SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: November 5, 2024 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

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. 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. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

FOR COURT REPORTERS: The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

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

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV385105	Ryoga Vee vs City of San Jose	**Motion to Strike** Scroll down to LINES 1 and 2 for Tentative Ruling.
LINE 2	21CV385105	Ryoga Vee vs City of San Jose	**Motion to Dismiss** Scroll down to LINES 1 and 2 for Tentative Ruling.
LINE 3	23CV417149	B-Line Construction, Inc. v. Chow, Wen Lung	**Demurrer** Scroll down to LINES 3 and 4 for Tentative Ruling.
LINE 4	23CV417149	B-Line Construction, Inc. v. Chow, Wen Lung	**Motion to Strike** Scroll down to LINES 3 and 4 for Tentative Ruling.
LINE 5	23CV426428	Harrison Wang vs Palo Alto Foundation Medical Group, Inc. et al	**Demurrer** Scroll down to LINE 5 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	23CV423986	ARELI MENDOZA vs AMERICAN HONDA MOTOR CO., INC., a California Corporation	**Motion to Compel (Request for Production of Documents)** Plaintiff Areli Sandoval Mendoza's motion to compel further responses to Plaintiff's Requests for Production of Documents (Set One) for Request Nos. 3-4, 7, 9-10, 24-26, 37-38, 44 and 46 and for sanctions of $3,247.50 against Defendant American Honda Motor Co. Inc., and its attorneys of record Clark Hill LLP. The nature and extent of and meet and confer by counsel is unclear from the record before the Court --it is not well described and submitting a cursory confirmation email of what moving party is going to file a motion to compel for does not satisfy the meet and confer requirement. As such, the hearings of the motions to compel set for November 5, 2024, and November 14, 2024, are CONTINUED to January 30, 2025 at 9a.m. in Department 18b. The parties are ordered to (1) meet and confer, either in person, by phone or video conference, for *each* of the items in dispute in both motions to compel (November 5 and 14, 2024 hearings) and (2) file a *joint* statement no later than January 13, 2025, identifying the discovery items in those motions that remain in dispute, and the reasons why they should be compelled/not compelled. Moving party to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	24CV428728	DAVID MARTINEZ, Jr. vs JI LEE	**Motion to Compel (Special Interrogatories)** The parties further met and conferred pursuant to this Court's October 3, 2024 order. Defendant amended the responses to Special Interrogatories, Set One that were at issue on September 10, 2024. There are no longer any Special Interrogatory responses in dispute. This motion is therefore MOOT and ordered OFF CALENDAR.
LINE 8	23CV423529	COMPASS CONCIERGE, LLC vs KAREN DOYLE	**Motion to Deem Requests for Admission Admitted**. Plaintiff Compass Concierge, LLC's motion for an order deeming its Requests for Admission admitted by Defendant Karen Doyle and a request for sanctions of $960. Plaintiff served the Requests for Admission on Defendant on June 18, 2024. Responses were due by July 25, 2024. No responses were received. This motion was served on Defendant on August 9, 2024. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendant has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party meets its burden of proof. Good cause appearing, the Motion is GRANTED. The Requests for Admission (Set One) served on Defendant Karen Doyle on June 18, 2024 by Plaintiff, are deemed admitted against Defendant Karen Doyle. Sanctions of $360 are awarded to Plaintiff to be paid by Defendant Karen Doyle by November 29, 2024. Plaintiff shall prepare a formal order after hearing, that repeats the admissions to be admitted verbatim.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	23CV423546	Irina Buckvar et al vs Bernard Buckvar et al	**Motion for Leave (Third Amended Cross Complaint)** Scroll down to LINE 9 for Tentative Ruling.
LINE 10	24CV443781	DEMAR, LLC vs MIKE MAK	**Petition to Confirm Arbitration Award** No proof of service filed showing service of the petition on Respondent. Absent an amended poof of service showing that timely notice of hearing was given, the hearing will not go forward. If no appearance is made by the moving party the matter will be ordered OFF CALENDAR.
LINE 11	23CV426254	City of San Jose, a charter city vs Brent Lee et al	**Order to Show Cause** Scroll down to LINE 11 for Tentative Ruling.

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Calendar Lines 1- 2
Case Name: *Ryoga Vee v. City of San Jose, et al.*
Case No.: 21CV385105

Before the Court is (1) defendant City of San Jose's motion to strike first amended complaint; and (2) defendant City of San Jose's motion to dismiss unserved defendants. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

The first amended complaint filed October 18, 2024 now alleges: On or about May 29, 2020, at some time between 7:00pm and 9:00pm, at or near downtown San Jose, plaintiff Ryoga Vee ("Plaintiff"), an African-American male, was peacefully protesting the murder of George Floyd along with thousands of other protesters. (First Amended Complaint ("FAC"), ¶¶1 and 6.) Plaintiff was moving around the area wearing roller blades on his feet and a mask covering his face. (*Id.*) Plaintiff alleges he was injured by defendant City of San Jose ("City") police officers at four incidents throughout the evening of May 29, 2020. (FAC, ¶7.)

The first incident occurred between 7:00 – 7:30pm at or near the intersection of Santa Clara and Third Street where Plaintiff alleges a flash bang device exploded near him, concussing him, and causing him injury. (FAC, ¶8.) The flash bang device was deployed by a defendant City police officer acting within the course and scope of employment. (*Id.*)

The second incident occurred between 7:00 – 7:35pm at or near the intersection of Third Street and San Fernando where Plaintiff alleges he was struck in his upper back by a less-than-lethal projectile deployed by defendant City police officers while his back is facing the skirmish line of defendant City police officers. (FAC, ¶9.) The projectile impact takes Plaintiff to the ground causing him injury. (*Id.*) As Plaintiff struggled to his feet, defendant Neil Cossey ("Cossey"), a defendant City police officer, and other defendant City police officers continued to deploy less-than-lethal ammunitions at Plaintiff causing Plaintiff injury. (FAC, ¶10.)

The third incident occurred between 8:00 – 8:30pm at or near the intersection of First Street and Santa Clara where defendant City police officers threw tear gas at Plaintiff situated on the far right side of the street even though an individual had thrown an object from the far left side of the street. (FAC, ¶11.)

The fourth incident occurred between 8:30 – 9:00pm at or near Cesar Chavez Park where defendant City police officer Jared Yuen ("Yuen") and other defendant City police officers fired less-than-lethal 40mm projectiles at Plaintiff hitting Plaintiff in the arm and causing Plaintiff injury. (FAC, ¶12.)

It was clear or should have been clear to defendant City police officers that Plaintiff was merely one of hundreds of peaceful protesters exercising free speech rights; was unarmed; was not throwing any objects at the police; was not holding anything in his hands which could reasonably be construed as a dangerous weapon; and was not posing a reasonable threat of violence to anyone's safety. (FAC, ¶¶13 and 24.) Defendant City police officers were not justified in using any force against Plaintiff. (FAC, ¶14.)

Defendants Cossey and other City police officers, while acting under color of law, violated Plaintiff's civil rights when they deployed less-than-lethal munitions against Plaintiff. (FAC, ¶15.) Each of the involved defendant City police officers failed to properly implement the training they were given on the appropriate use of less-than-lethal force on peaceful protesters and/or failed to implement training they received from defendant City with regard to dispersal of peaceful protesters. (FAC, ¶¶18 – 19.)

Defendants Cossey and other City police officers negligently concluded Plaintiff posed a threat to their safety and/or negligently pointed less-than-lethal weapons at Plaintiff which then accidentally discharged and/or negligently shot Plaintiff while intending to strike a different individual. (FAC, ¶¶20 – 21.)

On July 2, 2021, Plaintiff filed a complaint against defendant City and Doe defendants asserting causes of action for:

(1) Civil Rights Violations (Civil Code §§51.7, 52.1(b) and 52.1(h))

(2) Battery (Government Code §820)

(3) False Imprisonment (Government Code §820)

(4) Negligence

On November 8, 2021, defendant City filed an answer to Plaintiff's complaint.

On July 16, 2024, defendant City filed a motion for summary judgment/ adjudication of Plaintiff's complaint.

On September 23, 2024, Plaintiff filed a motion for leave to amend the complaint.

On October 9, 2024, the court issued an order denying defendant City's motion for summary judgment/ adjudication.

On October 25, 2024, the court issued an order with regard to Plaintiff's motion for leave to amend. In relevant part, the court's order states:

> As a possible meritorious claim, the Stinger Event, the Flashbang Event, and the Park Incident were not identified in Plaintiff's prelitigation claim to Defendant, and as such any proposed amendment with regards to those individuals is rejected. Although Plaintiff's arguments are weak with regards to amendment, in furtherance of justice, **an amendment permitting the amendment of the Complaint to add Officer Neil Cossey as a Doe defendant, *as an employee of Defendant City only* (limited to the Third Street/ San Fernando Street 40mm rubber projectile incident) is GRANTED. The motion in all other respects is DENIED.**

(Italics original. Emphasis added.)

On October 18, 2024[1], Plaintiff filed the operative FAC which now asserts the following causes of action:

(1) Civil Rights Violations (Civil Code §§52.1(b) and 52.1(h)) [against defendants City and Cossey]

(2) Battery (Government Code §§820 and 815.2) [against defendants City and Cossey]

(3) Negligence (Government Code §§820, 815.2) [against defendants City and Cossey]

On October 22, 2024, defendant City filed its answer to the FAC.

On October 24, 2024, defendant City filed the two motions now before the court: (1) a motion to strike the FAC; and (2) a motion to dismiss unserved defendants.

[1] Hearing on the motion for leave to amend occurred on October 17, 2024 at which time the court orally issued its ruling. Consequently, the FAC pre-dates the October 24, 2024 order after hearing.

II. Defendant City's motion to strike is GRANTED.

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: … Strike out all or any part of any pleading not drawn or filed in conformity with … an order of the court." (Code Civ. Proc., §436, subd. (b).)

Despite the court's explicit October 25, 2024 order as highlighted above, Plaintiff engaged in a wholesale re-writing of his complaint. In opposition to defendant City's motion to strike, Plaintiff contends he did so to "clarify[y] the facts," "parse down Plaintiff's case," "eliminate[] the collateral causes of action," and "solidif[y] the remaining causes of action."[2] The highlighted language above limited the scope of the amendment to "add Officer Neil Cossey as a Doe defendant, *as an employee of Defendant City only* (limited to the Third Street/ San Fernando Street 40mm rubber projectile incident)." The court very clearly stated, "The motion in all other respects is DENIED."

Therefore, despite whatever well intentions Plaintiff may have had with regard to amendment, the FAC was not drawn in conformity with this court's October 25, 2024 ruling. As the minute order from the October 17, 2024 hearing on Plaintiff's motion for leave to amend reflects (as well as the court's independent recollection), neither party contested the court's tentative ruling. If the court's tentative ruling was unclear, Plaintiff should have sought clarification at the hearing.

In light of the extensive changes made in the FAC, defendant City's motion to strike the FAC is GRANTED. Plaintiff's FAC is hereby stricken in its entirety. Plaintiff may file a corrected FAC which is drawn in conformity with the court's October 25, 2024 order granting leave to amend as specifically delimited. Plaintiff shall file a corrected FAC within 10 days from notice of entry of this order. So that there is no further misunderstanding, Plaintiff may name Officer Neil Cossey ("Cossey") in an amended pleading but only for the purpose of identifying him as an employee of defendant City of San Jose. The court did NOT grant Plaintiff leave to amend to pursue individual liability against Cossey. The court's intent was to allow Plaintiff to identify Cossey to the extent Plaintiff is pursuing liability against defendant

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[2] See page 3, line 18, and page 4, lines 9 and 12 – 13, of Plaintiff Ryoga Vee's Opposition to Defendant City of San Jose's Motion to Strike First Amended Complaint.

City pursuant to Government Code section 815.2, subdivision (a) which provides, in relevant part, "(a) which provides: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." The court did NOT grant Plaintiff leave to amend to make any other changes to the complaint.

Plaintiff's request for leave to conform to proof is DENIED WITHOUT PREJUDICE. Such motions are made after the presentation of evidence at trial.

III. Defendant City's motion to dismiss unserved defendants is unopposed and GRANTED.

Code of Civil Procedure section 583.250 states:

(a) If service is not made in an action within the time prescribed in this article:

(1) The action shall not be further prosecuted and no further proceedings shall be held in the action.

(2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties.

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.

There being no opposition, defendant City's motion to dismiss all unserved Doe defendants is GRANTED.

The Court will prepare the formal order.

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Calendar Line 3 and 4
Case Name: *B-Line Construction, Inc. v. Wen Luong Chow*
Case No.: 23CV417149

Before the Court is Cross-Defendant California Automobile Insurance Company's (erroneously sued as Mercury Insurance Services, LLC) Demurrer and Motion to Strike. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This action arises out of the alleged "non-payment of monies and a breach of contract action under a construction services agreement to rebuild Wen Lung Chow's residential home after a fire that caused the total destruction and loss to Chow's property." (Cross-Complaint at ¶ 8.) The underlying Complaint was filed by Plaintiff and Cross-Defendant B-Line Construction Services ("Cross-Defendant" or "B-Line") for an accounting and breach of contract against Defendant and Cross-Complainant Wen Lung Chow ("Cross-Complainant" or "Chow"). Cross-Complainant has in turn filed suit against B-Line and Mercury Insurance Services, LLC ("Mercury").

Cross-Complainant has sued Mercury for the "failure to pay for and permit the rebuilding of Chow's home to restore it in the same like kind manner and quality of construction his home had existed prior to the fire under CHOW's Mercury Homeowner's policy" with "code compliant" upgrades included in the reconstruction of the home. (Cross-Complaint at ¶¶ 9, 10.) Cross-Complainant alleges he has "consistently paid the required premiums in full and has satisfied all other conditions to coverage or is otherwise excused from doing so . . . ." (Cross-Complaint at ¶ 11.)

Cross-Complainant alleges that Mercury Claims Adjustor, Angelo Lopez, represented that supplemental additions to make the home code compliant would be paid for by Mercury. (Cross-Complaint at ¶ 13.) The Cross-Complaint alleges that while these additions were initially paid for by Mercury, as time went on, Mercury refused to pay for the supplemental additions to make the home code complaint in bad faith and in contravention of the homeowner's policy. (Cross-Complaint at ¶ 14.)

Cross-Complainant alleges that Mercury "has set out on a deliberate, willful, and intentional scheme to sabotage and interfere with he construction rebuild of his home, and to

interfere and deny CHOW the benefits under his policy . . . ." (Cross-Complaint at ¶ 18.) Cross-Complainant further alleges that Mercury and Claims Adjuster Angelo Lopez have made numerous misrepresentations with knowledge of their falsity to delay the rebuild and completion of his home. (*Ibid.*)

The underlying Complaint in this action was filed on May 24, 2023. Cross-Complainant Chow filed the Cross-Complaint on April 29, 2024 alleging five causes of action for: (1) declaratory relief as to Mercury's duty to indemnify and pay policy benefits; (2) bad faith breach of contract against Mercury; (3) breach of the implied covenant of good faith and fair dealing against Mercury; (4) breach of contract against B-Line; and (5) negligence against B-Line. Cross-Complainant Chow seeks attorneys' fees and punitive damages against Mercury for the second and third causes of action. California Automobile Insurance Company ("CAIC") contends that it has been erroneously sued as Mercury Insurance Services, LLC as its parent company and filed a Demurrer and Motion to Strike the Cross-Complaint on July 22, 2024. The Court will hereinafter refer to Mercury as or "CAIC" or "Cross-Defendant". Cross-Complainant filed its Opposition to the Demurrer and Motion to Strike on October 23, 2024. Cross-Defendant CAIC filed its Replies on October 29, 2024. Below, the Court considers the parties' arguments raised therein.

II. DISCUSSION

A. DEMURRER

1. *TIMELINESS*

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).)[3] Even if a demurrer is untimely filed, the Court has discretion to hear the demurrer so long as its action ". . . 'does not affect the substantial rights of the parties.' [Citations.]" (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.)

As stated above, the Cross-Complaint was filed on April 29, 2024. The summons and Cross-Complaint were served on May 22, 2024. (Proof of Service filed July 10, 2024.)

[3] All further undesignated statutory references are to the Code of Civil Procedure.

Counsel for Cross-Defendant, Mary H. Kim, provides that she sent a detailed letter to counsel for Cross-Complainant addressing its bases for the demurrer and motion to strike on June 14, 2024. (Declaration of Mary H. Kim[4] ["Kim Decl."] at ¶ 3, Ex. A.) The parties agreed to file a declaration for a thirty-day extension of time, which elapsed on July 22, 2024. (Kim Decl. at ¶ 4, Ex. B.) That same day, Cross-Defendant filed its Demurrer. The Court finds Cross-Defendant's Demurrer timely pursuant to section 430.40, subdivision (a).

2. *MEET AND CONFER*

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (§ 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (§ 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (§ 430.41, subd. (a)(4).)

Counsel for Cross-Defendant, Mary H. Kim, provides that on June 14, 2024, she sent a letter detailing the bases for a demurrer and motion to strike to counsel for Cross Complainant. (Kim Decl. at ¶ 3, Ex. A.) Thereafter, counsel for Cross-Defendant filed a declaration for a 30-day extension of time indicating that she had requested a response from counsel for Cross Complainant by June 19, 2024. (Kim Decl. at ¶ 4, Ex. B.) The declaration was executed on June 21, 2022 and the 30-day extension of time lapsed on July 22, 2024. (*Ibid.*) It is unclear if the parties have had any further efforts to meet and confer since the original date of letter. It is also unclear if the parties have telephonically met and conferred per code. Regardless, even if these efforts are insufficient, the Court may still consider the Demurrer.

3. *LEGAL STANDARD*

A demurrer must distinctly specify the grounds upon which a pleading is objected to; a demurrer lacking such specification may be disregarded. (§ 430.60.) As relevant to the

[4] The Declaration of Mary H. Kim is attached to the Notice of Demurrer and Memorandum of Points and Authorities.

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

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

A party against whom a complaint has been filed may also object by demurrer as provided in Section 430.30 to the pleading on the grounds that the pleading is uncertain. (§ 430.10, subd. (f).) "As used in this subdivision, 'uncertain' includes ambiguous and unintelligible." (*Ibid.*) A "[d]emurrer for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond; i.e. he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him." (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

4. *ANALYSIS*

Cross-Defendant CAIC demurrers to the first cause of action for declaratory relief on the grounds that it is uncertain and duplicative of the second cause of action for bad faith breach of contract and third cause of action for breach of the covenant of good faith and fair

dealing. (Notice of Demurrer at p. 2:5-12.) Cross-Defendant also demurrers to the third cause of action on the grounds that it is uncertain and Cross-Complainant has not alleged sufficient facts to state a claim for breach of the covenant of good faith and fair dealing. (*Id.* at p. 2:13-16.)

a. WHETHER THE FIRST, SECOND, AND THIRD CAUSES OF ACTION ARE DUPLICATIVE

As stated above, Cross-Defendant CAIC demurrers to the first cause of action for declaratory relief on the grounds that it is duplicative with the second and third causes of action for bad faith breach of contract and breach of the covenant of good faith and fair dealing. (Demurrer at p. 6:9-11.)

"A complaint for declaratory relief should show the following: (a) A proper subject of declaratory relief within the scope of C.C.P. 1060; (b) An actual controversy involving justiciable questions relating to the rights or obligations of a party." (5 Witkin, California Procedure (4th ed. 1997) §809, pp. 264 – 265; emphasis omitted.) Code of Civil Procedure section 1060 specifically provides for a declaration of rights and duties between two persons. "Any person claiming rights under a contract (oral or written) … may bring an action for a declaration of his or her rights or duties with respect to another. [Citations.] The action may be brought before any breach of the obligation regarding which the declaration is sought." (Weil & Brown, CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Group 2016) ¶ 6:186, p. 6-63 citing Code Civ. Proc., § 1060; *Market Lofts Community Ass'n v. 9th St. Market Lofts, LLC* (2014) 222 Cal.App.4th 924, 931.)

The court in *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403 wrote, "declaratory relief operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them." (Internal quotation marks omitted. .) The argument is as follows: If the obligation has already been breached, the breach of contract claim is ripe and either party could pursue a fully matured cause of action for breach of contract or breach of the covenant of good faith and fair dealing. "Hence, where there is an

accrued cause of action for an actual breach of contract or other wrongful act, declaratory relief may be denied." (5 Witkin, California Procedure (4th ed. 1997) Pleading, § 823, p. 279.)

It is statutorily recognized that declaratory relief is within the discretion of the trial court. "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc. § 1061.) "The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not furnish a litigant with a second cause of action for the determination of identical issues." (*California Ins. Guarantee Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617, 1623-1624.)

In its moving papers, Cross-Defendant relies on *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 324 (*Hood*) and *General of America Ins. Co. v. Lilly* (1968) 258 Cal.App.2d 465, 470 (*General of America Ins. Co.*) for the proposition that "[t]he declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues." (Demurrer at pp. 6:16-7:18 [citing *Hood, supra,* 33 Cal.App.4th at p. 324 (quoting *General of America Ins. Co., supra,* 258 Cal.App.2d at p. 470)].) The Court finds these authorities persuasive.

In *Hood*, the court there determined that the underlying cause of action had already matured and a declaration of rights added nothing further to the claims at issue. (*Hood, supra,* 33 Cal.App.4th at p. 324.) In *General of America Ins. Co.*, the court there likewise held that "Plaintiff's complaint, however, falls short of the necessary allegations to entitle it, as a matter of right, to maintain the action in a declaratory relief, where the issues raised by the complaint may be properly and finally adjudicated in the personal injury action." (*General of America Ins. Co., supra,* 258 Cal.App.2d at p. 472.)

Recently, the First District Court of Appeal in *Fox Paine & Co., LLC v. Twin City Fire Ins. Co.* (2024) 104 Cal.App.5th 1034, 1052, similarly upheld a trial court's ruling to sustain a

demurrer on grounds much like the one at issue. The court determined that the demurrers were properly sustained because "at least two aspects of plaintiff's declaratory relief claim are derivative of other claims. For example, the TAC requests declaratory relief 'that St. Paul's policy . . . is triggered by the exhaustion of the "first lawyer" Twin City policy and plaintiffs' losses,' a request obviously derivative of plaintiff's breach of contract claim." (*Ibid.*)

Here, Cross-Complainant seeks a judicial declaration that "Mercury Homeowner's policy imposes on MERCURY, and ROES 3 through 10, inclusive, and each of them, a duty to defend, indemnify, and pay the insurance policy benefits to its insured Wen Len Chow in such cases of a fire loss." (Cross-Complaint at ¶ 66.) Cross-Defendant argues that since the breach of contract claim has already accrued, declaratory relief is unnecessary and the ultimate determination to be made by the Court is the liability of one party to another. (Demurrer at p. 6:9-24.) Cross-Defendant argues that the first cause of action for declaratory relief rests on the same operative facts as the bad faith breach of contract and breach of the covenant of good faith and fair dealing claims. (Demurrer at p. 7:14-18.) Cross-Complainant, on the other hand, maintains that an actual controversy exists with respect to the construction of the homeowner's insurance policy. (Opposition to Demurrer at p. 4:9-16.) Cross-Complainant insists that the Court must make a determination of the rights and obligations of the parties by way of a declaratory judgment. (*Ibid.*)

The Court agrees with Cross-Defendants that the allegations of the second and third causes of action for breach of contract and breach of the covenant of good faith and fair dealing are redundant with the first cause of action for declaratory relief. For example, Cross-Complainant describes the policy issued to him, and the requests made per the policy to rebuild his home after a total fire destruction. (See Cross-Complaint at ¶¶ 10, 11, 13, 14, 25, 27, 29.) While the policy itself is not in fact attached as Exhibit A as contended in the Cross-Complaint, Cross-Complainant nonetheless describes the terms of the policy including the rights and obligations owed between the parties. (*Ibid*.) Cross-Complainant alleges that Cross-Defendant breached its obligations under the policy by not permitting Cross-Complainant to rebuild his home in a like manner as before the fire. (Cross-Complaint at ¶ 15.) In paragraph 34, Cross-Complainant alleges "[p]ursuant to the terms of the Mercury Homeowner's Insurance Policy,

MERCURY, and ROES 3 through 10, and each of them, inclusively, as the insurer, is obligated to indemnify and pay for the cost of rebuilding and reconstruction of the CHOW home." (Cross-Complaint at ¶ 34.) Cross-Complainant's allegations under the third cause of action are similar in that he describes the tortious actions as "[d]eliberately, unjustifiably, and unreasonably adopting an unwarranted interpretation and application of the terms and conditions provisions of the Policy contrary to the facts presented to the facts or applicable law for the denial of coverage." ("Cross-Complaint at ¶ 41(b).) Although Cross-Complainant alleges that the tortious acts are ongoing and continue to the present day in the Cross-Complaint, a mere continuing contractual relationship is not enough. (Cross-Complaint at ¶ 41.) (See *Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 371 (*Osseous*).) *Osseous* suggests that there must also be allegations that the "future consequences for the conduct of the relationship that depended on the court's interpretation of the contracts at is." (*Ibid*.) No such allegations are found in the Cross-Complaint, which instead describe past acts of breach.

Cross-Complainant's breach of contract and breach of the covenant of good faith and fair dealing will inevitably resolve the question of whether Cross-Defendant owed a duty to defend, indemnify, and pay the insurance policy benefits to its insured for a fire loss. In resolving this claim, the Court would be required to consider and interpret the policy issued to Cross-Complainant and resolve whether Cross-Defendant owed certain rights and obligations under the policy and whether those rights and obligations were breached. Thus, the inquiry into the first cause of action and second and third causes of action rest on the same operative facts and are one and of the same. Therefore, these claims are duplicative with the request for declaratory relief. Accordingly, the Court SUSTAINS the Demurrer to the first cause of action for declaratory relief WITHOUT LEAVE TO AMEND because it is duplicative with the second and third causes of action, and amendment cannot cure the deficiencies or duplicative nature of these claims. (*General of American Ins. Co.*, *supra,* 258 Cal.App.2d at p. 472 [noting that the Court did not abuse its discretion in sustaining the demurrer without leave to amend under a similar set of facts and causes of action].)

b. FAILURE TO STATE A CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

Cross-Defendant demurs to the third cause of action for breach of the covenant of good faith and fair dealing on the ground that Cross-Complainant has failed to state a claim.

The law implies in every contract, including insurance policies, a covenant of good faith and fair dealing. "The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's benefits. To fulfill its obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208, 214-215 (*Frommoethelydo*).)

Tort liability for the breach of the implied covenant of good faith and fair dealing has been variously measured. The primary test in this context is whether the insurer withheld payment of an insured's claim unreasonably and in bad faith. (*Frommoethelydo, supra*, 42 Cal.3d at pp. 214-215.) Where benefits are withheld for proper cause, there is no breach of the implied covenant. (*California Shoppers, Inc. v. Royal Glob Ins. Co.* (1985) 175 Cal.App.3d 1, 54-55.) The duty imposed by law is not to unreasonably withhold payments due under the policy. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 920.)

Thus, there are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause. (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1151-1152; see also *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1986) 184 Cal.App.3d 1428, 1433 [no award for bad faith can be made "without first establishing that coverage exists"]; *Kopczynski v. Prudential Ins. Co.* (1985) 164 Cal.App.3d 846, 849.)

"In evaluating whether an insurer acted in bad faith, "the critical issue [is] the reasonableness of the insurer's conduct under the facts of the particular case.' [Citation.]" (*Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676, 687 (*Pinto*).) "Although 'the reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact, it

becomes a question of law where the evidence is undisputed and only one reasonable inference can be drawn from the evidence.' [Citation.]" (*Pinto, supra,* 61 Cal.App.5th at p. 689.)

Cross-Defendant maintains that the Cross-Complaint does not allege the specific benefits that were due under the policy and whether the withholding was objectively unreasonable under the circumstances to constitute bad faith. (Demurrer at p. 8:23-25.) The Cross-Complaint generally alleges that benefits included coverage in the event of fire loss, and restoration of Cross-Complainant's home in a "like kind" manner and quality as it had existed prior to the fire under the policy. (Cross-Complaint at ¶ 10.) The Cross-Complaint further alleges that this includes certain "code upgrades" that were required for the rebuilding of the home. (*Ibid.*) Cross-Complainant alleges that Cross-Defendant and Claims Adjuster Angelo Lopez, represented that his home would be rebuilt and restored to a "like kind" manner as paid for by Cross-Defendant, but these benefits were ultimately denied. (Cross-Complaint at ¶ 13.) The Cross-Complaint alleges that while Cross-Defendant initially paid for supplemental additions, they refused to pay for further supplemental additions to make the home "code compliant" over time. (Cross-Complaint at ¶ 14.) While it describes the refusal to pay as "deliberate, willful, and intentional," the Cross-Complainant at least characterizes the denial as unreasonable based on Cross-Defendant's initial payments towards the claim and representations that the home would be restored to a "like-manner" condition with the "code upgrades" included in the cost paid by Cross-Defendant. (Cross-Complaint at ¶ 18.)

The Court finds these allegations sufficient for stating a claim for breach of the covenant of good faith and fair dealing. Cross-Complainant has sufficiently alleged that coverage exists under the policy, benefits under the policy were withheld, and the reason for withholding benefits was unreasonable based on the initial payments and past representations made. For these reasons, the Demurrer to the third cause of action for breach of the covenant of good faith and fair dealing is OVERRULED for failure to state a claim.

B. MOTION TO STRIKE

1. *TIMELINESS*

"Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof." (Code Civ. Proc. § 435, subd. (b)(1);

see also Cal. Rules of Court, rule 3.1322, subd. (b).) "The term 'pleading' means a demurrer, answer, complaint, or cross-complaint." (§ 435, subd. (a)(2).) Unless extended by stipulation or court order, a defendant's answer is due within 30 days after service of the complaint. (See § 412.20, subd. (a)(3).) The Motion to Strike was filed on the same day as the Demurrer. Based on the above analysis regarding the Demurrer, the Motion to Strike is also timely.

2. *MEET AND CONFER*

A party moving to strike some or all of a complaint is required to engage in meet and confer efforts prior to the filing of a motion to strike. (§ 435.5, subd. (a).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to grant or deny the motion to strike." (§ 435.5, subd. (a)(4).) For the same reasons stated above with respect to the Demurrer, although the parties have not telephonically met and conferred per code, they have attempted to confer and set forth their respective positions on the issues. Accordingly, even if the failure to telephonically meet and confer renders the parties' meet and confer efforts insufficient, the court may nonetheless reach the merits of the Motion to Strike.

3. *LEGAL STANDARD*

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (§ 436, subd. (a).) A court may also strike out all or any part of a pleading not drawn or filed in conformity with the laws of the State of California. (§ 436, subd. (b).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (§ 437, subd. (a).)

4. *ANALYSIS*

Cross-Defendant moves to strike Cross-Complainant's request for punitive damages and attorney's fees. (Notice of Motion to Strike at p. 2:11-24.) Cross-Defendant further argues that the term "bad faith" should be stricken from the second cause of action for breach of contract. (*Id.* at p. 2:6-10, ¶ 1.)

a. PUNITIVE DAMAGES

Cross-Defendant moves to strike paragraphs 49, 50 of the Cross-Complaint in addition to paragraph 5 of the Prayer for Relief seeking punitive damages. (Notice of Motion to Strike at p. 2:11-19, ¶¶ 2-4.)

"In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damages statute, Civil Code section 3294. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. 'Malice' is defined in the statute as conduct 'intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights and safety of others'. 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant thereby depriving a person of property or legal rights or otherwise causing injury.'" (*Turnman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 [internal citations omitted].)

"In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants' conduct may adequately plead the evil motive requisite to recovery of punitive damages." (See *Monge v. Super. Ct.* (1986) 176 Cal.App.3d 503, 510.) "With respect to a corporate employer, the advanced knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an *officer, director, or managing agent of the corporation*." (*White v. Ultramar* (1999) 21 Cal.4th 563, 572.)

Cross-Defendant maintains that Cross-Complainant's allegations with respect to punitive damages are vague and conclusory. (Motion to Strike at pp. 7:19-8:28; Motion to Strike Reply at p. 2:4-3:14.) However, the Cross-Complaint here alleges that although Cross-Defendant initially paid for supplemental additions, it later denied payment for this same type of claim. (Cross-Complaint at ¶ 14.) Cross-Complainant further alleges that Claims Adjuster, Angelo Lopez represented that the home would be restored to a "like-manner" condition as covered under the policy. (Cross-Complaint at ¶ 13.) Cross-Complainant alleges that this was

a misrepresentation that Cross-Defendant and Angelo Lopez knew to be false, based on the subsequent denial of coverage. (Cross-Complaint at ¶¶ 18, 19.)

While these allegations of misrepresentation may otherwise be sufficient to state a request for punitive damages, it is unclear whether Angelo Lopez is an officer, director, or managing agent of the corporate Cross-Defendant. As such, the Court is unable to rely on the alleged misrepresentations made by Angelo Lopez alone in considering the sufficiency of the request for punitive damages. Apart from conclusory allegations that Defendant acted willfully or deliberately, Cross-Complainant has not stated any other specific facts to support that Cross-Defendant acted with oppression, malice, or fraud in denying coverage. Cross-Complainant has not sufficiently alleged a motive, intent, or reason behind the denial of benefits apart from its unreasonableness that would rise to the requisite level of conduct needed for punitive damages. For these reasons, the Court GRANTS the Motion to Strike portions of the request for punitive damages. Accordingly, paragraphs 49, 50 and paragraph 5 of the Prayer for Relief are stricken from the Cross-Complaint.

"[W]here the plaintiff requests leave to amend the complaint, but the record fails to suggest how the plaintiff could cure the complaint's defects, 'the question as to whether or not [the] court abused its discretion [in denying the plaintiff's request] is open on appeal … .' (Code Civ. Proc., § 472c, subd. (a).) Because the trial court's discretion is at issue, we are limited to determining whether the trial court's discretion was abused as a matter of law. Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found 'only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case.'" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal App 4th 497, 507, disapproved on another ground in *Yvanova v. New Century Mortg. Corp., supra*, 62 Cal.4th at p. 939, fn. 13.)

Here, Cross-Complainant references the standards for leave to amend but fails to state how exactly the Cross-Complaint can be amended. (Opposition to Motion to Strike at p. 3:17-22.) Nonetheless, the Court will exercise its discretion and grant 20 DAYS' LEAVE TO AMEND as to the request for punitive damages since the Cross-Complaint has not yet been

amended and additional facts with respect to punitive damages may be apparent and consistent with Cross-Claimant's theory of the case.

b. ATTORNEY'S FEES

Cross-Defendant argues the request for attorney's fees is improper because Plaintiff seeks attorney's fees for the second and third causes of action, and contends that attorney's fees are not recoverable unless authorized by statute or agreement. (Motion to Strike at p. 9:19-26; Reply to Opposition to Motion to Strike at p. 3:17-27.)

"Under California law, 'each party to a lawsuit may pay its own attorney fees unless a contract or statute or other law authorizes a fee award." (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 504; see Code Civ. Proc. § 1021.) Thus, unless specifically provided by statute or agreement, attorneys fees are not recoverable." (*K.I. v. Wagner* (2014) 225 Cal.App.4th 1412, 1420-1421.)

However, in *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 (*Brandt*), "the California Supreme Court created an exception to the general rule that each party must bear its own attorney fees." (*Byers v. Superior Court* (2024) 101 Cal.App.5th 1003, 1009 (*Byers*).) "Under *Brandt*, an insurer is liable for attorney fees when the insurer's tortious conduct in refusing to pay insurance benefits requires the insured to retain an attorney to obtain the benefits of the policy." (*Byers, supra,* 101 Cal.App.5th at p. 1009.) "The attorney's fees are an economic loss—damages—proximately caused by the tort." (*Brandt, supra*, 37 Cal.3d at p. 817.)

"In order to recover such *Brandt* fees . . . , the insured is required to plead and prove (1) the amount to which [*sic*] the insured was entitled to recover under the policy, (2) that the insurer withheld payment unreasonably or without proper cause, (3) the amount that the insured paid or incurred in legal fees and expenses in establishing the insured's right to contract benefits [fn. omitted] and (4) the reasonableness of the fees and expenses so incurred." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1079.)

The Court agrees with Cross-Claimant that the request for attorney's fees under *Brandt* is proper. (Opposition to Motion to Strike at p. 4:9-17.) In paragraph 47 of the Complaint,

Cross-Complainant alleges that he is entitled to recover attorney's fees and expenses reasonably occurred in his efforts to "obtain the benefits of insurance" that have been withheld by Cross-Defendant. (Cross-Complaint at ¶ 47.) Cross-Complainant further alleges "[a]t this time, CHOW is entitled to attorney's fees and interest on said fees at the legal rate of 10% per annum from October 23, 2020 to the date payment was due under the submitted B-Line Change Order, according to proof, because Cross-Complainant CHOW was compelled to obtain an attorney to enforce and collect on policy benefits improperly withheld and due under the policy by Cross-Defendant . . . ." (*Ibid.*)

In the second cause of action, Cross-Complainant alleges that he has been damaged in the amount of $189,030.30 due under the policy, unpaid and with interest at a rate of 10% per annum from October 23, 2020, the date the payment was due. (Cross-Complaint at ¶ 37.) As stated above, Cross-Complainant alleges Cross-Defendant unreasonably withheld coverage based on the misrepresentations made by the Claims Adjuster Angelo Lopez, which are sufficient to at least state a claim for breach of the covenant of good faith and fair dealing, for which Cross-Complainant seeks attorneys' fees. (Complaint at ¶ 8.) The Prayer for Relief specifies that Cross-Complainant is seeking attorney's fees pursuant to *Brandt*. (Cross-Complaint at ¶ 67(4).) Accordingly, the Court finds Defendants' basis for seeking attorney's fees proper under these facts. The Motion to Strike the request for attorney's fees with respect to the second and third causes of action is DENIED.

c. "BAD FAITH" BREACH OF CONTRACT

Cross-Defendant maintains that the reference to "bad faith" in the breach of contract claim should be stricken from the Cross-Complaint because there is no recognized cause of action for bad faith breach of contract. (Motion to Strike at p. 10:3-8; Reply to Opposition to Motion to Strike at p. 4:3-13.) However, California has recognized a cause of action for bad faith breach of contract at least in insurance cases, such as the one at issue. (See *Applied Equipment Corp. v. Little Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515-516.) Since Cross-Defendant has not challenged the sufficiency of this claim on Demurrer, the Court need not consider it. For these reasons, the Motion to Strike "bad faith" from the breach of contract claim is DENIED.

III. CONCLUSION

The Demurrer to the first cause of action for declaratory relief on uncertainty grounds is SUSTAINED WITHOUT LEAVE TO AMEND because it is duplicative with the second and third causes of action. The Demurrer to the third cause of action for breach of the covenant of good faith and fair dealing is OVERRULED. The Motion to Strike portions of the request for punitive damages is GRANTED WITH 20 DAYS' LEAVE TO AMEND. However, the Motion to Strike the request for attorney's fees under *Brandt* and the term "bad faith" from the second cause of action for breach of contract is DENIED.

The Court will prepare the formal order.

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Calendar Line 5
Case Name: *Harrison Wang, M.D. v. Palo Alto Foundation Medical Group, et al.*
Case No.: 23CV426428

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

I. Background.

Plaintiff Harrison Wang, M.D. ("Dr. Wang"), an Asian-American male, is an experienced radiologist employed by and a shareholder of defendant Palo Alto Foundation Medical Group, Inc. ("PAFMG"). (Second Amended Complaint ("SAC"), ¶¶1 and 5.) Defendant Sutter Bay Medical Foundation ("Sutter") was a joint employer of plaintiff Dr. Wang along with defendant PAFMG. (SAC, ¶¶7 and 10.) Defendants Sutter and PAFMG (collectively, "Employers") do business at the same address. (SAC, ¶10.)

Defendant PAFMG provides the medical staff who practice medicine at various Sutter buildings/ facilities including the building/ facility where plaintiff Dr. Wang practiced medicine. (SAC, ¶11.) Defendants PAFMG and Sutter's names and/or logos are prominently displayed together on dozens of buildings/ facilities/ locations throughout the Bay Area. (SAC, ¶12.) While defendant PAFMG paid plaintiff Dr. Wang, defendant Sutter also participated in the supervision of plaintiff Dr. Wang's work schedule, duties, assignments, review of performance and conduct, and controlled his workplace equipment. (SAC, ¶13.) Plaintiff Dr. Wang used defendant Sutter's email address, received workplace requests indicating defendant Sutter information and letterhead, and received workplace guidance and discipline from both defendants Sutter and PAFMG. (SAC, ¶14.)

Over the past several years, plaintiff Dr. Wang repeatedly (dozens of times) expressed concerns to his supervisors that patients were undergoing unnecessary exposure to radiation during radiology procedures. (SAC, ¶¶16 and 19.) On several other occasions, plaintiff Dr. Wang also complained that the wrong patients were being radiated and that the wrong part of a patient's body was radiated. (SAC, ¶¶17 and 19.) Plaintiff Dr. Wang's complaints were ignored by defendants. (SAC, ¶20.)

Throughout plaintiff Dr. Wang's employment, he objected to performing a hysterosalpingogram ("HSG"), a procedure to view the inside of a women's uterus with a toxic dye, when there was a possibility that female patient could be pregnant. (SAC, ¶21.) During plaintiff Dr. Wang's nine-year employment with defendants, plaintiff Dr. Wang also repeatedly complained about the use of a poor-quality ultrasound device used to screen for breast cancer. (SAC, ¶22.)

Between approximately March 2020 and September 2023, plaintiff Dr. Wang made complaints about defendant Employers' failure to require patients to keep masks on during consumption of Barium for radiology procedures during which patients regularly cough, spewing saliva and Barium into the air. (SAC, ¶23.) Instead of taking corrective action, defendants retaliated against and reprimanded plaintiff Dr. Wang. (SAC, ¶24.) Employers also ignored plaintiff Dr. Wang's complains about the failure to require patients be tested for Covid-19 prior to a radiology procedure. (SAC, ¶25.) During that same period, plaintiff Dr. Wang's requested Protective Personal Protection equipment, but Employers failed to provide such equipment. (SAC, ¶26.) Defendants failed to take prompt corrective action despite plaintiff Dr. Wang's concerns and complaints. (SAC, ¶27.)

The primary reason plaintiff Dr. Wang's warnings were unheeded was due to plaintiff Dr. Wang's race and gender as an Asian-American man who was expected to comport with a stereotype of weakness, docility, and compliance. (SAC, ¶29.) Another Asian-American male doctor who fit this stereotype received better treatment than plaintiff Dr. Wang. (SAC, ¶30.) Defendants failed to take any action to address plaintiff Dr. Wang's complaints but took immediate action when a white male made the same complaint. (SAC, ¶31.) Two white male physicians routinely speak condescendingly to and/or insult technologists. (SAC, ¶32.) Plaintiff Dr. Wang speaks professionally with technologists, but defendants are quick to discipline/ scold plaintiff Dr. Wang at the slightest complaint by a technologist. (*Id.*)

During the pandemic, plaintiff Dr. Wang's work environment included hurtful references by other employees and staff including, "China virus," "Goddamn China," and "Dammit China," but supervisors and managers did not take any corrective action against those staff members who made these remarks. (SAC, ¶¶33 – 35.) Colleagues at work made other

offensive and unwelcome remarks to plaintiff Dr. Wang based on race, sex and/or national origin. (SAC, ¶¶36 – 41.)

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

On January 23, 2024, defendant PAFMG filed a demurrer to plaintiff Dr. Wang's complaint which prompted plaintiff Wang to file, on February 7, 2024, a first amended complaint which asserted the following causes of action:

(1) Violation of Labor Code Section 1102.5

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

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

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

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

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

(7) Wrongful Termination in Violation of Public Policy

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

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

On June 3, 2024, the court (Hon. Pennypacker) sustained defendant PAFMG's demurrer with leave to amend.

On June 21, 2024, plaintiff Dr. Wang filed the operative SAC continuing to assert the same seven causes of action asserted in the FAC.

On July 26, 2024, defendant Sutter filed an answer to plaintiff Dr. Wang's SAC.

On July 30, 2024, defendant PAFMG filed the motion now before the court, a demurrer to the second cause of action of plaintiff Dr. Wang's SAC.

II. DEFENDANT PAFMG'S DEMURRER TO THE SECOND CAUSE OF ACTION [VIOLATION OF HEALTH AND SAFETY CODE SECTION 1278.5] OF PLAINTIFF DR. WANG'S SAC IS OVERRULED.

In his second cause of action, plaintiff Dr. Wang invokes the whistleblower protections afforded pursuant to Health and Safety Code section 1278.5.

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

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

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

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

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

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

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

(Emphasis added.)

Defendant PAFMG focuses the court's attention on that portion of the Health and Safety Code section 1250 which defines health facility as "a facility, place, or building" and asserts that it is none of these. Instead, defendant PAFMG seeks judicial notice of the fact that it "is a group of clinicians." For purposes of discussion only, the court accepts PAFMG's assertion that it is a group of clinicians.

Continuing from that premise, defendant PAFMG cites, among others, *Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, 831 (*Armin*) for the principle that, "section 1278.5 does not allow individual doctors to be sued."

> Section 1278.5, focuses on the "facility" as the target defendant under the statute. Subdivision (a), the statement of intent, expresses the Legislature's concern that people who work at hospitals be protected when they notify government entities of unsafe patient care or conditions.22 Subdivision (b) is the operative subdivision, forbidding facilities, *and only facilities*, from

> retaliating against individuals who complain of potentially unsafe care or conditions—even if they complain to somebody other than a government entity.

(*Armin, supra*, 5 Cal.App.5th at pp. 831-832; italics original. Accord, *Brenner v. Universal Health Services of Rancho Springs, Inc.* (2017) 12 Cal.App.5th 589, 602.)

The *Armin* court also recognized that section 1278.5, subdivision (i), "defines …. 'health facility' to mean "any facility defined under this chapter, including, but not limited to, the facility's administrative personnel, employees, boards, and committees of the board, and *medical staff*.'" (*Id.* at p. 832; italics original.) "The phrase 'medical staff' is thus a uniplural entity, like church or team or jury. [Footnote omitted.] … [We] conclude that by 'medical staff' the Legislature meant the uniplural corporate body, which brings peer review proceedings against individual members of that 'medical staff' rather than individual staff members." (*Id.* at p. 833.)

Defendant PAFMG contends *St. Myers v. Dignity Health* (2019) 44 Cal.App.5th 301, 313-314 is also of some relevance where the court explained:

> The target defendant of section 1278.5 is the facility, here MTMC. (*Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, 832 [210 Cal. Rptr. 3d 388].) Optum360 provided end-to-end revenue cycling services to MTMC. These services included scheduling, patient registration, health information management in the form of coding and transcription, billing, and collections. Optum360 provided services to the front office staff; the office staff did not provide medical care. No Optum360 staff worked onsite at MTMC. This evidence established that Optum360 was a third party service provider to MTMC; it did not operate MTMC. [Footnote omitted.] Optum360 provided ancillary services; it did not operate or manage "the diagnosis, care, prevention, and treatment of human illness." (§ 1250.)
>
> St. Myers argues that without the scheduling and billing services provided by Optum360, MTMC's clinics would be unable to operate. This may be an accurate observation, but it is not relevant; a medical clinic needs power and

water to operate, but that does not make utility companies "health facilities" under the statute.

From these authorities, the court concludes defendant PAFMG is not precluded from liability under Health and Safety Code section 1278.5 simply because it is a "group of clinicians." *Armin* makes clear that the term "facility" includes "medical staff" which, in turn, means a "uniplural corporate body." Defendant PAFMG's own request for judicial notice establishes that it is a uniplural corporate body. (See also SAC, ¶53—"Case law has interpreted 'medical staff' to mean a uniplural or corporate body.") Plaintiff Dr. Wang has not named any individual shareholder/ doctor of defendant PAFMG as a defendant in this action and has, instead, leveled his complaint against the entire corporate body.

The court's ruling does not disturb Judge Pennypacker's reasoning in sustaining defendant PAFMG's earlier demurrer to this same cause of action that "there must be a facility within which the referenced staff, etc. are contained." If there is a flaw or misunderstanding of Judge Pennypacker's reasoning, it would be that her reasoning implicitly suggests that defendant PAFMG must ***first*** be a "place or building" or that defendant PAFMG must ***also*** be a "place or building" in order for liability to attach. Neither the language of the statutes nor any authorities cited leads to such a conclusion.

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

Defendant PAFMG's request for judicial notice in support of demurrer to plaintiff's SAC and plaintiff Dr. Wang's request for judicial notice in support of opposition to defendant PAFMG's demurrer to SAC is DENIED as unnecessary. (See *Duarte v. Pacific Specialty Insurance Company* (2017) 13 Cal.App.5th 45, 51, fn. 6—denying request where judicial notice is not necessary, helpful or relevant.)

The Court will prepare the formal order.

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Calendar Line 9
Case Name: *Irina Buckvar et al vs Bernard Buckvar et al*
Case No.: 23CV423546

Before the Court is Defendant and Cross-Complainant Bernard Buckvar's motion for leave to file a third amended cross-complaint, pursuant to Code of Civil Procedure section 473(a)(1). Moving party argues that the proposed third amended cross-complaint (1) adds or alters legal theories based on the same facts already pleaded in that it re-alleges causes of action for resulting trust, constructive trust, and conversion and eliminates the former quiet title cause of action and (2) Plaintiffs will not suffer any prejudice.

Plaintiffs oppose the motion, arguing that the motion is procedurally defective, that the minimum requirements to seek leave have not been met, that the proposed amended pleading will be subject to a demurrer on "multiple grounds," and that the amended pleading will prejudice Plaintiffs as it introduces three new causes of action shortly before an upcoming mediation.

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading." (Code of Civil Procedure, section 473 subd. (a)(1).) Judicial policy favors the liberal exercise of discretion to permit amendment of the pleadings so as to resolve all disputed matters between the parties in the same lawsuit. The California Supreme Court has held that under Code of Civil Procedure section 473 there is a "strong policy in favor of liberal allowance of amendments." (See *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 297.) The cases have established a policy of great liberality in allowing such amendments at any stage of the proceeding.

If the delay in seeking the amendment has not misled or prejudiced the other side, the liberal policy of allowing amendments prevails and it is an abuse of discretion to deny leave to amend. (See *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.)

The court's discretion is typically exercised liberally so as not to deprive a party of the right to assert a meritorious cause of action or a meritorious defense. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) This liberal policy of permitting amendments, however, is not without limitation or qualification. A proposed amendment should be timely made and should not be permitted where it will prejudice the opposing party (*Id.* at p. 530), or where other factors preclude a proposed amendment or otherwise render an amendment impermissible.

Leave to amend a pleading has been denied when the requested amendment was untimely or was prejudicial to the opposing party. (*Bank of America Nat. Trust & Savings Ass'n v. Goldstein* (1938) 25 Cal.App.2d 37, 46-47.) "Prejudice exists where the proposed amendment would require delaying the trial, resulting in added costs of preparation and increased discovery burdens." (*Miles v. City of Los Angeles* (2020) 56 Ca1.App.5th 728, 739).

No trial date has been set in this case, the briefing is silent as to the extent of discovery conducted to date or what remains to be completed, and Plaintiffs have not identified prejudice. Defendant and Cross-Complainant Bernard Buckvar has adequately described the amendments he proposes. The Court will exercise its discretion and will permit the amendment that Defendant/Cross-Complainant Buckvar seeks. The motion for leave to file an amended cross-

complaint is GRANTED. Defendant and Cross-Complainant Bernard Buckvar shall file his amended cross-complaint within 10 days of this order.

Counsel for moving party is instructed to prepare the formal order.

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Calendar Line 11
Case Name: *City of San Jose v. RPRO152N3 LLC et. al*
Case No.: 23CV426254

Plaintiff City of San Jose ("Plaintiff") filed this action against defendants RPRO152N3 LLC ("RPRO152N3") and Brent Lee (together, "Defendants") based on alleged San Jose Municipal Code ("SJMC") violations and other statutory violations on property allegedly owned by Defendants. On August 27, 2014, Plaintiff filed an ex parte application for a temporary restraining order ("TRO"), an order to show cause for a preliminary injunction (the "OSC"), and sought the appointment of a receiver. The court granted the ex parte application on September 12, 2024 and issued an OSC requiring Defendants show cause as to why the court should not issue a preliminary injunction preventing Defendants from using the property they own in a manner that violates the SJMC. The court held a hearing on the OSC on October 3, 2024. The court continued the OSC hearing until November 5, 2024 and now evaluates the parties' arguments as to the OSC.

I. BACKGROUND

According to the allegations of the first amended complaint ("FAC"), Plaintiff "has the authority to protect the public health, safety, and welfare within the City of San Jose." (FAC, ¶ 11.) RPRO152N3 "owns and maintains two residential properties located at 146 North 4th Street in San Jose, California, 95112 with Assessor's Parcel Number 467-20-021 and 152 North 4th Street in San Jose, California, 95112 with Assessor's Parcel Number 467-20-022. RPRO152N3 also owns four adjacent vacant lots located at 117 North 5th Street with Assessor's Parcel Number 467-20-074, 0 East Saint John Street with Assessor's Parcel Number 467-20-040, 120 North 4th Street with Assessor's Parcel Number 467-20-020, and 100 North 4th Street with Assessor's Parcel Number 467-20-019."[5] (*Id.* at ¶ 2.) Plaintiffs allege Brent Lee is the shareholder, owner, officer, and/or manager of RPRO152N3. (*Id.* at ¶ 3.) Plaintiff "is informed and believes, and on that basis alleges, that in Brent Lee's position as the sole manager of RPRO152N3, he controls and or makes decisions for RPRO152N3 as a closely held, family-run company, and is responsible for knowing the company status of RPRO152N3." (*Ibid*.) Plaintiff alleges a series of facts related to their claims that Defendants have violated a number of SJMC sections, among other statutory violations, including those relating to nuisance and unpaid fees. (*Id.* at ¶¶ 11-155.) Plaintiff alleges that Plaintiff cited Defendants for violations of the SJMC, including unlawful vacancy, accumulation of solid waste, dangerous accumulation of refuse, attractive nuisance, blighted property, unsecured building or structure, and substandard housing, among other violations, and Defendants did not pay any fines. (See *ibid*.)

Plaintiff filed its initial complaint on November 15, 2023. Plaintiff filed the FAC on August 16, 2024, alleging causes of action for (1) unpaid citations for building, health, and safety violations; (2) unpaid neglected or abandoned building monitoring fee; (3) account stated; (4) violations of state housing laws; (5) declaratory and injunctive relief for maintaining a public nuisance; (6) cost recovery pursuant to Health and Safety Code sections 13009 and 13009.1; and (7) unlawful and unfair business practices.

[5] The court will refer to these properties collectively as the "Properties."

Plaintiff filed an *ex parte* application for the TRO and OSC on August 27, 2024, the court granted the application on September 12, 2024, and the court held a hearing on the OSC on October 3, 2024 as to why the court should not grant a preliminary injunction. The court continued the OSC hearing until November 5, 2024 to allow both parties additional time to submit briefing. The court set a briefing schedule requiring that Defendants submit an opposition brief to Plaintiff's request for a preliminary injunction by October 17, 2024. To date, Defendants have submitted no opposition brief and the time in which to do so has passed.

II. PRELIMINARY INJUNCTION

a. General Legal Standards

Where a party requests a temporary restraining order, the party may, at the same time, request an order to show cause as to why a preliminary injunction should not be issued. (Cal. Rules of Court, rule 3.1150(a).) In determining whether to issue preliminary injunctive relief prior to trial, by way of temporary restraining order or a preliminary injunction, the "trial court considers two factors: (1) the likelihood the plaintiff will prevail on the merits of her case at trial, and (2) the interim harm the plaintiff is likely to sustain if the injunction is denied as compared to the harm the defendant is likely to suffer if the court grants preliminary injunctive relief. [Citation.]" (*Husain v. McDonald's Corp.* (2012) 205 Cal.App.4th 860, 866-67 (*Husain*); see also *Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251 ["'[T]rial courts should evaluate two interrelated factors when deciding whether or not to issue [a restraining order]. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the [restraining order] were denied as compared to the harm that the defendant is likely to suffer if the [order] were issued.' [Citation.]".) The balancing of harm between the parties "involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo." (*Husain, supra,* 205 Cal.App.4th at p. 867, internal citation and quotations omitted.)

Pursuant to Code of Civil Procedure section 526, subdivision (a), preliminary injunctive relief may be issued "when it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually," or "when it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action." (Code Civ. Proc., § 526, subds. (a)(1)&(a)(2).) "The decision to grant a preliminary injunction rests in the sound discretion of the trial court . . . [b]efore the trial court can exercise its discretion the applicant must make a prima facie showing of entitlement to injunctive relief." (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 138.)

b. Discussion

As already noted, the court granted Plaintiff's ex parte application for a TRO on September 12, 2024. (See Temporary Restraining Order, Order to Show Cause Regarding Preliminary Injunction, and Appointment of Receiver (the "Order"), filed Sept. 12, 2024.) The court found that "[o]n reading the Plaintiff City of San Jose's Ex Parte Application in this matter, the Declarations, and Memorandum of Points and Authorities submitted therewith it

appears to the satisfaction of the Court that this is a proper case for granting a Temporary Restraining Order and an Order to Show Cause for a Preliminary Injunction, and that unless the temporary restraining order prayed for be granted, great or irreparable injury will result to Plaintiff before the matter can be heard on notice." (*Id.* at p. 1:19-24.)

In the Order, the court issued an OSC regarding a preliminary injunction, requiring Defendants to: "show cause, if any they have, why they and their agents, servants, employees, and representatives, and all persons acting in concert or participating with them, should not be enjoined and restrained during the pendency of this action from engaging in committing, or performing, directly or indirectly, any and all of the following acts at the Properties:

a. From engaging in any use of the Properties not consistent with the San Jose Municipal Code, including, using or permitting the Properties to be used for:

i. Being the situs for other nuisance activity as defined under San Jose Municipal Code (SJMC) Section 1.13.050(A)(2).

ii. Any nuisance conditions in violation of California Civil Code Sections 3479 and 3480, California Health and Safety Code Section 17920.3, and SJMC Sections 1.13.040, 17.02.010, 17.04.010 and 17.72.020.

b. From restricting the use and/or occupancy of the Properties pursuant to SJMC Section 17.20.960 to protect the life, limb, safety, health, or property of the occupants and members of the public until the Properties have achieved full compliance with local and state building code."

(Order, pp. 3:27-4:15.)

Defendants submitted no opposition briefing in response to the Order, despite appearing at the OSC hearing scheduled on October 3, 2024 (later continued to November 5, 2024 to allow for opposition and reply briefings from the parties).

Plaintiff, on the other hand, submitted a memorandum of points authorities supporting its ex parte application for the TRO and OSC. Plaintiff contended that "[w]hen a public entity seeks to enjoin the violation of an ordinance, which provides for injunctive relief, and establishes that it is reasonably likely to prevail on the merits, a rebuttable presumption that the potential harm to the public outweighs the potential harm to the defendants." (Memorandum of Points and Authorities in Support of Plaintiff's Ex Parte Application ("MPA"), p. 9:8-12, citing *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72.) According to Plaintiff, only "[i]f the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, [must] the court examine the relative harm to the parties. [Citation.]" (MPA, p. 9:12-14.) Plaintiff provided four declarations, including declarations submitted by an owner of property located directly next to the Properties and a Code Enforcement Inspector for the City of San Jose. (See Declaration of Code Enforcement Inspector Wayne Cirone in Support of the City of San Jose's Ex Parte Application, Declaration of Jay Huang in Support of the City of San Jose's Ex Parte Application.) Plaintiff argued that the condition of the Properties violated numerous sections of the SJMC, "Defendants have failed to comply with

the written notices issued by the City to this date [August 27, 2024]," and "the Properties are substandard and endanger the health and safety of their occupants and the general public." (MPA, pp. 7-8.) Plaintiff further argued Defendants will not suffer "grave or irreparable harm" from the issuance of a preliminary injunction, having "ignored multiple administrative warnings, citations, and orders over the past 7 years" that in turn resulted in "three fire incidents [occurring] at the Properties in the past 9 months." (*Id.* at p. 9:18-25.) According to Plaintiff, an injunction benefits "Defendants immediately by protecting the Properties and neighboring residents from further risk of harm or nuisance." (*Id.* at p. 9:24-25.)

The court found these arguments persuasive in granting the TRO, and, given Defendants have submitted no opposition to the court granting a preliminary injunction on the same basis, the court GRANTS the OSC for a preliminary injunction. (See *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 ["By failing to argue the contrary, plaintiffs concede this issue."].)

III. Conclusion

The order to show cause is hereby discharged. The court GRANTS Plaintiff's request for preliminary injunction.[6]

Plaintiff to prepare formal order.

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[6] California Code of Civil Procedure section 529, subdivision (a) requires that on "granting an injunction, the court or judge must require an undertaking . . ." (See Code Civ. Proc., § 529, subd. (a).) This requirement, however, does not apply to a "public entity or officer described in Section 995.220," which includes a "county, city, or district, or public authority, public agency, or other political subdivision in the state." (See Code Civ. Proc., §§ 529, subd. (b)(3), 995.220, subd. (b)). Therefore, the court will not require such an undertaking here.