SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: October 10, 2023 TIME: 9:00 A.M.

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

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

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

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml.

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	2015-1-CV-285674	Angie Elconin v. Thanh Ha Bui	Order of examination: parties to appear (and to address debtor's counsel's declaration of September 13, 2023).
LINE 2	19CV354233	Todd Henry Jarvis v. State Farm General Insurance Company et al.	Click on LINE 2 or scroll down for ruling.
LINE 3	20CV373220	James O'Brien v. Rohith Polishetty	Click on LINE 3 or scroll down for ruling.
LINE 4	22CV395705	Kyle R. v. Patrick Clyne, M.D. et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	19CV348286	Paul S. White v. Ford Motor Company et al.	OFF CALENDAR
LINE 6	20CV367955	Honghua Li v. Hailing Yu et al.	Click on LINE 6 or scroll down for ruling.
LINE 7	20CV369381	Thomas Malgesini v. Gregory Malley	Motion to be relieved as counsel: it appears that this motion is now moot, as there are substitutions of counsel on file, as of 10/4/23. If that is incorrect, the parties should appear; otherwise, the court will take this OFF CALENDAR and strike the proposed order.
LINE 8	21CV380559	Judith Brendell Wormley v. Alonso Artigas et al.	Click on LINE 8 or scroll down for ruling.
LINE 9	20CV362817	Fang Xia v. Park Townsend Homeowners Association	Click on LINE 9 or scroll down for ruling.
LINE 10	22CV403647	Kateryna Pomogaibo v. Weeklys, Inc.	Click on LINE 10 or scroll down for ruling.

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LINE 11	23CV415865	Travelers Property Casualty Company of America v. Telgian Corporation et al.	The application of Mark W. Moran to appear *pro hac vice* on behalf of Travelers Property Casualty Company of America is unopposed. Good cause appearing, the court GRANTS the motion. To the extent that a proposed order has not already been submitted, the moving party will submit one for the court's signature.

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Calendar Line 2
Case Name: *Todd Henry Jarvis v. State Farm General Insurance Company et al.*
Case No.: 19CV354233

I. BACKGROUND

This is an insurance coverage dispute in which Plaintiff Todd Henry Jarvis ("Plaintiff" or "Jarvis") has sued Defendant State Farm General Insurance Company ("State Farm") and others in connection with property damage from a water leak that occurred in September 2018 at Jarvis's property, located at 509 Monterey Avenue in Los Gatos, California.

Jarvis filed his complaint on August 30, 2019. It states four causes of action: (1) Breach of Contract (the insurance policy, alleged against State Farm only); (2) Breach of the Implied Covenant of Good Faith and Fair Dealing (insurance bad faith, alleged against State Farm only); (3) Negligence (against all defendants); and (4) Unfair Business Practices (against all defendants). While the specific policy for the subject property is mentioned in the complaint, there are no attached exhibits. *This is still the operative complaint*.

More than a year later, on November 20, 2020, the parties submitted a stipulation to the court, asking it "to file" a proposed first amended complaint attached to the stipulation. As a document filed as an exhibit cannot be re-filed, this court (Judge Barrett) annotated the first page of the order with the statement that the "FAC must be separately filed." Judge Barrett also stated that "leave is granted for Plaintiff to file the First Amended Complaint within 15 days of the filing of this Order." Despite these instructions, no first amended complaint has ever been filed in this case in the nearly three years since Judge Barrett issued his order. This means that the motion presently before the court—State Farm's motion for summary judgment, which is expressly directed to a "First Amended Complaint"—is procedurally defective and cannot be heard at this time. A summary judgment motion is necessarily defined and limited by the pleadings, which "'set the boundaries of the issues to be resolved at summary judgment.'" (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250.)[1]

II. PLAINTIFF'S REQUEST FOR DENIAL OR CONTINUANCE BECAUSE OF DISCOVERY ISSUES

Jarvis filed his opposition to the current motion on September 26, 2023. In it, he asserts that the motion must be denied or continued pursuant to Code of Civil Procedure section 437c, subdivision (h). As this issue may also obviate the need for the court to consider the other issues presented by the motion at this time, the court addresses it first.

Section 437c(h) states:

> If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court

[1] Footnote 1 in State Farm's June 28, 2023 Notice of Motion, as well as footnote 1 in State Farm's Notice of Motion for its previously filed motion for summary judgment (filed on January 20 and withdrawn on June 7) both make clear that State Farm is well aware that Jarvis never followed the court's order to file the amended complaint.

> shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.

(Code Civ. Proc., § 437c, subd. (h).)

Jarvis's opposition asserts the following:

> State Farm's counsel has stated under oath that Plaintiff should reasonably have the depositions of McPeek, Madden, Powers and Brian Kirby (a State Farm team leader/supervisor) to fully and fairly oppose this motion. He further admits that these depositions were scheduled before the opposition [was due], but due to State Farm's counsel's own health issue, which was out of the control of any party, those depositions could not proceed. Several of those witnesses were simply not available to be rescheduled before the opposition due date
>
> . . . State Farm acknowledges it still has not produced key documents . . . . State Farm represented that it was going to produce them prior to the opposition due date, but has not . . . .
>
> Given that State Farm admits that key witnesses and documents have not been produced and could not or would not do so before the opposition date, the motion should be denied because State Farm is precluded from showing Plaintiff cannot obtain needed evidence to rebut the arguments it presents . . . . Given that the court will not grant a trial or other continuance after repeated requests, no further request to delay this brief was made. However, pursuant to section 437c(h) Plaintiff requests the court to do what the statute says it "shall" do and deny the motion or provide other just relief.

(See Opposition at pp. 12:15-13:20, internal citations omitted.)

The court notes that the parties have repeatedly requested continuances of the trial date in the last several months, despite the statement in the court's January 30, 2023 order (which granted a request for continuance of the trial date) that there would be "NO FURTHER CONTINUANCES of trial, absent an extraordinary showing of good cause." In its order dated July 28, 2023, the court also granted a joint request of the parties to continue this motion from August 15, 2023 to the current hearing date, as State Farm had failed to give Jarvis sufficient notice.

A. General Standard for Relief Under Section 437c(h)

When faced with a request for relief under section 437c(h), the trial court must determine whether the declaration or affidavit meets the substantive standards of the statute in that it demonstrates "'(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts.'" (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633 [quoting *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623].) "The reason for this 'exacting requirement' is to prevent

'every unprepared party who simply files a declaration stating that unspecified essential facts may exist' from using the statute 'as a device to get an automatic continuance.' 'The party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented.'" (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643 (*Chavez*), citing *Lerna v. County of Orange* (2004) 120 Cal.App.4th 709, 715-716 (*Lerna*).) If the party's submission fulfills these requirements, "the court shall deny the [summary judgment] motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." (Code Civ. Proc., § 437c, subd. (h).) "[I]n cases in which the opposing party (usually the plaintiff) has been thwarted in the attempt to obtain evidence that might create an issue of material fact, or discovery is incomplete, the motion for summary judgment should not be granted." (*Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 174 (*Krantz*).)

If the party does not meet the requirements for a mandatory denial or continuance, the court must still consider whether a party has established "good cause" for a discretionary denial, continuance, or other relief. The court's discretion must be exercised liberally in favor of granting a continuance: "The interests at stake are too high to sanction the denial of a continuance without good cause." (*Frazee v. Seely*, supra, at 634; see also *Insalaco v. Hope Lutheran Church of West Contra Costa County* (2020) 49 Cal.App.5th 506, 517-520 [denial of request for continuance to perform site inspection was error]; *Hamilton v. Orange County Sheriff's Dept*. (2017) 8 Cal.App.5th 759, 766 [trial court abused its discretion by denying parties' joint request to continue summary judgment hearing for plaintiff to take necessary depositions]; *Denton v. City & County of San Francisco* (2017) 16 Cal.App.5th 779, 791-794 [oral request at hearing may be sufficient to show good cause for discretionary continuance].)

The Courts of Appeal appear to be split on the question of whether a discretionary request for denial or continuance may itself be denied as a result of a party's failure to show diligence in pursuing discovery—such as Jarvis's previously observed failure to show diligence in pursuing discovery sufficient to justify the serial requests for trial continuances in this case. (See *Braganza v. Albertson's LLC* (2021) 67 Cal.App.5th 144, 152-157 [discussing cases].) Several courts have held that where the non-moving party has failed to show diligence in pursuing discovery, a denial of any relief under section 437c(h) is not an abuse of discretion. (*Id*.) Nevertheless, in *Chavez*, *supra*, the Court of Appeal stated that a discretionary request under section 437c(h) should not be denied based on requesting counsel's lack of diligence whenever "the delay" that prompted the request "was not entirely caused by plaintiffs." (238 Cal.App.4th at p. 644.) Also,"[g]ood cause has been found where an attorney's 'dire medical condition' or other special circumstances prevented the completion of discovery." (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 533, citing *Lerna*, *supra*, at p. 716 [hospitalization of attorney sufficient good cause for discretionary continuance].)

B. Plaintiff's Evidence in Support of its Section 437c(h) Request

Jarvis's request under section 437c(h) relies on two declarations. The first, submitted as Exhibit No. 60, is a September 14, 2023 declaration by counsel Stephen Ellingson that was previously submitted in support of the parties' joint ex parte request for reconsideration of the court's denial of one of the multiple requests to continue the trial date. The court has already considered this declaration in the context of that ex parte request, determining that the parties had not shown good cause for another continuance of the trial date.

Nonetheless, in the context of the separate section 437c(h) analysis, the court notes that this declaration does state under penalty of perjury that several depositions scheduled to take place from September 4, 2023 through September 11, 2023 had to be continued because Ellingson contracted COVID-19 and was unable to attend. Ellingson stated that those depositions could not be rescheduled prior to the due date for the opposition to State Farm's motion for summary judgment. He also stated that some of these witnesses would not be available again until after October 16, the current discovery cutoff in this case, and that State Farm would be unable to produce "responsive documents" before Plaintiff's deadline to file the opposition to State Farm's motion. He acknowledged Plaintiff counsel's "diligent efforts" to "facilitate" production of these documents and stated that he had agreed to continue the present motion to allow all necessary discovery to take place, but that this was "premised on trial being continued to May of 2024."

Jarvis's request also relies on a declaration from Suliman Khan, one of his own counsel. This declaration restates much of the information in the Ellingson declaration. Khan also states that Jarvis "has been repeatedly denied access to evidence necessary to oppose the arguments and facts raised in State Farm's motion . . . . Despite being requested as far back as April 2023, and repeated requests through meet and confer, Defendants ServiceMaster, Servpro, and State Farm all have yet to produce previously requested documents that pertain to material issues in this case and State Farm's motion. The failure to produce documents has repeatedly caused depositions to be rescheduled and continued . . . . Our office's diligence in trying to obtain all relevant documents and take all necessary depositions for nearly a year was acknowledged by State Farm's counsel in his declaration in support of the ex parte application and joint motion . . . . Servpro and Service Master also have yet to produce documents that were previously requested and have been the subject of meet and confer for months . . . . In addition to the outstanding documents . . . there are also depositions that have been repeatedly scheduled yet continued due to the aforementioned documents issues or State Farm's counsel's contraction of COVID-19. These include the depositions of Brenda Powers, Rebecca McPeek, Brian Kirby, Suzanne Madden, and the PMQs of State Farm, Servpro, and ServiceMaster. These are all scheduled to proceed after Plaintiff's opposition is due and the likelihood of this happening was acknowledged by State Farm's counsel . . . . State Farm has designated two PMQs, one with respect to the SFPSP and one with respect to the other relevant noticed categories, including the Jarvis claim, and claims handling procedures . . . . The aforementioned depositions and documents were repeatedly sought by our office since December of last year and even State Farm's counsel has acknowledged that. State Farm did not identify the PMQ with respect to the SFPSP until September 21, 2023, days prior to the submission of Jarvis' opposition." (Khan Declaration, ¶¶ 33-41.)

C. Analysis

Plaintiff's evidence is insufficient to support a mandatory denial or continuance under Code of Civil Procedure section 437c, subdivision (h). It does not address the "ongoing lack of diligence in completing discovery in this four-year-old case" that the court mentioned in its August 30, 2023 and September 7, 2023 orders denying the parties' requests for additional continuances of the trial date. Nothing submitted by Plaintiff in opposition to this motion alters the court's conclusion on that point. The evidence also does not establish how any of the outstanding discovery will be accomplished before the discovery cut-off date, or how and when any revised or supplemental opposition incorporating the outstanding discovery would be filed. No time estimates are provided.

The court must still separately consider whether "good cause" exists to exercise the court's discretionary power under section 437c(h) to (1) deny State Farm's motion, (2) continue it, or (3) "make any other order as may be just." The court is mindful of the Sixth District's holding in *Chavez* that a lack of diligence by plaintiff is not a sufficient basis in and of itself to deny discretionary relief where the immediate difficulty in obtaining evidence to oppose a summary judgment motion "was not entirely caused by plaintiffs." The Ellingson declaration demonstrates that the immediate delay here was not entirely caused by Plaintiff or Plaintiff's counsel, and that defense counsel's health issues played a major part in causing already-scheduled depositions not to go forward. Ellingson's statements that State Farm is unable to produce some documents and deponents before the current discovery cut-off date of October 16, 2023 further demonstrate that the immediate delay is not entirely attributable to Jarvis. The court also notes the Court of Appeal's statement in *Krantz, supra*, that "in cases in which the opposing party (usually the plaintiff) has been thwarted in the attempt to obtain evidence that might create an issue of material fact, or discovery is incomplete, the motion for summary judgment should not be granted." (*Krantz*, 89 Cal.App.4th at p. 174.) In these circumstances, some discretionary relief under section 437c(h) may well be appropriate, even if it also necessitates a continuance of the trial.

The court also must consider another factor, noted above: summary judgment cannot be granted based on a pleading that has never been filed—in this case, the first amended complaint. State Farm has known since at least January 20, 2023 (when it filed its first motion for summary judgment that was later withdrawn) that Jarvis had failed to file his first amended complaint in this case. State Farm's motion cannot be granted under the current circumstances, and so any discretionary relief granted to Plaintiff here will also benefit State Farm, as the court will not be required to deny the motion summarily.

Pursuant to the court's authority to make any order "as may be just" under section 437c(h), the court now orders the following:

1. The hearing date on State Farm's motion for summary judgment is continued to **March 12, 2024 at 9:00 a.m.** in this court.

2. As the continuance of the motion will require a continuance of the trial date (see *Cole v. Superior Court* (2022) 87 Cal.App.5th 84, 88-89), the trial date is hereby continued to **June 10, 2024 at 8:45 a.m.** The mandatory settlement conference is continued to **June 5, 2024** (time TBD).

3. Jarvis shall file his first amended complaint, the same first amended complaint previously approved by Judge Barrett, by no later than **October 31, 2023**.

4. State Farm must re-file its motion for summary judgment by **December 15, 2023**.

5. The discovery cutoffs are now based on the new trial date. All briefing deadlines are based on the new hearing date.

6. There will be **no further continuances or extensions** of any of these dates absent some truly extraordinary showing of good cause. Counsel should by now

understand that "extraordinary" means exactly that. An inability to work together to complete the outstanding discovery is not an "extraordinary" occurrence.

As the motion must be re-filed, the court will not address the merits of the motion at this time.

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Calendar Line 3
Case Name: *James O'Brien v. Rohith Polishetty*
Case No.: 20CV373220

On March 30, 2023, three motions to compel discovery responses, filed by defendant Rohith Polishetty against plaintiff James O'Brien, came before this court. Notice was proper, and the motions were unopposed; the court therefore granted all three motions. The court also awarded monetary sanctions of $735. Polishetty now brings this motion for terminating sanctions against O'Brien, based on O'Brien's failure to comply with the court's March 30, 2023 order. O'Brien has not served any responses and has not paid any monetary sanctions.

Notice is apparently proper for the present motion, and the motion is also unopposed. Nevertheless, Polishetty does not show in his motion "whether a sanction short of dismissal or default would be appropriate to the dereliction" committed by O'Brien. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796-797 (*Deyo*).) As the *Deyo* court observed, "[t]he penalty should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." (*Id.* at p. 793.) Here, Polishetty does not show that other non-monetary sanctions, such as evidence or issue sanctions, would remedy any prejudice to him arising out of O'Brien's failure to provide the requested discovery. Instead, he goes straight for the nuclear option of dismissal.

The court therefore DENIES the motion, but the court notes that O'Brien and/or his counsel have now missed multiple court appearances, without any apparent explanation. The matter was set for a case status review on February 16, 2023, but there was no appearance for O'Brien on that date. At the February 16, 2023 hearing, the court set the matter for a case management conference on June 27, 2023, but it is unclear if this was properly calendared, as there is no notice or minute order in the file for that date (and a different judge was covering for the undersigned on June 27, 2023). As already noted, there was no appearance (or opposition) on behalf of O'Brien for the March 30, 2023 motion to compel. And now there is no opposition or appearance in response to the motion for terminating sanctions. Given these multiple non-appearances, the court will issue an order to show cause ("OSC") why the case should not be dismissed for failures to appear by the plaintiff. The court sets the OSC hearing for **February 29, 2024 at 10:00 a.m**. in this case. Plaintiff's failure to appear may result in the dismissal of the case.

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Calendar Line 4
Case Name: *Kyle R. v. Patrick Clyne, M.D. et al.*
Case No.: 22CV395705

Plaintiff Kyle R. ("Plaintiff") brings this motion to compel further discovery responses against defendant County of Santa Clara (the "County"). When he originally filed his motion on June 6, 2023, he requested: (1) substantive responses to Form Interrogatory No. 17.1 (based on Requests for Admissions Nos. 1-35 ("RFAs 1-35")), (2) an identification of which document requests are tied to which documents produced by the County, (3) verifications for the County's document productions, and (4) a privilege log to support the County's privilege objections to the discovery requests. Since then, it appears that the parties have resolved items (2) and (3) above, leaving only (1) and (4) for resolution. Indeed, Plaintiff's reply brief addresses only the form interrogatory responses and the privilege log.

Having reviewed the discovery requests at issue, the court DENIES the motion to compel.

RFAs 1-35 are all directed to the adequacy of the County's responses to Plaintiff's requests for production of documents (which were propounded and responded to in late 2021 and early 2022), as well as the completeness of the County's document productions with respect to each request. As such, these RFAs are not discovery about any triable issues in the case; rather, they are "discovery about discovery," or "meta-discovery." Although there does not appear to be any case law regarding meta-discovery in California, this court finds persuasive the general approach adopted in federal courts when applying a different but similar set of rules (the Federal Rules of Civil Procedure). For example, the court agrees with the federal district court in *Koppers Performance Chemicals, Inc. v. Travelers Indemnity Co.* (D.S.C. 2022) 638 F.Supp.3d 610 (*Koppers*), which observed:

> "[M]eta-discovery" or discovery about discovery "should be closely scrutinized in light of the danger of extending the already costly and time-consuming discovery process *ad infinitum*." *Freedman v. Weatherford Int'l Ltd.*, 2014 U.S. Dist. LEXIS 133950, 2014 WL 4547039 at *2 (S.D.N.Y. Sept. 12, 2014). Nevertheless, there are instances where it is appropriate. For example, courts have allowed discovery on how the opposing party has searched for responsive ESI. [Citations.]
>
> Here, the Court finds that such meta-discovery is unwarranted . . . .

(*Koppers*, 638 F.Supp.3d at p. 615 [italics in original].)

As in *Koppers*, the court finds the discovery at issue here to be unwarranted. First, they are requests for admissions, which are a unique discovery device: RFAs are not intended to obtain unknown information, but rather to expedite trial by reducing the number of triable issues that must be adjudicated. (*Doe v. Los Angeles County Department of Children & Family Services* (2019) 37 Cal.App.5th 675, 690.) In this case, RFAs 1-35 have nothing to do with the merits of the case and will not have any effect on the number of triable issues. Second, as the County points out, they are an effort to obtain further information about responses to document requests that were given over a year ago. The court agrees with the

County that this is an improper effort to perform an end run around discovery deadlines that have long since passed.

It is no excuse for Plaintiff to argue that "it would have been impossible, impractical, inefficient, and uneconomical for Plaintiff to bring a Motion to Compel at an earlier date while the promise of more documents dangled before them." (MPA at p. 8:9-17.) This clearly confuses motions to compel *further responses* under Code of Civil Procedure section 2031.310 with motions to compel *compliance* under Code of Civil Procedure section 2031.320. The former has a time limit; the latter does not. (Similarly, Plaintiff's counsel's now-abandoned argument that the County failed to include verifications with its document productions "as required by CCP2031.310(c) [sic]" demonstrates a misapprehension of the difference between document *responses* and document *productions*.)

Because the court finds RFAs 1-35 to be an unwarranted use of discovery, no further answers to Form Interrogatory No. 17.1 are required. For precisely the same reason, no privilege log is required.[2] The court denies the motion to compel in its entirety.

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[2] "Discovery about discovery" often inevitably raises disagreements over privilege and attorney work product—such as the parties' dispute here regarding a privilege log—that are time-consuming and completely unnecessary.

Calendar Line 6
Case Name: *Honghua Li v. Hailing Yu et al.*
Case No.: 20CV367955

Defendants Hailing Yu, Zhong Zheng, and Angelina Wang bring this motion for leave to file a cross-complaint against plaintiff Honghua Li ("Li"). Although the cross-complaint was not filed with their answer to the complaint, the moving parties argue that the proposed cross-complaint is substantially similar to a cross-complaint previously filed by defendants Lihong Peng and Xiang Wu in this case. In addition, they note that the Alameda County Superior Court observed (in a case filed by defendants against Li in that county) that this is a compulsory cross-complaint and therefore needs to be filed in this case, rather than in Alameda County. Finally, the moving parties argue that although there have been substantial delays in presenting this proposed cross-complaint, there were a number of circumstances—language barriers with prior counsel, poor advice by prior counsel, and numerous other pretrial motions in this case—that interfered with their ability to bring this motion sooner.

Li opposes the motion, arguing that this is a "mere tactical strategic maneuver" and that there is no good reason why Yu, Zheng, and Wang waited so long to present this cross-complaint. (Opp. at pp. 1:9-14, 3:23-27.) Li also raises a number of irrelevant arguments about defendants' counsel's "unethical" behavior. (*Id.* at p. 3:13-22.) Finally, Li argues that she is "not aware of the subject matter of the 'proposed' cross-complaint," and she is therefore "incapable" of opposing a motion "without a proposed copy of the purported cross-complaint." (*Id.* at p. 1:3-8.)

The court finds that sufficient cause has been shown to grant the motion. First, the court notes that the proposed cross-complaint appears to be attached as Exhibit B to the Declaration of Zhong Zheng, filed with the motion, so it does not understand Li's contention that she is "not aware" of the subject matter of the proposed pleading. Second, although the moving parties did delay quite a long time before bringing this proposed cross-complaint here—and the court suspects that there may well have been "tactics" or "strategy" behind the decision to assert these claims in a different county first—Li has not shown, or even attempted to show, that there would be any prejudice to her in allowing the pleading at this time. Indeed, the court finds it difficult to see how there would be any prejudice, given the substantial overlap between the proposed cross-complaint and the cross-complaint that the non-moving defendants (Peng and Wu) have already asserted in this case. (In addition, Li has been on notice of these allegations for a long time, given the litigation in Alameda County.) Finally, no trial date has been set yet, and so there appears to be ample time for Li to address any discovery or other pretrial issues arising out of the cross-complaint.

The court GRANTS the motion and directs Yu, Zheng, and Wang to file the cross-complaint within 10 days of this order.

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Calendar Line 8
Case Name: *Judith Brendell Wormley v. Alonso Artigas et al.*
Case No.: 21CV380559

This is a renewed motion to vacate a dismissal and motion for reconsideration of the court's May 23, 2023 and May 31, 2023 orders, filed by plaintiff Judith Brendell Wormley ("Wormley"). Both defendants—Alonso Artigas ("Artigas") and Uber Technologies, Inc. ("Uber")—have filed separate oppositions to the motion. They also previously opposed the original motion that the court heard on May 23, 2023.

1. Procedural Background

At the May 23 hearing, the court noted that Wormley's counsel's declaration in support of the motion to vacate (Declaration of Patrick Khalil) was inadequate, because it did not provide enough information about an alleged calendaring error that led to his multiple failures to appear, and it was also not delivered under oath, as required by Code of Civil Procedure section 473, subdivision (b). Nevertheless, the court also stated that it would grant the motion if counsel fixed the errors in the declaration, because calendaring mistakes that result in failures to appear are the type of "mistake" or "excusable neglect" that are generally deserving of relief under section 473(b). Patrick Khalil, who appeared at the hearing, indicated that he would file a corrected declaration right away, and he assured the court that if it set a deadline of May 26, 2023 (three days later), that would be more than enough time to do so.

Accordingly, the court signed an order stating that "the court will grant the motion, so long as counsel fixes the issues with the declaration noted above . . . . The court will deny the motion if it does not receive the declaration by then [May 26, 2023]." May 26, 2023 came and went. On Wednesday, May 31, 2023, the court still had not received anything from Wormley's counsel, and so the court denied the motion.

2. The Renewed Motion and Motion for Reconsideration

The present motion by Wormley is supported by a declaration from her current counsel, Daniel Azizi, which is delivered under oath, unlike Khalil's original declaration. It provides some more information about the calendaring error that resulted in Khalil's failures to appear; it also describes some issues that Khalil had with a leg injury, both before and after the May 23, 2023 hearing, that resulted in lapses in his duties as an attorney. It states that Khalil was hospitalized for his leg injury between May 23 and May 26, which supposedly explains the failure to file the promised declaration. In addition, it states that Khalil "is no longer employed by Downtown LA Law Group and is no longer the handling attorney for Plaintiff in this case." (Azizi Declaration at ¶ 7.)

In response, Artigas argues that the renewed motion does not constitute "excusable neglect," because the conduct amounts to "gross negligence." (This is nearly the same argument that defendants made in response to the original motion.) In addition, both Artigas and Uber argue that the Azizi declaration lacks foundation and is based on hearsay, because Azizi could not have personal knowledge about Khalil's failures to appear and to follow through with a proper declaration.

3. Conclusion

Although this is a closer call than Wormley's original motion to vacate, the court ultimately concludes that the renewed motion sets forth sufficient facts for relief under section 473(b), even if just barely. Azizi's declaration fails to explain why Khalil's hospitalization for a *leg injury* prevented him from e-filing a declaration as promised court three days earlier, asking someone else in the law firm to file a declaration on his behalf, *or at least asking someone to notify the court that more time was needed*. The court waited five more days before denying the original motion. To date, no supplemental declaration from Khalil has been submitted, even if belatedly, and Azizi's declaration fails to say why. Wormley's reply brief (but not Azizi's declaration) says that because of Khalil's departure from the law firm, Khalil is "unavailable to provide the required sworn affidavit." (Reply at p. 2:18-20.) This, too, is unexplained: why is Khalil no longer available to submit a declaration on behalf of a former client, regardless of his departure from the law firm? That is the minimum level of client service that this court expects from a current member of the California Bar.

Nevertheless, the court finds that the Azizi declaration contains enough detail about the law firm's calendaring errors to justify relief. Even though it could still have used more specific details, the court concludes that Azizi likely has as much personal knowledge about the information contained therein (concerning the law firm's operations) as Khalil would have had. The court generally resolves any doubts on a motion to vacate or set aside in the moving party's favor, as there is a strong public policy in California that favors deciding cases on the merits. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 685.) In this case, the court has no doubt that all of the procedural failures in this case—failures to appear, failures to submit *sufficient* papers, failures to submit *timely* papers, and failures to explain these prior failures adequately—are attributable to counsel, and so it would be unfair for Wormley to bear the brunt of them. Although the court nearly agrees with Artigas that these actions come close, in the aggregate, to constituting "gross" neglect rather than excusable neglect, the court ultimately finds that they are excusable.

The renewed motion to vacate is GRANTED.

The case management conference on January 16, 2024 at 10:00 a.m. remains as set.

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Calendar Line 9
Case Name: *Fang Xia v. Park Townsend Homeowners Association*
Case No.: 20CV362817

This motion for attorney's fees and costs by plaintiff Fang Xia follows a trial in which the court (Judge Rosen) ruled in Xia's favor on all three causes of action: breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief.[3] Xia now seeks $252,309.00 in fees and $5,750.07 in costs, for a total of $258,059.07. Defendant Park Townsend Homeowners Association ("Defendant") does not dispute the costs amount, but it challenges the fees amount as excessive, particularly given that this case was filed as a limited civil action, and Xia's eventual monetary recovery was only $223.00. Defendant also questions whether Xia should be considered the prevailing party at all. Having reviewed the parties' submissions, as well as Judge Rosen's statement of decision, the court GRANTS Xia's motion in large part and DENIES it in small part, slightly reducing the amount of attorney's fees that Defendant must pay, from $252,309.00 to $232,103.50.

1. Judicial Notice

On its own motion, the court takes judicial notice of Judge Rosen's May 8, 2023 statement of decision in this case, under Evidence Code section 452, subdivision (d). The court also grants Defendants' request for judicial notice of four prior pretrial orders in this case by Judge Kirwan. With her reply papers, Xia submits a request for judicial notice, as well, which is denied as unnecessary: Exhibit 2 is the May 8, 2023 statement of decision, of which the court has already taken judicial notice; Exhibits 1 & 3 are documents of which the court does not need to take judicial notice, as they are irrelevant to the court's decision.

2. Prevailing Party

The court finds that Xia was the prevailing party "on the contract." All three causes of action were based on the 2014 settlement agreement between Xia and Defendant, contrary to Defendant's contention. Indeed, at trial, Defendant strenuously argued that the second cause of action (for breach of the implied covenant of good faith and fair dealing) sounded in contract rather than in tort, in order to avoid the imposition of punitive damages. Now, Defendant argues that the third cause of action for declaratory relief was "not one based in contract." (Opp. at p. 10:12.) The court disagrees. The third cause of action sought a declaration regarding the parties' rights and obligations under their September 2014 settlement agreement; indeed, the third cause of action explicitly refers to Defendant's "contractual obligations." (Complaint, ¶ 28.) An objective reading of the complaint in this case permits no other reasonable interpretation than that the third cause of action was based on Defendant's contractual duties rather than some other unspecified and undefined duty.

Defendant also argues that the eventual monetary recovery of only $223 means that Xia is not the prevailing party, because she sought much more in her trial brief: $4,656 for the loss of use of closet space and $57,310 in punitive damages. Having reviewed the record, the court concludes that Xia's primary objective in this litigation was specific performance (moving the "backflow device" and the "red box") rather than compensatory damages. Indeed, it appears that the "closet space claim" was an afterthought, as Xia did not even raise it during her first

[3] Xia withdrew a fourth cause of action for rescission of the parties' contract.

eight years on the property (2006 to 2014), and it was only after she sought to assert her right to relocate the backflow device that she first identified this claim.

Given that the trial court ruled in Xia's favor on all causes of action—especially her claims for specific performance—this court finds that Xia was the prevailing party on the contract, regardless of the relatively low amount of monetary damages.

3. Reasonableness of the Requested Fees

For these same reasons—particularly the fact that the gravamen of the complaint was for specific performance, not damages—the court finds that the requested attorney's fees are not necessarily unreasonable, even if they significantly exceed the amount of compensatory damages that were ultimately awarded. According to the Supreme Court, the general principle that applies is that attorney's fees must be fully compensatory, and they should cover "*all* the hours *reasonably spent*" by the prevailing party's attorneys. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133 [citing *Serrano v. Unruh* (1982) 32 Cal.3d 621, 624, 639]; italics in original.)

As in most cases involving contractual attorney's fees, the court here applies the lodestar method, which is to compute "the number of hours reasonably expended multipled by the reasonable hourly rate." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096.) Defendant indicates that it "does not challenge the hourly rate presented by [lead counsel] Mr. Jiang," which was $400/hour in 2020 and 2021, $450/hour in 2022 and the beginning of 2023, and $500/hour as of February 1, 2023. (Opp. at p. 11:10-11.) Defendant does object to the hourly rates of the junior attorneys who worked under Mr. Jiang's supervision, but the court finds that their rates (between $225/hour and $260/hour) were commensurate with their level of experience (between one and four years out of law school) and were not unreasonable.

Defendant also takes issue with the number of hours expended by Xia's attorneys, but the arguments in its opposition brief are presented as broad generalities, rather than specific issues with specific tasks or events in the case. Defendant's basic argument, as articulated in its opposition brief, is: "This was a limited jurisdiction case. Discovery is severely limited in such a matter. Is it equitable that a defendant, who had every right to assume that a maximum award would be $25,000[,] would now face an award of a quarter of a million dollars?" (Opp. at p. 13:13-16.) The court answers this rhetorical question with an unequivocal "yes" and with another rhetorical question. The 2014 settlement included a prominent attorney's fees provision, and Defendant plainly knew that it included such a provision, so why did it waste so much time and energy litigating so many pretrial motions, fighting over so much discovery, and taking this case—where its manager, Susan Hoffman, was so clearly in the wrong—all the way to a trial? The fact that this is a limited civil action does not automatically restrict the amount of attorney's fees that may be awarded, if the parties truly incurred those expenses in the course of fighting every possible battle. This court has seen many instances in which one or both sides exercise exceedingly poor judgment in devoting far more resources to litigating a case than may be warranted by the amount in controversy. This is undoubtedly one of those cases.

Finally, rather than identifying issues about specific time entries by plaintiff's counsel in its brief, Defendant incorporates "by reference" over six pages of attorney argument from its

counsel's declaration into its opposition, in an improper effort to circumvent the page limits for motions. (Cal. Rules of Court, rule 3.1113(d), (e).) Most of the arguments contained in counsel's declaration are not mentioned anywhere in the opposition brief. In addition, nearly all of Defendant's arguments—especially those focused on the hours spent on various tasks by Xia's more junior attorneys—are entirely speculative and based on an unduly narrow and miserly understanding of the work involved in litigating and trying a hotly contested case. The court rejects nearly all of them.

Nevertheless, the court will strike three sets of entries pertaining to motions to compel in which the question of monetary sanctions was previously raised by the parties and adjudicated by Judge Kirwan: (1) entries from July 22, 2020 to September 9, 2020 ($5,482), (2) entries from October 9, 2020 to October 22, 2020 ($5,092), and (3) entries from November 4, 2022 to November 28, 2022 ($9,631.50). According to Defendant's counsel, these fee amounts were either denied by the court or granted in part (and paid by Defendant), and so the court sees no basis for revisiting these time entries. The court reduces the amount of awardable fees by $20,205.50.

In all other respects, the court finds that the hours expended by Xia's counsel were reasonable, and the hourly rates were reasonable.

4. Conclusion

The court grants Xia's request for $232,103.50 in fees and $5,750.07 in costs, for a total of **$237,853.57**.

IT IS SO ORDERED.

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Calendar Line 10
Case Name: *Kateryna Pomogaibo v. Weeklys, Inc.*
Case No.: 22CV403647

This is a renewed motion to set aside a default by defendant Weeklys, Inc. After a hearing on June 1, 2023, this court denied Weeklys' original motion to set aside, because the court found that it was not supported by any showing of "mistake, inadvertence, surprise, or excusable neglect" under Code of Civil Procedure section 473, subdivision (b). Weeklys now submits a declaration from a representative of the company, Dan Pulcrano, as a well as a declaration from counsel, that sets forth both "mistake" and "excusable neglect" on the part of client and counsel. The court finds that this new information is sufficient under section 473(b).

The court generally resolves any doubts on a motion to set aside in the moving party's favor, as there is a strong public policy in California that favors deciding cases on the merits, rather than by default. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 685.) Thus, the court should apply the remedial provisions of section 473(b) broadly and liberally, so long as the party moves promptly to seek relief. (*Brochtrup v. INTEP* (1987) 190 Cal.App.3d 323, 329.) In this case, Weeklys' original motion and renewed motion were timely.

Plaintiff Kateryna Pomogaibo opposes the motion, but her arguments do not rebut Weeklys' showing under section 473(b). She argues that section 473(b) does not "fit" this case, because "Defendant knew about all action [sic] of all his newspapers . . . and affirmatively responded to Plaintiff that he will not answer on the claim." (July 31, 2023 Opp. at p. 1.) This does not negate a finding of mistake or neglect. In addition, she raises other arguments about the conduct of defendant's counsel—including the allegation that counsel has been criminally charged—but this again does not negate a finding of mistake or neglect. (The printout from the California State Bar website submitted by plaintiff indicates that defendant's counsel is still an active member of the bar.) Notably, she does not identify any prejudice that would arise from granting relief in this case.

In view of the foregoing, the court GRANTS the renewed motion to set aside. Weeklys shall file its response to the complaint within 10 days of the date of this order.

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