SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: November 7, 2023 TIME: 9:00 A.M.

TO REQUEST ORAL ARGUMENT: Before 4:00 PM 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 at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO HAVE THE HEARING REPORTED: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

TO SET YOUR NEXT hearing date: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and 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. Civil Local Rule 8C is in the amendment process and will be officially changed in January 2024.

Where to call for your hearing date:	408-882-2430
When you can call:	Monday to Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV381415	CREDITORS ADJUSTMENT BUREAU, INC. vs CAMPBELL DRY INC.	Parties are ordered to appear for examination.
2	19CV345665	SILVIA NATERA vs HYUNDAI MOTOR AMERICA	Defendant's Demurrer to the Fourth Cause of Action is OVERRULED. Please scroll down to line 2 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
3	23CV411811	Giti Harper vs Rose International Market, Inc. et al	Defendants' Demurrer is OVERRULED AND SUSTAINED, in part. Please scroll down to line 3 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
4	2013-1-CV-255184	Sohum, Inc. vs A2O Mobile, Inc., et al	The Court set this hearing for Plaintiff to show cause why this case should not be dismissed pursuant to Code of Civil Procedure section 583.360. Plaintiff failed to submit any response to the Court's order. Section 583.360 provides: "(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article. (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." This case has languished in this court for nearly 10 years without virtually no effort by Plaintiff to bring it to trial. No statutory exception applies. Accordingly, the case is dismissed pursuant to Code of Civil Procedure 583.360.
5	21CV381752	Mazen Arakji vs Super Micro Computer, Inc	Defendant's Motion for Summary Judgment is GRANTED. Please scroll down to line 5 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
6	23CV409991	Maria Carrillo vs Ashley Cardenas et al	Motion withdrawn; off calendar.
7	19CV346663	Sz Huang et al vs Tesla Inc. et al	Caltrans' Motion to Augment Expert Witness Information is GRANTED Caltrans' Motion to Compel Drs. Badger and Harris's Deposition is DENIED. Please scroll down to line 7 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

8	21CV376792	AMERICAN EXPRESS NATIONAL BANK vs Tiefu Liu	Plaintiff's motion to enter judgment is GRANTED. An amended notice of motion with this hearing date was served by U.S. mail on August 14, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) The evidence also demonstrates that (1) the parties entered an enforceable settlement agreement on March 22, 2021 and expressly requested the Court to retain jurisdiction to enforce the settlement agreement terms pursuant to Code of Civil Procedure 664.6 and (2) Defendant failed to make any payments pursuant to the terms of the settlement agreement. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
9	22CV397100	Sushma Venkataramanappa vs Sudhir Pai et al	Plaintiff's counsel Scott Graham's Motion to be relieved as counsel is GRANTED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court will use order on file.
10	23CV414340	PP Elmdale, LLC vs CN One Investment LLC	Defendant CN One Investment LLC's Motion to Expunge Lis Pendens and Request for Monetary Sanctions is GRANTED. Please scroll down to Line 10 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

oo0oo

Calendar Line: 2
Case Name: *Silvia Natera v. Hyundai Motor America*
Case No.: 19CV345665

Defendant Hyundai Motor America ("Hyundai") demurs to plaintiff Silvia Natera's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a lemon law action. On April 15, 2011, Plaintiff purchased a new 2011 Hyundai Santa Fe (the "Vehicle"). (FAC, ¶ 8.) The sale was accompanied by express warranties by which Hyundai undertook to preserve or maintain the utility or performance of the Vehicle or to provide compensation if there was a failure in such utility or performance. (*Ibid*.) The Vehicle was delivered to Plaintiff with serious defects and nonconformities to the warranty and it developed other serious defects and nonconformities to the warranty, including but not limited to, engine, transmission, electrical, and exterior defects. (FAC, ¶ 9.)

Plaintiff initiated this action on April 3, 2019, asserting (1) breach of express warranty, (2) breach of implied warranty, and (3) violation of Civil Code section 1793.2. On June 17, 2022, the Court (Hon. Rudy) issued its order denying Hyundai's motion for summary judgment. On July 19, 2023, Plaintiff filed her FAC, which asserts claims for (1) breach of express warranty; (2) breach of implied warranty; (3) violation of Civil Code section 1793.2; and (4) breach of contract. On July 7, 2023, the Court issued its order denying Plaintiff's motion to enforce settlement but granted Plaintiff leave to amend her complaint to add the fourth cause of action. On August 23, 2023, Hyundai filed the instant demurrer to the fourth cause of action on the ground it fails to allege sufficient facts. (Code of Civ. Proc., § 430.10, subd. (e).) Plaintiff opposes.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of

the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

A. Fourth Cause of Action- Breach of Contract

To state a claim for breach of contract, a plaintiff must allege (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921 (*Bushell*).) The elements of a breach of oral contract are the same as those for a breach of a written contract. (*Stockon Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453.) Mutual assent or consent is necessary for the formation of a contract. (Civ. Code, §§ 1550, 1565.) For a meeting of the minds to exist, parties must agree on all material contract terms. (*Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1430 (*Elyaoudayan*).) Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 119, p. 144.)

"The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. … ' "In considering expressions of agreement, the court must not hold the parties to some impossible, or ideal, or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and

some degree of uncertainty." ' Moreover, ' "[t]he law leans against the destruction of contracts because of uncertainty and favors an interpretation which will carry into effect the reasonable intention of the parties if it can be ascertained." ' " (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 777 (*Moncada*).)

Hyundai argues no agreement was reached because the alleged settlement agreement did not contain terms regarding the disposition of the Vehicle or the attorney's fee cut off term and it contends those terms are material to Song-Beverly claims. However, Hyundai's arguments require consideration of extrinsic evidence, which is beyond the allegations of the FAC and facts currently before the Court. (See *Committee on Children's Television, supra,* 35 Cal.3d at pp. 213-214.)

Hyundai relies heavily on *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793 (*Weddington*). However, *Weddington* differs from the instant matter because it was an appeal from a judgment and the court's decision was based on its review of the full record, which included evidence that a licensing agreement was "centrally material" to both sides. (*Id.* at p. 799.) Here, the FAC is void of facts regarding any discussion between the parties about the disposition of the vehicle or time range of the attorney's fees. Thus, the Court cannot decide based on the allegations that the terms were material. Moreover, Hyundai does not direct the Court towards any authority that states such terms must be included in Song-Beverly settlement agreements nor does it cite to any cases that state settlement agreements are deficient as a matter of law if they do not include those terms.

Here, Plaintiff alleges there was a settlement agreement between the parties that Hyundai would pay Plaintiff $54,999, plus her attorney's fees and costs in an amount to be determined by the Court in exchange for dismissal of the case and release of Plaintiff's claims against Hyundai. (FAC, ¶¶ 60-62.) Plaintiff further alleges Hyundai breached when it backed out of the alleged settlement agreement, Plaintiff performed, and she has been harmed as a result of Hyundai's breach. (FAC, ¶¶ 64-69.) As alleged, the terms provide a basis for determining the existence of a breach and for giving an appropriate remedy. (See *Moncada, supra,* 221 Cal.App.4th at p. 777.) Therefore, Plaintiff has alleged sufficient facts to state a claim for breach of contract, and the demurrer to the fourth cause of action is OVERRULED.

Calendar Line 3
Case Name: *Giti Harper v. Rose International Market, Inc., et al.*
Case No.: 23CV411811

Defendant Rose International Market, Inc. ("Rose"), New Rose International Food Market, Inc. ("New Rose"), Cupertino International Food, Inc. ("Cupertino"), and Saied Mehranfar (collectively, "Defendants") demur to plaintiff Giti Harper's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This action arises out of an employment dispute. In September 2008, Defendants hired Plaintiff as a full time, non-exempt employee. (Complaint, ¶ 28.) She performed her job duties with excellence until Mehranfar terminated her on July 8, 2021. (*Ibid*.) During her employment, Defendants misclassified Plaintiff as an independent contractor and deprived her of pay for all hours worked, rest periods, mealtimes, and itemized wage statements. (Complaint, ¶ 35.) Plaintiff worked 6 days a week, with 3 of those days comprising 12 hour shifts, without compensation for all hours worked and over time. (Complaint, ¶ 36.)

In May 2021, Mehranfar asked Plaintiff to testify in court on his behalf and told her what to say. (Complaint, ¶¶ 39-41.) She refused to testify because she did not want to provide false testimony and consequently, she was terminated. (Complaint, ¶¶ 42-43.)

Plaintiff filed the Complaint on February 9, 2023, asserting: (1) wrongful termination in violation of Labor Code, section 1102.5 and Government Code, section 12940, subd. (h)); (2) discrimination in violation of Labor Code section 1102.5, et seq; (3) failure to prevent discrimination, harassment, and retaliation (Gov. Code, § 12940, subd. (k)); (4) retaliation for disclosing violations of law (Lab. Code, §§ 1102.5, 1102.6); (5) misclassification in violation of Labor Code, section 226.8; (6) failure to provide meal periods (Lab. Code, §§ 226.7, 512); (7) failure to provide rest breaks (Lab. Code, §§ 226.7, 512); (8) failure to pay overtime compensation (Lab. Code, §§ 510, 1194); (9) failure to pay wages (Lab. Code, §§ 201, 1182.12, 1194, 1194.2); (10) waiting time penalties (Lab. Code, §§ 201-203); (11) failure to prepare, keep, and produce itemized statements in violation of Labor Code, sections 226 and 1174; and (12) unfair competition. On July 14, 2023, Defendants filed the instant demurrer, which Plaintiff opposes.

II. Request for Judicial Notice

Defendants request judicial notice of the California Secretary of State Business Search result webpages for Rose and New Rose.

Evidence Code section 452, permits the Court to take judicial notice of "[f]act and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) Here, both items are filings with the state of California. Plaintiff does not object to the request or dispute the accuracy of the facts. Thus, Defendants' request for judicial notice is GRANTED.

III. Legal Standard

Defendants demur to each cause of action on the basis of uncertainty and to the first, third, and fifth causes of action on the basis of failure to state sufficient facts. (Code of Civ. Proc., § 430.10, subd. (e) & (f).)

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

The court treats a demurrer "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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank,*

N.A. (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Ibid*.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

IV. Analysis

A. Uncertainty

Defendants argue the Complaint is uncertain because they are unable to discern which causes of action are alleged against each of them. However, Plaintiff asserts each claim against all defendants. Defendants further argue the claims are uncertain because the allegations are insufficient to establish agency and alter ego liability. However, that argument pertains to the sufficiency of the allegations, which is a different basis for demurrer than uncertainty. Moreover, the allegations are not so unintelligible that Defendants cannot reasonably respond to them. (See *Khoury, supra*, 14 Cal.App.4th at p. 616.) Thus, the demurrer on the basis of uncertainty is OVERRULED.

B. Allegations Regarding Alter Ego and Agency

Defendants argue the demurrer should be sustained because Plaintiff fails to allege sufficient facts to state alter ego liability and an agency relationship.

1. Alter Ego Liability

"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 [complaint alleging individual defendant was owner of all stock of defendant corporation and personally made all its

business decisions was not sufficient for alter ego liability]; see *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 235 [plaintiff sufficiently alleged unity of interest by alleging corporate entity was inadequately capitalized, failed to "abide by the formalities of corporate existence," and was dominated, controlled, and used by defendant as a "mere shell and conduit"].)

Plaintiff alleges there is a unity of interest and ownership between Rose, New Rose, Cupertino, and Mehranfar such that the individuality and separateness of Defendants have ceased to exist. (Complaint, ¶ 24.) She further alleges despite the formation of corporate existence, Defendants are one in the same for the following reasons: (1) Rose, New Rose, and Cupertino are dominated and controlled by Mehranfar; (2) Mehranfar derives actual and significant monetary benefits through Rose, New Rose, and Cupertino, by unlawful conduct, and he uses them as funding sources for his personal expenditures; (3) Rose, New Rose, and Cupertino do not comply with requisite corporate formalities to maintain a legal and separate corporate existence; and (4) the business affairs of the companies are so mixed and intermingled that they cannot reasonably be segregated. (Complaint, ¶ 25(a)-(e).) Thus, Plaintiff sufficiently alleges alter ego liability, and the demurrer cannot be sustained on this basis.

2. Agency Relationship

"An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." (Civ. Code, § 2295.) "'An agency relationship "may be implied based on conduct and circumstances.'" (*Ralphs Grocery Co. v. Victory Consultants, Inc*. (2017) 17 Cal.App.5th 245, 262, internal citations omitted.) "It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract." (*Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1178.) "For an agency relationship to exist, the asserted principal must have a sufficient right to control the relevant aspect of the purported agent's day-to-day operations." (*Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 85.) "The existence of an agency relationship is a factual question for the trier of fact." (*Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.* (2007) 148 Cal.App.4th 937, 965 (*Garlock Sealing Techs*).) "Only when the essential facts are not in conflict will

an agency determination be made as a matter of law." (*Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 55.)

Here, Plaintiff alleges Defendants were each other's agents and acted within the scope of such agency. (Complaint, ¶ 13.) She further alleges Mehranfar completely dominated and controlled Rose, New Rose, and Cupertino. (See Complaint, ¶ 25(a).) Defendants dispute this, therefore, the existence of an agency relationship is a question of fact that cannot be resolved on demurrer. (See *Garlock Sealing Techs., supra,* 148 Cal.App.4th at p. 965.) Thus, the demurrer cannot be sustained on this basis.

Based on the foregoing, the demurrer to the sixth, seventh, eighth, eleventh, and twelfth causes of action is OVERRULED.

C. Duplicative Claims

Defendants' argument that the second and fourth causes of action as well as the ninth and tenth causes of action are duplicative of each other is not a ground on which a demurrer may be sustained. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890 (*Blickman*); see *Tracfone Wireless, Inc. v. Los Angeles County* (2008) 163 Cal.App.4th 1359, 1368 [indicating same]; see also Code Civ. Proc., § 430.10 [setting forth the grounds for demurrer].)

While some cases indicate that duplicative causes of action "may be disregarded" or stricken (see e.g. *Ponce-Bran v. Trustees of Cal. State Univ.* (1996) 48 Cal.App.4th 1656, 1658, *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 (*Careau*), and *Bionghi v. Metropolitan Water Dist. of So. California* (1999) 70 Cal.App.4th 1358, 1370 (*Bionghi*)), the Sixth District Court of Appeal found that duplicativeness "is the sort of defect that, if it justifies any judicial intervention at all, is ordinarily dealt with most economically at trial, or on a dispositive motion such as summary judgment." (*Blickman, supra,* 162 Cal.App.4th at 890; This Court follows the Sixth District's guidance and declines to sustain the demurrer on this basis. (See *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 (*McCallum*) [as a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district].) Consequently, Defendants' demurrer cannot be sustained on the basis of duplicative causes of action, the and the demurrer to the second, fourth, ninth, and tenth causes of action is OVERRULED.

D. First Cause of Action- Wrongful Termination in Violation of Labor Code section 1102.5 and Government Code section 12940, subdivision (h)

Government Code section 12940, subdivision (h), provides that it is an unlawful employment practice for an employer to otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under Fair Employment and Housing Act (the "FEHA"). (Gov. Code, § 12940, subd. (h).)

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) "Employees need not explicitly and directly inform their employer that they believe the employer's conduct was discriminatory or otherwise forbidden by FEHA." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046.)

The FEHA protects against discrimination, harassment on the basis of various categories, including but not limited to race, gender, physical disability, and age. (See Gov. Code, § 12940.) Although Plaintiff asserts her claims are based on age discrimination, she fails to state any facts in support. Moreover, she fails to identify protected activity *under the FEHA* on which to state this claim. Nevertheless, the demurrer cannot be sustained on this basis because the claim is predicated on Labor Code section 1102.5 as well. (See *PH II, Inc. v. Super. Ct.* (1995) 33 Cal.App.4th 1680, 1682 ["A demurrer does not lie to a portion of a cause of action"]; see also *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778 ["[A] defendant cannot demur generally to part of a cause of action"].)

To establish a prima facie case of retaliatory discharge under section 1102.5, a plaintiff must show that "(1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 468.) Section 1102.5, provides:

> Any employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of

state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(Lab. Code, § 1102.5, subd. (c).) Falsely testifying under the penalty of perjury violates state and federal statutes. (See Pen. Code, § 118; see also 18 U.S Code, §§ 1621 & 1623.)

Here, Plaintiff alleges she refused to falsely testify for Mehranfar. (Complaint, ¶¶ 39-42.) She further alleges she was terminated on July 8, 2021 as a result of her refusal to falsely testify. (Complaint, ¶ 43.) Plaintiff alleges sufficient facts to state this claim under Section 1102.5, and the demurrer to the first cause of action is therefore OVERRULED.

E. Third Cause of Action-Failure to Prevent Discrimination, Harassment, and Retaliation in Violation of Government Code section 12940, subd. (k)

"The FEHA makes it unlawful for an employer 'to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.'" (§ 12940, subd. (k).)" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003 (*Scotch*).) "An actionable claim under section 12940, subdivision (k) is dependent on a claim of actual discrimination: 'Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented.'" (*Id.* at p. 1021.)

A prerequisite to a finding of liability for the failure to take all reasonable steps is a finding that the plaintiff suffered unlawful discrimination, harassment, or retaliation. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 282-283 (*Trujillo*); see also *Scotch*, supra, 173 Cal.App.4th at p. 1021.)

As stated above, Plaintiff fails to allege any facts to support her claims of discrimination or harassment based on any protected categories under the FEHA. Consequently, she fails to allege the prerequisite to predicate this claim upon. (See *Trujillo, supra,* 63 Cal.App.4th at pp. 282-283.) Thus, the demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

F. Fifth Cause of Action-Misclassification in Violation of Labor Code section 226.8

Labor Code section 226.8 prohibits the willful misclassification of an individual as an independent contractor. (See Lab. Code, § 226.8, subd. (a)(1).) Defendants argue there is not a private right of action under Labor Code section 226.8. Defendants' argument is well taken as the California

Supreme Court stated, in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 (*Kim*), "[n]or can employees misclassified as independent contractors sue for relief directly under section 226.8." (*Id.* at p. 89, citing *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 337-341 (*Noe*).) *Noe* states:

> The only specific language regarding enforcement of [section 226.8] appears in subdivision (g), which authorizes the Labor Commissioner to enforce the statute "pursuant to Section 98 or in a civil suit." If the commissioner proceeds under Section 98 and determines a violation has occurred, he or she "may issue a citation to assess penalties." (Lab Code, § 226.8, subd. (g)(2).) If the commissioner elects to enforce the statute "in a civil suit" ([Lab. Code], § 226.8, subd. (g)(3)), the penalties would be assessed through a court order. There is no language suggesting a private plaintiff may bring a direct action under [section 226.8] action or that a misclassified employee may collect the penalties described within the statute.

(*Id*. at p. 338.)

Thus, the demurrer to the fifth cause of action is SUSTAINED without leave to amend.

Calendar Line: 5
Case Name: *Mazen Arakji v. Super Micro Computer Inc.*
Case No.: 21CV381752

Before the Court is Defendant, Super Micro Computer Inc.'s motion for summary judgment. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for employment discrimination. Plaintiff is a 40-year-old male, who for "[M]uslim religious purposes," wears a long beard. Plaintiff also has a "very obvious musculoskeletal disability which limits [his] ability to grip and lift heavy objects." Plaintiffs "national origin is Lebanese, which is an Arab country in the Middle East" and has "Arabic ancestry and ethnic characteristics." Plaintiff's first name "Mazen" is allegedly "known to be an Arabic name" and his surname "Arakji" is allegedly "known to be a [M]uslim surname." (First Amended Complaint ("FAC")¶ 1.)

Plaintiff holds a Bachelor's in Electrical and Computer Engineering and a Master's in Computer Engineering from the University of Colorado, Boulder. (FAC ¶ 2.) Plaintiff has earned various certifications in his field. (*Id.* ¶ 3-4.) Plaintiff worked at Sun Microsystems (now Oracle), where he was promoted within 6 months and was accepted into the "selective Sun Engineering Enrichment & Development (SEED) program" on the technical tract—designed for individuals with a high potential to excel. (*Id.* ¶ 5.) Plaintiff received a letter from a previous employer commending his performance and contributions and developed three Android and two iOS applications. (*Id.*) Plaintiff also developed a "novel RTOS architecture for which he has a patent pending." (*Id.*)

Plaintiff applied for "several Embedded Engineering positions at Super Micro from 2013 to 2020." (FAC ¶ 20.) In total, Plaintiff submitted 25 job applications for Firmware engineer position with Defendant over a period of approximately 7 years (2013-2020). (FAC ¶¶ 21-46.) Plaintiff's June 22, 2020, application was for a Firmware Engineer position that required:

- Bachelor's degree electric/computer engineering or computer science preferred, MS degree is strongly desirable
- Minimum of 2 years working experience in firmware development preferred
- Strong programming skills in C/C++ and Java is strongly desirable, with hands-on experience in embedded Linux development

• Experience in IPMI protocol, ARMs processors, virtual media and web server is a plus

• TCP/IP network protocols and typical network operation practices are desirable

(FAC ¶ 53.) Plaintiff claims that although he meets and exceeds these requirements, Defendant never selected him for an interview. (FAC ¶¶ 47, 54.)

Plaintiff alleges he never had any personal or professional relationship with Defendant, and Defendant's information about him was limited to what Plaintiff provided in the online job applications. Plaintiff thus claims that "the set of possible reasons Defendant has for denying [him] employment is limited to the following: [his]first name (and thus [his] Arab ancestry by deduction, [his] last name (and thus [his] religion by deduction), [his] disability, and [his] qualifications". (FAC ¶ 55.)

Plaintiff filed his suit against Super Micro Computer Inc. on May 11, 2021, and amended his complaint on June 21, 2021, alleging employment discrimination based on religion, creed, national origin, ancestry, and disability in violation of Gov. Code section 12940. Plaintiff claims he obtained a right-to-sue notice from the DFEH on August 10,2020. (FAC ¶ 62)

II. Legal Standard

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

"On a motion for summary judgment, the initial burden is always on the moving party to make a prima facie showing that there are no triable issues of material fact." (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) The moving party is entitled to summary judgment if they can show that there is no triable issue of material fact or if they have a complete defense thereto. (*Aguilar*, *supra*, 25 Cal. 4th at 843.)

A defendant moving for summary judgment bears two burdens: (1) the burden of production, i.e., presenting admissible evidence, through material facts, sufficient to satisfy a directed verdict standard; and (2) the burden of persuasion, i.e., the material facts presented must persuade the court that the plaintiff cannot establish one or more elements of a cause of action, or a complete defense vitiates the cause of action. (Code Civ. Proc., § 437c(p)(2); *Aguilar, supra*, 25 Cal.4th at p. 850-851.) A defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Once the defendant meets this burden, the burden shifts to the plaintiff to show that a "triable issue of one or more material facts exists as to that cause of action or defense thereto." (*Id*.)

"On ruling on a motion for summary judgment, the court is to 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.'" (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 760.)

On a summary judgment motion, the court must therefore consider what inferences favoring the opposing party a factfinder could reasonably draw from the evidence. "While viewing the evidence in this manner, the court must bear in mind that its primary function is to identify issues rather than to determine issues. [Citation.]" (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.)

Defeating summary judgment requires only a single disputed material fact. (See CCP § 437c(c) [a motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."] [emphasis added].) Thus, any disputed material fact means the court must deny the motion; the court has no discretion to grant summary judgment. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. 8; *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511-1512.)

III. Failure to Submit a Separate Statement

Code. Civ. Proc. §473c subsection b(3) requires the opposition papers to "include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the

supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion."

Plaintiff did not comply with this requirement. Plaintiff also failed to submit a separate responsive statement. Although the Court has the authority to grant Defendant's summary judgment on this ground, it will nevertheless exercise its discretion to consider Plaintiff's opposition.

IV. Legal Standard

California's FEHA provides in pertinent part: "It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] (a) For an employer, because of the race, … sex, … [or] age, … of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214; see § 12940, subd. (a).) Before a person may file a civil complaint alleging a violation of this statute, they "must exhaust the administrative remedy provided by the statute by filing a complaint with the" DFEH, "and must obtain from the [DFEH] a notice of right to sue." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492 (*Romano*); see also *Williams v. City of Belvedere*, (1999) 72 Cal. App. 4th 84, 90 (*Williams*).) When analyzing how Government Code section 12940 applies to a FEHA claim, California courts look to California precedent and to cases interpreting similar federal employment antidiscrimination laws. (See, *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317 (Guz); *Pollock v. Tri-Modal Distribution Services, Inc*. (2021)11 Cal.5th 918 (*Pollock*).)

V. Analysis

Defendant asserts:

1. Plaintiff's job applications in 2013, 2017, and 2018 are barred by the statute of limitations.

2. Plaintiff failed to exhaust his administrative remedies for his September 19, 2020, and November 11, 2020, applications.

3. Plaintiff's claims for the remaining five applications fail under *McDonnell Douglas* because he cannot establish a prima facie case.

4. Defendant had legitimate, nondiscriminatory reasons for not hiring Plaintiff.

A. Statute of Limitation

"The timely filing of an administrative complaint" before the DFEH "is a prerequisite to the bringing of a civil action for damages." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492 (*Romano*).) Prior to the January 1, 2020, FEHA required an administrative complaint be filed with the DFEH [currently known as California Civil Rights Department ("CRD")] no later than "the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred." (Gov. Code §12960, former subd. (d).) The current statute allows for a period of three years. (Gov. Code § 12960, subd. (e).) This requirement is "[t]he statute of limitations for FEHA actions." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 811 (*Richards*).)

In failure to hire cases "'[o]nce the employee is aware or reasonably should be aware of the employer's decision [not to hire], the limitations period commences.'" (*Amini v. Oberlin College* (6th Cir. 2001) 259 F.3d 493, 498-500, quoting *EEOC v. United Parcel Service, Inc.* (6th Cir. 2001) 249 F.3d 557, 561–562; see also *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92; *Harris v. City of New York* (2d Cir. 1999) 186 F.3d 243, 247 (*Harris*); *Miller v. Beneficial Management Corp.* (3d Cir. 1992) 977 F.2d 834, 843 (*Miller*).) "[T]he claim accrues upon awareness of the actual injury, i.e. the adverse employment action, and not when the plaintiff suspects a legal wrong." (*Lukovsky v. City and County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1049 [failure to hire claim].) Because the statute of limitations is an affirmative defense, it is Super Micro's burden to prove it has run. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1985) 39 Cal.3d 57, 67, fn. 8.)

Plaintiff alleges he applied for a Firmware Engineer position with Super Micro nine times from March 30, 2013 to August 20, 2013, three times from July 26, 2017 to August 18, 2017, and six times from January 12, 2018 to June 14, 2018. None of these applications led to an interview or any response from Super Micro. (FAC ¶¶ 21-39, 47)

Plaintiff's job applications prior to January 1, 2019 are subject to the one-year statute of limitation. Therefore, unless it was previously the subject of a timely administrative complaint, these applications are time-barred. Plaintiff does not allege or submit evidence with his opposition demonstrating that he filed a timely administrative complaint prior to August 10, 2020 to negate the running of the statute for these applications. Thus, his claim based on these applications is time barred.

Plaintiff argues the continuing violation doctrine prevents application of the statute of limitations to this aspect of his claim. Arguing Super Micro's continuous pattern of refusing to extend an interview to him over eight years, Plaintiff asserts: "the statute of limitations began to run when I realized that any further effort to get Super Micro to give me a chance to interview would be in vain." (Opposition p. 9.) "Under that doctrine, an employer is liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period." *(Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1056 (*Yanowitz*.) To determine whether the doctrine applies, courts examine whether the employer's actions (1) were sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. (*Yanowitz, supra,* 36 Cal.4th at p. 1059.)

First, Plaintiff failed to allege the continuing violation doctrine the FAC, and "a summary judgment motion necessarily is addressed to the pleadings." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 172.) "[A] party cannot successfully resist summary judgment on a theory not pleaded." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541; *Hutton v. Fidelity National Title Company* (2013) 213 Cal.App.4th 486, 493 (papers "filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings.") And, even if the Court were to liberally construe the FAC and resolve doubts in Plaintiff's favor (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 760), Plaintiff provides no *evidence* to support the application of the continuing violation doctrine in this case. Finally, as explained below, Plaintiff fails to establish a prima facie case of discrimination, thus this doctrine fails at the outset.

Accordingly, the Court finds Plaintiff's claims, based on job applications submitted in 2013, 2017, and 2018 are time-barred.

B. Exhaustion of Administrative Remedy

Plaintiff applied seven times for a Firmware Engineer position with Super Micro from August 19, 2019 to November 11, 2020. Plaintiff's claims based on these applications are within the three-year limitations period pursuant to the January 1, 2020, amendment. However, to assert a FEHA claim based on these applications, Plaintiff was required to file a complaint with DFEH and obtain a right to sue notice. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492 (*Romano*); See also *Williams v. City of Belvedere*, (1999) 72 Cal. App. 4th 84, 90 (*Williams*).)

It is undisputed that Plaintiff submitted his September and November 2020 job applications after he filed his administrative complaint on August 10, 2020, and that Plaintiff's administrative complaint did not include a claim for discrimination based on ancestry. (Defendant's Appendix of Evidence, Ex. A.) Plaintiff thus failed to exhaust his administrative remedies for a discrimination claim based on ancestry. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1723-1725, [grant of summary judgement was affirmed based in part on failure to include claims in DFEH administrative complaint that were ultimately asserted in complaint.) Accordingly, Plaintiff's September 19, 2020 and November 11, 2020 job applications and claims for ancestry discrimination are barred.

C. McDonnell Douglas Test

Turning to Plaintiff's remaining job applications, "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination, including age discrimination, based on a theory of disparate treatment." (*Guz, supra*, 24 Cal.4th 317, (collecting cases, including *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.)) "This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz, supra*, 24 Cal.4th at 354.)

Under the *McDonnell Douglas* test, plaintiff has the initial burden to establish a prima facie case of discrimination. (*Guz, supra*, 24 Cal.4th at 354 (internal citations and quotation omitted).) "The specific elements of a prima facie case may vary depending on the particular facts. Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for

the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstances suggest discriminatory motive. (*Guz, supra*, 24 Cal.4th at 354-355 (internal citations and quotation omitted).)

If the plaintiff meets the initial burden, a rebuttal presumption of discrimination arises, and the burden shifts to the employer to produce admissible evidence that that the employer's action was taken for a legitimate, nondiscriminatory reason. If the employer sustains this burden, the presumption of discrimination disappears. (*Hicks, supra*, 509 U.S. 502, 510-51.) The plaintiff may then attack the employer's evidence as pretexts for discrimination or offer other evidence of discriminatory motive. (*Hicks, supra*, at pp. 515-518.) The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff throughout the *McDonnell Douglas* analysis. (*Hicks, supra*, at p. 518; *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 356.) There must be evidence supporting a rational inference that intentional discrimination on prohibited grounds was the true cause of the employer's actions. (*Guz, supra*, 24 Cal.4th at pp. 360-361) Where there is evidence from which the trier of fact could conclude the employer's action was caused by unlawful discrimination and evidence that it was caused by nondiscriminatory motivations, the plaintiff must prove "discrimination was a 'substantial factor' in the decision." (*Harris, supra*, 56 Cal.4th at pp. 217, 225.)

Similarly, to state a claim for disability discrimination, plaintiff must allege that (1) he suffers from a qualifying disability, (2) was qualified for the job, i.e., able to perform its essential functions with reasonable accommodation, and (3) was subjected to an adverse employment action, (4) because of his disability. (*Brudnage v. Hahn*, (1997) 57 Cal,App.4th 228, 236.)

Super Micro contends that Plaintiff cannot establish the second, third, or fourth elements of a prima facie case. The Court agrees. Plaintiff fails to submit any evidence connecting his qualifications to the listed job requirements. (See Plaintiff's Responses to Form Interrogatories and Requests for Admission; see also generally FAC and Opposition.) Plaintiff also fails to provide any evidence that he was qualified to perform the jobs he applied for despite his disability. Plaintiff therefore fails to make a prima facie case as to the second element.

Plaintiff also fails to make a prima facie case as to the third element, since he does not dispute that Super Micro did not even review or consider any of these five applications. (UMF Nos. 22,47,81.) Plaintiff also submits no evidence or undisputed facts from which one can infer that Super Micro did not hire him because he was a member of a protected class. It is undisputed that in a response to form interrogatory asking Plaintiff to state 'all reasons for each adverse employment action," his response was only that " Defendant is a discriminator." (UMF Nos. 26, 51.) In response to another interrogatory asking Plaintiff to state all facts upon which he bases each claim of discrimination, Plaintiff states: "I applied for numerous positions for about 8 years, and despite being qualified, I was never selected for an interview." (UMF Nos. 27, 52.) Plaintiff thus fails to make a prima facie showing for the fourth element.

Plaintiff's speculations and conclusory allegations in his FAC and opposition to this motion fail to establish a plausible claim for discrimination. Accordingly, Super Micro's motion for summary judgment is GRANTED.

Calendar Line: 7
Case Name: *Sz Huang et al vs Tesla Inc. et al*
Case No.: 19CV346663

Before the Court are Defendant Caltrans' Motions to Augment Expert Witness Information and to Compel Drs. Badger's and Harris's Depositions.

I. Background

This is a product liability action. Plaintiffs are the wife and children of Walter Huang who suffered a fatal crash while driving his Tesla Model X in 2018. Mr. Huang added Autopilot when he purchased his Tesla, but he did not purchase the "Full Driving Capability Package." According to Tesla, Autopilot provides numerous warnings and instructions to its users, both in the manual and in the car while the Tesla is in use, making clear that drivers need to keep their hands on the wheel and "be prepared to take over at any time" even while Autopilot is engaged. Tesla also argues that consumers are made aware of Autopilot's limitations in areas where, for example, the lanes are unclear, the light is low or the Tesla's cameras are obstructed in some way.

Mr. Huang's crash occurred on March 23, 2018, approximately four months after he purchased his Tesla Model X. He was driving his regular morning route when he approached the junction of 101 South and State Route 85 where a high-occupancy vehicle (HOV) lane splits off southbound 101 to the left to go up a ramp. A concrete attenuator (median) eventually begins in the middle of the two lanes, which middle is called a "gore." Mr. Huang apparently had experienced the Tesla veering towards this gore in his morning route, and complained of this to others, including his wife. On the morning of March 23, 2018, Mr. Huang's Tesla Model X veered toward the gore point, crashing into the attenuator at high speed. Upon impact with the attenuator, the front portion of Mr. Huang's Tesla was ripped apart as the Tesla spun into the fast lane where it was struck by an approaching Mazda and then by an Audi before stopping in the shoulder/fast lane. Mr. Huang was pronounced dead at the scene.

According to Tesla, Mr. Huang's hands were not detected on the wheel multiple times during the 19 minutes leading up to the crash, Autopilot issued two visual and one audible alert for hands-off driving, Mr. Huang's hands were not on the wheel for the final six seconds before the crash, and Mr. Huang was playing the video game Three Kingdoms on his phone at the time of the crash.

The National Transportation Safety Board ("NTSB") investigated the crash and found that if the crash attenuator (median) had been "in a functional condition before the March 23, 2018 crash, the Tesla driver most likely would have survived the collision." (Declaration of Rosemary Love ("Love Decl."), ¶5, Ex. B.) The parties have had this NTSB report since the lawsuit was filed.

Plaintiffs filed this action on April 26, 2019 asserting claims against Tesla and the State of California, acting by and through the Department of Transportation ("Caltrans"). Caltrans hired accident reconstruction expert Stephen Fenton and provided him with voluminous materials. (Love Decl., ¶6-7; Declaration of Stephen Fenton ("Fenton Decl."), ¶¶3, 4, 6, 7.) Caltrans claims after Fenton received photographs of the Mazda attached as Exhibit 0197 to driver Ellery Wong's deposition, Fenton refined his opinion regarding the severity of the second impact between the Mazda and Tesla, raising new questions about when and how Mr. Huang suffered the injuries that ultimately lead to his death. As a result of this change, Caltrans claims it was necessary to consult with a biomechanical expert, and this expert is now critical to its defense. Caltrans also claims Tesla and Plaintiff are wrongfully preventing it from deposing non-testifying experts given that those parties have deposed experts after the close of expert discovery and it was not included in those parties' stipulations concerning discovery deadlines and trial dates.

Tesla and Plaintiff claim it would be prejudicial to permit Caltrans to add new expert material at this time after so many depositions have already been completed, and Caltrans should have known long ago it would need a biomechanical expert, since Tesla and Plaintiff each timely disclosed such experts, and all parties have had the NTSB report since 2018. Tesla and Plaintiff further object to Caltrans taking Dr. Badger's and Dr. Harris's depositions because they claim expert discovery is closed, and Caltrans fails to explain why these depositions are needed.

This case was first set for trial to commence on March 27, 2023. On February 8, 2023, Plaintiff and Tesla submitted a stipulation to continue the trial date to "approximately July 31, 2023 or a date thereafter that is convenient for the Court" along with a proposed schedule for completing fact and expert discovery. According to that stipulation, the "Last day to complete fact discovery timely served/noticed and pending as of February 28, 2023" was May 1, 2023, the deadline for "Simultaneous exchange of expert witness disclosures" was May 1, 2023.

On June 29, 2023, Plaintiff and Tesla again jointly requested to continue the trial date. Paragraph 3 of that stipulation (which Caltrans did not sign) states:

> The parties disclosed experts early, pursuant to a Stipulation and order, on May 1, 2023. In total, Plaintiffs, Tesla, and the State of California (hereinafter, "Caltrans") disclosed 27 experts. All parties have been diligently scheduling and performing expert depositions and, to date, seven depositions have already been completed, with one additional deposition this week. Some, but not all, of the remaining experts are on calendar before the current close of expert discovery on July 17, 2023. All of the parties' accident reconstruction experts, biomechanic experts, and economists will be completed before the close of expert discovery. The remaining experts primarily relate to Plaintiffs' products liability claims against Tesla.

Plaintiff and Tesla go on to explain that due to plaintiffs' counsel's involvement in another trial and unexpected medical issues for certain counsel on both Tesla's and Plaintiff's teams, Tesla and Plaintiffs would be unable to complete the remaining depositions by the then current expert discovery cut off. Those parties accordingly agreed to continue the trial date to March 2024. At paragraph 9, Plaintiff and Tesla state:

> Caltrans does not agree to the proposed continuance. Plaintiffs and Tesla do not believe any party will be prejudiced by the requested continuance because the extension to complete expert discovery does not impact Caltrans. The expert depositions occurring after the current expert discovery cut off primarily relate to Plaintiffs' product liability allegations against Tesla.

The undersigned Court granted Plaintiffs' and Tesla's request, despite Caltrans' opposition, stating: "No additional trial continuances will be granted absent exigent circumstances, which circumstances shall NOT include outstanding fact or expert discovery issues."

On August 1, 2023, Caltrans filed its motion to augment expert witness information. More than two months later, Caltrans filed an ex parte application for an order shortening time to have its motion to compel depositions of Plaintiffs' non-retained expert witnesses Dr. Badger and Dr. Harris heard with

Caltrans' motion to augment expert witness disclosures. The Court granted the application to shorten time, so that both of Caltrans' motions could be heard on November 7, 2023. Tesla and Plaintiff oppose both motions.

II. Legal Standards and Analysis: Motion to Augment

If a party unreasonably fails to list an expert or submit a declaration for an expert when exchanging expert witness information, the trial judge must exclude the expert's testimony at trial unless that party obtains a court order after a motion filed under Code of Civil Procedure section 2034.610. (Code Civ. Proc. §2034.300; *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536.) To obtain such leave, the moving party must establish that at the time of the deadline for expert exchanges, (1) the party could not, with reasonable diligence, have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness or (2) the failure to previously identify the witness or additional testimony was due to mistake, inadvertence, surprise, or excusable neglect.

Here, Mr. Fenton, Caltrans' accident reconstruction expert states in his declaration:

> In May and June, 2023, I received documentation of physical evidence that allowed me to refine my reconstruction of the collision sequence, and in particular, the collision between the Mazda and the Tesla. The documentation included a series of 10 photographs of the scene taken by the Mazda driver Ellery Wong which were appended to his deposition as Exhibit 0197. After reviewing the photographs, and re-examining the case materials in light of the Wong photographs, I refined my opinion as to the nature and severity of the forces involved in the series of collisions. I spoke with the Caltrans attorneys who had retained me and advised of my reconstruction analysis. (Fenton Decl. ¶¶7-8.)

Caltrans emailed all counsel on July 25, 2023 to meet and confer regarding a stipulation for Caltrans to augment its expert witness list to add a biomechanical engineer. Plaintiffs did not agree to do so, and Tesla did not respond. Caltrans also attaches its proposed augmented expert disclosure with its motion.

Tesla and Plaintiff essentially argue they would be prejudiced if the Court were to allow this augmentation because so many depositions have already been taken and the parties should now be focusing on trial preparations. The Court is not persuaded that this is the type of prejudice that should prevent the augmentation Caltrans seeks. While the Court did not see in the record when Ellery Wong deposition was taken, neither Tesla nor Plaintiff submit an expert or other declaration to dispute Mr. Fenton's declaration stating that he did not earlier know about the photographs that caused him to refine his opinion, which, in turn caused Caltrans to believe it needed its own biomechanical expert. Further, Tesla and Plaintiff twice sought to continue the trial date, which is now not until March 18, 2024, and Caltrans promptly contacted those parties in July—just after Mr. Fenton informed Caltrans' counsel of his refined opinion—to seek a stipulation. On this record, the Court finds Caltrans meets the requirements for the augmentation it seeks.

Caltrans' motion to augment is therefore GRANTED with the following conditions. Caltrans may augment its expert disclosures to include the material attached as Exhibit M to the Declaration of Rosemary Love in Support of Caltrans Motion to Augment Expert Witness Information. Caltrans shall promptly make its biomechanical expert available for deposition and make Mr. Fenton available for a 1 hour further deposition solely on the topic of Mr. Fenton's "refined opinion" at mutually agreeable time(s) and location(s). Caltrans' biomechanical expert may offer opinions solely related to Mr. Fenton's refined opinion and the impact of the Mazda and may not rebut Tesla's and Plaintiffs' biomechanical experts' opinions on other subjects.

III. Legal Standards and Analysis: Motion to Compel Depositions

Plaintiff disclosed non-retained experts Dr. James Badger, MD and Dr. Odette Harris, MD in its May 1, 2023 expert disclosures. Caltrans served notices for the depositions of these experts over five months later on September 29, 2023.

Trial continuances do not change the date for fact and expert discovery cut offs; unless the parties agree or the court otherwise orders, those cut offs are calculated from the initial trial date, which in this case was March 27, 2023. (Code Civ. Proc. §2024.020(b). The parties here agreed to take some depositions after the cut off for those experts whose depositions were noticed as of September 1, 2023. At no time before September 29, 2023 did Caltrans express an interest in taking these depositions.

Caltrans does not explain why it needs these depositions or justify why it waited so long to seek them. On this record, the Court does not find good cause to re-open discovery for Caltrans to take these depositions, and its motion to compel is DENIED.

Calendar Line: 10
Case Name: *PP Elmdale, LLC vs CN One Investment LLC*
Case No.: 23CV414340

Before the Court is Defendant CN One Investment LLC's Motion to Expunge Lis Pendens and Request for Monetary Sanctions. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff PP Elmdale, LLC ("PP Elmdale") filed this action for quite title and declaratory relief against Defendant CN One Investment LLC ("CN One") on April 7, 2023. PP Elmdale filed a notice of pendency of action pursuant to Code of Civil Procedure section 761.010 on May 30, 2023. CN One moves the Court to expunge the *lis pendens.*

PP Elmdale owns apartment buildings located at 984 Elm Street in San Jose ("Plaintiff's Property") and at the adjacent 990 Elm Street, both of which it acquired in 1973. (Complaint, ¶¶1, 4, Ex. A; Corrected Declaration of Kirk Kozlowski, ¶3.) In 2020, CN One purchased property adjacent to 984 Elm Street for development ("Defendant's Property"). (Complaint, ¶¶2, 4, Ex. B.) Plaintiff's and Defendant's Property share a property line, along which a fence currently exists. (Complaint, ¶¶3, 5.)

PP Elmdale describes the fence as "a poured concrete footing approximately 12 inches tall at the front of the property that steps up to approximately 24 inches in height about a third of the way down the property line. . . [and] [o]n top of the concrete footing [has] a traditional residential wooden fence." (Kozlowski, ¶4.) PP Elmdale claims that when it purchased Plaintiff's Property, "[a] fence existed between the two properties, in the same configuration as the existing fence." (Kozlowski, ¶4.) In support, Plaintiff cites to Exhibit B to the Kozlowski Declaration, which is "an aerial photo that was taken on December 16, 1965. . . purchased. . .from Pacific Aerial Surveys, a company in Berkeley, California that maintains an extensive archive of historical aerial photograph of the Bay Area." (Kozlowski, ¶9, Ex. B.) Plaintiff purchased the property with the understanding that the fence was built on the property line shared with Defendant's property.

In 2020, CN One purchased Defendant's Property from Tosh Okano, who had purchased the property in 1977. (Declaration of Tosh Okano In Support of Reply ("Okano Reply Decl."), ¶ 2.) Mr. Okano explains that he built the existing fence himself in 1993. (Okano Reply Decl., ¶¶2-6; see also

generally Opening Declaration of Tosh Okano ("Opening Okano Decl.").) When Mr. Okano purchased the property in 1977 "there existed an old fence built only on posts. It was in bad shape." (Okano Reply Decl., ¶2.) Mr. Okano states that he "maintained, and often repaired, the wooden boards on the fence, and [t]he owners of 984 Elm Street never maintained the fence or contributed to its repair." (*Id.*) In 1993, the wooden fence was in such disrepair that Mr. Okano decided it needed to be "completely repaired." Mr. Okano contacted the owners of Plaintiff's Property, who are the same owners today, to see whether they would share the costs of conducting a survey and the repairs to the fence, but they refused to do so. (*Id.*, ¶5.) Mr. Okano could not afford to pay for both a survey and a new fence, but he needed to keep his large dog safe. (*Id.*, ¶6.) So, he set out to repair the fence himself. He hired and paid Valley Concrete to pour the concrete block footing that is currently part of the fence, and he built the fence on top of the footing himself, since he is a carpenter. (*Id.*, ¶¶2, 4; Opening Okano Decl.) Mr. Okano then "solely maintained and repaired the fence" from 1993 until he sold the property to CN One in 2020. (Reply Okano Decl., ¶4.)

In 2020, in connection with its development plans, CN One conducted a survey and determined the fence encroaches on Defendant's Property by approximately 3.8 feet near the street and encroaches on Plaintiff's property approximately 18 inches at the rear of the property. (Kozlowski, ¶5.) CN One provide these survey results to PP Elmdale who expressed concern that if CN One moved the fence to the property line in the course of development, PP Elmdale's driveway would be too narrow for some emergency vehicles and large private vehicles to use, and the driveway would not meet San Jose's requirements for a 10 foot driveway. The parties agreed in principle to a 12 foot driveway, but that agreement was never consummated. CN One submits credible evidence that an emergency vehicle would not be able to use the driveway in its current form in any event (Declaration of Huimin Mu, Ex. A) and agrees to an easement that would permit a 10 foot wide driveway in accordance with San Jose's requirements (Reply Declaration of Huimin Mu, ¶10.)

II. Legal Standard and Analysis

Code of Civil Procedure section 405.30 provides:

> At any time after notice of pendency of action has been recorded, any party, or any nonparty with an interest in the real property affected thereby, may apply

> to the court in which the action is pending to expunge the notice. . . Evidence or declarations may be filed with the motion to expunge the notice. The court may permit evidence to be received in the form of oral testimony, and may make any orders it deems just to provide for discovery by any party affected by a motion to expunge the notice. The claimant shall have the burden of proof under Sections 405.31 and 405.32.

(Code Civ. Proc. § 405.30.)

A *lis pendens* is intended to ensure a plaintiff's interest in real property is preserved pending litigation. (*Campbell v. Superior Court* (2005) 132 Cal.app.4th 904. 917-918 (internal citations omitted).) A *lis pendens* clouds the title, effectively preventing transfer of the property until the litigation is resolved, thus it is to be applied narrowly. (*BGJ Associates LLC v. Superior Court* (1999) 75 Cal.App.4th 952, 966-67.) Thus, to maintain a *lis pendens*, a complaint must state a real property claim and the claimant must establish "probable validity" of the real property claim. (Code Civ. Proc. § 405.32; *Brownlee v. Vang* (1962) 206 Cal.App.2d 814, 817; *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1017.) "Probable validity" means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim. (Code Civ. Proc. § 405.32; *Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003, 1016.)

Here, Plaintiff seeks an equitable easement which requires: (1) the encroacher is innocent not willful or negligent; (2) the title holder will not suffer irreparable injury regardless of injury to the encroacher; and (3) the encroacher proves through clear evidence that the hardship that would result to the encroacher is greatly disproportionate to the hardship that the title holder would suffer by the continuance of the encroachment. (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 575; *Hirschfiled v. Schwartz* (2001) 91 Cal.App.4th 749, 750.)

The Court finds that Plaintiff cannot meet its burden to show probable validity of its claim; Plaintiff fails to meet even this minimum burden for any one of the three requirement elements. First, Plaintiff had the opportunity to determine the property line in 1993, but it refused to do so. Thus, at a minimum, Plaintiff was a negligent, not an innocent, encroacher. Next, CN One will suffer irreparable injury at least in the form of a reduced number of units that can be built on Defendant's Property—in

perpetuity and permanent loss of use of the property comprising Plaintiff's encroachment. And three, PP Elmdale will not suffer any injury according to this record. The fire department cannot use the driveway at 12 feet, thus reducing the driveway to the property line has no bearing on use by emergency vehicles. Further, CN One worked with San Jose to be able to provide Plaintiff with a code compliant 10 foot driveway. This leaves PP Elmdale's complaints regarding private vehicles and the location of drains and other fixtures on its own property. These complaints are plainly not "disproportionate to the hardship that the title holder would suffer by the continuance of the encroachment."

Accordingly, CN One's motion to expunge *lis pendens* is GRANTED.

III. Sanctions

Code Civil Procedure section 405.38 provides:

> The court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust.

The Court finds it appropriate on this record to award CN One its attorneys' fees and costs pursuant to this code section. PP Elmdale's complaints regarding the property line were not comparable to the fact patterns where courts affirmed the granting of equitable easements. Unlike the encroachers in Plaintiff's cited cases, moving the fence costs PP Elmdale nothing, it controls its own property and can make adjustments to drains and other fixtures if it thinks that is necessary for the convenience of its renters or it can decide to leave them as they are and still rent its property, and it did not build or at any time maintain the fence.

CN One seeks $6000 in attorneys' fees and costs. The Court finds counsel's rate of $650 per hour and 10 hours of time to prepare this motion to be reasonable. Accordingly, the Court orders PP Elmdale to pay CN One $6000 within 60 days of service of this final order.