SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2320

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"Every case is important" . . . . . "No case is more important than any other."— United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Tuesday, 24 October 2023
TIME: 9:00 A.M.

Please note that for the indefinite future, all hearings will be conducted remotely as the Old Courthouse will be closed. This Department prefers that litigants use Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in-court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwidth. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if

any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	23CV409498	Joanne Rainser Narad v. Haig Shalvarjian	**Motion of Defendants to Strike Plaintiff's Experts, to Compel Plaintiff to Provide Defendant Current Medical Records, to Preclude Plaintiff's Experts from Conducting Additional Work, and for Monetary Sanctions.** This Court will not entertain argument on this matter pending a further hearing. An appearance tomorrow will be limited to selecting a time on any afternoon during the week of 13 November 2023 to discuss the status of discovery. Both parties are to submit their expert disclosures to this Department via the e-filing queue by the close of business on 03 November 2023. Issues of rulings and sanctions will be deferred until the further hearing. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 2	19CV341477	Felipe Reyes v. Canh Vo et al.	**Motion of Defendants Chae Lee And Catherine Lee for Summary Judgment.** On 07 September 2023, counsel for plaintiff filed a "Notice of Settlement (Conditional) Of the Entire Case." A request for dismissal will be filed on or before 07 December 2023. On 21 December 2023 defendant/cross-defendant Elite Home Development has calendared a motion to dismiss plaintiff's amendment to the complaint for noncompliance with ***Code of Civil Procedure***, § 583.210. This Court will assume that the filing of the notice of settlement will moot this motion. The dismissal review currently set for 25 January 2024 at 10:00 AM will REMAIN AS SET. If the foregoing is correct, appearances will not be necessary. NO FORMAL TENTATIVE RULING.
LINE 3	21CV381337	Jesus Lopez v. Western National Contractors et al	**Motion of Defendant Western National Contractors for Summary Judgment.** Defendant WNC's motion for summary judgment of plaintiff López's complaint is DENIED. SEE ATTACHED TENTATIVE RULING.
LINE 4	20CV369408	Anil Bhatnagar v. City of Milpitas	**Motion of Defendant City of Milpitas to Compel a Second Medical Examination.** This Court is unaware of the status of the disclosure of experts and related depositions. The Court will therefore defer ruling on this matter until the conclusion of oral argument. SEE ATTACHED TENTATIVE RULING.
LINE 5	23CV410044	Mark Smith v. Terry Drymonacos	**Motion Of Defendant To Compel Plaintiff's Attendance And Testimony At Deposition And Request For Sanctions** NO TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise this Court if they wish to appear and argue on the merits or submit on the papers.
LINE 6	23CV410044	Mark Smith v. Terry Drymonacos	**Motion Of Plaintiff To Compel Defendant To Provide Further Responses To Plaintiff's Request For Admissions Set One, and for Sanctions and Costs.** NO TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise this Court if they wish to appear and argue on the merits or submit on the papers.
LINE 7	23CV410044	Mark Smith v. Terry Drymonacos	**Motion Of Plaintiff To Compel Defendant To Provide Further Responses To Plaintiff's Request For Production Of Documents, Set One, Sanctions and Costs.** NO TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise this Court if they wish to appear and argue on the merits or submit on the papers.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 8	23CV410044	Mark Smith v. Terry Drymonacos	**Motion of Plaintiff to Compel Defendant to Provide Further Responses to Plaintiff's Form Interrogatories, Set One, and for Monetary Sanctions and Costs.** NO TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise this Court if they wish to appear and argue on the merits or submit on the papers.
LINE 9	19CV357485	Natasha Doubson v. Elena Kozlova; et al.	**Motion of Plaintiff to Continue Trial and to Keep Discovery Open.** Defendants did not file opposition to this motion. The five-year statute runs on 29 August 2023. NO FORMAL TENTATIVE RULING. Counsel should appear to argue this matter on the merits.
LINE 10	20CV373746	American Express National Bank v. Freddy Walla; Maxi Fit, LLC	**Motion of Plaintiff to Vacate Conditional Dismissal and for Entry of Judgment Pursuant to *Code Of Civil Procedure*, § 664.6.** The motion is GRANTED. This Court will execute the proposed judgment. Counsel for plaintiff should appear via the Zoom virtual platform to answer any questions that the Court may have. NO FORMAL TENTATIVE RULING.
LINE 11	2012-1-CV-238704	Unifund CCR, LLC v. David. H. Dao	**Motion of Defendant to Vacate Judgment.** Plaintiff made a prima facie showing that defendant was properly served and that he failed to answer the complaint. The motion of defendant to vacate the judgment is DENIED. SEE ATTACHED TENTATIVE RULING.
LINE 12	C1518585	People of the State of California v. Monica Marie Milla	**Hearing Ordered by the Court.** Probation terminated on 15 July 2021 pursuant to ***Penal Code***, § 1203.1 (apparently the order was made on 20 April 2021). ***Penal Code***, § 977 waiver on file.
LINE 13			SEE ATTACHED TENTATIVE RULING.
LINE 14			SEE ATTACHED TENTATIVE RULING.
LINE 15			SEE ATTACHED TENTATIVE RULING.
LINE 16			SEE ATTACHED TENTATIVE RULING.
LINE 17			SEE ATTACHED TENTATIVE RULING.
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 21			SEE ATTACHED TENTATIVE RULING.
LINE 22			SEE ATTACHED TENTATIVE RULING.
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LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV408498 **Joanne Rainser Narad v. Haig Shalvarjian**
DATE: 24 October 2023 **TIME: 9:00 am** **LINE NUMBER: 01**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 23 October 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Defendants to Strike Plaintiff's Experts, to Compel Plaintiff to Provide Defendant Current Medical Records, to Preclude Plaintiff's Experts from Conducting Additional Work, and for Monetary Sanctions.

Counsel are reminded about the limits on the number of pages in the law and motion matters.[1] (California ***Rules of Court***, rule 3.1113(d).)

The history of this matter was well known to this Court. Succinctly, counsel for plaintiff first indicated that plaintiff wanted a trial as soon as possible. Counsel even attempted to get a preferential setting with the interesting argument that the age of the defendant required such. Once a trial date was set, counsel for plaintiff sought continuances on various grounds, including illness and her wedding.

The statutes concerning expert disclosure were designed to prevent confusion and surprise as to which experts would be called by any party. Defense counsel suggests that "Simply put, Plaintiff retained experts without first determining if they could participate in this litigation as required by statute. (See Cal. Code Civ. Proc., § 2024.030.)"[2]

Defense counsel further argues that plaintiff unreasonably failed to prepare experts for expert discovery; plaintiff's experts were not available, or were not prepared because plaintiff failed to notify them of the statutorily mandated dates prior to retention and to prepare them with timely production of records. This unreasonable failing had nothing to do with illnesses or weddings.

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[1] "Length of memorandum Except in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages. In a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 20 pages. No reply or closing memorandum may exceed 10 pages. The page limit does not include the caption page, the notice of motion and motion, exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service."

[2] Moving Papers, page 8, lines 21-23.

"Except as provided in [***Code of Civil Procedure***,] Section 2024.050, a continuance or postponement of the trial date does not operate to reopen discovery proceedings." (***Code of Civil Procedure***, § 2024.020.) Accordingly, discovery is closed unless other good cause is shown.

Defense counsel seeks to exclude from testifying Drs. Dawn Osterweil and Maureen Miner because counsel for plaintiff unreasonably failed to make them available for deposition during the time period for expert discovery. (***Code of Civil Procedure***, §§ 2024.030, 2034.300; ***Kennemur v. State of California*** (1982) 133 Cal.App.3d 907; ***Zellerino v. Brown*** (1991) 235 Cal.App.3d 1097.)

The defense seeks to preclude Drs. Osterweil and Miner from testifying, compel plaintiff to provide to defendant complete and current medical records pertaining to plaintiff as well as to keep defendant fully apprised of plaintiff's medical treatment; preclude Plaintiff's experts from offering opinions or doing work not completed by 28 August 2023, and for monetary sanctions in the amount of $11,603.00.

Plaintiff claims that she disclosed all of her experts, apparently eight experts in total, and their reports, if prepared, were attached to the designation and their depositions were taken except for Drs. Osterweil and Miner.

Plaintiff contends that Dr. Miner for past and future medical bills and is a necessary witness. Claims that defense counsel refused to depose her on 03, 30 or 31 August 2023, notwithstanding that defendant never even issued a deposition notice for this witness.

Counsel for plaintiff further contends that reasonable actions were taken in regard to Dr. Osterweil's availability for deposition.

Plaintiff further argues that defendant improperly refused to produce both Dr. Robertson and Dr. Ishizue who were noticed for deposition three times during the normal discovery period after they issued their Defense Medical Exams Reports.

In further opposition to this motion, plaintiff further recites the status of discovery concerning issues with interrogatories and defense medical examinations.

Plaintiff does not seek sanctions.

This Court has needed a couple of occasions to get up and walk away from this matter.

This Court turning this matter into a State Bar issue.

Notwithstanding the obvious fact that counsel do not like each other, issues concerning experts appear to be for the most part resolved. It seems that the current dispute is limited to the two depositions of Dr. Miner and Dr. Osterweil.

This Court will not entertain argument on this matter pending a further hearing. An appearance tomorrow will be limited to selecting a time on any afternoon during the week of 13 November 2023 to discuss the status of discovery. Both parties are to submit their expert disclosures to this Department via the e-filing queue by the close of business on 03 November 2023. Issues of rulings and sanctions will be deferred until the further hearing.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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Calendar Line 2

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Calendar Line 3

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV381337 **Jesús A. López v. Western National Contractors, et al.**
DATE: 24 October 2023 **TIME: 9:00 am** **LINE NUMBER: 03**
This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 23 October 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Defendant Western National Contractors Motion For Summary Judgment.

I. Statement of Facts.

On 29 October 2018, while performing electrical repairs at private property located at 3320 Montgomery Drive in Santa Clara ("Subject Property"), plaintiff Jesus A. López ("López") sustained severe burns, among other injuries, when he was electrocuted due to a wiring system being suddenly, unexpectedly, and/or negligently turned on by defendant John Doe ("Doe") who was acting in the course and scope of his employment, agency, joint enterprise, and/or independent contractor relationship with defendant Western National Contractors ("WNC"). (Complaint, ¶GN-1.)

Defendant WNC negligently hired, trained, supervised, managed, and/or controlled defendant Doe. (*Id.*) Defendant WNC failed to adequately train, supervise, and/or monitor its employees and/or agents and/or contractors, including defendant Doe. (*Id.*)

On 26 March 2021[3], plaintiff López filed a Judicial Council form complaint against defendants Doe and WNC asserting a single cause of action for general negligence.

On 7 September 2021, defendant WNC filed an answer to plaintiff López's complaint and also filed a cross-complaint against Roe cross-defendants asserting claims for: (1) indemnity; (2) contribution and apportionment; and (3) declaratory relief.

On 24 May 2023, defendant WNC filed the motion now before the court, a motion for summary judgment of plaintiff López's complaint.

II. Summary Judgment Motions in General.

[3] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

Any party may move for summary judgment. (***Code of Civil Procedure*,** § 437c, subd. (a); ***Aguilar v. Atlantic Richfield Co***. (2001) 25 Cal.4th 826, 843 (***Aguilar***).) The motion "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." (***Code of Civil Procedure*,** § 437c, subd. (c); ***Aguilar,*** *supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (***Aguilar,*** *supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (***Aguilar,*** *supra,* 25 Cal.4th at p. 850; see ***Evidence Code*,** § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (***Aguilar,*** *supra,* at p. 851.) A defendant moving for summary judgment may satisfy its initial burden either by producing evidence of a complete defense or by showing the plaintiff's inability to establish a required element of the case. (***Code of Civil Procedure*,** § 437c, subd. (p)(2); ***Aguilar,*** *supra,* at p. 853.) *supra,* at p. 853.) Allegations in the complaint alone are not enough to defeat a motion for summary judgment. (***Coyme v. Krempels*** (1950) 36 Cal.2d 257.)

If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (**Code of Civil Procedure,** § 437c, subd. (p)(2); see ***Aguilar,*** *supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier 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 p. 850, fn. omitted.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (***Id.*** at p. 856.)

"An issue of fact can only be created by a conflict of evidence. It is not created by speculation, conjecture, imagination or guess work. Further, an issue of fact is not raised by cryptic, broadly phrased, and conclusory assertions, or mere possibilities that or by allegations in the complaint." (***Lyons v. Security Pacific National Bank*** (1995) 40 Cal.App.4th 1001, 1014) (internal citations omitted, punctuation modified.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (***Aguilar,*** *supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (***Id.*** at p. 843.)

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (***California Bank & Trust v. Lawlor*** (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

In addition to the facts provided by a moving defendant, the burden of production on summary judgment can shift to the plaintiff upon a showing that the plaintiff cannot factually support his claim. (See, e.g., ***Chavez v. Glock, Inc.*** (2012) 207 Cal.App.4th 1283.) Indeed, a defendant can satisfy its initial burden to show an absence of evidence through discovery responses that are factually devoid. (Id. at 1302.)

Thereafter, the plaintiff must present evidence supporting the challenged claim.

III. Analysis.

A. Defendant WNC's motion for summary judgment is DENIED.

In support of the motion for summary judgment, defendant WNC requests judicial notice of plaintiff López's complaint. Defendant WNC's request for judicial notice in support of motion for summary judgment is GRANTED insofar as the court takes judicial notice of the existence of the document, not necessarily the truth of any matters asserted therein. (Evid. Code, §452, subd. (d); see also *People v. Woodell* (1998) 17 Cal.4th 448, 455-- Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.".)

In opposition to the motion for summary judgment, plaintiff López requests judicial notice of his own declaration filed in opposition. Although a court record, plaintiff López apparently requests judicial notice of the truth of matters asserted therein which, as noted above, is improper. Accordingly, plaintiff López's request for judicial notice in support of Jesus López's opposition to motion for summary judgment is DENIED.

1. *Privette* doctrine.

Plaintiff López's complaint asserts a single cause of action for negligence. "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.)

In moving for summary judgment, defendant WNC argues it did not owe a legal duty of care to plaintiff López. "Recovery for negligence depends as a threshold matter on the existence of a legal duty of care." (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213.) "[T]he existence of a duty is a question of law for the court." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.)

"The question of whether a duty exists is a question of law and must be decided by the court on a case-by-case basis." (*Dutton v. City of Pacifica* (1995) 35 Cal.App.4th 1171, 1175.) "Whether a legal duty of care exists in a given factual situation is a question of law to be determined by the court, not the jury." (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754.) "The existence and scope of duty are legal questions for the court." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 163.)

It is well settled that "[w]hen a person or organization hires an independent contractor, the hirer presumptively delegates to the contractor the responsibility to do the work safely." (*Sandoval v. Qualcomm Incorporated* (2021) 12 Cal.5th 256, 269 (*Sandoval*), citing *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 597, 600, 602.) As the California Supreme Court has explained, "[t]his presumption is grounded in two major principles: first, that independent contractors by definition ordinarily control the manner of their own work; and second, that hirers typically hire independent contractors precisely for their greater ability to perform the contracted work safely and successfully." (*Sandoval*, *supra*, at p. 269, citing *Privette v. Superior Court* (1993) 5 Cal.4th 689, 693 (*Privette*).) "We refer to this principle that a hirer is ordinarily not liable to the contract workers as the *Privette* doctrine, for the first case in which we announced it." (*Sandoval*, *supra*, at p. 270.) Through application of this doctrine, California courts "have endorsed a 'strong policy' of presuming that a hirer delegates all control over the contracted work, and with it all concomitant tort duties, by entrusting work to a contractor." (*Ibid.*)

> A presumptive delegation of tort duties occurs when the hirer turns over control of the worksite to the contractor so that the contractor can perform the contracted work. Our premise is ordinarily that when the hirer delegates control, the hirer simultaneously delegates all tort duties the hirer might otherwise owe the contract workers. (*Tverberg I*, *supra*, 49 Cal.4th at p. 528; *Kinsman*, *supra*, 37 Cal.4th at p. 671.) Whatever reasonable care would otherwise have demanded of the hirer, that demand lies now only with the contractor. If a contract worker becomes injured after that delegation takes place, we presume that the contractor alone—and not the hirer—was responsible for any failure to take reasonable precautions.

(*Sandoval*, supra, 12 Cal.5th at p. 271.)

Defendant WNC contends this case falls squarely within the confines of the *Privette* doctrine and that the presumption of delegation of tort duties has arisen. Defendant WNC proffers the following relevant facts: In or about May 2016, defendant WNC contracted with 3265 Scott Boulevard LLC ("Owner") to serve as the general contractor to construct an apartment complex project identified as Santa Clara Square North Phase I (B1, B2), Job No. 10-714, located at the Subject Property.[4] The project consisted of seven individual five-story apartment buildings and parking.[5] On 2 August 2016, defendant WNC entered into a subcontract agreement with Seal

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[4] See Separate Statement of Undisputed Material Facts in Support of Defendant Western National Contractors' Motion for Summary Judgment ("Defendant WNC's UMF"), Issue No. 1, Fact No. 6.

[5] *Id.*

Electric.[6] Pursuant to the express terms of the Seal Electric subcontract with defendant WNC, Seal Electric was the "Controlling Employer," and therefore had the authority and responsibility for the safety of its employees, including plaintiff López, subcontractors and materialmen, as well as the safety of other subcontractors and trades in relation to the electrical work while on the project site.[7] Other than requiring Seal Electrical [sic] to comply with the terms of the subcontract, … defendant WNC has never directed Seal Electric on the subject project about the manner or performance of the electrical work they contracted to perform, nor directed the electric work be completed by a particular mode, nor actively participated in how Seal Electric's electric work would be done.[8] Defendant WNC does not activate or de-active [sic] permanent power breakers on a project such as the subject project.[9] Instead, defendant WNC relies on its electrical subcontractors to address electrical power related issues at its construction projects.[10] Defendant WNC is not aware of any documentation, notations, or otherwise within defendant WNC's project files that indicate that plaintiff López and/or Seal Electric submitted a request to shut down power at the building which plaintiff López was purportedly injured on 29 October 2018, nor is defendant WNC aware of anyone at the subject project on 29 October 2018, that prevented plaintiff López from shutting off the power to the building he was working on or who prevented plaintiff López from complying with California OSHA tag out/ lock safety procedures prior to plaintiff López sustaining injuries that day.[11]

> But the *Privette* doctrine has its limits. Sometimes a hirer intends to delegate its responsibilities to the contractor in principle but … fails to effectively delegate its responsibilities in practice; or a hirer delegates its responsibilities only partially by retaining control of certain activities directly related to the contracted work. When such situations arise, the *Privette* doctrine gives way to exceptions. …in *Hooker*, we articulated the rule that a hirer owes a duty to a contract worker if the hirer retains control over any part of the work and actually exercises that control so as to affirmatively contribute to the worker's injury. (*Hooker*, *supra*, 27 Cal.4th at p. 202.)

(*Sandoval*, *supra*, 12 Cal.5th at p. 271; see also *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 717—"One allows a contractor's employee to sue the hirer of the contractor when the hirer (1) retains control over any part of the work and (2) negligently exercises that control (3) in a manner that affirmatively contributes to the employee's injury.")

In *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*), an independent contractor's employee was killed in a crane accident while helping to construct a freeway overpass for Caltrans. Caltrans had permitted vehicles to use the overpass where the employee operated his crane. Shortly before the accident, the employee had retracted the crane's outriggers to allow traffic to pass. The employee attempted to swing the boom without first reextending the outriggers, and the crane tipped over, killing the employee. Caltrans was responsible for compliance with safety laws and regulations, and its construction safety coordinator was supposed to "'recognize and anticipate unsafe conditions'" in its construction projects. (*Ibid.*) The employee's estate contended there was a triable issue regarding whether Caltrans was liable under a "retained control theory" under the Restatement Second of Torts, section 414, which states: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the

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[6] See Defendant WNC's UMF, Issue No. 1, Fact No. 7.

[7] *Id.*

[8] See Defendant WNC's UMF, Issue No. 1, Fact No. 13.

[9] See Defendant WNC's UMF, Issue No. 1, Fact No. 14. In opposition, plaintiff Lopez filed objections to evidence offered by defendant in support of its motion for summary judgment. Plaintiff's objection number 7 is OVERRULED. The court declines to rule on plaintiff Lopez's other objections since the court has already found a triable issue of material fact. "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).)

[10] *Id.*

[11] See Defendant WNC's UMF, Issue No. 1, Fact No. 16.

employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." The Supreme Court agreed that "if a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer." (*Id.* at p. 213.) However, the court noted that liability would not attach on the hirer "merely because the hirer retained the ability to exercise control over safety at the worksite. …[T]he imposition of tort liability on a hirer should depend on whether the hirer exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee." (*Id.* at p. 210.) The court affirmed summary judgment in favor of Caltrans because it found that by merely permitting traffic to use the overpass, Caltrans did not affirmatively contribute to the employee's death.

In opposition to defendant WNC's motion for summary judgment, plaintiff López contends the "retained control" exception applies under the circumstances and, consequently, defendant WNC [as hirer of contractor Seal Electric] would still owe a duty to plaintiff López [as contractor Seal Electric's employee].

a. Hirer retains control over any part of the contracted work.

> A hirer "retains control" where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. This concept simply incorporates the Restatements' theory of retained control: Against a backdrop of no hirer duty respecting the manner of performance of work entrusted to a contractor, the Restatements provide that a hirer who retains control over any part of that work owes others a duty of reasonable care respecting the hirer's exercise of that retained control. (See Rest.2d Torts, § 414; *Hooker*, *supra*, 27 Cal.4th at pp. 201–202 [incorporating Rest.2d Torts, § 414]; Rest.3d Torts, Liability for Physical and Emotional Harm, § 56 [modern version of Rest.2d Torts, § 414].) So "retained control" refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform. For simplicity we will often call this the "contracted work"—irrespective of whether it's set out in a written contract or arises from an informal agreement. A hirer's authority over noncontract work—although potentially giving rise to other tort duties—thus does not give rise to a retained control duty unless it has the effect of creating authority over the contracted work. [Footnote.] (See Rest.3d Torts, supra, § 56, com. b, pp. 390–392.) Furthermore, ***a hirer's authority over the contracted work amounts to retained control only if the hirer's exercise of that authority would sufficiently limit the contractor's freedom to perform the contracted work in the contractor's own manner.*** (*Id.*, com. c, p. 392; see, e.g., *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1395 [68 Cal. Rptr. 2d 806] [***"the 'control' necessary to give rise to a duty of care*** under Restatement [Second of Torts] section 414" ***is "not simply general control over the premises," but control "over the methods of the work or the manner in which the contractor's employees perform the operative details of their tasks"***], disapproved on other grounds in *Hooker*, *supra*, 27 Cal.4th at p. 214 and *Camargo*, *supra*, 25 Cal.4th at p. 1245; *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902] ["the [hirer] may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], the right to stop the work [citation], the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without" incurring a retained control duty].)

(*Sandoval*, *supra*, 12 Cal.5th at pp. 274-275; emphasis added.)

Plaintiff López presents the following facts to show that defendant WNC did retain control of the work purportedly contracted to Seal Electric. Plaintiff López's job was to land wires for the AC units on the roofs of the buildings.[12] Plaintiff López was hired to do electrical work for the AC units by Seal Electric, Inc.[13] Defendant WNC

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[12] See Plaintiff's Separate Statement in Opposition to Defendant's Motion for Summary Judgment and/or Adjudication ("Plaintiff's Additional Material Facts"), Fact No. 2. In reply, defendant WNC filed evidentiary objections to the declaration of plaintiff Lopez. To the extent the court relied on plaintiff Lopez's declaration in ruling on defendant WNC's motion for summary judgment, defendant WNC's evidentiary objections to the declaration of plaintiff Lopez are OVERRULED. To the extent this court did not rely on the declaration of plaintiff Lopez in making its ruling, the court declines to rule on defendant WNC's

was always at the job site when plaintiff López was there and had several employees around at all times.[14] Defendant WNC would direct plaintiff López on what work needed to be done, when and where.[15] The job site consisted of apartment complex buildings that were new.[16] Some of them had floors that were complete and they were being rented out already.[17] The floors and/or buildings that were still being built/ completed were not yet rented out.[18] Some of the buildings were partially complete and those portions that were complete were partially rented out and being lived in.[19] Defendant WNC employees would do "hot checks" on the buildings' electrical systems for each room and part of the building including checking the A/C, the lights, and all electrical outlets to make sure everything was working properly.[20] Plaintiff López knew that defendant WNC did these "hot checks" because he not only saw them do it, but he also heard them talking about it.[21] The "hot checks" included turning the power on and testing outlets, lights and electrical things in various rooms and floors of the buildings.[22] While at the job site, plaintiff López witnessed defendant WNC regularly going through buildings to do "hot checks" when finalizing buildings or rooms and floors of buildings to be ready to lease.[23] Each building had electrical subpanels throughout that could turn the power on and off.[24] Defendant WNC went through buildings before they were completed to do "hot checks" on the thermostats and other items and would complete the "hot checks" by turning the power on, checking things, and then turning the power back off.[25]

Plaintiff López recalled that on the day of the incident, a man named "Duffy" was working at the property and job site with other WNC employees.[26] Duffy held himself out as someone who oversaw other WNC employees at the job site.[27] Duffy held himself out to be with WNC.[28] Duffy was also at the job site on previous occasions.[29] Plaintiff López knew Duffy was an employee of WNC because of what he was wearing; he previously told plaintiff López he was working for WNC; he was in charge of other WNC employees at the job site; he held himself out to be with WNC; and because he had been at the job site previously and plaintiff López understood that he was working for WNC.[30]

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objections thereto. "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).)]

[13] See Plaintiff's Additional Material Facts, Fact No. 2.

[14] See Plaintiff's Additional Material Facts, Fact No. 3.

[15] See Plaintiff's Additional Material Facts, Fact No. 4.

[16] See Plaintiff's Additional Material Facts, Fact No. 5.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] See Plaintiff's Additional Material Facts, Fact No. 6.

[21] See Plaintiff's Additional Material Facts, Fact No. 7.

[22] See Plaintiff's Additional Material Facts, Fact No. 8.

[23] See Plaintiff's Additional Material Facts, Fact No. 9.

[24] See Plaintiff's Additional Material Facts, Fact No. 10.

[25] *Id.*

[26] See Plaintiff's Additional Material Facts, Fact No. 11.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

On 29 October 2018, Duffy told plaintiff López to go finalize the AC unit on the roof to a specific building because they needed to start leasing that building.[31] Plaintiff López followed Duffy's instructions.[32] On his way up to the roof, plaintiff López noticed a few WNC employees around that building but none told plaintiff López that they would be doing "hot checks."[33]

Prior to starting his work, plaintiff López used his stick and his meter to double check that the electricity was off.[34] The electric current was not live and there was no electrical current at that time.[35] López then went to get his tools to complete the job and when he returned to where the wiring was, he was instantly electrocuted and burned.[36] The electrocution caused plaintiff López to be thrown and to fall.[37]

A WNC employee turned the power on just before the incident when plaintiff López suffered the injuries that are the subject of this litigation.[38] As plaintiff López was being taken to get medical care, he witnessed WNC employees doing "hot checks" in the same building where he had just been electrocuted.[39]

When Duffy saw plaintiff López was injured, he asked plaintiff López what happened and when plaintiff López explained what happened, Duffy yelled at his employees that were doing "hot checks"—he told them: "Turn that f*cking power off!"[40] On the date of the incident, WNC employees had access to and did activate permanent power breakers when necessary to do their work and "hot checks" on the buildings, including the subject building.[41]

The circumstantial evidence proffered by plaintiff López directly contradicts defendant WNC's factual assertion that it does not activate or de-activate permanent power breakers on a project such as the subject project and that it relies on its electrical subcontractors to address electrical power related issues at its construction projects. As such, a triable issue of material fact exists with regard to whether defendant WNC retained control over the work contracted to plaintiff López's employer.

b. Hirer actually exercises that retained control.

> A hirer "actually exercise[s]" its retained control over the contracted work when it involves itself in the contracted work "such that the contractor is not entirely free to do the work in the contractor's own manner." (Rest.3d Torts, supra, § 56, com. c, p. 392; see *Thompson v. Jess* (Utah 1999) 1999 UT 22 [979 P.2d 322, 327]; *Hooker*, *supra*, 27 Cal.4th at p. 209 [endorsing an approach similar to *Thompson*'s].) In other words, the hirer must exert some influence over the manner in which the contracted work is performed. Unlike "retained control," which is satisfied where the hirer retains merely the right to become so involved, "actual exercise" requires that the hirer in fact involve itself, such as through direction, participation, or induced reliance. [Footnote.] (See, e.g., *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 39 [103 Cal. Rptr. 2d 594] (*Kinney*) [a hirer's "mere failure to exercise a power to compel the [contractor] to adopt safer procedures does not, without more, violate any duty owed to the [contract worker]"]; *Hooker*, *supra*, 27 Cal.4th at p. 209 [quoting and agreeing with this passage in *Kinney*].)

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[31] See Plaintiff's Additional Material Facts, Fact No. 12.

[32] See Plaintiff's Additional Material Facts, Fact No. 13.

[33] *Id.*

[34] See Plaintiff's Additional Material Facts, Fact No. 15.

[35] *Id.*

[36] See Plaintiff's Additional Material Facts, Fact No. 16.

[37] *Id.*

[38] See Plaintiff's Additional Material Facts, Fact No. 17.

[39] See Plaintiff's Additional Material Facts, Fact No. 18.

[40] See Plaintiff's Additional Material Facts, Fact No. 19.

[41] See Plaintiff's Additional Material Facts, Fact No. 20.

(*Sandoval*, *supra*, 12 Cal.5th at p. 276.)

The same evidence discussed above presents a triable issue of material fact with regard to whether defendant WNC actually exercised control over the work contracted to plaintiff López's employer.

c. In a manner that affirmatively contributes to employee's injury.

Finally, " ' "[a]ffirmative contribution" means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury.' [Citation.] ***A hirer's conduct satisfies the affirmative contribution requirement when 'the hirer in some respect induced—not just failed to prevent—the contractor's injury-causing conduct.***' [Citation.]" (*McCullar*, *supra*, 83 Cal.App.5th at pp. 1014-1015; emphasis added.)

The same evidence offered by plaintiff López, above, is in this court's opinion sufficient to raise a triable issue of material fact with regard to whether defendant WNC's conduct, in some respect, induced plaintiff López's injury causing conduct.

Accordingly, defendant WNC's motion for summary judgment of plaintiff López's complaint is DENIED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The Court will set a trial setting conference for 05 March 2024 at 11:00 AM in Department 20. Counsel should meet and confer and agree on a trial date approximately six months after that date.

VI. Order.

Defendant WNC's motion for summary judgment of plaintiff López's complaint is DENIED.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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Calendar Line 4

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 20CV369408 **Anil Bhatnagar v. City of Milpitas, et al.**
DATE: 24 October 2023 **TIME: 9:00 am** **LINE NUMBER: 04**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 23 October 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Defendant To Compel Plaintiff to Submit To a Second Medical Examination.

I. Statement of Facts.

The facts of this Jesus Christ interesting matter are well known to this Court.

II. Motion To Compel Second Examination.

On 20 June 2022, plaintiff was examined by John Panagotacos, M.D., Board Certified Neurologist, who concluded that any Complex Regional Pain Syndrome (CRPS) suffered by plaintiff had resolved or mostly resolved.[42]

Codefendant 200 Serra Way, LLC has not designated or served notice of a physician to conduct the medical examination although it has agreed to jointly retain Dr.Panagotacos.

Plaintiff has seen five health care professionals, apparently two of them have concluded that plaintiff's CRPS is resolving or has resolved.

Defendants wish to have plaintiff examined by Joshua Prager, M.D., M.S., a pain medicine specialist and renowned expert on the condition of CRPS. They would like the doctor to conduct an examination in order to determine the status of plaintiff's current condition and whether additional treatment is necessary.

Defendants suspect and argue that counsel for plaintiff is following the "strength by numbers" approach by calling five witnesses apparently to tip the scale by share number alone.

III. Analysis.

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[42] In the opposition papers to this motion, describes how he attended the examination somewhat under physical duress and that of his wife.

As a preliminary matter, and though not addressed by the parties, the Court notes that Defendants did not file a separate statement in support of their motion.

A separate statement is required for a motion to compel a medical examination over objection. (Cal. ***Rules of Court***, rule 3.1345(a)(6).) A separate statement must provide "all the information necessary to understand each discovery request and all the responses to it that are at issue," and be "full and complete so that no person is required to review any other document in order to determine the full request and the full response." (Cal. ***Rules of Court***, rule 3.1345(c).) While the Court has discretion to deny the motion for failure to provide a separate statement, it is not required to do so. (See ***Mills v. U.S. Bank*** (2008) 166 Cal.App.4th 871, 893.)

Here, Defendants fully describe in their motion the reasons why a second IME should be compelled and provided the Court with a copy of the demand for IME that is at issue. Accordingly, the lack of a separate statement will not prevent the Court from addressing the merits of the motion, just as it has not prevented Plaintiff from filing a substantive opposition. Thus, in deference to the principle that matters should be decided upon their merits, the Court will overlook Defendants' failure to file a separate statement.

B. Legal Standard

Subject to the limits of ***Code of Civil Procedure***, § 2019.010, any party may obtain discovery by means of a physical examination of a party to the action. (***Code of Civil Procedure***, § 2032.020, subd. (a).) The right to a physical examination does not include "any diagnostic test or procedure that is painful, protracted, or intrusive." (***Code of Civil Procedure***, § 2032.220(a)(1).) Any exam will be limited to the condition in controversy in the action; i.e., it must directly relate to the specific injury or condition that is the subject of the litigation. (***Roberts v. Superior Court Superior Court*** (1973) 9 Cal.3d 330, 337; Weil & Brown, Cal. Practice Guide***: Civil Procedure Before Trial*** (The Rutter 2009) at 8:1551-8:1552.)

Under ***Code of Civil Procedure***, § 2032.220, subdivision (a), any defendant may demand one physical examination of the plaintiff without leave of the court in any case in which the plaintiff is seeking recovery for personal injuries. If a defendant who has demanded a physical examination deems that any refusal to submit to the physical examination is unwarranted, that defendant may move for an order compelling compliance with the demand. (***Code of Civil Procedure***, § 2032.250, subd. (a).)

If the defendant seeks to have an additional physical examination of the plaintiff conducted, he or she must seek leave of the court. (***Code of Civil Procedure***, § 2032.310, subd. (a).) The court shall grant such a motion upon a showing of good cause. (***Code of Civil Procedure***, § 2032.320, subd. (a); ***Shapira v. Superior Court*** (1990) 224 Cal.App.3d 1249, 1255.) Good cause requires a showing of both: (1) relevance to the subject matter and (2) specific facts showing a need for the information sought. (***Vinson v. Superior Court*** (1987) 43 Cal.3d 833, 840.) There is no limit on the number of physical exams that may be ordered on a showing of good cause. (***Shapira v. Superior Court*** (1990) 224 Cal. App. 3d 1249, 1255; Weil & Brown, Cal. Practice Guide: ***Civil Procedure Before Trial*** (The Rutter 2009) at 8:1558.5.)

If the Court orders an additional physical examination, it must specify the person, or persons, who will perform the examination, as well as the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination to be performed. (***Code of Civil Procedure***, § 2032.320, subd. (d).) By including such specific information in its order, the court "confirms that [it] has weighed the risks of unwarranted intrusion upon the plaintiff against the defendant's need for a meaningful opportunity to test the plaintiff's claims of physical [. . .] injury." (***Carpenter v. Superior Court*** (2006) 141 Cal.App.4th 249, 261.)

Plaintiff opposes the motion. Plaintiff argues that defendant should not be allowed two bites of the metaphor apple and that the timing of the examination is a risk that the defendant took. Plaintiff also makes the interesting statement that most of the treating providers were provided via the Worker's Compensation system which is notorious for under diagnosing and denying treatment.

This Court is unaware of the status of the disclosure of experts and related depositions. The Court will therefore defer ruling on this matter until the conclusion of oral argument.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The matter is also here for a trial setting conference at 11:00 AM. This Court will hear the matter at 9:00 AM. Counsel should meet and confer and agree on a trial date commencing in mid-July of next year.

VI. Order.

The Court will therefore defer ruling on this matter until the conclusion of oral argument.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 2012-1-CV-238704 **Unifund CCR, LLC vs D. Dao**

DATE: 24 October 2023 **TIME: 9:00 am** **LINE NUMBER: 11**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 23 October 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Motion of Defendant to Vacate Judgment.

A. Statement of Facts.

This action was filed on 31 December 2012 for collection of amounts owed under a credit card account issued by Citibank, N.A.

Defendant filed this motion on 19 July 2023 to vacate a default judgment which was entered against him on 27 June 2013 and renewed on 14 April 2021.

Plaintiff caused defendant to be served on or about 18 April 2013 via substituted service by a Registered California Process server at his place of abode located at Pearl Avenue. Following substituted service, a copy of the summons and complaint was mailed to the Defendant at Pearl Avenue. Plaintiff notes that Pearl Avenue address is the same address that defendant uses on his moving papers.

The moving papers are devoid of a memorandum of points and authorities and a declaration of fact by the defendant. The only papers defendant filed is a statement as follows:

> "I did not know there was a court date. and [sic] didn't know there was a case I [sic] need the Judge please please help to look at this again. thank [sic] you so much."

B. Litigants Appearing *in Propria Persona.*

"A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts.'" (***Lombardi v. Citizens Nat'l Trust & Sav. Bank*** (1955) 137 Cal.App.2d 206, 208-209.)

This Court is not insensitive to the hardships placed on pro se litigants, even if they are experienced. Trial Courts are given broad discretion to consider motions and the nature of the motion is determined by the relief sought, not specific words contained therein. (See ***Sole Energy Co. v. Petrominerals Corp.*** (2005) 128 Cal.App.4th 187, 193.)

Although a judge should ensure that self-represented litigants are not being misled or unfairly treated (see ***Gamet v. Blanchard*** (2001) 91 Cal.App.4th 1276, 1284), self-represented litigants are not entitled to special treatment regarding the ***Rules of Court*** or the ***Code of Civil Procedure***. "[W]e cannot disregard the applicable principles of law and accord defendant any special treatment because he instead elected to proceed in propria persona. [Citations.]" (***Stein v. Hassen*** (1973) 34 Cal.App.3d 294, 303.) "A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts and would be unfair to the other parties to litigation. (***Burnete v. La Casa Dana Apartments*** (2007) 148 Cal.App.4th 1262, 1270.)

Therefore, a self-represented litigant is held to the same standards as an attorney. (*Id.*; see also ***Burnete v. La Casa Dana Apartments*** (2007) 148 Cal.App.4th 1262, 1264 [mistake in judgment in representing oneself not considered excusable neglect].) When a litigant is appearing in propria persona, he or she is entitled to the same, but no greater, consideration than other litigants and attorneys. (***County of Orange v. Smith*** (2005) 132 Cal.App.4th 1434, 1444; see also ***Kobaysahi v. Superior Court*** (2009) 175 Cal.App.4th 536, 543; ***Rappleyea v. Campell*** (1994) 8 Cal.4th 975, 984-985.)

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C. Unsupported Argument.

Issues do not have a life of their own. If they are not raised or supported by argument or citation to authority, we consider the issues waived. (***Jones v. Superior Court*** (1994) 26 Cal.App.4th 92, 99.) This Court is not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide. (***Quantum Cooking Concepts, Inc. v. LV Associates, Inc.*** (2011) 197 Cal.App.4th 927, 934; see also ***Dills v. Redwoods Associates, Ltd.*** (1994) 28 Cal.App.4th 888, 890, fn. 1 [undeveloped argument may be treated as abandoned]; ***Badie v. Bank of America*** (1998) 67 Cal.App.4th 779, 784-785 (stating that "[w]hen [a party] fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"); see also ***Schaeffer Land Trust v. San Jose City Council*** (1989) 215 Cal.App.3d 612, 619, fn. 2 (stating that "a point which is merely suggested by a party's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion.").)

There is no declaration setting forth any fact concerning the claim that defendant makes to the effect that he did not receive any notice of this lawsuit at any time.

Defendant was served by substitute service and served by mail. Request for entry of judgment was mailed to his current address and an abstract of judgment filed. This Court assumes that the County Recorder properly fulfilled its duty to send a notice of an involuntary lien to the judgment debtor when an abstract of judgment is filed. Plaintiff also served a memorandum of costs on four occasions. A keeper and Were executed at the defendant's place of business.

This Court concludes that defendant probably had notice of this lawsuit. Even now, he does not say how this lawsuit finally came to his attention.

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D. Order.

Plaintiff made a prima facie showing that defendant was properly served and that he failed to answer the complaint. The motion of defendant to vacate the judgment is DENIED.

DATED:	**HON. SOCRATES PETER MANOUKIAN** ***Judge of the Superior Court*** ***County of Santa Clara***

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