SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 05-07-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 05-07-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	24CV433371 OEX	Balboa Capital Corporation vs Italeau, Incorporated, a Delaware corporation et al	All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS video. If all parties appear, the Court will administer the oath and the examination will take place off line. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 2	21CV386441 Hearing: Demurrer	Sean Marzola vs Berkeley Select et al	See Tentative Ruling. The Court will prepare the final order.
LINE 3	23CV413334 Hearing: Demurrer	Muhammad Khan vs Bay Area Criminal Lawyers et al	Continued to June 25, 2024
LINE 4	23CV413334 Motion: Strike	Muhammad Khan vs Bay Area Criminal Lawyers et al	Continued to June 25, 2024
LINE 5	23CV413334 Hearing: Demurrer	Muhammad Khan vs Bay Area Criminal Lawyers et al	Continued to June 25, 2024
LINE 6	23CV417706 Hearing: Demurrer	JAMES MCLEAN et al vs MARK LONG et al	See Tentative Ruling. The Court will prepare the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 05-07-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 7	21CV392689 Motion: Set Aside Default/Judgment	Professional Plastics, Inc. vs Advoque Safeguard LLC et al	This is the third time Defendants have effectively brought this motion. This motion does not rest on any new facts or law which were not previously known to defendants. To the extent new arguments are made (and there is no concession that there are new arguments), they could have been made before. As such, the motion is once again DENIED. Plaintiff shall submit the final order.
LINE 8	23CV410704 Hearing: Petition for Order	Mehryar Mogharrab vs Logan Rand Jennings, et al.	See Tentative Rule. Defendants shall submit the final order.
LINE 9	23CV428330 Hearing: Confirm Arbitration Award	KENNETH WOOD et al vs FORD MOTOR COMPANY et al	This motion by Defendant Price Ford of Turlock is rendered moot by its dismissal from the lawsuit filed April 24, 2024.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 05-07-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 10	2012-1-CV-220303 Hearing: to Enter Renewal of Judgment	Cavalry SPV I, LLC vs O. Williams	The Court expects both sides to appear at the hearing and for Judgment Creditor to advise the court of its investigation into Debtor's claims of fraud. If no fraud found, the original tentative, stated below, is adopted: Good cause having been shown, the Court grants Judgment Creditor's unopposed motion as follows: The Court enters Application for Renewal of Judgment *nunc pro tunc* to December 1, 2022. The Court grants this Application and enters a Renewed Judgment *nunc pro tunc* as follows: Judgment Principal remaining unsatisfied of $21,117.64; remaining accrued and unpaid interest in the amount of $20,989.41; and renewal application fee of $ 60.00 for a total renewed judgment of $42,167.05. Prevailing party to prepare order.
LINE 11	22CV398156 Motion Compel	Central Coast Community Energy et al vs BigBeau Solar LLC	See Tentative Ruling. Defendant shall submit the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 05-07-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 12	21CV390702 Motion: Compel	Paul Medina vs Jimmy Herrera, Jr	Notice appearing proper and good cause appearing, the unopposed motion is GRANTED. Plaintiff shall pay sanctions to defense counsel in the amount of $1735. Both the discovery and the sanctions are due within 20 days of the final order. Defendant shall submit the final order.
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

- oo0oo -

Calendar Line 2
Case Name: *Marzola v. Platinum Roofing, Inc., et al.*
Case No.: 21CV386441

According to the allegations of the third amended complaint ("TAC"), on May 8, 2015, plaintiff Sean Marzola ("Plaintiff") was hired by defendant Platinum Roofing, Inc. ("Platinum") as its Chief Operating Officer in which Plaintiff was to have no equity stake in Platinum, but would receive an annual salary of $120,000 and work 35% of a standard workweek. (See TAC, ¶ 10.) Plaintiff was made by Platinum's CEO to sign certain vendor credit applications that, unbeknownst to Plaintiff, included personal guaranties against both Plaintiff and the CEO. (See TAC, ¶ 11.) On June 30, 2016, defendant Ron Jankov ("Jankov") had Plaintiff sign an indemnification agreement concerning the personal guarantees on the credit application Plaintiff signed. (See TAC, ¶ 12.) Platinum also obtained insurance policies from Berkeley Select and expressly represented that the policy specifically included negotiated carve-outs to cover any liability arising from the breach of any written or oral agreements including the guaranties. (*Id*.) Jankov expressly told Plaintiff that the insurance policy was obtained in order to protect Plaintiff specifically. (See TAC, ¶ 13.)

Within 6 months of his hire, Plaintiff's hours increased to above 35% of a standard workweek, but his wages did not increase. (See TAC, ¶ 13.) Throughout 2016 and 2017, Platinum began to default on its credit obligations. (See TAC, ¶ 14.) On December 7, 2017, Plaintiff was asked to become CEO of Platinum at an annual salary of $210,000. (See TAC, ¶ 15.) Plaintiff performed in an exemplary manner and was promised a $90,000 bonus for obtaining a bank credit that did not require a personal guarantee by the chairman. (See TAC, ¶ 16.) The bonus was never paid but Plaintiff received a raise in 2019 that was ostensibly to cover a portion of the bonus. (See TAC, ¶ 17.) The former CEO was removed as a personal guarantor on the various aforementioned vendor credit applications in November 2018. (See TAC, ¶¶ 18-19.)

In 2020, Ahern Rentals, Inc. filed a complaint against Platinum in the Superior Court of California, County of Santa Clara (Case No. 19CV352644), relating to a dispute arising from the alleged breach of a credit application secured by a personal guarantee executed by Platinum's previous owner, Michael Stephenson. (See SAC, ¶ 81.) Admiral Insurance Company interpreted the same insurance policy in question to cover the alleged breach of contract. (*Id*.)

Plaintiff expended over $85,521.02 of his own funds during the course of his employment for the purchase of building materials for Platinum for which Plaintiff was not reimbursed even though Platinum and Jankov received funds for these materials from the property owners on which work was to be done. (See TAC, ¶ 20.) In January 2019, Plaintiff's father was suffering from a serious medical condition and Plaintiff needed to care for him; however, Platinum and Jankov refused to allow Plaintiff sufficient time off to care for his ailing father. (See TAC, ¶ 21.) Throughout the final quarter of 2019, Plaintiff was having health problems directly caused by or exacerbated by the stress of Plaintiff's job, and defendants Platinum and Jankov knew of these health problems. (See TAC, ¶ 22.) From the middle of 2019 through the middle of 2020, the various venders who had personal guaranties filed at least five lawsuits against Plaintiff, and despite having executed the indemnification agreements, the defendants have not taken any action to protect Plaintiff in those lawsuits, causing Plaintiff to incur additional expenses to defend himself. (See TAC, ¶ 23.) On

November 20, 2019, Platinum went into receivership. (See TAC, ¶ 25.) On February 28, 2020, Platinum ceased operation and Plaintiff was separated from his employment. (See TAC, ¶ 26.) Plaintiff was not paid all wages due to him at the time of his separation of employment. (*Id*.)

Jankov was the controlling owner of Platinum as well as Chairman of the Board of Directors and was the alter ego of Platinum. (See TAC, ¶ 7.) Jankov owned 82.7% of the company and used the disparity in ownership to exercise complete control in which he: undercapitalized Platinum; sought new credit lines that were never repaid and refused to fund them; refused to convert a $4,990,000 loan into equity even though he personally informed banks and other financial institutions that the loan was converted into equity; misrepresented Platinum's financial position and engaged in accounting fraud in order to lose money for tax purposes and to gain a financial benefit; had personal bills paid by Platinum; commingled his own assets with the assets of Platinum; stored items of another company in Platinum's warehouse and required Platinum to purchase wooden vaults to store the other company's items; instructed Plaintiff to send monies between Platinum and other entities controlled by Jankov; instructed Plaintiff to divert accounts receivable directly to Jankov for Jankov to benefit from financial gain at the expense of Platinum's creditors, Plaintiff and other creditors and shareholders; and, refused to follow proper governance rules such as not requiring board resolutions for actions that should have been . (See TAC, ¶ 7.) By doing the above, Jankov willingly and knowingly eliminated any barriers between he and Platinum, causing the two to be one and the same. (See TAC, ¶ 8.)

On December 15, 2023, Plaintiff filed the TAC against Platinum, Jankov, Berkeley Select, and, QBE Specialty Insurance ("QBE"), (collectively "defendants"), asserting causes of action for:

1) Failure to indemnify in violation of Labor Code § 2802 (against Platinum and Jankov);
2) Breach of written contract (indemnification agreement) (against Platinum and Jankov);
3) Unpaid wages (against Platinum and Jankov);
4) Breach of written contract (employment agreement) (against Platinum and Jankov);
5) Breach of the covenant of good faith and fair dealing (against Platinum and Jankov);
6) Violation of the Family Medical Leave Act (against Platinum and Jankov);
7) Conversion (against Platinum and Jankov);
8) Unjust enrichment (against Platinum and Jankov); and,
9) Breach of written contract (against Admiral Insurance Company).

On July 18, 2022, the Court [Hon. Hayashi] granted the substitution of Richard Jankov, as Administrator of the Estate of Ron Jankov ("Estate"), in place of defendant Ron Jankov.

ESTATE'S DEMURRER TO THE TAC

A. Demurrer to the TAC in its entirety

Defendant Estate demurs to the TAC, arguing that Plaintiff fails to allege sufficient facts to support the allegation that Ron Jankov was the alter ego of Platinum because: the fact

that Jankov was a majority shareholder with a controlling power over Platinum is insufficient to establish alter ego; the allegation regarding undercapitalization is false as demonstrated by Platinum's articles of incorporation; the allegations regarding Jankov's loan are insufficient to impose alter ego liability; the allegations regarding Jankov's storage of another company's furnishings and purchasing of vaults for another company fails to demonstrate a unity of interest; the allegations regarding transferring of monies are insufficient to impose alter ego liability; and, the allegations regarding corporate governance do not support alter ego liability. (See Estate's memorandum of points and authorities in support of demurrer ("Estate's memo"), pp.10:12-23, 11:1-27, 12:1-27, 13:1-24, 14:1-27, 15:1-21.)

As stated in the Court's prior order, "[o]rdinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations." (*Sonora Diamond Corp. v. Super. Ct. (Sonora Union High School Dist.)* (2000) 83 Cal.App.4th 523, 538.) "A corporate identity may be disregarded--the 'corporate veil' pierced--where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation." (*Id*.) "The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds." (*Id*.) "To recover on an alter ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415.)

> In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other. [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used. [Citation.]

(*Id. at pp.*538-539; see also *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1341 (stating same); see also *Cam-Carson, LLC v. Carson Reclamation Authority* (2022) 82 Cal.App.5th 535, 549 (regarding demurrer, stating same).)

Estate first argues that Jankov's controlling power over Platinum is not enough for alter ego liability, citing *Leek*, *supra*, which stated that "[a]n allegation that a person owns all of the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity." (*Leek*, *supra*, 194 Cal.App.4th at p.415.) While true, it is nevertheless a consideration.

Estate's next argument that the allegation regarding undercapitalization is false because the articles of incorporation establish that Jim Williams incorporated Platinum is premised on Estate's belief that "it is an entity's capitalization at the time of formation that is important for alter ego purposes," is without merit. If a corporation is set up without sufficient capital, that certainly gives reason for the application of the alter ego doctrine. However, that does not preclude application of the alter ego doctrine where a subsequent owner of the corporate entity decides to thereafter deprive the corporation of assets so that it will avoid payments to its creditors. Estate quotes *Carlesimo v. Schwebel* (1948) 87 Cal.App.2d 482, in which the court noted that "[i]f a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability." (*Id*. at p.492.) Estate focuses on the word "organized," but ignores the remainder of the sentence indicating application of the alter ego doctrine for carrying on business without substantial capital. Estate's interpretation of *Carlesimo* is that an individual could obtain a controlling ownership of a corporate entity, plunder the corporation's assets for his or her personal benefit so as to defraud any corporate creditors and be nonetheless immune from any claims because the corporation was at one time initially capitalized with assets that he or she thereafter used for his own benefit in disregard of any corporate separateness. Estate is incorrect. Estate's request for judicial notice is DENIED. (See *Aquila, Inc. v. Super. Ct. (City and County of San Francisco)* (2007) 148 Cal.App.4th 556, 569 (stating that "[a]lthough a court may judicially notice a variety of matters… only relevant material may be noticed"); see also *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 (stating that "judicial notice… is always confined to those matters which are relevant to the issue at hand").)

Estate also argues that while the TAC alleges that Jankov commingled funds, instructed Plaintiff to divert Platinum's accounts receivable to Jankov, and to send monies from Platinum to other entities controlled by Jankov, these allegations do not demonstrate that there was in fact diversion of accounts receivable or sending of monies to other entities, and does not allege whether the transfers of monies to the other entities were legitimate. However, these are not matters that will be resolved on demurrer. The TAC alleges that these allegations demonstrate that Jankov was an alter ego of Platinum and whether these actions demonstrate an inequitable result if the acts in question are treated as those of the corporation alone will be determined by a trier of fact.

Estate lastly argues in its supporting memorandum that the allegation that Jankov would not follow proper corporate governance procedures are not pled with sufficient particularity, and that Plaintiff cannot have been harmed since he was Platinum's CEO and "could have taken corrective action." (See Estate's memo, p.15:13-21.) However, Estate cites to no authority demonstrating that alter ego liability is unavailable where an officer of the corporation could have taken corrective action, or that a plaintiff must allege each instance of the disregarding of corporate formalities.

Estate's demurrer to the TAC in its entirety is OVERRULED.

B. Demurrer to second cause of action for breach of the indemnification agreement

Estate argues that the second cause of action for breach of the indemnification provision fails to state facts sufficient to constitute a cause of action because the provision states that it only applies "[i]f Indemnitee was or is a party or is threatened to be made a party to any Proceeding… by reason of Indemnitee's Corporate Status," and Plaintiff was sued in personal capacity as a guarantor of Platinum. (See Estate's memo, p.17:13-19; see also TAC, exh. A, § 3 ("Agreement to Indemnify"), subpara. (b).) The agreement defines "Corporate Status" as "the status of a person who is serving or has served… as a director of the Company, including as a member of any committee thereof… in any capacity with respect to any employee benefit plan of the Company or the participants or beneficiaries of any employee benefit plan of the Company, including as a deemed fiduciary thereto, or… as a director, manger, partner, trustee, officer, employee, or agent of the Company or any other Entity at the request of the Company." (TAC, exh. A, § 1 ("Definitions"), subpara. (b).)

Here, Estate is correct that the TAC specifically alleges that Plaintiff was made to sign "a personal guarantee against both Plaintiff and the CEO." (TAC, ¶ 11.) A lawsuit stemming from Plaintiff's personal guarantee would not be "by reason of Indemnitee's Corporate Status," and Estate cannot be found liable for the breach of the indemnification agreement. However, it is also alleged that Jankov expressly represented that the indemnification agreement was to protect Plaintiff in his capacity as a guarantor. (See TAC, ¶ 12.) As it is possible that Plaintiff may instead state facts sufficient to constitute a cause of action for fraudulent inducement rather than breach of the indemnification agreement, Estate's demurrer to the second cause of action is SUSTAINED with 10 days leave to amend.

C. Demurrer to the seventh cause of action for conversion

Estate argues that the seventh cause of action fails to state facts sufficient to constitute a cause of action for conversion since he is seeking payment of wages owed and the California Supreme Court has determined that "a conversion claim is not an appropriate remedy… for wage nonpayment." (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1163.) However, the seventh cause of action alleges that Plaintiff made purchases using his own personal monies and that the defendants failed to reimburse him for those expenses. (See TAC, ¶¶ 20, 67.) The seventh cause of action does not concern wage nonpayment.

Estate next argues that while the TAC alleges that Plaintiff made certain purchases on behalf of Platinum, the TAC "does not allege Platinum's customers owed him money directly, or that they paid any money to Platinum in which Marzola had a possessory interest." (Estate's memo, p.16:22-25.) Estate cites to no legal authority supporting its assertion that a corporation that authorizes an employee to make certain purchases of materials and then receives funds from its customers for the costs of those materials and then refuses to reimburse the employee for his purchases made with his personal credit cards cannot be held liable for conversion. In its reply, Estate makes no further argument.

Estate's demurrer to the seventh cause of action is OVERRULED.

D. Demurrer to the eighth cause of action for unjust enrichment

Estate argues that the eighth cause of action for unjust enrichment fails to state facts sufficient to constitute a cause of action because "[t]he claim does not exist under California law." (Estate's memo, p.19-21.) However, courts have indeed recognized the claim for unjust enrichment, noting that "the elements for a claim of unjust enrichment [are]: receipt of a benefit and unjust retention of the benefit at the expense of another." (*Lectrodryer v. Seoulbank* (2000) 77 Cal.App.4th 723, 726.)

Estate's demurrer to the eighth cause of action is OVERRULED.

E. Estate's new arguments in reply

Estate makes a number of new arguments not raised in its initial memorandum. (See Estate's reply brief, pp.3:17-28, 4:1-28, 5:1-28, 6:1-18.) "Arguments presented for the first time in an appellant's reply brief are considered waived." (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292, fn. 6; see also *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1064, fn. 2 (stating that "[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument").) The Court declines to consider the new arguments.

The Court will prepare the Order.

- oo0oo -

Calendar Line 6
Case Name: *McLean, et al. v. Long, et al.*
Case No.: 23CV392689

I. Factual and Procedural Background

Plaintiffs James McLean ("McLean") and Lara Druyan ("Druyan")(collectively, "Plaintiffs") bring this action against Prime Impact Cayman, LLC ("Prime Impact"), Mark Long ("Long"), and Michael Cordano ("Cordano")(collectively, "Defendants").

Long and Cordano are the Operating Members of Prime Impact and together they own more than 25% of Prime Impact. (First Amended Complaint ("FAC"), ¶ 6.)

In the summer of 2020, Long and Cordano invited Plaintiffs to participate as investors in Prime Impact. (FAC, ¶ 8.) On or around September 1, 2020, the parties entered into an agreement ("the Agreement") whereby Plaintiffs became Investment Members of Prime Impact and McLean became a manager of Prime Impact and sat on its Board of Directors. (*Id.* at ¶ 9.) The Agreement contains no provisions by which an Investment Member's status can be removed. (*Id.* at ¶ 11.) Plaintiffs understood that as Investment Members, they would be consulted regarding any mergers with target companies. (*Id.* at ¶ 12.) Plaintiffs invested approximately $2.8 million in Prime Impact and were deemed to be Unitholders pursuant to the terms of the Agreement. (*Id.* at ¶ 10.)

In or around April 2022, McLean was made aware that Prime Impact had signed a letter of intent to merge with a specific target company ("Company 1"). (FAC, ¶ 13.) McLean advised Long and Cordano that he disapproved of Company 1. (*Ibid*.)

In or around May 2022, Long and Cordano communicated to Plaintiffs on a call ("the capital call") that Prime Impact required a capital contribution in the amount of 70% of their originally invested capital, an additional $7 million of funding, to move forward in the process with Company 1. (FAC, ¶ 14.) The false representations and incomplete disclosures are reflected in emails from Long dated May 1 and May 6, 2022. (*Ibid*.)

Defendants were aware that Plaintiffs disliked Company 1, but misrepresented that entity as the target, as well as the need for 70% of the original capital contribution to convince Plaintiffs to decline to further invest. (FAC, ¶ 15.) Defendants also concealed that the exclusivity agreement included in the letter of intent with Company 1 had expired the week before the capital call. (*Ibid*.) Thereafter, Plaintiffs declined to make the additional contributions. (*Id.* at ¶ 16.)

In or around June 2022, Long and Cordano conveyed that Prime Impact had "'crammed down'" the interests belonging to Plaintiffs and they considered Plaintiffs' interests in Prime Impact to be forfeited. (FAC, ¶ 17.)

Subsequently, Plaintiffs learned that only approximately 20% of the originally invested capital was actually required, not 70%, and that Prime Impact was in negotiations with an entirely different company than the one described during the capital call. (FAC, ¶ 18.) Then, in a press release dated January 30, 2023, Prime Impact announced a merger between Cheche Technology Inc. ("Cheche") (*Id.* at ¶ 19.)

Had Plaintiffs known that the target company was Cheche, and not Company 1, and had they known the actual size of the capital contributions, they would have made additional contributions and would have made approximately $5 million on their investment. (FAC, ¶¶ 22, 23.)

On or around March 17, 2023 and April 18, 2023, Plaintiffs requested production of records in communication with Defendants. (FAC, ¶¶ 25-26.) Both times, Defendants refused to comply with the requests. (*Ibid*.)

On December 6, 2023, Plaintiffs filed their FAC, asserting the following causes of action against all defendants:

1) Declaratory Relief;
2) Violation of Corporations Code § 17704.10;
3) Fraud – Misrepresentation; and
4) Fraud – Concealment.

On January 29, 2024, Defendants filed a demurrer to each cause of action. On March 19, 2024, the Court (Hon. Rosen) granted the parties' joint stipulation dismissing the first and second causes of action with prejudice. On April 24, 2024, Plaintiffs filed an opposition to the demurrer and addressed only the third and fourth causes of action for fraud.[1]

II. Request for Judicial Notice

In support of their demurrer, Defendants request judicial notice of the following:
1) April 2022 Prime Impact Process Update (Ex. 1);
2) May 2022 Prime Impact Email Update and Presentation (Ex. 2);
3) July 8, 2022 Amended Prime Impact Agreement (Ex. 3);
4) McLean's 2022 Schedule K-1 for Prime Impact (Ex. 4); and
5) Druyan's 2022 Schedule K-1 for Prime Impact (Ex. 5).

The request for judicial notice of Exhibits 1-2 is DENIED. As Plaintiffs note in opposition to the request for judicial notice, where facts reflected in a document are subject to dispute, judicial notice is not proper. (See e.g., *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 ["A matter is ordinarily subject to judicial notice only if the matter is reasonably beyond dispute."].) Here, Plaintiffs dispute the accuracy of the documents. Accordingly, the Court may not properly take judicial notice of the documents.

The request for judicial notice of Exhibits 3-5 is DENIED. As Plaintiffs also note in opposition, these documents appear to only be relevant to the first two causes of action. The parties have since stipulated to dismissing the first two causes of action with prejudice. Therefore, it is unnecessary to take judicial notice of Exhibits 3-5. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

[1] Given that the Court has granted the joint stipulation, it will only address the remaining two fraud causes of action in this order.

III. Demurrer

a. Legal Standard

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

b. Fraud Generally

To state a cause of action for fraud, Plaintiffs must allege: 1) a misrepresentation (false representation, concealment, or nondisclosure); 2) knowledge of falsity; 3) intent to defraud; 4) justifiable reliance; and 5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

"In California, fraud must be pled specifically; general and conclusory allegations do not suffice. . . . This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered." (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184 [internal quotations, citations, and emphasis omitted].)

i. Third Cause of Action – Fraud-Misrepresentation

Defendants argue the third cause of action fails to allege fraudulent misrepresentation because 1) it does not allege any misrepresentation with the requisite particularity; and 2) it does not allege the requisite intent to defraud.

1. Allegations of Fraudulent Misrepresentation

Defendants first assert that Plaintiffs do not allege any facts indicating that as of the capital call, Company 1 was *not* the target company and that Plaintiffs' "mere speculation that Cheche may have been the target prior to [the capital call] is precisely the type of conjecture that is improper to support a fraud claim." (Demurrer, pp. 12:23-13:3.)

In opposition, Plaintiffs contend they have sufficiently alleged that Defendants misrepresented the identity of the target company and the amount of money required for Defendants to continue with the process. (Opposition, p. 12:25-26, citing FAC, ¶ 38.) Plaintiffs further argue they provided detailed allegations for their belief that the representations are false, including that McLean made Defendants aware of Company 1's poor performance; Defendants were required to consult with McLean, a board member, on decisions about acquisition targets; Defendants went through with the acquisition anyway; and Plaintiffs subsequently learned that the amount of required capital was substantially lower than what was represented and that the target company was different. (FAC, ¶¶ 13-15, 18.)

The Court finds these allegations of Defendants' misrepresentations to be sufficient. "For purposes of a general demurrer to a complaint, all material fact allegations must be taken as true. Whether the plaintiff will be able to prove the pleaded facts is irrelevant to ruling upon the demurrer." (*Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 609-610.) Thus, whether Plaintiffs were told that Company 1 was only a "potential" company or whether the

ultimate costs were more or less, as Defendants contend in their demurrer, is outside of the pleadings and not subject to judicial notice. Moreover, "less particularity is required where the defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff." (*Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 474; see also *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 236.) In this case, Plaintiffs allege Defendants misrepresented the company they were targeting and the amount of money that would be required in order to "cram[] down" the interests belonging to Plaintiffs. (See FAC, ¶¶ 17, 22, 38, 39.) Thus, Plaintiffs sufficiently allege Defendants made fraudulent misrepresentations and the Court declines to sustain the demurrer on this basis.

2. Requisite Intent to Defraud

"Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 482.)

In general, "it is not sufficient to allege fraud or its elements upon information and belief, unless the facts upon which the belief is founded are stated in the pleading." (*Dowling v. Spring Valley Water Co*. (1917) 174 Cal. 218, 221; see also *Woodring v. Basso* (1961) 195 Cal.App.2d 459, 464-465.)

Defendants argue Plaintiffs do not allege that they acted with the required intent and that Plaintiffs rely solely on allegations made under "information and belief" to allege that Defendants intended to induce Plaintiffs into not making the requested capital contribution. (Demurrer, p. 14:16-19.)

In opposition, Plaintiffs do not dispute that they have alleged on information and belief that Defendants knew the representations were false when made and intended to induce Plaintiffs into not contributing. However, Plaintiffs argue, they have also provided detailed allegations as to the *basis* for their belief that these representations were false including that McLean informed Defendants about Company 1's poor performance; Defendants signed a letter of intent to merge with Company 1 without seeking McLean's approval as a board member, and that Defendants knew Plaintiffs disliked Company 1 but misrepresented the target company and costs to convince Plaintiffs to decline to invest. (Opposition, p. 13:8-17, citing FAC, ¶¶ 13-15, 18.) Based on this, the Court finds the allegations based on information and belief are supported by relevant facts. (See e.g., *Schessler v. Keck* (1954) 125 Cal.App.2d 827, 835 ["Such allegations, which apply to matters peculiarly within the knowledge of the defendants, may properly be based upon information and belief."]; *Pridonoff v. Balokovich* (1951) 36 Cal.2d 788, 792 ["Plaintiff may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe that the allegations are true."].)

Here, the Court finds Plaintiffs have sufficiently alleged Defendants' intent to induce Plaintiffs into not making the capital contributions. Accordingly, the Court declines to sustain the demurrer on this basis.

Based on the foregoing, the demurrer to the third cause of action is OVERRULED.

ii. Fourth Cause of Action – Fraud-Concealment

"As with all fraud claims, the necessary elements of a concealment/suppression claim consist of (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th

1178, 1185-1186 [internal quotations omitted].) Additionally, "[a] fraud claim based upon the suppression or concealment of a material fact must involve a defendant who had a legal duty to disclose the fact." (*Id.* at p. 1186.)

In support of their demurrer to the fourth cause of action, Defendants argue Plaintiffs fail to plead particularized facts alleging that Defendants intended to pursue Cheche as the real target when the capital call was made and that they have not pled with particularity that information was withheld from them or that they would have acted differently had they known the information. (Demurrer, p. 15:2-3, 16-18.)

In opposition, Plaintiffs assert that the FAC makes clear that Defendants concealed that they had no intention of pursuing Company 1 and that immediate capital was unnecessary, and they concealed that the actual target Defendant intended to pursue at the time of the capital call was Cheche. (Opposition, p. 17:9-12, citing FAC, ¶¶ 18-22.) Plaintiffs also argue they have sufficiently alleged that had they been made aware of all of the facts, they would have made the capital contribution as requested. (*Id.* at p. 17:17-19, citing FAC, ¶ 48.)

The Court again finds Plaintiffs' allegations to be sufficient at the demurrer stage. Here, the FAC alleges Defendants concealed the true target company, the amount of capital needed, and the fact that the exclusivity agreement with Company 1 had expired prior to the capital call. (FAC, ¶¶ 14-15, 45, 48.) Additionally, Plaintiffs allege that Defendants wanted to push them out of Prime Impact, Defendants knew that Plaintiffs did not think Company 1 was a good company, and had they been made aware that Company 1 was not the target company, and that the true company required less capital contribution, they would have made the capital contribution requested. (*Id.* at ¶¶ 22, 47.) Thus, Plaintiffs have alleged particularized facts sufficient to withstand a demurrer.

As such, the demurrer to the fourth cause of action is OVERRULED.

IV. Conclusion and Order

The demurrer is OVERRULED in its entirety. The Court shall prepare the final order.

- oo0oo -

Calendar Line 8
Case Name: Mehryar Mogharrab v. Logan Rand Jennings, et al.
Case No.: 23CV410704

Logan Jennings ("Defendant") petitions for an order relieving him from the provisions of Government Code § 945.4, which requires that a party file a claim with a public entity before being able to bring a cause of action against such public entity for money or damages.

FACTS

Defendant was riding his bicycle and collided with Mehryar Mogharrab ("Plaintiff") who was a pedestrian at the time, on May 5, 2021. On January 31, 2023, Plaintiff sued Defendant for negligence. On April 13, 2023, Defendant presented a claim against the Courty of Santa Clara ("County") for personal injuries that he sustained in the bicycle accident with Plaintiff. Defendant specified that the County was liable pursuant to Govt. Code § 835 (dangerous condition) and it indicated that that Plaintiff, an employee of the DOT, was involved in the injury to Defendant. See Ex. A attached to Defendant's Petition and Ex. B to Botha Decl. That same day, Defendant presented a claim against the State Department of Transportation ("DOT"). This claim was for both personal injuries and property damage related to the traffic accident of May 5, 2021. In this claim, in answering why Defendant believed DOT was responsible, Defendant wrote "Mr. Mogharrab was an employee of the California Department of Transportation at the time of the accident." See Ex. B attached to Defendant's Petition. On April 14, 2023, Defendant filed a cross-complaint against the County of Santa Clara, the CA Department of Transportation, Plaintiff, and Stanford. Defendant's cross-complaint alleges causes of action against all cross-defendants for implied equitable indemnity, comparative contribution, equitable indemnity, declarative relief, and personal injury.

On May 19, 2023, the County sent Defendant letter indicating that his claim was being returned without action because it was not presented within six months of the accident. The letter advised that Defendant's "only recourse" was "to apply without delay to the County of Santa Clara for leave to present a late claim," citing Govt. Code §§ 911.4 , 912.2 and 946.6. DOT appears not to have responded to defendant's claim. Its refusal to act on the application is deemed a rejection. Govt. Code § 911.6(c). Defendant never applied pursuant to 911.4 to make a late claim with either the County or DOT,

RELEVANT LAW

"Before suing a public entity, the plaintiff must present a timely written claim for damages to the entity. (Gov. Code, § 911.2; *State of California v. Superior Ct.* (2004) 32 Cal.4th 1234, 1239 (*Bodde*), but see Gov. Code, § 905 [itemized exceptions].)" (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208 (*Shirk*) [overruled by statute on other grounds].) The purpose of the Government Claims Act (Gov. Code § 900 et seq.) is to apprise the governmental body of an imminent legal action so that the entity may investigate and evaluate the claim and, where appropriate, avoid litigation by settling meritorious claims. (*Krainock v. Superior Ct.* (1990) 216 Cal.App.3d 1473, 1477; see also *Gehman v. Superior Ct.* (1979) 96 Cal.App.3d 257, 262.) "Timely claim presentation is not merely a procedural requirement, but

is, as this court long ago concluded, a condition precedent to plaintiff's maintaining an action against defendant." (*Shirk*, *supra*, 42 Cal.4th at p. 209 [internal citations and quotations omitted], citing *Bodde, supra,* 32 Cal.4th at pp. 1240, 1245.)

"Claims for personal injury must be presented not later than six months after the accrual of the cause of action, and claims relating to any other cause of action must be filed within one year of the accrual of the cause of action. Accrual for purposes of the [Government Claims] Act is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigants." (*Willis v. City of Carlsbad* (2020) 48 Cal.App.5th 1104, 1118 [internal citations and quotations omitted].) "Only after the public entity's board has acted upon or is deemed to have rejected the claim may the injured person bring a lawsuit alleging a cause of action . . . against the public entity." (*Ibid*. [quotations omitted].) "If a claim is not timely presented, a written application may be made to the public entity for leave to present such claim." (*Id*. at p. 1119.)

Government Code section 946.6 provides that in the event "an application for leave to present a claim is denied [...] a petition may be made to the court for an order relieving the petitioner from Section 945.4." Defendant seeks such relief.

ANALYSIS

Defendant filed claims against the County and DOT on April 13, 2023. (Ex. A and B attached to Petition.) Defendant first claims that his claims to the County and DOT were timely because his claims did not accrue until he learned that Plaintiff was suing him, which was March 3, 2023.[2] To determine whether this is true it is necessary to examine what claims Defendant made.

NEGLIGENCE

To the County, Defendant asserted a claim of dangerous condition, under Gov. Code § 835. He listed injuries he suffered to his body. Ex. A attached to Petition. Nowhere in the claim, did Defendant mention any claims for equitable indemnity, comparative contribution, or declaratory relief. To DOT, Defendant's claim include an explanation for late claim, and stated it was for injuries to his person and to his bicycle from a collision with a DOT employee.

The Claims Act states that a person has six months from "the accrual of the cause of action" to present a tort claim. Govt. Code § 911.2. Accrual for purposes of the Claims Act is specifically defined. Gov. Code § 901 states "the date of the accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations."

[2] Both the County and Defendant say the date of Defendant's receipt of the complaint was both on March 3, 2023 and May 3, 2023. It seems it must have been March 3, 2023, since Defendant's cross-complaint was filed in April 2023.

The date of accrual for defendant's claim of dangerous condition or negligence, began to accrue on the date of the accident. The delayed discovery rule does not apply to Defendant's claims of personal injury to him. He knew the date of the accident of his injury, and therefore, the cause of action accrued on May 5, 2021. Defendant claims that he was "blamelessly ignorant" of his causes of action against the County and DOT because Plaintiff Mogharrab did not file his Complaint until January 31, 2023, and he was not served until March 3, 2023. Petition, p5. But Plaintiff's complaint against Defendant is not relevant to Defendant's suit against the public entities for his own personal injuries. As such, the Court declines to apply the delayed discovery rule to his negligence causes of action. (See *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111 ["Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that *plaintiff must go find the facts; she cannot wait for the facts to find her*"][emphasis added]; see also *Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 1431 ["plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation"]; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 80 ["Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury."].)

In his Reply, Defendant concedes that the time has run on his negligence claims and clarifies that he makes his delayed discovery claims only with respect to his indemnity and comparative contribution claims. See Reply, p3.

INDEMNITY CAUSES OF ACTION

Defendant need not rely on the delayed discovery rule with respect to his claims for equitable indemnity. Those claims did not accrue until March 3, 2023, when he was served with Plaintiff's complaint. Under Gov. Code § 901, "the date upon which a cause of action for equitable indemnity or partial equitable indemnity accrues shall be the date upon which a defendant is served with the complaint giving rise to the defendant's claim for equitable indemnity or partial equitable indemnity against the public entity." Defendant filed his claims against the County and DOT on April 13, 2023, which is within the time constraints.

Both the County and DOT argue that Defendant's claims for indemnity must be denied because the claims filed did not include claims for indemnity. The problem, cross-defendants allege, is not that Defendant filed a late claim for indemnity and comparative contribution, but that he failed to file a claim at all.

If a claim provides the public entity with timely notice of the nature of the claim, a court may hold that the claim substantially complied with statutory requirements for a valid claim and that it should therefore be treated as valid, despite technical deficiencies. (*Connelly v. County of Fresno* (2006) 146 Cal.App.4th 29, 38.) Under the substantial compliance test, a claim under California Government Code section 910 is sufficient if (1) there is "some compliance with all of the statutory requirements"; and (2) the claim discloses sufficient information to enable the public entity to adequately investigate the merits of the claim so as to

settle the claim, if appropriate. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 456-57.); see also *Loehr v. Ventura County Community College Dist.*, (1983) 147 Cal. App. 3d 1071, 1083. Only where there has been a "complete shift in allegations, usually involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim" have courts generally found the complaint barred. *Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal. 4th 441, 447. Where the complaint merely elaborates or adds further detail to a claim, but is predicated on the same fundamental actions or failures to act by the defendants, courts have generally found the claim fairly reflects the facts pled in the complaint. *Id.*

Defendant's claim to the County mentions his theory of liability – Govt. Code § 835. While it mentions that a DOT employee was involved in the accident, the claim presented is one in which the County is liable for a dangerous condition causing injury to Defendant. The claim only mentions Jenning's injuries and mentions nothing of Plaintiff's injuries, nor even mentions Plaintiff's suit, on which the claim of indemnity would rely. With respect to the claim made on DOT, Defendant does not specify his theory of liability, as he did in the County claim, but he describes the damages as his physical injuries and damage to his bicycle. He mentions nothing of damages stemming from any injury to the DOT employee, and does not mention Plaintiff's suit against him.

While it appears that Defendant did try to comply with the claims act, the question is whether he substantially complied. Were his claims sufficient to enable the County and DOT to make an adequate investigation of the merits of an indemnity or comparative contribution claim? There is nothing to suggest that the claims are based on a theory of indemnity or comparative contribution. Such theories shift the allegations as to who is liable and for what, as well as shift the timeliness of Defendant's claims from untimely ones, to timely ones. The Court does not find that Defendant's claims substantially complied with the notice provisions of the Claims Act, as Defendant's claims could not have and did not put either public entity on notice that it would need to investigate the claims made by Plaintiff Mogharrab and its liabilities for them. In fact, Defendant misled the State as to whether he was asserting an indemnity claim by stating the claim was late, when a claim of indemnity would not have been late. Defendant's inexplicable failure to include that he was making claims for indemnity is fatal to his claims against both the County and DOT.

Because Defendant made no claim for indemnity or comparative contribution within the time period proscribed, he is not eligible for relief under § 946.6 and § 945.4. The petition must be DENIED. The claims against the County and DOT in Defendant's cross-complaint must be dismissed with prejudice. Defendants shall submit the final order.

- oo0oo -

Calendar line 11
Case Name: Central Coast Community Energy, et al. v. BigBeau Solar
Case No.: 22CV398156

Plaintiff brings a motion to compel further responses to Special Interrogatories 12, 16, 17, and 27-31. Defendant opposes the motion.

SI 12

Plaintiff seeks the "words spoken" by plaintiff during negotiations on July 18, 2018. Defendant objects because the request is overbroad, unduly burdensome, and duplicative. The Court agrees that the request is overbroad in that it asks for a recitation of everything Plaintiff said during an all-day meeting on July 18, 2018. Plaintiff makes no attempt to limit the subject of the matter of the statements to anything relevant, which it could have done. As such the request is DENIED.

SI 16 and SI 17

In paragraph 22 of its cross-complaint, Defendant states that it "negotiated for a contractual mechanism to minimize its losses, to terminate and simply get out of the PPAS on mutually agreed and clear terms." In SI 16 and 17, Plaintiff seeks any statements made by either Defendant or Plaintiff that was made regarding "contractual mechanism to terminate and simply get out of the PPAs on mutually agreed and clear terms" on each date listed in response to Interrogatory No. 14. In essence, it seems Plaintiff seeks the statements Defendant relies on in making its assertion in its cross-complaint. The Court does not agree that a transcript is requested or necessitated. Because the requests as written could include inadmissible and irrelevant statements, the Court will limit the requests to: statements Defendant relies on or intends to rely in making the claim that it "negotiated for a contractual mechanism to minimize its losses, to terminate and simply get out of the PPAs on mutually agreed and clear terms." These requests are GRANTED IN PART.

SI 27

The Court agrees that as written the request is overbroad as it is not limited in time, nor does it limit what it means by communications "regarding commercial operation of the Facility." Although that term may be defined in the PPA, that definition is not incorporated into the request and in any event, what is significant is whether the Commercial Operation Date was achieved prior to termination, not commercial operation in general. The request is DENIED.

SI 28-31

These interrogatories concern whether Defendant "granted, pledged, assigned or otherwise committed to any PERSON, any of [its] rights to the FACILITY, including without limitation, present or future energy generation, Resource Adequacy Credits, Green Attributes or Capacity Utilization, to any other entity on or after October 25, 2018." Defendant objects, claiming primarily that the interrogatories are irrelevant to the suit which is about whether Defendant property terminated the PPAs on May 4, 2022. Plaintiff counters that whether

Defendant made such an assignment may implicate the default provisions of the PPA, and that if Defendant were in default prior to May 4, 2022, then Defendant would have lost whatever right it had to terminate the PPAs. Defendant counters that the Complaint is not based on breach of contract and does not request that the Court declare a default based on this conduct. While this is so, such a claim ignores the fact that Defendant has brought a cross-complaint in which it seeks a determination that it had the "right to terminate the PPAs at any time before the Commercial Operation Date." (Cross-Complaint paragraph 40; see also paragraph 42). Plaintiff's answer to the cross-complaint specifically alleges that its obligations were excused by Cross-Complainant's breach of the alleged contract. See Answer to Cross-Complaint paragraph 3. As such, the Court grants the requests but only for the period of time from October 25, 2018 to May 4, 2022. The Requests are GRANTED IN PART.

Because the Court finds that Defendant's objections were largely justified, no sanctions are awarded.

-oo0oo-