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: November 14, 2023 TIME: 9:00 A.M.

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

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

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

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV375651	Festo Corporation v. Arevo, Inc.	Click on LINE 1 or scroll down for ruling.
LINE 2	22CV398575	Julia Minkowski v. James Hann et al.	Demurrer: the parties have stipulated to continue this hearing, although for some reason they have proposed random, unworkable dates (two out of three proposed dates are not even proper law-and-motion dates). The court continues the hearing to **January 18, 2024** at 9:00 a.m.
LINE 3	23CV415836	Jin Zhang v. Zhichao Lu et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 4	23CV415836	Jin Zhang v. Zhichao Lu et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 5	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 5 or scroll down for ruling in lines 5-7.
LINE 6	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 5 or scroll down for ruling in lines 5-7.
LINE 7	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 5 or scroll down for ruling in lines 5-7.
LINE 8	21CV391300	Vaibhav Puri v. Jonathan Lopez Chico	Motion to compel responses to form interrogatories, special interrogatories, and requests for production: notice is proper, and the motion is unopposed. The court GRANTS the motion and orders plaintiff to provide responses, without objection, within 30 days of this order. In addition, the court GRANTS defendants' request for $860 in monetary sanctions.

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LINE 9	22CV403993	Shi Xia ("Sharon") Yang et al. v. Keen Wei et al.	Click on LINE 9 or scroll down for ruling.
LINE 10	23CV415418	McManis Faulkner, APC v. Melvin Cooper	Click on LINE 10 or scroll down for ruling in lines 10-11.
LINE 11	23CV415418	McManis Faulkner, APC v. Melvin Cooper	Click on LINE 10 or scroll down for ruling in lines 10-11.

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Calendar Line 1
Case Name: *Festo Corporation v. Arevo, Inc.*
Case No.: 21CV375651

I. BACKGROUND

This is a collection action brought by Plaintiff Festo Corporation ("Festo") against Defendant Arevo, Inc. ("Arevo") and various Does. The original and still operative complaint, filed by Festo on January 4, 2021, states four causes of action that appear to be common counts. Festo alleges that Arevo owes it $62,112.56 plus interest.

On April 2, 2021, Arevo filed an answer to the complaint, while represented by counsel. The answer generally denied the allegations and listed 28 affirmative defenses. On January 26, 2023, more than a year and a half later, the court heard and granted a motion to be relieved as counsel by Arevo's attorney. A formal order on the motion issued on March 24, 2023.

Currently before the court is Festo's motion to strike Arevo's answer. There is no opposition on file.

II. REQUEST FOR JUDICIAL NOTICE

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code §453(b) requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

In support of the motion Festo has submitted a request for judicial notice of four documents, attached to the request as Exhibits A-D, pursuant to Evidence Code section 452, subdivisions (c) and (d).

Judicial notice of Exhibits A and B, copies of Festo's complaint and Arevo's answer, is GRANTED under subdivision (d) (court records) only. Notice is taken only of the existence and filing dates of both documents, and not of the truth of their contents or the contents of any attached exhibits. Judicial notice of Exhibit C, a copy of the motion to withdraw filed by Arevo's former counsel, is DENIED as irrelevant to the material issue before the court. Judicial notice of Exhibit D, a copy of the court's March 24, 2023 order, is GRANTED pursuant to Evidence Code section 452, subdivisions (c) and (d).

III. FESTO'S MOTION TO STRIKE

A. General Authority

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn

or filed in conformity with the laws of this state, a court rule, or an order of the court. The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437(a).) "[J]udges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Sup. Ct.* (1998) 67 Cal.App.4th 1253, 1255.)

As an initial matter, the court notes that Festo has not complied with section 435.5(a), which states that before a motion to strike is filed the parties are required to meet and confer "in person or by telephone." The moving party must file a declaration with the motion describing the meet and confer efforts. (Code Civ. Proc., § 435.5(a)(3).) The declaration submitted by Festo counsel Gary Benis makes no mention of any meet and confer efforts. As a failure to meet and confer is not, in itself, a basis for denying the motion, however, the court will consider the motion.

B. Analysis

Despite no opposition having been filed—which is to be expected, as Arevo is not currently represented by counsel—the court denies Festo's motion to strike Arevo's Answer.

First, the motion is untimely. A motion to strike must be brought "within the time allowed to respond to a pleading." Where the pleading in question is an answer, the time to respond by either demurrer or motion to strike is 10 days after service of the answer. (See Code Civ. Proc., §§ 430.40(b), 435(b)(1); see also Cal. Rules of Court, rule 3.1322(b).) Because Arevo filed its answer on April 2, 2021, Festo's motion, filed on July 20, 2023, is untimely *by years*.

Second, even if it were timely, the motion would be denied. The fact that a corporate defendant is no longer represented by counsel is not a basis for striking a pleading that was filed when it was represented by counsel. The court is aware of no authority—and Festo cites none—in support of this novel proposition. Festo also identifies no actual defect in the answer itself. Accordingly, this motion to strike is without merit.

DENIED.

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Calendar Lines 3-4
Case Name: *Jin Zhang v. Zhichao Lu et al.*
Case No.: 23CV415836

I. BACKGROUND

This is an employment dispute between plaintiff Jin Zhang ("Zhang" or "Plaintiff") and defendants Hefei Reliance Memory LTD ("Hefei Reliance"), Reliance Memory, Inc. ("Reliance Memory"), Hefei Ruibo Enterprise Consulting Management LLP ("Hefei Ruibo") and Zhichao Lu ("Lu") (collectively, "Defendants").

The complaint, filed on May 2, 2023, states 11 causes of action: (1) Breach of Contract (against all defendants); (2) Breach of the Covenant of Good Faith and Fair Dealing (against all defendants); (3) Promissory Estoppel (against all defendants); (4) Unjust Enrichment (against all defendants); (5) Nonpayment of Wages (Labor Code, § 201(a)), (alleged against the three corporate entities); (6) Unfair Competition (against all defendants); (7) Fraudulent Inducement (against all defendants); (8) Intentional Misrepresentation (against all defendants); (9) Negligent Misrepresentation (against all defendants); (10) Concealment (against all defendants); and (11) Intentional Interference with Contractual Relations (against all defendants). There are no exhibits attached to the complaint. The complaint alleges in paragraph 1 that Zhang was employed as General Counsel for "the Company" from May 3, 2018 to May 30, 2021.

The Proof of Service of Summons ("POSS") on Hefei Reliance, filed June 8, 2023, lists the person served as "Person Authorized to Accept Service of Process" at "1430 Koll Cir, Suite 101, San Jose, CA 95112." The method of service on May 23, 2023 was by substitute service on "Glen Rosendale, Principal Design Engineer – Person In Charge of Office." The POSS on Reliance Memory, also filed June 8, states identical information. The POSS on Hefei Ruibo, filed June 27, 2023, lists the person served as "Zhichao Lu – Person Authorized to Accept Service of Process" at "1410 Helmond Ln, San Jose, CA 95118." The method of service on June 23, 2023 was by substitute service on "'Jane Doe' (Asian/F/80/5'2/120) – Co-Occupant."

Currently before the court are two motions to quash service of summons, one brought jointly by Hefei Reliance and Reliance Memory (filed on July 18, 2023) and the other brought by Hefei Ruibo (filed on August 2, 2023). Plaintiff has filed a joint opposition to all three motions.

II. MOTION TO QUASH SERVICE OF SUMMONS

A. General Authority

"[I]n California, '. . . the original service of process, which confers jurisdiction, must conform to statutory requirements or all that follows is void.'" (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 809 [quoting *Honda Motor Co. v. Superior Court* (1992) 10 Cal. App. 4th 1043, 1048].) "Until statutory requirements are satisfied, the court lacks jurisdiction over a defendant." (*Ruttenberg*, at p. 808.) "When a defendant challenges the court's personal jurisdiction on the ground of improper service of summons the burden is on the plaintiff to prove . . . the facts requisite to an effective service." (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 413; see also *Lebel v. Mai* (2012) 210 Cal.App.4th 1154, 1163.) In meeting

this burden, the filing of a proof of service creates a rebuttable presumption that service was proper, so long as the proof of service complies with applicable statutory requirements. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1442 ("*Dill*"); *Floveyor International, Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205.)

B. The Basis for Defendants' Motions

The notice of motion by Hefei Reliance and Reliance Memory states that "Plaintiff failed to comply with the provisions of Code Civ Proc. §§ 415.20, 416.10 when she mailed the summons and complaint to the defendant entities generally, rather than to an individual authorized to accept service of process specified in Code Civ. Proc § 416.10." (Notice of Motion at p. 2:5-7.) The notice of motion by Hefei Ruibo states essentially the same thing, substituting Code of Civil Procedure section 416.40 (service on unincorporated association or partnership) for section 416.10. (See Hefei Ruibo Notice of Motion at p. 2:5-9.)

The motions argue that the instances of substitute service on Glen Rosendale and "Jane Doe" were invalid, and both motions rely heavily on the Court of Appeal's decision in *Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1441-1442 (*Ramos*), which relies in part on the decision in *Dill*, *supra*. (See Hefei Reliance/Reliance Memory Memorandum of Points and Authorities ("MPA") at pp. 7:17-8:28; Hefei Ruibo MPA at pp. 10:12-12:3.) The *Ramos* Court stated:

> By its terms, section 416.10 permits service on a corporation that is not a bank by way of service on an individual or entity designated as an agent for service of process (§ 416.10, subd. (a)); service on one of the 11 officers or managers of the corporation specified in section 416.10, subdivision (b); service on a person authorized by the corporation to receive service (§ 416.10, subd. (c)); or service in a manner authorized by the Corporations Code (§ 416.10, subd. (d)). In turn, section 415.20 permits substituted service on a person specified in section 416.10 by leaving the summons and complaint "in his or her office . . . with the person who is apparently in charge thereof." (§ 415.20, subd. (a), italics added.)
>
> While section 415.20, subdivision (a) permits substituted service on "the person to be served as specified in Section 416.10," where the proof of service fails to identify any such person, the proof of service is defective. As the court in *Dill v. Berquist Construction Co.*, *supra*, 24 Cal.App.4th at pages 1435–1436 stated with respect to analogous provisions of section 415.40: "[T]he distinction between a 'party' and a 'person to be served' on behalf of that party . . . is central to the statutory scheme governing service of process. 'The words "person to be served" are words of precision, used throughout the act, intended to refer to the "individual" to be served, and not to the "party." For example, reference is to the vice president of defendant corporation who is being served on behalf of the corporate defendant, and not to the corporate defendant.' [Citation.] *Since a corporate defendant can only be served through service on some individual person, the person to be served is always different from the corporation*."

(*Ramos*, *supra* 223 Cal.App.4th at pp. 1441-1442, italics added and footnote omitted.) *Ramos* held that where the proofs of service were addressed solely to a corporation, rather than to any of the individuals required to be served, the corporation is not required to present any evidence

in order to establish the invalidity of the service and the resulting lack of personal jurisdiction. The burden instead falls on the plaintiff to show that, notwithstanding the facial defect in service, service nonetheless *substantially complied* with the requirements of the Code of Civil Procedure. Strict compliance with the Code's provisions for service of process is not required.

As to substantial compliance, the *Ramos* court further explained:

> In general, substantial compliance with the code occurs when, although not properly identified in a proof of service, the person to be served in fact actually received the summons. (*Dill v. Berquist Construction Co*., *supra*, 24 Cal.App.4th at p. 1437; see *Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 39–41 [283 Cal. Rptr. 271].) "[W]hen the defendant is a corporation, the 'person to be served' is one of the individuals specified in section 416.10. Therefore, [plaintiff] could be held to have substantially complied with the statute if, despite his failure to address the mail to one of the persons to be served on behalf of the defendants, the summons was actually received by one of the persons to be served." (*Dill v. Berquist Construction Co*., *supra*, at p. 1437.) However, mere receipt of the summons by an unknown employee of the corporation who is not a person specified in section 416.10 does not necessarily establish substantial compliance. (*Dill*, at pp. 1438–1439.) Evidence that shows the name of the person who received the summons and complaint as well as the person's title or capacity is required by statute (§ 417.10) and, without it, a trial court need not infer that a person specified in section 416.10 actually received the summons and complaint.

(*Id.* at p. 1443.)

Here, the proofs of service of summons on Hefei Reliance and Reliance Memory fail to identify any persons authorized to accept service. While the POSS on Hefei Ruibo purports to list Defendant Lu, the proof admits that the actual service relied upon for service on Hefei Ruibo was substitute service on "Jane Doe."

The motion by Hefei Reliance and Reliance Memory is accompanied by a declaration from Glen Rosendale stating (at ¶ 2) that on May 23, 2023, he was alone in the office when "[a] man entered the office and handed me two stapled bundles of paper, about 35 pages each. The man who entered the office and handed me the papers asked me for my name and title, and I told him I was Glen Rosendale and that I worked as a Principal Engineer." Rosendale goes on to state that he is not authorized to accept service of process for Hefei Reliance or Reliance Memory, has never been designated an agent for service of process for either entity, and is not a president, vice president, chief executive officer, general manager or any other type of officer or employee for Hefei Reliance or Reliance Memory, on whom service could be made pursuant to Code of Civil Procedure section 416.10(a) or (b). Attached as Exhibits 1 and 2 to his declaration are copies of the envelopes in which the summons and complaint were later mailed to Hefei Reliance and Reliance Memory. Both envelopes are addressed only to the business entity and not to any specific person authorized to accept service on either entity's behalf.

The motion by Hefei Ruibo is accompanied by a declaration from Mei Zhao, who is apparently the "Jane Doe" who was served by Plaintiff. She states that she resides at 1410 Helmond Lane and that it is a residence and not used as a place of business. She states that on June 23, 2023 "a person came to my home . . . and left some papers." (Zhao Declaration at

¶ 2.) She further states that she has never been authorized to accept service for Hefei Ruibo and has never held any position with Hefei Ruibo that would allow service through her under Code of Civil Procedure section 416.40. Attached to her declaration as Exhibit A is a copy of the envelope in which copies of the summons and complaint were later mailed to her residence. It is addressed only to Hefei Ruibo and not to "Zhichao Lu" (as claimed in the POSS) or to any specific person authorized to accept service for Hefei Ruibo.

The evidence submitted with both motions is sufficient to show that the May 23, 2023 service on Hefei Reliance and Reliance Memory and the June 23, 2023 service on Hefei Ruibo were invalid. The burden therefore shifts to Plaintiff to show either valid service or substantial compliance.

C. Plaintiff's Opposition

Plaintiff's opposition asserts that she properly served Lu (who has not moved to quash) and that all defendants have actual knowledge of this lawsuit. Neither of these facts, even if assumed to be true, is a sufficient basis for denying the current motions. The opposition also asserts that Plaintiff re-served Reliance Memory on September 18 and that all three motions should be considered moot because Plaintiff filed a First Amended Complaint on October 30. While an amended complaint appears to have been submitted to the court, this does not render these two motions to quash—directed at service of the original summons and complaint on May 23, 2023 and June 23, 2023—moot. Neither does a subsequent service on September 18. The validity of September and October proofs is not at issue in these motions.

Plaintiff's opposition further asserts that both motions should be denied because there was "substantial compliance" with Code of Civil Procedure section 415.20 and because it was only necessary for Plaintiff to serve Reliance Memory to effectuate service on Hefei Reliance. The opposition admits that the envelopes containing the summons and complaint sent to Hefei Reliance and Reliance Memory were not addressed to any specific person authorized to accept service on their behalf, but it deems this a "mere technical defect." Regarding service on Hefei Ruibo, the opposition argues that the substitute service on "Jane Doe" was sufficient.

A critical problem for the opposition is that it repeatedly relies upon documents referenced as "Exhibit A" to "Exhibit M" to support its arguments. None of these exhibits were actually submitted with the opposition. Instead, Plaintiff separately filed her exhibits several days late, without leave of court, on November 3, 2023. In addition to being untimely, these documents are not authenticated. (See Evid. Code, § 1401, subd. (a) ["Authentication of a writing is required before it may be received into evidence."]; *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 273 [a writing must be authenticated by evidence establishing that the writing is what it purports to be]; *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 523 [explaining that ordinarily in law and motion matters, a writing is authenticated by declarations establishing how the documents were obtained, who identified them, and their status as "true and correct" copies of the original].) These are not mere "technicalities"; if Plaintiff wishes to proceed in this court, she must comply with the rules and statutes that control in this court. The court has not considered the unauthenticated documents.

Plaintiff's opposition also cites two declarations. The first is from counsel Qiaojing Zheng, which discusses communications and disagreements with defense counsel. The declaration has little relevance to these motions and does not support Plaintiff's substantial

compliance argument. The declaration refers to Exhibits A-D, which were separately filed, late, and without leave of court.

The second declaration is from Richard Lee. Lee states that he is a private investigator retained by Plaintiff "to investigate Zhichao Lu ('Defendant Lu') and Reliance Memory, Inc." (Lee Decl., ¶ 1.) Again, tthe declaration discusses Exhibits A-D, which were separately filed, late, and without leave of court, on November 3, 2023.

D. Conclusion

The court GRANTS both motions to quash. Hefei Reliance, Reliance Memory, and Hefei Ruibo have submitted sufficient evidence to establish that the instances of alleged service on May 23, 2023 and on June 23, 2023 were invalid. Zhang has failed to rebut this showing with timely, authenticated evidence that establishes the facts of valid service by a preponderance of the evidence. (See *Lebel v. Mai* (2012) 210 Cal.App.4th 1154, 1160.)

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Calendar Lines 5-7
Case Name: *Wendy Towner et al. v. Gilroy Garlic Festival Assoc., Inc., et al.*
Case No.: 19CV358256

I. BACKGROUND

This case arises out of a horrific shooting at the Gilroy Garlic Festival on July 28, 2019 by a single shooter, who killed himself after police returned fire and shot him multiple times. Three people died, and 17 others were wounded by the gunfire. The original complaint in this matter was filed on November 12, 2019 by plaintiffs Wendy Towner, Francisco Aguilera, Nick McFarland, Justin Bates, and Brynn Ota-Matthews and stated causes of action for: (1) negligence and (2) premises liability against defendants Gilroy Garlic Festival Association, Inc. ("GGFA") and First Alarm Security & Patrol, Inc. ("First Alarm"). Plaintiffs filed a First Amended Complaint on February 27, 2020, with additional plaintiffs—Gabriella Gaus, Harry de la Vega, Barbara V. Aguirre, Alberto Romero, Barbara J. Aguirre, Lesley Sanchez (by and through her guardian ad litem, Diana Galindo), and Leslie Andres (by and through her guardian ad litem, Laura Rodriguez) (collectively, "Plaintiffs")—as well as a third cause of action for wrongful death. Pursuant to a stipulation and order signed by the court (Judge Barrett) on June 26, 2020, Plaintiffs filed a Second Amended Complaint on July 6, 2020, adding the City of Gilroy (the "City") as a defendant, and adding a fourth cause of action for dangerous condition of public property.

Pursuant to a September 23, 2020 stipulation and order signed by the court (Judge Barrett), Plaintiffs filed a Third Amended Complaint ("TAC") on October 7, 2020. The TAC stated causes of action for: (1) negligence (against all defendants except the City); (2) premises liability (against all defendants except the City); (3) wrongful death (against all defendants); and (4) public entity liability (alleged as a dangerous condition of public property against the City and various Does only).

On March 9, 2021, this court (Judge Kirwan) overruled the City's demurrer to the fourth cause of action in the TAC but granted the City's motion to strike portions of the fourth cause of action. In the same order, the Court granted leave to amend the complaint, subject to a condition: if Plaintiffs filed a Fourth Amended Complaint, any joint venture allegations would be removed from the fourth cause of action and pled as a separate claim.

Plaintiffs filed the Fourth Amended Complaint ("4AC") on March 19, 2021. The 4AC struck paragraphs 104 through 106 from the Fourth Cause of Action, per Judge Kirwan's order. The 4AC also contained an additional cause of action for joint venture liability against the City, GGFA, and Does 1-100.

On July 22, 2021, the court (Judge Kirwan) granted Plaintiffs' motion for leave to file a Fifth Amended Complaint ("5AC"), which Plaintiffs filed the next day. This is the operative complaint. The 5AC added an additional defendant, Century Arms, Inc. ("Century Arms"), and three additional causes of action against Century Arms and various Does: (6) "Product Liability re: WASR Assault Rifle"; (7) "Negligence re: WASR Assault Rifle"; and (8) "Public Nuisance re: WASR Assault Rifle." There are no exhibits attached to the 5AC.

On October 5, 2021, the court (Judge Arand) heard GGFA and the City's demurrer to, and motion to strike portions of, Plaintiffs' fifth cause of action for joint venture liability. In an

order dated December 29, 2021, Judge Arand sustained the demurrer to the fifth cause of action without leave to amend and granted the motion to strike references to the term "joint venture" from various portions of the 5AC.

Following the December 29, 2021 order, the causes of acttion in the 5AC that are still alleged against the City are the third (wrongful death) and fourth (public entity liability/dangerous condition of public property) causes of action. The remaining causes against GGFA and First Alarm are the first (negligence), second (premises liability) and third (wrongful death) causes of action.

Currently before the court are three separate motions for summary judgment by the City, First Alarm, and GGFA. All three motions were filed on December 16, 2022. Although they were originally assigned hearing dates on May 25 and May 27, 2023, Plaintiffs requested a continuance of the hearings, and the court ultimately granted the continuance to August 22, 2023 over all three Defendants' objections. The parties then stipulated to a further continuance in order to complete additional discovery, resulting in the current hearing date of November 14, 2023. Plaintiffs filed separate oppositions to the three motions on October 31, 2023.

II. REQUEST FOR JUDICIAL NOTICE

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

GGFA has submitted a request for judicial notice of two documents in support of its motion, pursuant to Evidence Code sections 452(d) and (h): (1) a copy of the "Declaration of Kurt Svardal filed in support of the [City's] Motion for Summary Judgment," submitted as Exhibit 44 to GGFA's "Lodgment of Evidence"; and (2) a copy of the 5AC, submitted as Exhibit 1 to GGFA's Lodgment.

As an initial matter, subdivision (h) does not apply to either document. (See *Gould v. Md. Sound Indus*. (1995) 31 Cal.App.4th 1137, 1145 ["Judicial notice under Evidence Code section 452, subdivision (h), is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."].)

Nevertheless, the court grants judicial notice of the declaration of Kurt Svardal, pursuant to subdivision (d) (court records). Declarations cannot be noticed as to the truth of their contents, only as to their existence. (See *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81 [truth of contents of court records cannot be judicially noticed]; *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057 [court may take judicial notice of existence of declaration but not of facts asserted in it]; *Bach*

v. McNelis (1989) 207 Cal.App.3d 852, 865 [court may not notice the truth of declarations or affidavits filed in court proceedings].) While unnecessary, the court also grants judicial notice of the 5AC pursuant to subdivision (d)—the court automatically considers the operative pleading on a summary judgment motion, regardless of whether there is a request for judicial notice. The court does not take judicial notice of the truth of any allegations within the 5AC.

III. GENERAL LEGAL STANDARDS

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion."].) "'A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion.'" (*Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14 Cal.App.5th 438, 444. [quoting *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421]; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["Evidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings."].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.)

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

The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252.) Accordingly, the court has not considered: (1) the declaration of Daniel Marcus in support of the City's reply or any of the "supplemental" evidence submitted with the City's reply; (2) the second declaration of Maureen O'Hara

submitted with GGFA's reply; and (3) the second declaration of Luanne Rutherford, submitted with First Alarm's reply.

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action . . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, at 850.)

IV. THE CITY'S MOTION FOR SUMMARY JUDGMENT

A. The Basis for the City's motion

The City seeks summary judgment on the basis that "no triable issue exists for any material fact in this case and the City is entitled to judgment as a matter of law." (City's Notice of Motion at p. 2:11-12.) The City further states that, in the alternative, it moves for summary adjudication of the 5AC's third cause of action on the basis that "the City has shown that (1) the subject fence and gates, the trees foliage and brush near the fence, as well as parked cars and box trucks near the fence were not dangerous conditions of public property, (2) the City did not own or control the fence or the parked cars and box trucks near the fence, (3) City employees did not create the fence or the parked cars or box trucks near the fence, (4) the kind of injuries that plaintiffs sustained were not foreseeable given the alleged physical distance between their injuries and the alleged dangerous conditions of public property, (5) Santino Legan's (the shooter['s]) act of mass violence was completely unforeseeable and (6) the City did not have any actual or constructive knowledge of the alleged dangerous conditions of public property. The City also has immunity under Government Code sections 845 and 820.2." (City's Notice of Motion at p. 2:19-28.) The City's notice of motion then states that it seeks summary adjudication as to the fourth cause of action on the same grounds. (See City's Notice at p. 3:2-11.)

The City's motion is properly considered as one for summary judgment only. Rule of Court 3.1350(b) states: "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." Rule of Court 3.1350(h) requires that each claim or issue for which summary adjudication is sought have its own heading in the supporting Separate Statement. The City's separate statement does not comply with Rule of Court 3.1350, as it only lists 58 undisputed material facts ("UMFs") in support of summary judgment.

The City's supporting memorandum and separate statement focus primarily on the 5AC's fourth cause of action for public entity liability / dangerous condition of public property. The City argues that Plaintiffs cannot prevail on their third cause of action for wrongful death unless they first establish public entity liability under the fourth cause of action. (See City's

Supporting Memorandum ("MPA") at p. 20:10-19.)[1] The City's motion is accompanied by a declaration from counsel, Daniel Marcus, authenticating the 57 exhibits submitted in the City's "Lodgment of Evidence."

B. Analysis

Plaintiffs are bound by their pleading on summary judgment. As alleged, the fourth cause of action (5AC at ¶¶ 88-108) remains a claim for dangerous condition of public property, despite the change in title. It alleges that the City owned and controlled the property on which the Gilroy Garlic Festival (the "Festival") was held (Christmas Hill Park); that a dangerous condition existed on the day of the shooting in the form of inadequate "environmental and/or infrastructure characteristics," as a result of the City's failure "to erect barriers that would keep out and deter intruders and criminals," inadequate monitoring of the perimeter barriers, failure "to trim trees, foliage and brush" around the perimeter barriers, and allowing of "cars, box trucks and/or other obstructions to be placed near" the perimeter barriers. Plaintiffs further allege that the City's acts and omissions in maintaining its property "foreseeably, unreasonably and/or substantially increased the risk of criminal conduct by third parties," thereby causing Plaintiffs' injuries. The fourth cause of action also speculates that the shooting at the festival was "foreseeable" and that it is "common knowledge" that criminals who intend to commit mass shootings "target venues that do not have adequate perimeter barriers."

Government Code section 835 "sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property," to the exclusion of any general negligence claim regarding the property. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829 ("*Brown*").) Section 835 provides that a public entity is liable for injury caused by a dangerous condition:

> . . . if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

(Gov. Code, § 835.)

> [A] claim alleging a dangerous condition may not rely on generalized allegations but must specify in what manner the condition constituted a dangerous condition. A plaintiff's allegations, and ultimately the evidence,

[1] A cause of action for wrongful death requires a "wrongful act or neglect of another." (See Code Civ. Proc., § 377.60.) The third cause of action (5AC at ¶¶ 82-87) does not contain any specific allegations against the City, but generally references the fourth cause of action. The court agrees that third cause of action cannot be maintained against the City unless Plaintiffs can show liability under the fourth cause of action.

> must establish a physical deficiency in the property itself. A dangerous condition exists when public property is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself, or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger users.

(*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347-1348, internal citations and quotations omitted; see also *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 759 ["To establish a qualifying condition, the plaintiff must point to at least one physical characteristic of the property."] [internal citations and quotations omitted].)

"Property cannot be 'public property' unless owned or controlled by the public entity." (5 Witkin, *Summary of Cal. Law* (11th ed., 2017) Torts § 303; see also Gov. Code, § 830, subd. (c) ["'Property of a public entity' and 'public property' mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity."].)

The court GRANTS the City's motion for summary judgment, as follows.

The City has submitted evidence, including Exhibits 1, 3, 4, 5, 7, 8, and 50 (excerpts from the depositions of Brian Bowe, Ryan Hollar, Dirk Bible, Juan Rocha, Kurt Svardal, Paco Rodriguez, and John Ballard, respectively), Exhibit 20 (a copy of GGFA's invoice no. 114-8911595, showing its rental of fencing from United Site Services), and Exhibit 43 (a declaration from Kurt Svardal). The court finds that this evidence is sufficient to meet the City's initial burden to establish that no dangerous condition of public property existed.

The City's evidence shows that it did not own or control the "perimeter barriers" at the festival location or determine their location. The quality of "perimeter barriers" and their placement are the only physical condition of property alleged in the fourth cause of action. The City's evidence also shows it was not responsible for the placement of "perimeter barriers" near trees, foliage, or brush or for the barrier's proximity to any parked vehicles.

The City's evidence also establishes that, even if the "perimeter barriers" could be construed as owned and controlled by a public entity (the City), the City did not have actual or constructive notice of any problems with the physical condition of the "perimeter barriers" on July 28, 2019, before the shooting occurred. Any gaps or openings noticed by law enforcement prior to that date were called in and addressed by the other defendants; they were not the City's responsibility.

The City's evidence is also sufficient to establish that it is entitled to judgment on a separate basis: lack of foreseeability. Even if the "perimeter barriers" could be construed as "public property" owned and controlled by the City, no physical condition of such barriers or any other physical condition of the property "created a reasonably foreseeable risk of the kind of injury which was incurred" under Government Code section 835. It is undisputed that Plaintiffs' injuries were proximately caused by the extreme and shocking criminal acts of Santino Legan, the lone shooter at the Festival. The City has met its initial burden of showing through evidence, particularly the depositions of Bowe, Hollar, and Ballard, as well as the

declaration of Svardal, that no other incidents of gun violence had occurred at the Festival from 1992 to 2019.

Premises liability claims against private landowners are analogous to claims against public entities for dangerous condition of public property. In that area of law, California treats "third party criminal acts differently from ordinary negligence, and require us to apply a heightened sense of foreseeability before we can hold a defendant liable for the criminal acts of third parties. There are two reasons for this: first, it is difficult if not impossible in today's society to predict when a criminal might strike. Also, if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1149-1150 (*Wiener*), internal citations omitted.) "In each case . . . the existence and scope of a property owner's duty to protect against third party crime is a question of law for the court to resolve." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213 (*Castaneda*).) "In assessing whether the facts show 'heightened foreseeability' of third party crimes, our precedents have focused on whether there were prior similar incidents from which the property owner could have predicted the third party crime would likely occur, though we have recognized the possibility that 'other indications of a reasonably foreseeable risk of violent criminal assaults' could play the same role." (*Id*. at pp. 1220-1221 [quoting *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 240]; see also *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1207-1212 (*Alvarez*) [stating that "a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated"; that "[f]oreseeability is the crucial factor in determining the existence of this duty"; and that "the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises"]; *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 536-538 (*Melton*) ["'In the case of criminal conduct by a third party, an extraordinarily high degree of foreseeability is required to impose a duty on the landowner' for the resulting harm . . . . When the court engages 'in any analysis of foreseeability, the emphasis must be on the specific, rather than more general, facts of which a defendant was or should have been aware.'"].) "[I]n cases involving liability for third party criminal conduct, 'the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents.' . . . Common sense is not the standard for determining duty. Nor is hindsight." (*Id.* [citations omitted].)

The lack of any evidence of prior incidents of gun violence at the Festival in prior years is sufficient to show that, even if the City were responsible for the "perimeter barriers," a mass shooting incident was not a reasonably foreseeable risk *of that particular physical condition* that would support a claim for dangerous condition of public property.

When the burden shifts to Plaintiffs, they are unable to raise triable issues of material fact as to the fourth cause of action. Plaintiffs are bound by the 5AC on summary judgment, and they have no ability to expand or amend the fourth cause of action in their opposition to the City's motion or through submitted declarations.

Plaintiffs' argument that the City has failed to meet its burden to show that no dangerous condition of public property existed because triable issues remain as to the quality or adequacy of perimeter barriers is unpersuasive, as is the argument that the City had a nondelegable duty to keep Christmas Tree Hill Park (where the festival was located) in a safe condition. Plaintiffs are limited to what the fourth cause of action actually alleges. The City's

evidence is sufficient to show that it did not own or control the "perimeter barriers," including any allegedly unsecured or inadequately secured gates or openings. Pursuant to Government Code sections 830(c) and 835, a claim for dangerous condition of public property must be based on a physical condition of property itself and cannot be based on other property—here, the perimeter barriers—that is not controlled by the public entity.

The declaration of Steven Adelman, the "event safety" expert witness retained by Plaintiffs, does not raise any triable issue of material fact as to the fourth cause of action. Expert opinions about whether a given physical condition of public property is dangerous (and here, the location and quality of the perimeter barrier are the only physical conditions of property alleged in the fourth cause of action) are not determinative or binding on the court. (See *Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, 755.)

Adelman's discussion of prior instances of unlawful and disorderly conduct at the Festival in years past (e.g., drunkenness, fistfights, confiscation of knives at gates, gang activity) fails to raise any triable issue as to the reasonable foreseeability of a mass shooting event by a lone gunman, as does his general discussion of shootings at other locations in California or in other states. His discussion of purported "industry standards" in relation to the City also fails to raise any triable issue as to the fourth cause of action. Again, Government Code section 835 "sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property," to the exclusion of any more general negligence claim on this subject. (*Brown, supra*, 4 Cal.4th at p. 829.)

As the third cause of action as alleged against the City entirely depends on the fourth cause of action, the City is entitled to judgment on the third cause of action as well. It is not necessary for the court to address the City's assertions that it also has immunity under Government Code sections 845 and 820.2.

C. Evidentiary Objections

The court notes that Plaintiffs have submitted objections to some of the City's evidence with their opposition to the City's motion, and these objections comply with Rule of Court 3.1354.

Plaintiffs' objections to the declaration of Kurt Svardal (City's Exhibit 43) are all OVERRULED, as is their objection to the City's Exhibit 20, a copy of the invoice showing GGFA's rental of fencing from United Site Services. It is not necessary for the court to rule on Plaintiffs' other objections to the City's evidence. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c, subd.(q).)[2]

[2] In particular, Plaintiffs repeatedly object to the allegation in all three Defendants' moving papers that the shooter used "bolt cutters" to cut through the fence and enter the Festival (rather than enter through a part of the fence that was secured by non-metal zip ties). The court agrees with Plaintiffs that all three Defendants have failed to submit non-hearsay evidence to support the "bolt cutters" allegation, but it is ultimately not material to the court's decision.

The court also notes that the City has submitted objections to some of Plaintiffs' evidence (specifically, the declaration of Steven Adelman). As these objections do not comply with Rule of Court 3.1354, the court will not rule upon them. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) As noted above, the court has considered the Adelman declaration but finds that it fails to establish a material factual issue for trial.

V. GGFA'S MOTION FOR SUMMARY JUDGMENT

A. The Basis for GGFA's motion

GGFA states that it moves for summary judgment on the basis that "no triable issue exists for any material fact in this case, and the [Association] is entitled to judgment as a matter of law." (Association Dec. 16, 2022 Notice of Motion at p. 2:12-13.)

In the alternative, GGFA states that it seeks summary adjudication of the 5AC's first, second, and third causes of action (the fourth cause of action is not asserted against GGFA). GGFA argues that the first and second causes of action for negligence and premises liability fail because it "did not owe Plaintiffs a duty to prevent an unforeseeable mass shooting. It did not own or control a dangerous condition of public property. The kind of injuries that Plaintiffs actually sustained were unforeseeable given the alleged dangerous condition of public property. Its employees did not create the alleged dangerous condition of public property and it did not have actual or constructive knowledge of the alleged dangerous condition of public property." (Association Notice at p. 2:21-26.) GGFA also argues that the third cause of action for wrongful death fails because it is dependent on the first and second causes of action. This language is repeated in GGFA's separate statement of UMFs.

The first cause of action for negligence alleges that GGFA had a duty to provide a "reasonably safe" environment during the Festival and to take "reasonable care" in protecting attendees. It further alleges, on information and belief only, that GGFA knew the perimeter fencing was inadequate and allowed unauthorized entry to the Festival grounds; that persons had previously attempted to bring weapons into the Festival and that there had been "previous incidents of criminal behavior and violence" at the Festival in prior years. It also alleges that "mass shootings are reasonably foreseeable." It claims, on information and belief, that the defendants were negligent and breached their duties in various ways. (5AC at ¶¶ 17-64.)

The second cause of action for premises liability similarly alleges that "defendants" negligently operated and controlled the Festival and that this negligence allowed the shooter to gain entry through the inadequate fencing, which ultimately allowed him to commit the shooting. (5AC at ¶¶ 65-81.) The third cause of action for wrongful death incorporates and depends upon the allegations of the first and second causes of action. (5AC at ¶¶ 82-87.)

GGFA's supporting memorandum primarily argues that no duty of care existed because the July 28, 2019 mass shooting was unforeseeable. In addition to the request for judicial notice, GGFA's motion is supported by a declaration from counsel Maureen O'Hara, authenticating the 46 exhibits submitted in the "Notice of Lodgment of Evidence."

B. Analysis

The analysis of the first cause of action for negligence and the second cause of action for premises liability is essentially the same because premises liability is a variety of negligence. The third cause of action for wrongful death requires either the first or second cause of action to survive to provide an underlying wrongful act by GGFA.

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.)

"Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-Cinema, Inc*. (1999) 72 Cal.App.4th 1403, 1406.) "Premises liability is a form of negligence . . . and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611, 1619; see also CACI 1001 ["A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others."].)

There is also a separate notice requirement: "An owner is liable for harm caused by a dangerous condition, of which the owner had actual or constructive knowledge. An injured plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it, but failed to take reasonable steps to do so." (*Howard v. Omni Hotels Management Corp*. (2012) 203 Cal.App.4th 403, 431 (*Howard*), citations omitted.) "Although no two accidents happen in the same way, to be admissible for showing notice to a landowner of a dangerous condition, evidence of another similar accident must have occurred under substantially the same circumstances." (*Id*. at p. 432.)

"An owner of real property is 'not the insurer of [a] visitor's personal safety . . . .' However, an owner is responsible 'for an injury occasioned to another by [the owner's] want of ordinary care or skill in the management of his or her property . . . .' Accordingly, landowners are required 'to maintain land in their possession and control in a reasonably safe condition,' and to use due care to eliminate dangerous conditions on their property." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943-944, internal citations and quotations omitted.) "The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156.)

The court GRANTS GGFA's motion for summary judgment, as GGFA is correct that it "did not owe Plaintiffs a duty to prevent an unforeseeable mass shooting."

GGFA has met its initial burden of establishing through evidence, primarily Exhibits 3 and 5 (deposition testimony of Brian Bowe and Ryan Hollar) and Exhibit 44 (the declaration of Kurt Svardal)[3], that there had been no prior incidents of gun violence at the Festival from at least 1992 until July 28, 2019. This is sufficient to establish that the July 28, 2019 criminal attack was not reasonably foreseeable.

As already noted in the foregoing discussion of the City's motion, California law treats "third party criminal acts differently from ordinary negligence, and require us to apply a heightened sense of foreseeability before we can hold a defendant liable for the criminal acts of third parties." (*Wiener, supra,* 32 Cal.4th at pp. 1149-1150) Because the mass shooting by a lone gunman on July 28, 2019 was not reasonably foreseeable, GGFA did not owe a duty to prevent such an attack. (See *id.*; see also *Castaneda, Alvarez,* and *Melton, supra*.)

When the burden shifts to Plaintiffs, they are unable to raise any triable issue of material fact as to the reasonable foreseeability of the mass shooting, as they do not present any evidence of substantially similar incidents (*e.g.*, any incidents of gun violence) at the Festival in prior years. Assertions that the Festival had a "history of violence and criminality" because knives were confiscated at Festival gates and some patrons were arrested for drunkenness or fistfights do not come close to demonstrating that the July 28, 2019 shooting itself was reasonably foreseeable. Nor do assertions of historical gang activity (apparently not involving any guns) at the Festival support a "heightened sense of foreseeability," as there is no evidence that the lone shooter, Legan, had any connection with any gang.

The decision in *Dix v. Live Nation Entertainment, Inc.* (2020) 56 Cal.App.5th 590, cited in Plaintiffs' opposition to GGFA's motion, does not support Plaintiffs' efforts to raise a triable issue of material fact. Although that case included a discussion regarding the "special relationship" that exists between festival operators and festival attendees, that case arose from an accidental fatal drug overdose at a music festival, involving a completely different kind of duty to attendees (including a duty to provide adequate medical care and adequate protection from illegal substances). It is completely distinguishable from the facts of this case and does not support the idea that a mass shooting by a lone gunman was reasonably foreseeable third-party criminal conduct at the Festival.

As noted above with respect to the City's motion, the Adelman Declaration (Plaintiffs' Exhibit 11) also does not raise any triable issues of material fact as to the reasonable foreseeability of the July 28, 2019 attack or GGFA's ability to prevent it, by referencing "unlawful and disorderly" conduct that had no connection with guns. The same is true for Adelman's discussion of gun violence at other locations in California and the country in general. In *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763 the California Supreme Court held that even if the existence and breach of a duty of care were presumed, without evidence that the defendant's act or omission caused or substantially contributed to the injury, summary judgment had to be granted because property owners cannot be made the insurers of the absolute safety of anyone on their property. "[T]he plaintiff must establish, by nonspeculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures." (25 Cal.4th at p. 774). It further

[3] While judicial notice cannot be taken of the truth of the contents of the Svardal declaration, the court has already considered its contents in the context of the City's motion and may do so again in the context of GGFA's motion, as the motions are being heard on the same date and at the same hearing.

stated that "expert opinion resting solely on speculation and surmise is inadequate to survive summary judgment," and that "when the matter remains one of pure speculation or conjecture, or the probabilities are at the best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (*Id*. at pp. 775-776.)

Finally, Plaintiffs cannot raise triable issues of material fact based on allegations that Defendants (or GGFA in particular) were negligent in other ways, such as in the hiring or training of security staff. (See 5AC at ¶¶ 53, 54, 54o, 54p, and 54s.) "[P]laintiffs cannot attempt to circumvent governing decisional law about a commercial enterprise's liability for criminal acts by recasting their claim in some other sub-theory of negligence. The dispositive issue remains the foreseeability of the criminal act. Absent foreseeability of the particular criminal conduct, there is no duty to protect the plaintiffs from that particular type of harm." (*Alvarez v. Jacmar Pacific Pizza Corp*., *supra*, 100 Cal.App.4th at 1212; see also *Rinehart v. Boys & Girls Club of Chula Vista* (2005) 133 Cal.App.4th 419, 431.)

As GGFA has established that it did not have a duty to prevent the unforeseeable attack on July 28, 2019, it is entitled to judgment on the 5AC's first and second causes of action for negligence and premises liability. It is also entitled to judgment on the third cause of action for wrongful death, as no underlying wrong remains to support that cause of action.

C. Evidentiary Objections

Plaintiffs have submitted objections to some of GGFA's evidence with their opposition to the motion, and these objections comply with Rule of Court 3.1354.

Plaintiffs' objections to the Declaration of Kurt Svardal are overruled (again). It is not necessary for the court to rule on Plaintiffs' other objections. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c(q).)

The court also notes that GGFA has submitted objections to the declaration of Steven Adelman with its reply brief. As these objections do not comply with Rule of Court 3.1354, they will not be ruled upon. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)

VI. FIRST ALARM'S MOTION FOR SUMMARY JUDGMENT

A. The Basis for First Alarm's Motion

First Alarm moves for summary judgment "on the grounds that the undisputed material facts establish that there is no merit to the claims alleged in the Towner Plaintiffs' operative Fifth Amended Complaint, as these Plaintiffs cannot establish the elements of duty, breach or causation for their causes of action against First Alarm." (Dec. 16, 2022 Notice of Motion at p. 2:11-13.)

The 5AC's first cause of action for negligence (5AC at ¶¶ 17-64) alleges that First Alarm contracted with GGFA to provide security for the Festival and had a duty, along with the other defendants, to provide a "reasonably safe event" which was breached by the failure to prevent the July 28, 2019 mass shooting. There are very few allegations against First Alarm specifically, but several references are made to allegedly inadequate security measures and training. The second cause of action for premises liability (5AC at ¶¶ 65-81) makes no specific allegations against First Alarm, but it incorporates by reference the various allegations about "security." The same is true for the third cause of action for wrongful death (5AC at ¶¶ 82-87), which incorporates and depends upon the allegations of the first and second causes of action.

Echoing GGFA, First Alarm argues that "Plaintiffs' claims are barred because the Plaintiffs' cannot establish that First Alarm owed the Plaintiffs a duty, or that First Alarm breached a duty, as the attack was an unforeseeable act of violence that occurred without warning. There has never been any prior gun violence, mass shooting, or any similar act of violence at the Festival." (First Alarm's MPA at p. 1:24-27.) First Alarm also argues that it cannot be liable because "[t]he Shooter did not gain access to the Festival through any gate or area where First Alarm was responsible for providing security." (*Id*. at p. 2:1-2.) First Alarm correctly notes that "[i]n general, a defendant has no duty to protect a party from unforeseeable third party criminal conduct even when a defendant has formed a special relationship with the plaintiff . . . . It is well settled law that 'foreseeability is the crucial factor' in determining whether there is a duty to prevent a third party's criminal conduct." (*Id*. at p. 9:7-20, internal citations omitted but citing, among others, *Wiener, supra,* 32 Cal.4th at 1146-1150.)

First Alarm's motion is supported by a declaration from counsel Luanne Rutherford, who authenticates attached Exhibits 1-7. As noted above, the court has not considered the second declaration from Rutherford, submitted with First Alarm's reply, or the attached exhibit thereto. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252.)

B. Analysis

First Alarm's motion for summary judgment is GRANTED, as follows. Just as the City and GGFA have shown, First Alarm has established through admissible evidence (the declaration of Kurt Svardal, submitted as Exhibit 2 to the declaration of Luanne Rutherford) that prior to the July 28, 2019 attack, there had been no incidents of gun violence at the Festival. This is sufficient to meet the initial burden of establishing that the July 28, 2019 attack could not be considered reasonably foreseeable. As the attack was not reasonably foreseeable, there could be no duty to prevent it and therefore First Alarm could not and did not breach any duty that might be owed to Plaintiffs by not preventing that third party criminal act. This is a sufficient basis upon which to grant First Alarm summary judgment on the 5AC's first, second, and third causes of action.

When the burden shifts to Plaintiffs, they are unable to raise any triable issues of material fact regarding foreseeability. In fact, as with the motions brought by the City and GGFA, Plaintiffs' own opposition evidence actually supports the non-foreseeability of the mass shooting by underscoring the absence of evidence of any "prior similar instances" of gun

violence on the subject property. As noted above, the decision in *Dix v. Live Nation Entertainment, Inc.* (2020) 56 Cal.App.5th 590 does not alter the conclusion that, even where a special relationship exist, a duty to prevent third-party criminal conduct can only arise when the conduct is reasonably foreseeable.

The Adelman Declaration (Exhibit 1 to Plaintiffs' Lodgment of Evidence in opposition to First Alarm's motion) fails to raise any triable issues as to the reasonable foreseeability of the mass shooting and the lack of any duty owed by First Alarm to prevent it. As noted above, "In each case . . . the existence and scope of a property owner's duty to protect against third party crime is a question of law for the court to resolve." (*Castaneda, supra*, 41 Cal.4th at 1213.) "'In the case of criminal conduct by a third party, an extraordinarily high degree of foreseeability is required to impose a duty on the landowner' for the resulting harm . . . . When the court engages 'in any analysis of foreseeability, the emphasis must be on the specific, rather than more general, facts of which a defendant was or should have been aware.'" (*Melton, supra*, 183 Cal.App.4th at p. 536-538.) "[I]n cases involving liability for third party criminal conduct, 'the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents.' . . . Common sense is not the standard for determining duty. Nor is hindsight." (*Id.*)

Adelman does not discuss any prior incidents of gun violence on Festival grounds that could have made the July 28, 2019 attack reasonably foreseeable. What he does describe as having previously occurred on Festival grounds (fistfights, public drunkenness, etc.) is not comparable to the July 28, 2019 attack. Similarly, general knowledge of gun violence elsewhere in California or in the nation is not enough to make the July 28, 2019 attack reasonably foreseeable under California law. The court agrees with First Alarm (and the other Defendants) that "possibility" is not the same as "foreseeability." "[A] general knowledge of the *possibility* of violent criminal conduct is not in itself enough to create a duty under California law." (*Williams v. Fremont Corner, Inc.* (2019) 37 Cal.App.5th 654, 668, emphasis in original.) "Knowing there is a general potential for rowdy or troublesome conduct by bar patrons, however, does not make the category of aggressive parking lot assaults reasonably foreseeable, any more so than the presumed awareness of previous assaults and robberies or problems with transients on the property establishes the foreseeability of a violent sexual assault." (*Id*. at pp. 6711-672; see also *Hanouchian v. Steele* (2020) 51 Cal.App.5th 99, 111-113.)

As First Alarm has established that it did not have a duty to prevent the third-party mass shooting, it is entitled to judgment on the 5AC's first and second causes of action for negligence and premises liability. It is also entitled to judgment on the third cause of action for wrongful death, as no underlying wrong remains to support that cause of action.

C. Evidentiary Objections

Plaintiffs have submitted objections to some of First Alarm's evidence with their opposition. These objections comply with Rule of Court 3.1354.

Plaintiffs' objections to the declaration of Kurt Svardal are OVERRULED. It is not necessary for the court to rule on Plaintiff's other objections. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that

are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c(q).)

The court also notes that First Alarm has submitted objections to some of Plaintiffs' evidence (specifically the declaration of Steven Adelman) with its reply brief. As these objections do not comply with Rule of Court 3.1354 they will not be ruled upon. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)

VII. CONCLUSION

The court GRANTS the summary judgment motions of the City of Gilroy, the Gilroy Garlic Festival Association, and First Alarm Security & Patrol, Inc.

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Calendar Line 9
Case Name: *Shi Xia ("Sharon") Yang et al. v. Keen Wei et al.*
Case No.: 22CV403993

Plaintiffs Shi Xia Yang, Shanmei Xu, Juping Zhang, and Fang Wang (collectively, "Plaintiffs") move to compel further responses to requests for production of documents and special interrogatories from defendant Rosebrook 58, LLC ("Rosebrook"). In addition, Plaintiffs request $2,090.00 in monetary sanctions from Rosebrook. The court GRANTS the motion in part and DENIES it in part, as follows:

Requests for Production Nos. 20, 22, 29, 32 & 33: As a general matter, the court finds all of Plaintiffs' document requests to be overbroad. The formulation "ALL DOCUMENTS RELATING TO" should not be the default, except in contexts where it would clearly be appropriate. The court is not even sure what the scope of "all documents relating to" Rosebrook's financial records would be: documents *relating to* Rosebrook's finances could potentially encompass all documents in the possession of the company, which is patently unreasonable.

Nevertheless, the court finds that Rosebrook should produce documents sufficient to show its financial records from 2015 to the present. Rosebrook argues that Plaintiffs have already obtained third-party discovery from its bank (CTBC Bank), as well as compiled financial statements that it asked its CPA to prepare in response to these document requests. Rosebrook fails to explain how these documents are a sufficient substitute for documents that Plaintiffs argue are still being withheld, including Rosebrook's accounts payable and accounts receivable ledgers, check ledger, and general ledger. The argument in Rosebrook's opposition is perfunctory and conclusory. As a result, the court orders Rosebrook to produce its accounts payable and accounts receivable ledgers, check ledger, and general ledger for 2015 to the present. Rosebrook shall do so within 30 days of notice of entry of this order. GRANTED IN PART.

Request for Production No. 23 and Special Interrogatory No. 3: Rosebrook argues that it should not have to identify its members, even though the entire focus of this lawsuit is on Plaintiffs' investments in Rosebrook (and allegations of fraud and breaches of fiduciary duty arising therefrom), as well as on the claim that Rosebrook is a "shell," "sham," and "alter ego" of defendants Joe Wu and Gloria Wu. The court finds that an identification of Rosebrook's members is directly relevant to the central allegations in this case, and that Rosebrook has failed to specify a valid third-party privacy interest that would apply here. Nevertheless, to alleviate Rosebrook's concerns, the court narrows the scope of Special Interrogatory No. 3 from "full name, business and residence addresses, and telephone number" to "full name and contact information." Rosebrook shall produce responsive documents, if any exist, and provide a substantive answer to this interrogatory within 30 days of notice of entry of this order. GRANTED IN PART.

Request for Production No. 30: The court agrees with Rosebrook that tax returns are protected from disclosure by the implied taxpayer privilege. (*Siri v. Sutter Home Winery, Inc.* (2019) 31 Cal.App.5th 598, 605.) In addition, Plaintiffs have failed to show that Rosebrook waived the privilege, or that the privilege is outweighed by other, competing public policy concerns. Because Rosebrook will be producing the information responsive to the other

discovery requests, discussed above, and because Rosebrook's bank has already produced relevant information, there is no demonstrated need for Rosebrook's tax returns. DENIED.

Monetary sanctions: As noted above, Plaintiffs' discovery requests are overbroad. Nevertheless, Rosebrook has not been sufficiently forthcoming in its discovery responses. Accordingly, the court grants Plaintiffs' request for sanctions *in part*: Rosebrook shall pay $890 to Plaintiffs within 30 days of notice of entry of this order.

IT IS SO ORDERED.

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Calendar Lines 10-11
Case Name: *McManis Faulkner, APC v. Melvin Cooper*
Case No.: 23CV415418

1. Background

This is an action for allegedly unpaid attorney's fees. Plaintiff McManis Faulkner represented defendant Melvin Cooper in a family court case in Santa Cruz County Superior Court. Plaintiff alleges that Cooper owes over $200,000 for legal services, and it alleges that Cooper concealed an award of attorney's fees that he ultimately obtained in the family court case, after he replaced plaintiff with other counsel. In addition to this case, there is another action for unpaid attorney's fees between these same parties that is pending in this court: Case No. 20CV366228. That earlier-filed case was set to go to trial on October 30, 2023, but because of severe docket congestion and the lack of availability of trial judges in the Civil Division of the court, the matter had to be reset for a trial-setting conference on December 12, 2023.

Presently before this court are two motions by Cooper: a motion to stay the current action until trial is completed in the earlier-filed case; and a motion to quash a subpoena duces tecum to the MTSA Family Law Group, which was the law firm that represented Carrie Click, the opposing party in Cooper's family court case (with whom Cooper shares a child).

2. Motion to Stay

Cooper argues that plaintiff is misusing the present action to obtain discovery that should have been obtained in the earlier-filed case. He notes that there is no reason for this case to proceed, given that an adjudication in the earlier-filed case will either render the present action moot or preclude it under res judicata and collateral estoppel principles, given that both cases seek the same recovery of unpaid attorney's fees. For some unknown reason, plaintiff has not filed an opposition to the motion, even though it has filed an opposition to the concurrent motion to quash. As a consequence, the court was originally inclined to grant the stay motion, as it understands that this later-filed case may well be duplicative of the earlier-filed case. On the other hand, the court is not aware of any authority that allows it to stay the action on its own. Cooper cites Rule 3.515(f) of the California Rules of Court, but that rule applies solely to motions for a stay pending a determination on a coordination motion under Code of Civil Procedure section 404.5. That provision is not applicable to the present case. Although there are other common, well-known circumstances under which a court may stay a pending case—e.g., pending arbitration, bankruptcy, or a federal court case—none of those circumstances exist here, either.

Accordingly, the court does not discern any authority for a stay here and shall—even in the absence of any response from plaintiff—deny the motion.

3. Motion to Quash

As for the motion to quash, the court concludes that it, too must be denied, as Cooper's objections to the subpoena are not well taken.

- First, Cooper argues that plaintiff failed to serve a notice of deposition, but because this is a subpoena for records of a third party, no separate deposition notice is required.

- Second, Cooper argues that plaintiff failed to serve Click with a copy of the subpoena under Code of Civil Procedure section 1985.3, but Cooper does not have standing to raise this objection on behalf of Click, who is the "consumer" under section 1985.3. Cooper is not the "consumer." (Further, to the extent that Click's law firm, MTSA, objects to the subpoena, that is the subject of a separate motion to enforce that is scheduled to be heard on December 19, 2023.)

- Third, Cooper argues that the document requests "lack specificity"—again, that is an issue to be addressed in the motion to enforce, and Cooper does not have standing to object on this basis.

- Fourth, Cooper raises a rule of evidence (Evidence Code section 1271) to oppose production of the records sought by the subpoena, but section 1271 is a hearsay exception—it has no application to a discovery dispute, and indeed, it is completely irrelevant.

- Fifth, Cooper argues that the records sought are protected from disclosure by Family Code section 7643, but this rule, on its face, applies only to records that were actually sealed in family court. It does not apply to any documents not filed in court, such as documents evidencing payments of attorney's fees from Click to Cooper.

In short, the court DENIES both the motion to stay and the motion to quash.

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