**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: December 12, 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 | 19CV358250 | Nick Pal v. Farmers Insurance Exchange | Click on LINE 1 or scroll down for ruling. |
| LINE 2 | 21CV385565 | Dilber Sraon v. KY Management, Inc. et al. | Click on LINE 2 or scroll down for ruling. |
| LINE 3 | 23CV418773 | Shirley Getty v. Villa Verde et al. | Click on LINE 3 or scroll down for ruling. |
| LINE 4 | 22CV396635 | Arrow Sign Company, Inc. v. California Plus Engineering, Inc. | Click on LINE 4 or scroll down for ruling. |
| LINE 5 | 20CV369118 | Nancy Tu v. Chefling, Inc. et al. | Click on LINE 5 or scroll down for ruling. |
| LINE 6 | 20CV369180 | FW CA-Mariposa Gardens Shopping Center, LLC v. Varatharajaperumal Manavalan et al. | Motion to compel deposition of KVPT Foods, Inc.: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. In addition, the court GRANTS the request for $1,747.50 in monetary sanctions, which the court finds to be reasonable. Moving party to prepare final order. |
| LINE 7 | 21CV382776 | JPMorgan Chase Bank, N.A. v. Jennifer C. Villarreal | Claim of exemption: the court finds that judgment debtor Villareal has not met her burden of showing the application of any statutory exemption, and her proposed amount to be withheld of $0 is unreasonable, given her gross income. Accordingly, the claim is DENIED. Judgment creditor indicates that it would be willing to accept 25% of net earnings per pay period, but the court does not have enough information to determine what that means in specific dollars. The court encourages the parties to communicate to formulate a payment plan. |

**- oo0oo -**

**Calendar Line 1**
**Case Name:** *Nick Pal v. Farmers Insurance Exchange*
**Case No.:** 19CV358250

Plaintiff Nick Pal brings this "motion to strike, or in the alternative, tax costs" that are listed on defendant Farmers Insurance Exchange's ("Farmers'") memorandum of costs. Having reviewed the parties' submissions, the court DENIES the motion for the most part.

First, Pal argues that Farmers was not the "prevailing party" in this case under Code of Civil Procedure section 1032. The court finds this argument—which appears to be presented in boilerplate text in Pal's brief—to be completely meritless. The court granted Farmers' motion for summary judgment, negating all of Pal's causes of action, and entered a judgment that was entirely in Farmers' favor.

Second, Pal misstates the burden of proof on a motion to strike or tax costs. He argues that because he "properly objected" to the memorandum of costs, "the burden shifted to Plaintiff to introduce evidence that the costs were reasonable and necessary." This argument is based on a clear misreading of the case law. In the context of a memorandum of costs, a moving party makes a "proper" objection only if the items appearing in the memorandum do not appear *on their face* to be allowable charges under Code of Civil Procedure section 1033.5. (See *Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal.App.5th 323, 338 [if the items on the memorandum of costs appear to be proper charges, the memorandum is *prima facie* evidence of their propriety, and the burden is on the party contesting them to show that they were not reasonable or necessary].) Thus, in this case, if the items on the memorandum appear to be proper on their face, then the burden of proof remains with Pal, the party challenging the costs. The items are proper on their face.

Third, if objections are based on *factual* matters, a motion to strike or tax costs must be supported by a declaration under penalty of perjury. (See *County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113-1114.) Here, Pal has failed to submit any declaration with his motion, and so the only arguments that may properly be considered are legal in nature, rather than factual.

Pal raises numerous ill-conceived objections to items on the memorandum of costs that are generally allowable under section 1033.5 of the Code of Civil Procedure. For example, he objects to filing fees and jury fees that were paid to the court, including electronic filing and service fees, as well as deposition costs. These fees are permitted under section 1033.5, subdivisions (a)(1), (a)(3), and (a)(4); contrary to Pal's arguments, copies of bills, invoices, or other documentation are not required to be attached to a memorandum of costs. Rather, the burden is on Pal to show that these amounts were not reasonable or necessary, and he has failed to make even an initial showing as to this proposition because he has failed to submit a declaration or any evidence with his motion. In addition, a jury fee deposit is necessary to preserve the right to a jury trial, and so it is a recoverable cost even if the case never reaches a jury.

In its opposition to the motion, Farmers does note two errors on its memorandum of costs: filing and motion fees that were listed as $1,175.00 but that should have been $1,025.00, and electronic filing and service fees that were listed as $875.38 that should have been $215.30. Thus, the motion is granted to the extent that the $12,361.32 originally contained on

the memorandum of costs should be reduced by $810.08 to $11,551.24. In all other respects, the motion is denied.

**- oo0oo -**

**Calendar Line 2**
**Case Name:** *Dilber Sraon, DDS v. KY Management, Inc. et al*
**Case No.:** 21CV385565

## I. BACKGROUND

This case arises out of water damage to the dental office of plaintiff Dilber Sraon. After Sraon sued defendants KY Management, Inc. ("KY") and Electric Tech Construction ("Electric Tech"), KY filed a cross-complaint against AT&T Mobility LLC ("AT&T") and J5 Infrastructure Partners ("J5"), among others, for indemnification. AT&T tendered its defense and indemnity to J5 pursuant to an agreement between AT&T and J5. AT&T has also filed a cross-complaint against J5, Electric Tech, and Lawson Roofing ("Lawson").

Currently before the court is J5's demurrer to AT&T's first amended cross-complaint.

### A. The Underlying Complaint and KY's Cross-Complaint

On July 14, 2021, Sraon initiated the principal action for breach of contract and negligence against KY and Electric Tech. The complaint alleges that KY and Electric Tech failed, among other things, to "maintain the habitability of the leased premises which were inundated with water, moisture, and rot."[1] (Complaint, p. 3.) The "leased premises" are Sraon's dental practice, located at 6105 Snell Avenue, San Jose, California. (See *ibid*.)

On October 29, 2021, KY filed a cross-complaint for indemnification, apportionment of fault, and declaratory relief ("KY cross-complaint") against J5, AT&T, New Cingular Wireless PCS LLC, and Electric Tech, alleging each cross-defendant was "negligent in the matters of which plaintiff complains."[2] (KY cross-complaint, ¶ 7.)

### B. AT&T's First Amended Cross-Complaint

On April 4, 2023, AT&T filed its operative first amended cross-complaint ("FACC") against J5, Electric Tech, and Lawson (collectively, "Cross-Defendants"), alleging the following causes of action: (1) express indemnity; (2) comparative indemnity; (3) equitable indemnity; (4) apportionment of fault; (5) contribution; and (6) declaratory relief.

The FACC alleges that J5 is obligated to defend and indemnify AT&T against KY's cross-complaint pursuant to a defense and indemnification clause in the "Mobility Network Master Services Agreement" between J5 and AT&T ("Service Agreement"). (FACC, ¶ 6.)

The defense and indemnification clause states:

> [J5 INFRASTRUCTURE PARTNERS, LLC] shall indemnify, hold harmless, and defend AT&T and its Affiliates, as well as their respective employees, agents, distributors and customers, individually or collectively, against any Loss arising from, in connection with, or resulting from (i) the Material or Services furnished by [J5 INFRASTRUCTURE PARTNERS, LLC], (ii) [J5 INFRASTRUCTURE

[1] The court takes judicial notice of the original complaint. (Evid. Code, § 452, subd. (d) [permitting judicial notice of court's own records].)
[2] The court takes judicial notice of KY's cross-complaint. (*Ibid*.)

> PARTNERS, LLC's] acts or omissions with respect to this Agreement, or (iii) Employment Claims. [J5 INFRASTRUCTURE PARTNERS, LLC's] duty to indemnify, hold harmless, and defend against Loss extends to Loss that may be caused or alleged to be caused in part by the negligence of AT&T and other persons indemnified under this Agreement to the fullest extent that such indemnification is permitted by applicable Law.

(FACC at ¶ 7, brackets and capitalization in original.)

J5 now demurs to the FACC on the grounds that AT&T: (1) failed to file a certificate of merit in compliance with Code of Civil Procedure section 411.35; and (2) failed to allege sufficient facts in the FACC. AT&T filed its opposition on November 29, 2023. J5 filed its reply on December 5, 2023.

## II. LEGAL STANDARD

"When any ground for objection to a complaint, cross-complaint, or answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading." (Code Civ. Proc., § 430.30, subd. (a).) A cross-defendant may demur to a cross-complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action, or on the ground that no certificate of merit was filed as required by Code of Civil Procedure section 411.35. (Code Civ. Proc., § 430.10, subds. (e) and (h).)

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, [citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318].) "'A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint . . . ; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47 [quoting *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214].)

## III. ANALYSIS

### A. Certificate of Merit (Code Civ. Proc., §§ 411.35 & 430.10(h))

Under Code of Civil Procedure section 411.35, subdivision (a), any action that arises from the professional negligence of "a person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code" requires the attorney for the plaintiff or cross-complainant to first file and serve a merit of certificate "on or before the date of service of the complaint or cross-complaint."

J5 demurs to the FACC because AT&T failed to file the requisite certificate of merit. In opposition, AT&T maintains that Code of Civil Procedure section 411.35 does not apply

because: (1) neither Sraon's complaint nor KY's cross-complaint alleges professional negligence against J5; and (2) the FACC does not allege that J5 is a design professional.[3]

### 1. Application to Claims

As an initial matter, Code of Civil Procedure section 411.35, subdivision (i), provides the following: "'[A]ction' includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms 'professional negligence' or 'negligence.'" Thus, an action for damages or indemnity arising from the professional negligence of an architect, engineer, or land surveyor requires a certificate. (*Curtis Engineering Corp. v. Superior Court* (2017) 16 Cal.App.5th 542, 547 (*Curtis*).)

While Sraon's complaint does not name J5 as a defendant, it does include a cause of action for "negligence," and the KY cross-complaint seeks indemnification, apportionment of fault, and declaratory relief for negligent acts by J5. (See, e.g., KY cross-complaint, ¶ 6.) Thus, the court agrees with J5's argument that the FACC's causes of action for indemnity are also "derivative" claims for negligence. Accordingly, Code of Civil Procedure section 411.35 does potentially apply here, regardless of whether AT&T's own FACC used the magic words "professional negligence" for its indemnity claim.

### 2. Application to J5

At the same time, the court does not have sufficient information to sustain a demurrer under Code of Civil Procedure sections 411.35 and 430.10(h). That is because section 411.35, subdivision (a), expressly applies only to a person holding a valid architect's certificate, a person holding a valid land surveyor's license, or "a person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code." Here, the FACC does not allege that J5 has "a valid registration" under this provision, and so the court does not have any facts before it to indicate that J5 is entitled to invoke section 411.35. California courts have long held that "'[w]here the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.'" (*Curtis, supra,* 16 Cal.App.5th 542 at p. 546 [quoting *Burden v. Snowden* (1992) 2 Cal.4th 556, 562].)

While J5 contends in its reply brief that "AT&T knew fully well before filing and serving its cross-complaint that J5 is an engineering company," the standard for a demurrer requires this court to look to the four corners of the pleading, not what the pleader knows or could discover through an internet search. (Reply, p. 3:5-6.) Moreover, the fact that J5 is "an

[3] While AT&T also contends that filing a certificate of merit does not fulfill the statutory purpose of Code of Civil Procedure section 411.35, the argument is unpersuasive. In the cases AT&T cites, statutory purpose is discussed in the context of seeking sanctions under Code of Civil Procedure section 411.35, subdivision (h), for failure to comply with certificate requirements. (*UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, 28 ["The purpose of the statute is to 'discourag[e] frivolous professional negligence suits against registered civil engineers' by imposing a sanction on the noncomplying plaintiff or cross-complainant"]; see also *Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates* (1996) 45 Cal.App.4th 913, 915 [citing *Guinn v. Dotson* (1994) 23 Cal.App.4th 262 (*Guinn*)].) In *Guinn,* the Court of Appeal observed that the legislature intended subdivision (h) to enforce the purpose of discouraging frivolous professional negligence suits. (*Guinn, supra,* 23 Cal.App.4th at p. 270.) This principle applies regardless of whether such suits arrive in the form of an original complaint or a cross-complaint.

engineering company" does not establish in and of itself that J5 has a valid registration under Chapter 7 of Division 3 of the Business and Professions Code. Even further, J5's quotation of the Service Agreement constitutes extrinsic evidence that this court cannot consider. Neither the FACC nor any judicially noticeable facts indicate that J5 holds a valid registration as a professional engineer. Although section 411.35, subdivision (g), explicitly states that the failure to file a certificate of merit may be "grounds for a demurrer," the parties must still comply with the basic rules for a demurrer. (See *Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 359 [demurrer on ground of failure to file certificate of merit looks only to face of pleadings and judicially noticeable facts].)

The court must therefore OVERRULE J5's demurrer under Code of Civil Procedure sections 411.35 and 430.10, subdivision (h).

At the same time, the court notes that if it turns out that J5 is indeed the possessor of a valid registration as a professional engineer, then the present ruling is without prejudice to J5's ability to raise this contention in a motion or hearing that admits the consideration of extrinsic evidence, such as a summary adjudication motion or a trial. Indeed, section 411.35, subdivision (h), explicitly accounts for the possibility of the contention being raised at the conclusion of a trial, with a non-complying party or attorney being held to pay for attorney's fees and costs. Therefore, if AT&T has not complied with the certificate of merit requirement and the court determines that one "should have been filed," then AT&T proceeds with this FACC at its own peril. (Code Civ. Proc., § 411.35, subd. (h).)

### B. Sufficiency of the Alleged Facts (Code Civ. Proc., § 430.10(e))

In general, "a complaint must contain '[a] statement of the facts constituting the cause of action, in ordinary and concise language.'" (*Davaloo v. State Farm Insurance Co.* (2005) 135 Cal.App.4th 409, 415 (*Davaloo*) [quoting Code Civ. Proc., § 425.10, subd. (a)(1)].) "This fact-pleading requirement obligates the plaintiff to allege ultimate facts that as a whole apprise[] the adversary of the factual basis of the claim." (*Davaloo, supra,* 135 Cal.App.4th at p. 415 [internal quotation marks and citations omitted].) Thus, a demurrer tests whether the plaintiff alleges each fact essential to the cause of action asserted. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 873.)

J5 broadly contends with boilerplate objections that each individual cause of action fails to apprise J5 of the alleged "delict" or act of wrong.

#### 1. Express Indemnity

Indemnity is "the obligation resting on one party to make good a loss or damage another party has incurred." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 627.) This obligation arises from contract or equitable consideration. (See *Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1157 (*Prince*).)

The FACC sufficiently alleges an express indemnity claim. "Express indemnity refers to an obligation that arises 'by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances.' [Citation.]" (*Prince, supra,* 45 Cal.4th at p. 1158.) The indemnity provisions of the Service Agreement require J5 to "indemnify, hold harmless, and defend AT&T and its Affiliates, as well as their respective employees, agents, distributors and customers, individually or collectively, against

any Loss arising from, in connection with, or resulting from (i) the Material or Services furnished by [J5]." (FACC, ¶ 7.) The FACC further alleges that the KY cross-complaint's negligence claim against AT&T arose from the "Material or Services" furnished by J5 to Sraon's premises at 6105 Snell Avenue, San Jose, California. (*Id*. at ¶ 9.) Accordingly, the FACC sufficiently alleges that the indemnity provision of the Service Agreement was triggered and sufficiently pleads an express indemnity cause of action.[4]

The court OVERRULES J5's demurrer to the first cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

**2. Comparative and Equitable Indemnity**

As an initial matter, comparative indemnity is not a distinct type of indemnity; it is partial indemnity, as opposed to full indemnity. (See, e.g., *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578.) Thus, the only difference between the comparative and equitable indemnity causes of action is the extent to which AT&T seeks indemnification.

"Unlike express indemnity, traditional equitable indemnity requires no contractual relationship between an indemnitor and an indemnitee. Such indemnity 'is premised on a joint legal obligation to another for damages,' but it 'does not invariably follow fault.'" (*Prince, supra,* 45 Cal.4th at p. 1158 [quoting *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114].) With limited exceptions, there must be some basis for tort liability against the proposed indemnitor. (See *Stop Loss Insurance Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1041-1042 (*Stop Loss*).) Generally, it is based on a duty to the underlying plaintiff, although vicarious liability, strict liability, and implied contractual indemnity can provide a basis for equitable relief. (See *BFCG Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (2004) 119 Cal.App.4th 848, 852.)

Although the FACC's allegations are extremely bare when it comes to alleging any duty owed to either KY or Sraon *in tort*, the court finds that it alleges enough, for the same reason, discussed above, that the court has agreed with J5's argument that the FACC's causes of action for indemnity are "derivative" claims for negligence. (See *Stop Loss, supra,* 143 Cal.App.4th at 1040 [requiring an "action sounding in tort"].) The FACC alleges that Cross-Defendants "are responsible in some manner for the events and happenings in the principal action, as set forth in the Complaint for damages herein," and it incorporates the allegations in Sraon's complaint. (FACC, ¶¶ 4, 16, 19.) The FACC also incorporates the allegations of the KY cross-complaint against J5 and AT&T. (FACC, ¶ 4.) Though this is barely enough, it is enough.

The court OVERRULES J5's demurrer to the second and third causes of action under Code of Civil Procedure section 430.10, subdivision (e).

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[4] In its reply brief, J5 contends that the contract language limits J5's liability to its own "negligence, recklessness, or willful misconduct," and that AT&T fails to state sufficient facts "as to what J5 did negligently[,] and so its cross-complaint is subject to demurrer." (Reply, p. 6:15-24.) The court declines to consider this argument, as it is raised for the first time on reply. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1538 ["[p]oints raised for the first time in a reply brief will ordinarily not be considered"].) Indeed, even if the court were to consider it, the court would find that it improperly relies on extrinsic evidence and that it misapprehends the standard for notice pleading in California.

### 3. Apportionment of Fault and Contribution

As with indemnity, there must be some basis for liability in order for there to be apportionment of fault and contribution from one party to another. (See, e.g., *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 586.) Because AT&T's fourth and fifth causes of action for apportionment of fault and contribution are based on the second and third causes of action for comparative and equitable indemnity, the court OVERRULES J5's demurrer to the fourth and fifth causes of action under section 430.10, subdivision (e).

### 4. Declaratory Relief

A party may seek a declaration of its rights or duties with respect to another under a contract "in cases of actual controversy relating to the legal rights and duties of the respective parties . . . ." (Code Civ. Proc., § 1060.) "Declaratory relief pursuant to this section has frequently been used as a means of settling controversies between parties to a contract regarding the nature of their contractual rights and obligations. [Citations.]" (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647.) The fundamental basis of declaratory relief is the existence of an actual and present controversy over a proper subject. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 (*City of Cotati*).)

The FACC sufficiently alleges a declaratory relief cause of action by seeking a declaration of J5's duty to defend and indemnify under the Services Agreement. (FACC, ¶¶ 7, 31.) The FACC therefore identifies the existence of an actual and present controversy. (*City of Cotati, supra,* 29 Cal.4th at p. 79; see also *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606 ["A general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged"].)

The court OVERRULES J5's demurrer to the sixth cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

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**Calendar Line 3**
**Case Name:** *Shirley Getty v. Villa Verde et al*
**Case No.:** 23CV418773

## I. FACTS

This is an elder abuse action brought by plaintiff Shirley Getty ("Getty") against defendants Villa Verde, Dominica Oliva (the alleged owner and operator of Villa Verde), Sequoia Home Health & Hospice, Pennant Services, Inc. (an alleged owner and operator of Sequoia Home Health & Hospice), and Cornerstone Healthcare, Inc. (another alleged owner and operator of Sequoia Home Health & Hospice). The first two defendants are referred to herein as "Villa Verde"; the last three defendants are referred to herein as "Sequoia."

According to the complaint, filed on July 5, 2023, Getty is an "elder" within the meaning of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, §§ 15600 et seq. (the "Elder Abuse Act")). (Complaint, ¶ 1.) She became a resident of Villa Verde, a residential care facility for the elderly on May 4, 2023, after sustaining and receiving treatment for a fall on April 4, 2023. (*Id*. at ¶¶ 2, 26-27.) Upon admission to Villa Verde, Getty did not suffer from any pressure injuries but required frequent repositioning to avoid their development. (*Id.* at ¶ 27.) On May 11, 2023, Sequoia, a "home health agency," began providing nursing care for Getty. (*Id*. at ¶¶ 11, 29.) Sequoia identified its responsibilities as including "skilled teaching relating to [Getty's] risk for 'altered skin integrity,' including 'nutrition' and 'methods to prevent pressure ulcers.'" According to the complaint, Sequoia failed to uphold these duties. (*Id*. at ¶¶ 29-30.)

On May 16, 2023, Getty's family requested that Villa Verde and Sequoia check her for injuries after a complaint of pain. (Complaint, ¶ 31.) On May 18, a Villa Verde caregiver advised Getty's family of a blister on her body and stated that a Sequoia nurse would check the wound. (*Id*. at ¶ 32.) After treating the wound, the Sequoia nurse stated she would bring additional supplies but instructed Villa Verde staff to check the wound and change the bandages daily. (*Ibid.*) On May 20, Sequoia allegedly failed to provide additional wound care supplies, and on May 23, a Sequoia nurse noticed that the wound continued to worsen. (*Id*. at ¶¶ 33-34.) On May 24, a Sequoia nurse documented the deteriorating condition of the wound, and Sequoia increased the frequency of nursing visits to twice a week; at the same time, Sequoia declined to provide a physician because Getty was not within the Sequoia physician network. (*Id*. at ¶ 35.) On May 25, Sequoia allegedly failed to provide wound care supplies and a nurse to treat Getty's wound, prompting her family to contact her primary care physician. (*Id*. at ¶ 36.) On May 26, Getty was admitted to O'Connor Hospital and treated for a wound infection that had been ongoing for two to three weeks and required surgery. (*Id*. at ¶ 37.)

Currently before the court is Sequoia's motion for a judgment on the pleadings ("JOP motion") as to the causes of action against it (the fourth, fifth, sixth, ninth, eleventh, and thirteenth). This case is set for trial on January 8, 2024 (*i.e.*, in less than four weeks), after the court granted Getty's motion for a preferential trial setting under Code of Civil Procedure section 36.

## II. LEGAL STANDARD

A defendant's JOP motion is proper when the complaint does not state facts sufficient to constitute causes of action against the defendant. (Code Civ. Proc., § 438, subd. (c)(1)(B)(2).) "The grounds for motion provided for in this section shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc., § 438, subd. (d).)

A JOP motion is the functional equivalent of a general demurrer made after the time to demur has expired and more than 30 days before trial. (See Code Civ. Proc., § 438; see also *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 548; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999; *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254 (*Shea*).) "The court accepts as true all material factual allegations, giving them a liberal construction, but it does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts. [Citations.]" (*Shea, supra,* 110 Cal.App.4th at p. 1254; *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

The court denies as unnecessary Sequoia's request for judicial notice of the complaint, given that it is the pleading under review. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn.1.)

## III. ANALYSIS

### A. The Fourth and Fifth Causes of Action (Elder Neglect)

Sequoia contends that because the complaint fails sufficiently to allege that it had a substantial caretaking or custodial relationship with Getty—a threshold requirement to plead elder neglect under the Elder Abuse Act—the fourth and fifth causes of action for elder neglect fail as a matter of law as to them. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 165 (*Winn*).) Sequoia argues that the complaint clearly alleges that Villa Verde, as a residential care facility, was the defendant charged with addressing Getty's day-to-day basic needs, and Sequoia, as a home health care provider, was charged with providing medical care to Getty at her place of residence.

In *Winn*, the California Supreme Court held that a claim of neglect under the Elder Abuse Act "does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient." (*Winn, supra,* 63 Cal.4th at p. 152.) The California Supreme Court specifically defined a "robust caretaking or custodial relationship" as one "where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable managing without assistance." (*Id*. at p. 158.) Furthermore, "[i]t is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect." (*Id*. at 152.) Thus, in *Winn*, the intermittent, outpatient medical treatment shown there failed to demonstrate that the elderly plaintiff "relied on defendants in any way distinct from an able-bodied and fully competent adult's reliance on the advice and care of his or her medical providers." (*Id*. at p. 165.)

Following *Winn*, the Court of Appeal in *Oroville Hospital v. Superior Court* (2022) 74 Cal.App.5th 382 (*Oroville*) determined that the provision of wound care by a home health care provider involved professional medical services and rather than the provision of "basic needs" that an able-bodied and fully competent adult could otherwise independently manage. Therefore, it did not create a custodial relationship. (*Id*. at p. 405.) The Court of Appeal held that the frequency of medical care was not "dispositive to the question whether a substantial caretaking or custodial relationship" arose, and that *Winn* did not require a defendant to assume responsibility for all of the elder's needs to create such a relationship. (*Id*. at p. 404.)

Here, as in *Oroville*, Sequoia provided Getty with in-home wound care for a pressure injury on a number of occasions—*i.e.*, professional medical attention beyond her basic needs. While the complaint alleges that "defendants" undertook many forms of care and supervision, the cited paragraphs regarding Sequoia focus only on the pressure injury and related medical care. For example, paragraph 29 of the complaint alleges that Sequoia provided "nursing care and services for Ms. Getty's weakness, decrease in ADL function, and decreased mobility and endurance," in addition to "skilled teaching relating to Shirley's risk for 'altered skin integrity,' including 'nutrition' and 'methods to prevent pressure ulcers.'" Paragraphs 65-68 focus on the pressure injury, with paragraph 65 stating that Sequoia "entirely ignor[ed] their obligations to perform basic assessments and to provide basic bedside care with respect to Ms. Getty's severe pressure injury." (Complaint, ¶¶ 65-68.) The complaint does not allege any facts to support any notion that Sequoia was responsible for one or more of Getty's basic needs; rather, the complaint alleges that Villa Verde's staff oversaw Getty's daily living needs, including "[changing] bandages daily and as needed when soiled." (*Id.* at ¶¶ 27, 34, 45-46.) Indeed, the complaint alleges that Sequoia dispatched nurses on May 18 and 23, 2023, for the sole purpose of examining and treating the developing pressure injury. (*Id*. at ¶ 32, 34.) Thus, the allegations of the complaint do not adequately set forth a caretaking or custodial relationship to support a claim for elder abuse.[5]

Getty drops a footnote in her opposition brief claiming that discovery in this case has revealed that Sequoia was responsible for several of her basic needs (Opposition, p. 4, fn. 1), but this falls outside the scope of the court's consideration on a JOP motion. Getty still cannot argue that the complaint itself sufficiently alleges a caretaking or custodial relationship, and the court considers only the face of the pleading and any other judicially noticeable facts. (Code Civ. Proc., § 438, subd. (d).)

Because the complaint fails to allege sufficiently that Sequoia had a caretaking or custodial relationship with Getty under the Elder Abuse Act, the court does not need to address the parties' argument regarding recklessness and enhanced remedies. Accordingly, the court GRANTS Sequoia's JOP motion to the Elder Abuse Act causes of action with *no more than* 10 days' leave to amend.[6]

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[5] The complaint does allege in the constructive fraud claim that Getty "was dependent upon the Sequoia Defendants for custodial care and assistance in meeting her basic daily living and health and safety needs," but this, too, is a bare, conclusory allegation without any supporting facts. (Complaint, ¶ 97.)

[6] Under other circumstances, the court would grant a longer leave period, but because the trial has been set for January 8, 2024 under Code of Civil Procedure section 36 at Getty's own request, the court orders that any amendment be filed and served by Getty *by no later than* ***December 22, 2023***. *This is the deadline regardless of the timing of any service of notice of this decision*.

### B. The Sixth Cause of Action (Custodial Negligence)

Sequoia challenges the custodial negligence cause of action on the same ground as the fourth and fifth causes of action: the complaint fails to allege a custodial relationship between Sequoia and Getty. For reasons discussed above, the court GRANTS Sequoia's JOP motion as to the sixth cause of action with no more than 10 days' leave to amend.

### C. The Ninth Cause of Action (Constructive Fraud)

The Sequoia Defendants assert that the constructive fraud cause of action is defective for failure to allege the requisite fiduciary relationship and to plead the claim with specificity.

Generally, a complaint must plead each element in a fraud cause of action with specificity. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 645 (*Lazar*); *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) Constructive fraud "is a unique species of fraud applicable only to a fiduciary or confidential relationship" and therefore subject to the heightened pleading standard. (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131 [internal citation and quotation marks omitted].)

Under Civil Code Section 1573, constructive fraud consists of:

> (1) any breach of duty which, without an actually fraudulent intent, gains an advantage to the other person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or
>
> (2) any such act or omission the law specially declares to be fraud, without respect to actual fraud.

#### 1. Confidential or Fiduciary Relationship

Getty insists that the complaint sufficiently pleads a fiduciary relationship "in fact." To the extent that Getty bases her constructive fraud claim on the formation of a *confidential* relationship, the complaint satisfies the pleading requirements on a JOP motion. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1161 (*Persson*) [the existence of a confidential relationship creating a fiduciary duty between the parties is a question of fact]; see also *Shea, supra,* 110 Cal.App.4th at p. 1254 ["The court accepts as true all material factual allegations, giving them a liberal construction"].)

In *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257 (*Richelle*), the Court of Appeal distilled the common law definition of confidential relationship giving rise to fiduciary duty to the following elements: "'1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself.'" (*Id.* at p. 272 [quoting *Langford v. Roman Catholic Diocese of Brooklyn* (1998) 177 Misc.2d 897, 900].) The *Richelle* court identified "advanced age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity" as the "absolutely essential", necessary predicate of a confidential relation. (*Id.* at p. 273 [quoting Bogert, Trust & Trustees (2d ed. 1978), § 482, at pp. 288-289.) Applying the *Richelle* factors, the Court of Appeal in *Persson* held, "In the absence of evidence of any similar vulnerability or

incapacity, we decline to extend the scope of fiduciary obligations to an arms-length negotiation for the sale of shares in a corporate enterprise." (*Persson, supra*, 125 Cal.App.4th at pp. 1162.)

Under this standard, the complaint sufficiently pleads the existence of a confidential relationship creating a fiduciary duty by alleging Getty's advanced age, declining health, and decrease in function and mobility. (Complaint, ¶¶ 1, 27.) The complaint also pleads an empowerment of a stronger party by a weaker party by alleging:

> Shirley Getty was dependent upon the Sequoia Defendants for custodial care and assistance in meeting her basic daily living and health and safety needs. Ms. Getty and her family trusted the Sequoia Defendants to faithfully fulfill and observe their custodial duties and to act on Ms. Getty's behalf for purposes of providing her with care and assistance to meet her daily living and health and safety needs.

(*Id*. at ¶ 97.) Accordingly, the complaint sufficiently alleges the requisite confidential relationship to plead a constructive fraud claim.

**2. Specificity of Pleadings**

Sequoia also asserts that the constructive fraud cause of action is insufficiently pled because it fails to state facts showing "how, when, where, to whom, and by what means" fraud was committed. (Demurrer, p. 18:1-2; see also *Lazar, supra*, 12 Cal.4th at 645.)

Allegations of fraud must be pled with particularity. (*West v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.4th 780, 793 (*West*).) "[I]n the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made. [Citation.]" (*Ibid*.) Thus, in *West*, a plaintiff met the specificity requirement by alleging that misrepresentations were made in (1) a particular agreement, (2) a dated letter, and (3) in telephone conferences attached to plaintiff's complaint.

Here, the complaint alleges that the Sequioa defendants breached a fiduciary duty and concealed from Getty that they managed Sequoia in a manner focused on fully maximizing profits at the cost of quality care. (Complaint, ¶¶ 100-101.) The complaint also generally alleges that Sequoia knew that its staff lacked the experience and training to care properly for patients and misled Getty by failing to disclose this information. (*Id*. at ¶ 102.) These allegations are exceedingly generic and vague, but they are enough for a JOP motion. But the complaint fails to identify *who* concealed this information, in what capacity they concealed the information, and *how* they concealed the information. Indeed, the complaint fails to allege *when* concealment occurred and *to whom*. Accordingly, the complaint still lacks sufficient factual particularity for a fraud cause of action.

The court therefore GRANTS the Sequoia Defendants' JOP motion as to the ninth cause of action with no more than 10 days' leave to amend.

**D. The Eleventh Cause of Action (Intentional Infliction of Emotional Distress)**

The Sequoia Defendants argue that the intentional infliction of emotional distress ("IIED") cause of action is defective because the complaint fails to plead outrageous conduct.

The tort of IIED exists when there is "'(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.'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050 (*Hughes*) [internal quotations marks and citations removed].) Conduct is sufficiently outrageous if it is exceeds "'all bounds of that usually tolerated in a civilized community.'" (*Id.* at p. 1051 [quoting *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001].) "There is no bright line standard for judging outrageous conduct and its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility. The process evoked by the test appears to be more intuitive than analytical." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494 [internal quotations marks and citations removed].) "That the defendant knew the plaintiff had a special susceptibility to emotional distress is a factor which may be considered in determining whether the alleged conduct was outrageous." (*Ibid*.) "It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1265 [citations omitted].)

The complaint's allegations of egregious conduct focus on assertions that the defendants (as a whole) failed to prevent the pressure injury and care for the wound, and that they misled Getty and her family into believing that the wound did not require medical intervention. (Opposition, p. 13:19-24.) While these allegations show that Getty suffered indignity and may support a claim for negligence, they do not show that Sequoia acted outrageously. Getty fails to cite to any authority for the proposition that mere acts of negligence support a claim for intentional infliction of emotional distress. (E.g., *Teague v. Home Ins. Co.* (1985) 168 Cal.App.3d 1148, 1151-1152 ["Mere assertions of delay in the payment of benefits or the providing of medical treatment do not describe conduct which is deemed outrageous and extreme."].)

The court GRANTS the JOP motion as to the eleventh cause of action with no more than 10 days' leave to amend.

**E. The Thirteenth Cause of Action (Negligent Infliction of Emotional Distress)**

As Sequoia correctly points out, Getty's cause of action for negligent infliction of emotional distress ("NIED") alleges the boilerplate elements of a medical malpractice claim. (Complaint, ¶ 122.)

"The negligent causing of emotional distress is not an independent tort, but the tort of negligence." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072; see also *Lawson v. Management Activities, Inc.* (1999) 69 Cal.App.4th 652, 656 ["there is no such thing as the independent tort of negligent infliction of emotional distress"].) Thus, "when a plaintiff asserts a claim against a health care provider on a legal theory other than professional negligence, courts must determine whether the claim is nonetheless *based on the health care provider's professional negligence*, which would require application of MICRA. [Citations.]" (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 347 (*Larson*).) "The focus of the court's analysis must be on 'the nature or gravamen of the claim, not the label or form of action the plaintiff selects.'" (*Burchell v. Faculty Physicians & Surgeons etc.* (2020) 54 Cal.App.5th 515, 523 [quoting *Larson, supra*, 230 Cal.App.4th at p. 347].)

"'The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage.'" (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [quoting *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305].)

Here, the complaint alleges that Sequoia "owed a duty to [Shirley Getty][7] to exercise the same degree of care, knowledge, and skill in providing Ms. Getty with home health care as would have other similarly situated care providers in their community." (Complaint, ¶ 122.) The allegations are conclusory statements of fact alleging a professional negligence claim, and therefore insufficient to survive a motion for judgment on the pleadings.

Accordingly, the court GRANTS Sequoia's JOP motion to the NIED cause of action with no more than 10 days' leave to amend.

## IV. CONCLUSION

Again, with respect to all of the causes of action addressed in this motion, any amendment must be filed and served by **no later than December 22, 2023**.

**- oo0oo -**

[7] The complaint occasionally refers to the plaintiff as "Minnie Lee"; the court assumes that this is an error arising from the reuse of boilerplate allegations. (See Complaint, ¶¶ 112, 113, 122.)

**Calendar Line 4**
**Case Name**: *Arrow Sign Company, Inc. v. California Plus Engineering, Inc.*
**Case No.**: 22CV396635

## I. BACKGROUND

This is a contract dispute between plaintiff Arrow Sign Company ("Arrow"), a California contractor, and defendant California Plus Engineering, Inc. ("CPE"), another California contractor, involving alleged nonpayment under a subcontract for a project at the Santa Clara Valley Medical Center.

Arrow's complaint, filed on April 5, 2022, originally stated six causes of action: (1) Breach of Contract; (2) Common Counts; (3) Account Stated; (4) Open Book Account; (5) Open Book Account; and (6) Violation of Prompt Payment Statute (apparently referring to Business & Professions Code section 7108.5, though it is not identified in the body of the complaint). Attached to the complaint as Exhibit A is a copy of a "Subcontract Agreement" between the parties, identifying CPE as the "Contractor" and Arrow as the "Subcontractor." Attached to the Complaint as Exhibit B is a copy of a "Statement" generated by Arrow, dated March 10, 2022, purporting to state that CPE owes Arrow $48,590.26.

On June 24, 2022, CPE filed an answer to Arrow's complaint and also filed a cross-complaint against Arrow and the County of Santa Clara,[8] stating causes of action for: (1) Breach of Contract (against Arrow, alleging that it "refused to appropriately reduce the amount of money demanded" after the County reduced the scope of the project); (2) Quantum Meruit (against the County); (3) Common Count (against the County); (4) Equitable Indemnity (against the County); (5) Comparative Indemnity (against the County); (6) Implied Contractual Indemnity (against the County); and (7) Declaratory Relief (against the County).

Arrow previously brought a motion for summary judgment on its complaint that was heard by the court (Judge Geffon) on June 8, 2023. In a formal order issued that same day, the court denied Arrow's motion, as it only addressed one of the six causes of action in the complaint (a defect noted in CPE's opposition to the motion).[9] Judge Geffon stated: "As Plaintiff's motion for summary judgment is denied for failure to meet the initial burden[,] based on the failure to address any claims other than the breach of contract claim[,] it is not necessary for the court to address Plaintiff's substantive arguments on that claim or Defendant's responding arguments in the opposition." (June 8, 2023 Order at p. 4:25-28.) Thus, the June 8, 2023 order was expressly not a ruling on the merits of any claims alleged in Arrow's complaint.

On June 13, 2023, Arrow dismissed the second through sixth causes of action in the complaint, leaving the first cause of action for breach of contract as the only remaining cause of action. Currently before the court is a second motion for summary judgment by Arrow, filed on August 9, 2023. CPE's filed an opposition on November 28, 2023.

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[8] CPE has also sued the County in a separate lawsuit in this county (Case No. 21CV376991), which remains pending. The court takes judicial notice of the existence of this lawsuit pursuant to Evidence Code section 452, subdivision (d).

[9] The court also takes judicial notice of Judge Geffon's order on its own motion, under Evidence Code section 452, subdivision (d).

## II. MOTION FOR SUMMARY JUDGMENT

### A. General Standards

The pleadings limit the issues presented for summary judgment, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion."].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

Where a plaintiff has moved for summary judgment, it has the burden of showing that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a).) That burden can be met if the plaintiff has proved each element of the cause of action entitling it to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (Code Civ. Proc., § 437c, subd. (p)(1).) (See *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965.) It is not part of a plaintiff's initial burden to disprove affirmative defenses and cross-complaints asserted by a defendant. (See Code Civ. Proc., § 437c, subd. (p)(1).)

The moving party may generally not rely on additional evidence filed with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.)

### B. Arrow's Motion for Summary Judgment

#### 1. The Basis for the Motion

Arrow states that it seeks "summary judgment and/or summary adjudication against Defendant California Plus Engineering, Inc." (Notice of Motion and Motion at p. 1:21-22.) Rule of Court 3.1350(b) states in pertinent part, "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." Arrow's notice of motion does not identify any specific cause of action for summary adjudication, but given that there is only one cause of action left (for breach of contract), it does not ultimately matter how the motion is styled. The court will simply refer to this motion as one for summary judgment.

To state a breach of contract claim, a plaintiff must allege: 1) the existence of a (valid) contract; 2) plaintiff's performance or excuse for nonperformance; 3) defendant's breach; and 4) damage to plaintiff resulting from that breach. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 228, citing *Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.) Here, Arrow's first cause of action alleges that "Defendant has materially breached the Contract by failing and refusing to pay Plaintiff for the work performed by Plaintiff, and there is now due, owing, and unpaid a balance of $48,590.26, plus interest at the legal rate." (Complaint at ¶ 11.)

As noted above, a copy of the "Subcontract Agreement" between Arrow and CPE is attached to the complaint as Exhibit A (hereinafter, "Subcontract"). The Subcontract identifies Arrow as "Subcontractor," CPE as "Contractor," and the County of Santa Clara as "Owner." Paragraph 3 of the Subcontract states in pertinent part that "If Owner or other responsible party delays making payment to Contractor from which payment to Subcontractor is to be made, Contractor and its sureties shall have a reasonable time to make payment to Subcontractor. 'Reasonable Time' shall be determined according to relevant circumstances, but in no event shall be less than the time Contractor, Contractor's sureties and Subcontractor are required to pursue to conclusion their legal remedies against Owner or other responsible party to obtain payment including, but not limited to, mechanic's lien remedies." Again, as noted above, the "Contractor" here (CPE) has sued the "Owner" (County of Santa Clara) in a broader lawsuit for the entire project (Case No. 21CV376991), and that case is still pending in this court.

The proper interpretation of the Subcontract is a question of law for the court. Generally, "It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence." (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 724; see also *Sierra Vista Regional Medical Center v. Bonta* (2003) 107 Cal.App.4th 237, 245 [same].)

#### 2. Code of Civil Procedure Section 1008

As an initial matter, CPE argues that the current motion for summary judgment is barred by Code of Civil Procedure section 1008. (Opp. at pp. 8:2-10:2.) This is incorrect. The current motion quite plainly does not seek reconsideration of Judge Geffon's prior order that

the prior motion for summary judgment failed to address all of the causes of action that were then being asserted. "'The nature of a motion is determined by the nature of the relief sought, not by the label attached to it.'" (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193 [trial court had discretion to treat motion for reconsideration as motion for new trial]; see also *Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 930.) No one reading the prior June 8, 2023 order could reasonably interpret it as setting forth any conclusions as to the merits of Arrow's first cause of action for breach of contract. Rather, the prior order expressly stated that, in denying the motion, it was not necessary to consider the parties' arguments on the breach of contract claim.

In circumstances such as these, where a second motion for summary judgment does not seek reconsideration of the ruling on the first motion, the relevant statute is Code of Civil Procedure section 437c, subdivision (f)(2), not section 1008. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1099, citing *Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1092, 1096-1097 and *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 737-739 with approval on this point.) Section 437c(f)(2) states: "A party shall not move for summary judgment *based on issues asserted in a prior motion for summary adjudication and denied by the court* unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." (Emphasis added.) Here, Arrow's first motion was not denied on the basis of the merits of the breach of contract cause of action, and so the second motion raising those issues is not barred by section 437c(f)(2).

**3. Arrow's Prima Facie Showing**

Arrow argues that "it is undisputed that there was a contract between the parties, Plaintiff performed all of its obligations under the contract, the Defendant breached the contract by failing to make the payments required thereunder, and as a result Plaintiff has been damaged." (Memorandum of Points and Authorities ("MPA") at p. 3:22-25.) Arrow also clarifies that it is no longer seeking the amount specifically alleged in the complaint: "During the pendency of this lawsuit, Plaintiff has learned that the County of Santa Clara reduced a small portion of Plaintiff's work on the project, of which $1,743.03 was not previously accounted for in deductive change orders. Accordingly, the total principal balance due and payable to Plaintiff from Defendant amounts to $46,847.23. The total interest utilizing a 2% monthly interest charge from June 30, 2021 through June 30, 2023, amounts to $22,486.67, for a total outstanding balance due of $69,333.90." (MPA at p. 2:3-9, internal citations omitted.)

Arrow further argues that CPE cannot rely on the "pay-when-paid" language in paragraph 3 of the subcontract as a defense, citing the decisions in *Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882 (*Wm. F. Clarke*) and *Crosno Construction, Inc. v. Travelers Casualty & Surety Co. of America* (2020) 47 Cal.App.5th 940 (*Crosno*). (See MPA at pp. 3:27-5:7 generally.)

The motion is supported by three declarations that are attached to the motion. The first is from Tanner Brink, counsel for Arrow, who authenticates copies of the complaint and the dismissal of the second through sixth causes of action, attached to his declaration as Exhibits A and B.

The second declaration is from Nicole Salmon, who indicates that she is Arrow's Executive Director and Chief Financial Officer. She states: "During the pendency of this lawsuit I learned that Santa Clara County reduced a portion of the scope of work for Arrow (CCD #14) amounting to $1,743.03, for installation labor of a few signs. Accordingly, the principal amount due and payable to Plaintiff amounts to $46,847.23." She also states that she has "calculated the amount of interest due on the principal balance of $46,847.23 over the course of the past two plus years to amount to a total of $22,486.67, using our standard interest rate on past due invoices of 2%. The total outstanding balance due from Defendant to Plaintiff amounts to $69,333.90." (Salmon Decl. at ¶¶ 3-4.) Salmon authenticates three exhibits, attached to her declaration as Exhibits A-C. These are: a copy of the complaint, another copy of the statement prepared by Arrow purporting to state how much money is due (attached to the complaint as Exhibit B), and a copy of a stop payment notice sent to the County of Santa Clara. A fourth attached exhibit, Exhibit D, which is not mentioned or authenticated by Salmon in her declaration, has not been considered by the court.

The third declaration is from Marsh Mendez, who states that he is "Chief of Construction Services for the facilities department of the County of Santa Clara Health System." He states that the County of Santa Clara Health System "has no issues with the work or materials provided by Plaintiff at the Project." (Mendez Decl., ¶ 4.) He further states that it is the County of Santa Clara Health System's "understanding that Plaintiff's work was descoped from the Project in the total monetary amount of $7,638.74, as set forth in Construction Change Directives nos. 8 and 24." (*Id.* at ¶ 7.) Mendez authenticates two attached Exhibits (A and B) which he describes as "copies of spreadsheets contemporaneously prepared by the County [of Santa Clara Health System] to document and measure the extent of work descoped from the Project." (*Id.* at ¶ 5, brackets added.)

**4. CPE's Opposition**

In addition to its spurious argument that this motion is barred by Code of Civil Procedure section 1008, CPE argues that summary judgment must be denied because the amount owed to Arrow under the Subcontract is disputed. Rather than the $48,590.26 principal amount alleged in the first cause of action or the $46,847.23 claimed in the present motion, CPE argues that the principal amount owed to Arrow is $26,809.79, based on two descopings of the project by the County of Santa Clara. (See Opp. at pp. 13:13-14:20.) Finally, CPE argues that no amount is *currently* due and payable to Arrow because of the "pay-when-paid" language in paragraph 3 of the Subcontract. (See Opp. at pp. 14:23-17:4 generally.)

CPE has submitted two declarations in support of the opposition. The first is from Craig Wallace, counsel for CPE. Mr. Wallace authenticates Exhibit A, a copy of a letter sent to counsel for Arrow.[10]

The second declaration is from Rey Fard, CPE's President. He authenticates attached Exhibit A (another copy of the Subcontract), Exhibit B (a copy of the County's Construction Change Directive, "CCD" No. 24), and Exhibit C (a copy of the County's allocation of CCD No. 24 line items).

[10] As the present motion is not barred by section 1008, this letter is irrelevant to any analysis of this motion.

Fard states that the total contract price for the work to be performed by Arrow, prior to any project descaling by the County, was $484,413.95. (Fard Decl., at ¶ 2.) He further states that the County descoped the project on more than one occasion, leading to corresponding reductions in the amount to be paid to Arrow by CPE: "[B]ased on the County's descoped work shown in CCD #7 and CCD #24, [Arrow's] subcontract was descoped, and therefore reduced, in an amount totaling $27,174.21 ($3,395.93 + $23,778.28). That descoped amount reduces [Arrow's] subcontract price to $457,239.74 ($484,413.95 - $27,174.21). [Arrow] has been paid $430,429.95 so, based on County's descoped values, only $26,809.79 ($457,239.74 - $430,429.95) remains unpaid to [Arrow] . . . . In addition, consistent with standard construction practices, the County withheld a 5% retention from CPE until the Project is complete. Similarly, CPE withheld 5% retention from all its subcontractors, including [Arrow], and [Arrow]'s withheld retention totals $22,846. The withheld retention is already included in the $26,809.79, stated otherwise, $26,809.79 remains unpaid and $22,846 of that amount is withheld retention." (*Id.* at ¶¶ 4-9.)

Fard also claims that if the Mendez declaration submitted by Arrow is accurate, CPE has already significantly overpaid Arrow and is due a refund (Fard Decl., ¶¶ 13-15.)

**C. Analysis**

The court agrees with Arrow that the "pay-when-paid" provision in paragraph 3 of the Subcontract is unenforceable, as its definition of "reasonable time" is too indefinite under existing California authority. While a "pay-when-paid" provision is not technically unenforceable under the *Wm. R. Clarke* decision, *supra*, (which dealt only with a "pay-*if*-paid" provision), the Court of Appeal in *Crosno*, *supra*, made clear that a "pay-when-paid" provision that has an expansive, open-ended definition of "reasonable time" allowing for months or years of litigation to take place before payment is unenforceable, based on the same general principles set forth in *Wm. R. Clarke*: "If Travelers could invoke the subcontract's pay-when-paid clause to postpone its payment bond obligation until some unspecified and undefined point in time when Clark's litigation with the district concluded, that would unquestionably and unreasonably affect or impair Crosno's right to recover under the payment bond without either an express waiver or full payment required by [Civil Code] sections 8124 and 8126. Accordingly, the specific pay-when-paid provision before us is 'void and unenforceable' (§§ 8122, 8126) against Crosno's payment bond claim. It attempts to define as 'reasonable' an indefinite time period already determined to be unreasonable in [*Yamanishi v. Bleily & Collishaw, Inc*. (1972) 29 Cal.App.3d 457]." (*Crosno*, *supra*, at p. 956.) "We do not suggest that *every* pay-when-paid provision is unenforceable as an impairment of payment bond rights under section 8122. Instead, we conclude that this one is unenforceable because it unreasonably forestalls accrual of Crosno's payment bond rights for an indefinite period of time while the direct contractor pursues litigation against the owner." (*Id*. at p. 960, emphasis in original.)

While the present case does not involve a payment bond, the general principle described in *Crosno* still applies. A "pay-when-paid" contract provision that purports to delay payment from a contractor to a subcontractor for months or years in order to conclude litigation between the general contractor and the owner (if it concludes at all) is unenforceable as a matter of law. Therefore, CPE's argument that no amount of money could be due and owing to Arrow under the Subcontract until its dispute with the County is fully resolved is incorrect.

Nevertheless, the court concludes that summary judgment cannot be granted here, because triable issues remain regarding the amount of damages owed under the Subcontract. "As damages are an element of a breach of contract cause of action, a plaintiff cannot obtain judgment on a breach of contract cause of action in an amount of damages to be determined later." (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 241, internal citation omitted.) In this case, the Fard declaration and exhibits are sufficient to raise a triable issue regarding the amount of money owed to Arrow under the Subcontract. The court cannot weigh the credibility of declarants in deciding a motion for summary judgment. The conflict between the Salmon and Mendez declarations submitted on behalf of Arrow and the Fard declaration submitted on behalf of CPE demonstrates that a triable issue of material fact remains as to an essential element of Arrow's breach of contract claim. "Typically in summary judgment litigation, equally conflicting evidence requires a trial to resolve the dispute." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 881.)

Arrow's motion for summary judgment is DENIED.[11]

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[11] Evidentiary objections: With its opposition to the motion, CPE has submitted four objections to the Salmon declaration and two objections to the Mendez declaration. These objections comply with Rule of Court 3.1354 and were originally accompanied by the required proposed order (which was not accepted for filing). With the exception of the objection to the unauthenticated Exhibit D to the Salmon declaration, which is sustained, the court overrules these objections.

**Calendar Line 5**
**Case Name:** *Nancy Tu v. Chefling, Inc. et al.*
**Case No.:** 20CV369118

Plaintiff Nancy Tu seeks to compel further responses to her requests for production of documents (Nos. 142-155) from defendant Chefling, Inc. ("Chefling"). The court GRANTS IN PART and DENIES IN PART the motion to compel, as follows:

**Request for Production No. 142:** Although this request is phrased very broadly, it appears that Chefling's involvement with Vestel was minimal, and so there are unlikely to be a large number of responsive documents. The relevance of these documents is not apparent to the court, but the court finds that they are potentially relevant to Tu's claim that Chefling's stated reason for terminating her was that there was a change in Chefling's business model. The court is not persuaded by Chefling's repeated argument that Tu "had four opportunities to raise the theory that she was terminated because of a change in business model" in her third amended complaint and did not do so. (Opposition at p. 7:11-12.) This is a mischaracterization of the claim. As the court understands it, the "change in business model" is not Tu's theory; rather, her "theory" is that Chefling falsely claimed a "change in business model" as a pretext for her termination. She is entitled to discovery that might bear on this issue.

The court is also not persuaded by Chefling's "privacy" objection, which fails to identify any cognizable third-party privacy interest that cannot adequately be protected by the existing protective order. Corporations do not have a constitutional right of privacy. (*SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal.App.4th 741, 755.) Any alleged privacy concerns of third-party corporations are subject to a balancing test. (*Id.* at p. 756.) Here, Chefling fails to identify anything specific regarding Vestel, and any vague concerns are outweighed by the potential relevance of the information and the existence of a protective order. GRANTED.

**Requests for Production Nos. 143-146:** These requests are overbroad, particularly the request for documents "CONCERNING any communications between CHEFLING and Brian Deutsch," given that Deutsch was also a director of Chefling. The court narrows the scope of this request to: "documents that reflect XVVC III, LLC's investment(s) in Chefling." According to Chefling, such documents have already been produced at Bates Nos. 1149-1214 and 1310-1637. Accordingly, any further response is DENIED.

**Requests for Production Nos. 147-152:** Chefling claims that it has already produced all responsive documents in its possession, custody, or control regarding BSH, PantryChic, GE Appliances, Weber, and Campbell Soup Company. Tu presents no basis for refuting Chefling's claim, other than citing "Defendant's past misuse of the discovery process, and Defendant's numerous improper objections." (Reply at p. 2:1-2.) This is insufficient. DENIED.

**Request for Production No. 153:** For the same reasons set forth above with respect to Vestel, Chefling is entitled to discovery relating to Vorwerk. Even though Chefling's work for Vorwerk came after Tu's departure from the company, it is potentially relevant to the "change in business model" issue and is therefore discoverable. GRANTED.

**Requests for Production Nos. 154-155:** These requests are overbroad. The court narrows the scope of requests to: "investment materials provided to Smarter Applications Limited in 2022 in connection with the acquisition of Chefling." With this narrowed scope, Chefling shall provide a supplemental response. GRANTED IN PART.

**Requests for Sanctions:** Both sides seek monetary sanctions. The court finds that both sides acted with substantial justification in raising these issues with Judge Overton and attempting to compromise. At the same time, the court finds that both sides have engaged in unnecessarily overheated rhetoric in their meet-and-confer correspondence and in their briefing. The court DENIES both sides' requests for sanctions.

As to any requests that are either granted or granted in part, Chefling shall provide a further response within 20 days of this order.

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