SAC added allegations that Latessa "work[ed] under the direction of others, not as a co-equal partner of those others," which further undermined her claim that she was a equal shareholder. (*Id.* at pp. 10:24-11:9.) The court concluded that the new allegations failed to show "any further objective evidence of an intention to create a partnership or joint venture." (*Id.* at p. 11:10-25.)

VI. ANALYSIS

A. Breach of Contract Causes of Action

As in their prior demurrers, Defendants contend again that the first and second causes of action are defective because the TAC fails: (1) to allege whether the contract is written, oral, or implied by conduct; and (2) to allege the existence of a valid partnership or joint venture agreement (*i.e.*, a contract).

As stated in the court's May 4, 2023 order:

> "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) The party asserting breach of contract must plead "whether the contract is written, is oral, or is implied by conduct." (Code Civ. Proc., § 430.10, subd. (g).)

1. Failure to Allege the Form of a Contract

Defendants insist that dismissal of the first and second causes of action is proper because the TAC fails to allege whether the contract is written, oral, or implied by conduct.

In its May 4, 2023 order, this court determined that the form of the alleged agreement was sufficiently pled by Latessa as oral communications *plus* conduct indicating that the parties were working together for the business. This court noted: "*Holmes* does not stand for the specific proposition that a contract can only be pled as either oral, written, or implied by conduct, to the exclusion of the other options." In *Holmes v Lerner* (1999) 74 Cal.App.4th 442, the Court of Appeal held that the defendants created a partnership agreement through oral statements *and* by conduct: "The agreement is evidenced by Lerner's statements . . . . The additional terms were filled in as the two women immediately began work on the multitude of details necessary to bring their idea to fruition." (*Id.* at p. 459.)

Here, the TAC sufficiently pleads the form of the agreement by similarly alleging, as in *Holmes*, that the parties orally expressed an intent to work together on, and complete, the Botha-Chan program and that the parties worked together on their joint venture to bring it to fruition. (See e.g., TAC ¶¶ 30-34, 36-48].)

A cause of action predicated on the contract need not explicitly state whether the alleged contract is written, oral, or implied by conduct to withstand demurrer. (*Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 99.) Instead, courts look to the pleading as a whole to determine whether the nature of the contract can be ascertained. (*Ibid.*) While the TAC may not clearly state that the agreement was oral and implied by conduct, the court must construe the allegations liberally and ultimately find that they nonetheless sufficiently plead the form of the alleged agreement. Accordingly, the court OVERRULES (again) Defendants' demurrer on this basis. (Code Civ. Proc., § 430.10, subd. (g).)

2. Failure to Allege the Existence of a Contract

Defendants maintain that the TAC still fails to address the deficiencies identified in this court's prior orders. Given the court's prior determination regarding the sufficiency of the SAC, as described above in V.C (summary of the May 4, 2023 Order), the court's present task is to focus again on what is different in the TAC.

First, as Defendants point out, the TAC again omits problematic language from the FAC that was essential to the court's determinations in the December 7, 2022 order. Just as it did in its May 4, 2023 order, this court continues to deem the allegation that "Spencer and Ren almost immediately set about trying to exclude Latessa from the business to conceal their true intentions about equally splitting the rewards" as necessarily true for purposes of evaluating the sufficiency of the TAC. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384 ["[T]he policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint."].)

Second, the TAC newly alleges that Latessa served in a managerial role with "authority to assign tasks to [an summer intern]" and with substantial authority as the final decision maker in selecting and interviewing vendors. (TAC, at ¶¶ 33, 78.) But as Defendants point out, these new allegations do not show that she had "joint control" over the business along with Ren and Spencer; rather, they show "that plaintiff was empowered to make *particular* decisions in *specific* areas of the business." (Reply at p. 6:8-11.) Additionally, the TAC alleges, "In early May 2021, Chenyu Ren drafted a letter for Latessa to solicit an additional programmer for their 'fintech startup to dramatically expedite online payment,'" and "further asked candidates to email Latessa." (*Id*. at ¶ 18.) This latter allegation, in combination with the remaining allegations of the TAC (previously addressed in the court's May 4, 2023 order), still fails to show joint control and instead serves as "evidence of someone working under the direction of others, not as a co-equal partner of those others." (See *id*. ¶¶ 38, 44-45.)

Third, the TAC's repetitive references to the parties' intention to complete the Botha-Chan program remains insufficient to show an intention to create a *partnership* or *joint venture* and further confirms the existence of an "agreement to agree." Although the TAC newly alleges that Markai "started off as Pongo" and "pivoted to Markai," this is still the same restatement of the parties' multiple pivots that this court has already determined falls short of the definiteness identified in *Holmes*. (TAC, ¶ 62.) In its prior order, this court noted:

> In *Holmes*, the evidence of an alleged partnership was more concrete and definite than the various projects denominated "Pongo," "Romeo," "Echo," and ultimately "Markai" by the parties here. Whereas *Holmes* involved a[n] agreement to "start a cosmetics company based on the unusual colors developed by [plaintiff], identified by the urban themes and the exotic names," the actual business model here shifted with each new project name. Moreover, in *Holmes*, which involved the sufficiency of the evidence at trial, rather than the sufficiency of a pleading, there was no indication that there were allegations in the plaintiff's pleadings that directly undermined the existence of any meetings of the minds as to a partnership, such as can be found in the allegations of the FAC and SAC here.

(May 4, 2023 Order at p. 12:9-18.)

The additional allegations in Paragraphs 18, 33, and 78 of the TAC do not support finding a clear agreement and—instead—undermine the existence of any meeting of the minds between the parties regarding a partnership. Similarly, the addition of the slide from the Botha-Chan Powerpoint presentation that refers to Markai as "Markai fka Pongo" adds nothing material to Latessa's claim that an actual agreement was formed between the parties or that the parties had an intent to share equally in the management, profits, and ownership of a business that extended beyond their participation in the Botha-Chan program. (TAC, ¶ 62.)

Latessa's counsel persuaded the court at the May 4, 2023 hearing to grant leave to amend the SAC, given that substantial new discovery had just been obtained. Nevertheless, the TAC remains insufficient. Despite having now received multiple opportunities to amend her complaints to allege the existence of a contract, Latessa still has not done so. Accordingly, Defendants' demurrer to the first and second causes of action is SUSTAINED, this time WITHOUT LEAVE TO AMEND.

B. The Third, Sixth, and Eighth Causes of Action

As noted in the court's previous rulings, the third, sixth, and eighth causes of action for breach of fiduciary duty, conversion, and accounting are all dependent on the existence of a contract. Because the court again finds that the TAC fails to allege a contract, the court SUSTAINS WITHOUT LEAVE TO AMEND the demurrer to these causes of action.

C. Unjust Enrichment

As in the prior demurrer, Defendants contend that the seventh cause of action fails to state a claim because of the conclusory nature of the allegations.

As stated in the court's May 4, 2023 order:

> "Unjust enrichment is not a cause of action or even a remedy, but rather a general principle underlying various legal doctrines and remedies." (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231 [citations omitted].) It is synonymous with restitution. (*Ibid.*) The law of restitution allows an individual to make restitution if he or she is unjustly enriched at the expense of another. (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662 (*First Nationwide Savings*); see also *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388 ["[R]estitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion or similar conduct."]) "The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it. [Citation.]" (*First Nationwide Savings, supra,* 11 Cal.App.4th at p. 1663, italics in the original.)
>
> In this case, even though the court has sustained the demurrer with respect to the contract causes of action, it has overruled the demurrer as to the misrepresentation, or fraud, causes of action, which is sufficient to sustain an unjust enrichment claim. Because the SAC adequately alleges at least one basis

for relief (fraud), the unjust enrichment cause of action survives demurrer. (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167 [overruled on other grounds].)

(May 4, 2023 Order at p. 14:1-18.)

While Defendants assert that the fraud or negligent misrepresentation claims are without merit, they do not repeat their (previously unsuccessful) demurrer to the fourth and fifth causes of action. (Demurrer, p. 2, fn. 2.) Thus, for the purposes of this demurrer and as noted in the court's prior order, the fraud and negligent misrepresentations claims remain and individually provide a basis for the unjust enrichment claim, as stated in the court's prior order.

The court OVERRULES Defendants' demurrer to the seventh cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

VII. MOTION TO STRIKE

Defendants concurrently filed a motion to strike the prayer for punitive damages in Paragraphs 113 and 132, as a consequence of the breach of fiduciary duty and conversion causes of action. Because the court has sustained the demurrer to the third and sixth causes of action, the motion to strike is DENIED as moot.

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Calendar Line 3
Case Name: *Tianqing Li v. Phillip Mummah*
Case No.: 21CV389929

The court DENIES the motion for sanctions.

On June 27, 2023, this court (Judge Alloggiamento) heard a motion for judgment on the pleadings ("JOP motion") by plaintiff Tianqing Li against defendant Phillip Mummah's answer to the first amended complaint. In an order dated June 29, 2023, Judge Alloggiamento ultimately denied the motion in large part, determining that the answer "sufficiently raises a material issue" regarding the claims for declaratory relief; but the court also granted the motion in small part (with leave to amend), determining that the seventh affirmative defense was "merely conclusory and contains no supporting facts." (Order at pp. 5:24-26 & 6:16-18.)[1]

Mummah now brings this motion for sanctions under Code of Civil Procedure section 128.5, arguing that Li's JOP motion was "frivolous," "solely intended to cause unnecessary delay," and brought in "bad faith," but he fails to provide any support for these contentions. Just because a motion is denied (in part), that does not mean that it was "frivolous"—the party seeking sanctions must show that "'any reasonable attorney would agree the motion was totally devoid of merit.'" (*Rudisill v. California Coastal Commission* (2019) 35 Cal.App.5th 1062, 1070 [quoting (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450].) Here, Mummah recites the foregoing standard but then fails to explain how Li's JOP motion was "totally devoid of merit." Indeed, there is nothing in the June 29, 2023 order to indicate that Judge Alloggiamento found the arguments to be so, even though she ultimately denied the motion. It is not enough to show that a motion was denied, which is all Mummah has done. Sanctions should be "used sparingly in the clearest cases to deter the most egregious conduct." (*Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 893.) Mummah's motion fails to meet this standard.

Mummah insists that this motion has been brought under Code of Civil Procedure section 128.5, not section 128.7. (Reply at p. 1:27-28.) If so, then Mummah must also show conduct by Li or her attorney that evinces *subjective* bad faith, not just *objectively* unreasonable conduct under section 128.7. (See *Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337, 1346.) He has failed to meet this standard, as well. Indeed, his opening brief and reply brief do not even mention the subjective bad faith requirement, much less advance any evidence to satisfy it. For this additional reason, the sanctions motion must be denied.

In short, the court finds that the JOP motion was no more "frivolous," brought in "bad faith," or "intended to cause unnecessary delay" than the present motion for sanctions.

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[1] The court grants Li's request for judicial notice of the June 29, 2023 order under Evidence Code section 452, subdivision (d).

Calendar Line 4
Case Name: *Mertangel Corp. v. Howard Susman*
Case No.: 22CV396511

This is a motion by defendant and cross-complainant Howard Susman to compel further responses to form interrogatories, special interrogatories, requests for admissions, and document requests from plaintiff and cross-defendant Mertangel Corp ("Mertangel"). In addition, Susman requests $4,060.00 in monetary sanctions, representing eight hours of attorney time at $500/hour, plus a $60 filing fee.

Notice is apparently proper, and the motion is unopposed. The court notes that on June 21, 2023, it granted the motion of Mertangel's attorney to be relieved as counsel in this case. Since then, no counsel has appeared on behalf of Mertangel, and so it has no ability to respond to this motion.

The court GRANTS the motion to compel, with an order that Mertangel provide substantive responses to the discovery requests within 30 days of service of notice of entry of this order. In addition, the court GRANTS IN PART Susman's request for monetary sanctions in the amount of $1,060. The court finds that this motion is exceedingly simple, as it is directed to an unrepresented corporation that has been completely unresponsive, and so a lower sanctions amount is appropriate to reimburse Susman for the costs of this motion. The $1,060 must also be paid by Mertangel within 30 days of service of notice of entry of this order.

IT IS SO ORDERED.

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Calendar Line 10
Case Name: *Thomas Vo v. Technology Credit Union*
Case No.: 23CV417184

Defendant Technology Credit Union ("Tech CU") moves to compel arbitration in this case filed by its former employee, Thomas Vo ("Vo"). Vo opposes arbitration on the ground that the arbitration provision in his employment agreement is unconscionable, mainly because it does not allow him to conduct third-party discovery. For the reasons set forth below, the court ultimately finds, somewhat reluctantly, that the arbitration provision is unconscionable and DENIES the motion.

The party challenging a contractual arbitration provision bears the burden of proving that it is both procedurally and substantively unconscionable. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126.) This may be done on a sliding scale, where the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required, and vice versa. (*Id.* at pp. 125-126.)

In this case, Vo argues that the arbitration provision is procedurally unconscionable because it was presented as part of a contract of adhesion (his employment agreement). The court finds that this constitutes a showing of procedural unconscionability, though a relatively minimal one. (See *Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, 132 [the fact of an adhesion contract is insufficient to make an agreement unconscionable on its own]; *Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 402 [same].) Vo advances no other evidence to show surprise (*e.g.*, fine print, indecipherable jargon) or oppression (*e.g.*, undue pressure from the drafting party's salespersons).

As for substantive unconscionability, Vo points out that the Court of Appeal recently held that JAMS arbitrators (who would conduct the arbitration here) do not have the authority to issue third-party subpoenas, at least in the absence of any clear provision in the arbitration agreement to the contrary. (See *Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360 (*Aixtron*).) Because he has extensive third-party discovery that he needs to conduct in this wrongful termination case, Vo contends that his "inability to vindicate his statutory rights" with adequate discovery makes the arbitration provision substantively unconscionable.

Vo also relies on a few published decisions—*De Leon v. Pinnacle Property Management Services* (2021) 72 Cal.App.5th 476, 489 (*De Leon*); *Baxter v. Genworth North America Corp.* (2017) 16 Cal.App.5th 713, 729 (*Baxter*); and *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 912 (*Davis*)—in which the Court of Appeal held that default discovery limitations in an arbitration agreement are unconscionable if they prevent a party from "vindicating" their statutory rights. In *De Leon*, for example, the Court of Appeal noted that "[w]hile superficially neutral, the discovery limitations favor defendants" and were "nonmutual in effect," because they prevented claimants in "factually complex" employment disputes from obtaining necessary discovery. (*De Leon*, 72 Cal.App.5th at pp. 487-488.)

De Leon, *Baxter*, and *Davis* are somewhat distinguishable because the arbitration provisions in those cases expressly set forth specific default limitations on discovery (*e.g.*, 20 interrogatories and three depositions per side in *De Leon*, 10 interrogatories and two depositions per side in *Baxter*, and two depositions per side in *Davis*), which made them unconscionable on their face. Here, by contrast, the arbitration provision between Vo and

Tech CU does not contain any explicit limitations on discovery; instead, Vo argues that it is indirectly unconscionable because it provides for an arbitrator who lacks the power to issue and compel third-party subpoenas, under *Aixtron*, *supra*.

While it may well be an issue of first impression, and it is certainly a close factual and legal call, the court ultimately concludes that under the authority of the foregoing cases (*Aixtron* plus *De Leon/Baxter/Davis*), the arbitration provision here is substantively unconscionable, and that combined with Vo's minimal showing of procedural unconscionability, the provision should not be enforced. Tech CU attempts to distinguish *Aixtron* by arguing that it involved a limitation on "an arbitrator's ability to compel compliance with third-party *pre*-hearing subpoenas and not for the actual arbitration hearing itself." (Reply at pp. 6:21-7:3; italics in original.) The court finds that Tech CU's emphasis on "*pre*-hearing subpoenas" is not a meaningful one, because the "hearing," in arbitration parlance, is the trial itself, and so a "pre-hearing subpoena" simply means a "pretrial subpoena"—*i.e.*, discovery. The bottom line is that the arbitrator may not compel third-party *discovery* under *Aixtron*.

As noted above, the court reaches this conclusion somewhat reluctantly, for both legal and factual reasons. Legally, the effect of the foregoing case law is to place impractical limitations on what is permissible in arbitration: it reduces the discretion and authority of the arbitrator(s), and it simultaneously disqualifies arbitration as a dispute resolution mechanism if the scope of permissible discovery is *slightly* more limited than it would be in litigation—which is supposed to be the whole point of arbitration in the first place. Nevertheless, it appears to be the law, and it must be followed. Factually, the court is somewhat skeptical that Vo will actually need to subpoena all of the third-party witnesses that he identifies (see Opposition at p. 8:1-15), because he worked at Tech CU for less than two years (from April 2020 to February 2022, and for the month of September 2022), all of which was during the COVID-19 pandemic, when much of his work had to be done remotely from home. (Opposition at p. 1:17-2:1.) This is not a situation like in *Davis*, *supra*, where an employee had been at the company for 15 years, with a long history of interpersonal relationships. (53 Cal.App.5th at pp. 902-903.) Nevertheless, Tech CU has not countered Vo's identification of third-party witnesses in any way, and so the court has no concrete basis to discount it.

The court denies the motion to compel arbitration.[2]

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[2] The court also denies Tech CU's request for judicial notice, submitted with its reply brief. The court does not generally consider new evidence submitted with reply papers. In addition, Tech CU fails to identify any provision of the Evidence Code that would permit judicial notice of the JAMS rules. Finally, the JAMS rules are irrelevant to the court's decision on this motion.

Calendar Line 11
Case Name: *Jane Doe et al. v. Union School District et al.*
Case No.: 23CV422606

Plaintiffs Jane Doe and Jane Doe 2 ("Plaintiffs") move for a preferential trial setting under Code of Civil Procedure section 36, based on the fact that Jane Doe is "under 14 years of age." (Code Civ. Proc., § 36, subd. (b).) This motion was originally scheduled to be heard on November 30, 2023, but the court advanced the hearing upon Plaintiffs' ex parte application, which noted that Jane Doe will be turning 14 on November 16, 2023 (*i.e.*, in one week). While Jane Doe is presently just under 14 years old, Jane Doe 2 is nine months older and is already 14.

Defendant Union School District (the "District") does not oppose Jane Doe's request, recognizing "the mandatory nature of section 36, subd. (b)." (Opposition at p. 1:24-26.) But the District also argues that the "interest of justice" requires that Jane Doe's case be severed from Jane Doe 2's case and the two cases proceed on different timelines, given that Jane Doe 2 is not subject to the "mandatory nature" of the trial preference statute.

As an initial matter, the court finds that Plaintiffs have satisfied the statutory standard set forth in section 36, subdivision (b), given that Jane Doe is a "party to the action," is "under 14 years of age," and has "a substantial interest in the case as a whole." (Code Civ. Proc., § 36, subd. (b).) As a result, this case is entitled to a preferential trial setting within 120 days of the date of this order.

As to the question of severance, the court observes that there are material factors that weigh in both directions. On the one hand, Plaintiffs note that their claims involve the same school, the same school year, and most significantly of all, the same student ("John Zoe") who sexually assaulted each of them. In addition, the District apparently investigated Jane Doe and Jane Doe 2's allegations against Zoe as part of a single Title IX investigation. On the other hand, the District argues that Zoe's assaults occurred separately for each individual plaintiff, in different locations (e.g., "locker bay," "science classroom," "blacktop"), and at different times of day. As a result, Plaintiffs' negligent supervision allegations against the District could potentially call for the testimony of different, non-overlapping witnesses. The District claims that expedited discovery for Jane Doe and Jane Doe 2's cases will be onerous, and that adequate trial preparation "will be likely impossible."

In the end, the court finds that although preparation for trial within 120 days will undoubtedly be challenging—for either one or both of Jane Doe and Jane Doe 2's cases—it will not be "impossible." Indeed, discovery and case investigation is a two-way street, and Plaintiffs will be under the same time constraints as Defendants. The court is skeptical of the notion that the negligent supervision claims of each plaintiff will be so different as to be the equivalent of two independent cases, as the District seems to suggest. Rather, the court finds based on the limited record before it that the assaults by Zoe appear to have followed a common pattern, and that many of the District employees responsible for supervising these middle school students (Doe, Doe 2, and Zoe) would likely be overlapping. Given the common series of acts (of abuse), the commonality of witnesses, and the common questions of law and fact, the court finds that there will be significant economies of scale in trying these cases together. Moreover, the court agrees with Plaintiffs that it would be "cruel to force these young girls to testify to the horrifying details of their sexual abuse at two separate trials."

Indeed, the court is mindful of the fact that Zoe himself is a minor, and the impact of two repetitive and overlapping trials against him would likely be needlessly traumatic for him, too.

California law generally, and section 378 of the Code of Civil Procedure specifically, gives "discretion" to the plaintiffs to decide to join together "[i]f there is a right to relief arising out of the same series of transactions." (Code Civ. Proc., § 378; *Petersen v. Bank of America Corp.* (2014) 232 Cal.App.4th 238, 248.)

The court denies the District's request to sever the Plaintiffs' cases into two.

Finally, the District requests that if Plaintiffs' motion is granted, Plaintiffs be required to comply with shortened discovery deadlines—*e.g.*, 15 days instead of 30 days for written discovery responses, and up-front disclosures of any relevant medical records and law enforcement reports in Plaintiffs' possession. The court generally agrees with the District that an expedited schedule for discovery makes sense given the short amount of time to trial, but all of the District's proposals are one-way proposals—they purport to impose shortened deadlines on the Plaintiffs but no corresponding obligation on the part of Defendants. (Opposition at p. 7:1-26.) The court cannot accept these asymmetrical proposals. Consequently, the court orders the parties to meet and confer on a mutually agreeable plan for expedited discovery, with shortened deadlines for matters such as written discovery responses, production of obviously relevant information (such as law enforcement reports), and the production of witnesses for deposition. If the parties reach an impasse, they can raise the matter with court—including, if necessary, via a request for an informal discovery conference or an ex parte request to shorten time for any hearing.

The court sets this matter for trial on **March 4, 2024** at 8:45 a.m., with a mandatory settlement conference on **February 28, 2024** (time TBD).

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