SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding
Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 9/17/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (9/16/2024) you must notify the:

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

TO APPEAR AT THE HEARING: The Court prefers in-person appearances or by Teams. If you must appear virtually, please use video.

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

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

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV371904	Yosemite Capital LLC vs Edwin Heath et al	Motion: Strike Cross-Complaint of Ramesh Panchal and Deepika Panchal by Cross-Defendant Donald Schwartz Ctrl Click (or scroll down) on Line 1 for tentative ruling. The court will prepare the order.
LINE 2	23CV420692	Andre LaForge et al vs Matthew Leal	Hearing: Motion to Strike Causes 7 & 8 et al. of Plaintiff's Complaint by Defendant Matthew Leal **OFF CALENDAR**. Judge Pennypacker granted Plaintiffs' Ex Parte Application to Continue this Anti-SLAPP motion. The Anti-SLAPP motion set for 9/12/2024 and the Anti-SLAPP motion set for 9/17/2024 will be heard together on 9/26/2024 at 9am in Dept. 3 with the demurrer and motion to strike scheduled for that day.

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LINE 3	24CV439335	ZAHRA MANDJILI vs LIFE GENERATIONS HEALTHCARE, LLC et al	Hearing: Demurrer to Plaintiff's complaint by Defendants Ctrl Click (or scroll down on Lines 3-4 for tentative ruling. The court will prepare the order.
LINE 4	24CV439335	ZAHRA MANDJILI vs LIFE GENERATIONS HEALTHCARE, LLC et al	Hearing: Motion to Strike Plaintiff's Complaint by Defendants Ctrl Click (or scroll down on Lines 3-4 for tentative ruling. The court will prepare the order.
LINE 5	22CV404409	Carol Louie vs Deer Run At Frontier Village Association et al	Hearing: Motion Summary Judgment by defendant Deer Run At Frontier Village Association Ctrl Click (or scroll down on Line 5 for tentative ruling. The court will prepare the order
LINE 6	23CV420446	BXP West El Camino LP, a Delaware limited partnership vs Flex Logix Technologies, Inc., a Delaware corporation	Motion: Compel Compliance with Request for Production of Documents, Set One by Plaintiff BXP West El Camino LP, a Delaware limited partnership **OFF CALENDAR** [Stip. & order filed 9/9/2024 continuing this motion to 10/3/2024. There is also another stip.& order filed 9/11/2024 continuing this motion from 10/3/2024 to 10/31/2024 at 9:00 am in Dept. 3.]
LINE 7	23CV421818	Greenberg Development & Construction, Inc. vs Fernando Pio-Molinero et al	Motion: Compel Discovery from Defendant Pio M. Construction, Inc. by Plaintiff Greenberg Development & Construction, Inc. Ctrl Click (or scroll down on Line 7 for tentative ruling. The court will prepare the order.
LINE 8	24CV441976	Oscar Alberto Aldana Lemus vs CSAA Insurance Exchange	Hearing: Motion for Order Setting Compensation of Expert Witness by Respondent CSAA Insurance Exchange (“CSAA”) CSAA’s motion pursuant to Code of Civil Procedure section 2034.470(a) that the court issue an order setting the reasonable compensation for the deposition of expert witness Hieu Ball, M.D. (“Dr. Ball”) at $1,500 per hour (instead of the unreasonable $2,800 per hour requested by Dr. Ball). Unopposed and GRANTED. Moving party to prepare order for signature by the court.

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LINE 9	20CV365815	Rajiv Patel vs Creative Habitat, Inc. et al	Motion: Withdraw as attorney by Stephen B. Welsh and Sara L. Wild for Defendant/Cross-Complainant Mark Reynolds Unopposed and GRANTED. Moving attorney to prepare order for signature by the court.
LINE 10	20CV366329	Farid Shahrivar vs City of San Jose et al	Motion: Reconsider to Modify the Order that Sustained Defendants' Board and FCERS Demurrer to the Second Amended Complaint without Leave to Amend Complaint by Plaintiff Farid Shahrivar (in pro per) Ctrl Click (or scroll down) on Line 10 for tentative ruling. The court will prepare the order.
LINE 11	24CV441271	Farm Credit Services of America, PCA vs Elite Transportation, Inc. et al	Hearing: Pro Hac Vice Counsel Counsel for John OBrien for Plt (Daniel Chung) Unopposed and GRANTED. Moving party to prepare order for signature by the court.
LINE 12	2013-1-CV-240957	Unifund CCR, LLC vs M. Becerra	Hearing: Claim of Exemption to Maria Becerra by Plaintiff APPEAR in person or by Teams.

Line 13 22CV393016 Onemain Financial Group, LLC vs Tanya Rodrigue

Motion: Set Aside and Vacating its Prior Order of Dismissal and for Entry of Judgment by Plaintiff Onemain Financial Group, LLC

Line 13 is Unopposed and GRANTED. Moving party to prepare order for signature by the court.

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Calendar Line 1
Case Name: *Yosemite Capital LLC v. 3070 Brook LLC, et al.*
Case No.: 20-CV-371904

Special Motion to Strike to the Cross-Complaint by Cross-Defendant Donald Schwartz

Factual and Procedural Background

On October 7, 2020, plaintiff Yosemite Capital LLC ("Yosemite") filed a verified complaint against 3070 Brook LLC ("Brook LLC") and other defendants to quiet title. Plaintiff Yosemite, a lender, alleges Brook LLC and other defendants created false documents and false reconveyances in order to defraud lenders and title companies. By this complaint, Yosemite seeks damages for an unpaid loan in excess of $2.5 million dollars.

On December 9, 2021, cross-complainants Ramesh Panchal and Deepika Panchal (the "Panchals") filed a verified cross-complaint against Brook LLC and other cross-defendants alleging causes of action for:

(1) Cancellation of Instruments;
(2) For Rescission;
(3) Fraud;
(4) Breach of Contract;
(5) Enforcement of Personal Guaranty;
(6) Quiet Title; and
(7) For Declaratory Relief and Injunctive Relief.

On April 6, 2022, the Panchals filed a verified first amended cross-complaint ("FACC") against Brook LLC and other cross-defendants setting forth causes of action for:

(1) Cancellation of Instruments;
(2) For Rescission;
(3) Fraud;
(4) Breach of Contract;
(5) Enforcement of Personal Guaranty;
(6) Foreclosure of Vendor's Lien;
(7) Quiet Title; and
(8) For Declaratory Relief and Injunctive Relief.

According to the FACC, the Panchals transferred title to their Los Gatos home to cross-defendant Brook LLC based upon the fraudulent representations of cross-defendants Edwin J. Heath, Derek Wheat, and Donald Schwartz ("Schwartz"). The cross-defendants allegedly drained equity from the property in a series of loans and failed to pay the agreed consideration for the property and personal guaranty. Thus, the Panchals seek damages in excess of $4 million dollars.

On April 11, 2024, cross-defendant Schwartz filed for bankruptcy protection in the Northern District of California (case no. 24-40512). (Coleman Decl. at ¶ 11.) Thereafter, on April 15, 2024, counsel for the Panchals filed a Notice of Stay of Proceedings. (Ibid.)

On June 24, 2024, Schwartz filed the motion presently before the court, a special motion to strike to the FACC. The Panchals filed written opposition to the motion along with a request for judicial notice and request for sanctions. Schwartz filed reply papers.

Trial is scheduled for February 24, 2025.

Special Motion to Strike to the FACC

Cross-defendant Schwartz moves to strike the FACC on the ground that the claims against him arise from protected activity and the Panchals will be unable to demonstrate a probability of success on the merits.

Bankruptcy Stay

As a threshold matter, the court examines whether it has authority to consider the special motion to strike as cross-defendant Schwartz filed for bankruptcy protection in the federal court.

"Upon the filing of a bankruptcy proceeding, federal bankruptcy law imposes an automatic stay on all state and federal proceedings outside the bankruptcy court against the debtor and the debtor's property." (*Shaoxing County Huayue Import & Export v. Bhaumik* (2011) 191 Cal.App.4th 1189, 1196.) "The automatic stay is self-executing and is effective upon filing the bankruptcy petition." (*Ibid*.)

"The automatic stay has two broad purposes. First, it provides debtors with protection from hungry creditors by giving them a 'breathing spell' against all harassment, collection efforts and foreclosure actions. Second, it protects the debtor's creditors by preventing a race for the debtor's assets." (*Grant v. Clampitt* (1997) 56 Cal.App.4th 586, 590.) Along those lines, the Ninth Circuit reiterated:

> "The 'automatic stay gives the bankruptcy court an opportunity to harmonize the interests of both debtor and creditors while preserving the debtor's assets for repayment and reorganization of his or her obligations.' [Citation.] By halting all collection efforts, the stay affords the debtor time to propose a reorganization plan, or simply 'to be relieved of the financial pressures that drove him into bankruptcy.' [Citations.] The automatic stay also 'assures creditors that the debtor's other creditors are not racing to various courthouses to pursue independent remedies to drain the debtor's assets.' [Citations.]"

(*Gruntz v. County of Los Angeles (in re Gruntz)* (9th Cir. 2000) 202 F.3d 1074, 1081.)

"Actions taken in violation of the stay are void, even where there is no actual notice of the stay. [Citation.] The automatic stay remains in effect with respect to property of the estate 'until such property is no longer property of the estate.' [Citations.]" (*Pioneer Construction, Inc. v. Global Investment Corp.* (2011) 202 Cal.App.4th 161, 167.)

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay by terminating, annulling, modifying, or conditioning such stay. (11 U.S.C. § 362(d).)

As stated above, an automatic bankruptcy stay has been in place in this action since April 2024. There is no competent evidence in the moving papers to suggest the automatic stay has been lifted or otherwise terminated. In opposition, the Panchals contend they contacted Schwartz to inquire whether his bankruptcy had been dismissed but received no reply. (Coleman Decl. at ¶ 12.) But, in reply, Schwartz submits evidence demonstrating the bankruptcy had been dismissed, effective May 28, 2024. (See Schwartz Reply Decl. at Ex. C.) As a consequence, the automatic stay appears to be terminated and this court has authority to consider the instant special motion to strike.

Timeliness

Code of Civil Procedure section 425.16 contains a timeliness standard for bringing an anti-SLAPP motion. "The special motion may be filed within 60 days after service of the complaint, or in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after service of the motion unless the docket conditions of the court require a later hearing." (Code Civ. Proc., § 425.16, subd. (f).) All discovery is automatically stayed once an anti-SLAPP motion is filed. (Code Civ. Proc., § 425.16, subd. (g).)

"The Legislature enacted section 425.16 to prevent and deter 'lawsuits [referred to as SLAPP's] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.] Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought ' "to prevent SLAPPs by ending them early and without great cost to the SLAPP target" ' [citation]. Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citation.] In doing so, section 425.16 seeks to limit the costs of defending against such a lawsuit. [Citation.]" (*Varian Medical Systems, Inc.* (2005) 35 Cal.4th 180, 192.)

In opposition, the Panchals argue the motion is untimely filed as they successfully served cross-defendant Schwartz with service of process on April 5, 2024. (Coleman Decl. at ¶ 10.) Schwartz however did not file his special motion to strike until June 24, 2024, beyond the 60-day period permitted by statute. Nor did Schwartz submit any request to the court to file a late anti-SLAPP motion. This argument is not persuasive as the 60-day period was interrupted by Schwartz's filing for bankruptcy protection on April 11, 2024. As stated above, the bankruptcy was not dismissed until May 28, 2024. Thus, Schwartz would be unable to file his motion while the automatic stay was in place from approximately April 11th until May 28, 2024. And, in balancing the equities, the court finds this time period should not be counted against Schwartz in calculating the 60-day period for filing the anti-SLAPP motion. Absent the filing for bankruptcy protection and subsequent period for the automatic stay, the motion appears to be timely.

In the alternative, the Panchals assert cross-defendant Schwartz had received a copy of the FACC via mail in November 2023 but refused to return a Notice of Acknowledgement of Receipt. (See OPP at p. 10:19-22; Coleman Decl. at ¶ 7.) Thus, as Schwartz had actual notice of the FACC, the Panchals contend he had ample time to appear in this action and file his

special motion to strike. This contention however is not supported by proper legal authority. Furthermore, "[a]ctual notice of the action alone … is not a substitute for proper service and is not sufficient to confer jurisdiction." (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 392; see also *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 414 ["[N]o California appellate court has gone so far as to uphold a service of process solely on the ground the defendant received actual notice when there has been a complete failure to comply with the statutory requirements for service."].) Therefore, the court concludes the special motion to strike is timely and will address the merits.

Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

Here, the Panchals request judicial notice of the following:

(1) Decision In the Matter of DONALD CHARLES SCHWARTZ, State Bar No. 122476, dated July 2, 2019 (Ex. 1);
(2) DONALD CHARLES SCHWARTZ was ineligible to practice law effective December 4, 2019 until December 9, 2020.

The request for judicial notice is DENIED as these materials are not relevant to the outcome of the motion for reasons explained below. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [a court need not take judicial notice of a matter unless it "is necessary, helpful, or relevant"].)

Legal Standard

Code of Civil Procedure section 425.16 provides for a "special motion to strike" when a plaintiff's claims arise from certain acts constituting the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subds. (a) & (b)(1).)

"Consistent with the statutory scheme, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must identify 'all allegations of protected activity' and show that the challenged claim arises from that activity. [Citations.] Second, if the defendant makes such a showing, the 'burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.' [Citation.] Without resolving evidentiary conflicts, the court determines 'whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment.' [Citation.]" (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934 (*Bel Air Internet*).)

First Prong: Protected Activity

Law

"A defendant meets his or her burden on the first step of the anti-SLAPP analysis by demonstrating the acts underlying the plaintiff's cause of action fall within one of the four categories spelled out in [Code of Civil Procedure] section 425.16, subdivision (e)." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51 (*Collier*).) That section provides that an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).) "These categories define the scope of the anti-SLAPP statute by listing acts which constitute an 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' " (*Collier, supra,* 240 Cal.App.4th at p. 51, citing Code Civ. Proc., § 425.16, subd. (e).)

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.' [Citations.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*).)

"[A] claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park, supra,* 2 Cal.5th at p. 1060.) To determine whether the speech constitutes the wrong itself or is merely evidence of a wrong, "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Id.* at p. 1063.)

"In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670.)

Analysis

The FACC alleges claims against cross-defendant Schwartz for fraud, foreclosure of vendor's lien, quiet title and declaratory relief. As a preliminary matter, the moving papers fail

to specifically address allegations within these causes of action in examining whether such claims arise from protected activity. On that basis, the argument advanced by Schwartz appears to be undeveloped. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].) Instead, Schwartz contends the FACC arises from protected activity because:

(1) Schwartz's activity, whether alleged or inferred, is advising and litigating the savior of the Panchal 10th Street warehouse property; and
(2) The factual insinuations regarding the real property transactions which form the basis of the assertions in the FACC include his privileged communications with the Panchals. (See Motion at p. 8:21-28; Schwartz Decl. at ¶ 3.)

These contentions however lack merit as the claims alleged against cross-defendant Schwartz do not pertain to his legal representation of the Panchals with respect to property separate and apart from this action. Nor do such claims arise from any privileged communications between Schwartz and the Panchals during the course of legal representation. Rather, as the opposition points out, the gravamen of the Panchals' claims against Schwartz arise from his alleged involvement in fraudulent real estate transactions that are the subject of this lawsuit as an aider/abettor or co-conspirator. (See FACC at ¶¶ 24, 29-45, 81-92; see also *Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1399 ["[W]hether the statute applies is determined from the 'principal thrust' or gravamen of the plaintiff's claim."].) Such allegations of fraud do not constitute protected activity.

In reply, cross-defendant Schwartz asserts the FACC arises from protected activity based solely on: (1) advising the Panchals to retain professional advice on the Los Gatos deal; (2) that Schwartz was not involved in the matter; and (3) communicating a settlement offer. (See Reply at p. 5:6-10.)

But, "[c]onsistent with the primary role of the complaint in identifying the claims at issue, courts have rejected efforts by moving parties to redefine the factual basis for a plaintiff's claims as described in the complaint to manufacture a ground to argue that the plaintiff's claims arise from protected conduct." (*Bel Air Internet, supra,* 20 Cal.App.5th at pp. 936-937.)

For example, in *Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203 (*Central Valley*), the First Appellate District affirmed the denial of an anti-SLAPP motion by the operator of a hospital that claimed the plaintiff's causes of action were based on protected medical peer review activities. The complaint did not allege facts concerning peer review, and expressly disavowed basing any claims on peer review conduct. The appellate court rejected the defendant's attempt to construct a peer review claim through facts included in its own declarations. Citing a number of decisions that reached similar conclusions, the court explained that " '[t]he question is what is pled—not what is proven.' " (*Central Valley, supra,* 19 Cal.App.5th at p. 217, quoting *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 942.)

Similarly, in *Medical Marijuana, Inc. v. ProjectCBD.com* (2016) 6 Cal.App.5th 602 (*Medical Marijuana*), the Fourth Appellate District, in affirming the denial of an anti-SLAPP motion, stated:

> "It would be inappropriate for us to insert into a pleading claims for relief based on allegations of activities that plaintiffs simply have not identified, even if the parties suggest on appeal how plaintiffs might have intended to frame those claims or attempt to identify the specific conduct or assertions of statements alleged to be false on which plaintiffs intended to base such claims for relief. It is not our role to engage in what would amount to a redrafting of the first amended complaint in order to read that document as alleging conduct that supports a claim that has not in fact been specifically alleged, and then assess whether the pleading that we have essentially drafted could survive the anti-SLAPP motion directed at it." (*Medical Marijuana, supra,* 6 Cal.App.5th at p. 621.)

Just like the aforementioned cases, cross-defendant Schwartz is attempting to redefine the factual basis for claims alleged against him in the FACC. But, as stated above, the gravamen of such claims appears to be grounded in fraud and Schwartz's role as an aider/abettor and co-conspirator with other cross-defendants. Such claims do not arise from protected activity. Nor can Schwartz simply repackage these causes of action to construct claims with protected activity through facts included in the reply papers.

Therefore, the special motion to strike the FACC is DENIED as cross-defendant Schwartz fails to meet his burden in showing the pleading arises from protected activity. As a consequence, the court need not consider whether the Panchals can demonstrate a probability of success on the merits of their claims.

Request for Sanctions

"If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Code Civ. Proc., § 425.16, subd. (c)(1).)

In opposition, the Panchals argue cross-defendant Schwartz filed a frivolous special motion to strike and thus request sanctions be imposed against him in the amount of $9,016.00. (See OPP at pp. 14:23-15:14; Coleman Decl. at ¶¶ 13-14.) The request for sanctions however is DENIED WITHOUT PREJUDICE subject to a noticed motion and attorney declaration to support an award of fees and costs. (Code Civ. Proc., § 425.16, subd. (c); see *Visher v. City of Malibu* (2005) 126 Cal.App.4th 364, 371 ["The anti-SLAPP statute allows a trial court in its discretion to award attorney fees against a party that files a frivolous motion to dismiss."]; see also *Olive Properties v. Coolwaters Enterprises, Inc.* (2015) 241 Cal.App.4th 1169, 1177 [appellate court affirmed sanctions where tenant's anti-SLAPP motion was "clearly without merit" and brought to stall landlord's unlawful detainer action].)

Disposition

The special motion to strike the FACC is DENIED.

The request for sanctions is DENIED WITHOUT PREJUDICE.

The court will prepare the order.

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Calendar Line 2

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Calendar Line 3 Calendar Lines 3-4

Case Name: *Zahra Mandjili v. Life Generations Heathcare, LLC et al.*
Case No.: 24CV439335

I. Factual and Procedural Background

This is an action for neglect of a dependent adult. Plaintiff Zahra Mandjili ("Plaintiff") brings this action against defendants Life Generations Healthcare, LLC d/b/a Generations Healthcare and GHC of Sunnyvale, LLC d/b/a Cedar Crest Nursing & Rehabilitation Center ("Nursing Facility") (collectively, "Defendants").

On February 20, 2023, Plaintiff was admitted to the hospital where it was determined that she had significant knee pain on the right side, leading to limitations in mobility and subsequent deconditioning. (Compl. ¶ 25.) At the hospital, it was discovered that Plaintiff had a condition causing severe pain and joint swelling and it was recommended that she be discharged to a skilled nursing facility for rehabilitation. (Compl., ¶¶ 25-26.)

On or around February 23, 2023, at 78 years old, Plaintiff was admitted to the Nursing Facility. (Compl., ¶ 26.) At the time of her discharge, medical records did not indicate that Plaintiff had any pressure wounds on her body and Plaintiff alleges she did not have a 3.5x2 SDTI or a Stage IV sacrococcygeal pressure wound with bone exposed and requiring surgery upon admission to the Nursing Facility. (Compl., ¶ 27.) Instead, she developed the pressure wound as a direct result of severe neglect and abuse by Defendants. (*Ibid*.) Plaintiff believes that Defendants fraudulently doctored and/or falsified her admission records to the Nursing Facility to include the presence of a SDTI, despite there being no indication of one at the time she was transferred from the hospital. (*Ibid*.)

During Plaintiff's residency at the Nursing Facility, she required assistance with all activities of daily living. (Compl., ¶ 30.) Defendants repeatedly failed to follow Plaintiff's physician's orders and care plan and failed to document care plan changes in condition. (*Ibid*.) As a result of Defendants withholding essential medical care, Plaintiff developed the Stage IV pressure wound with a bone exposed and requiring surgical intervention. (*Ibid*.) Plaintiff's wound was so severe it became infected with bacteria. (*Ibid*.) Plaintiff's daughter, Vida, informed the Nursing Facility staff about Plaintiff's needs, but from the beginning Vida noticed poor care, including delays in changing her mother's diapers despite making requests for changings. (Compl., ¶ 29.) Vida made repeated complaints about the lack of proper care. (*Ibid*.)

On March 6, 2023, Plaintiff was seen by Dr. Kopardekar at the Nursing Facility for her worsening wound on her sacrum. (Compl., ¶ 31.) Dr. Kopardekar determined that Plaintiff needed to be transferred to the hospital for further evaluation and treatment. (*Ibid*.)

On March 10, 2023, Plaintiff underwent surgical debridement of the sacral wound and pathology of the debrided tissue showed necrosis and abscess. (Compl., ¶ 33.) On March 17, 2023, Plaintiff was discharged from the hospital and transferred to a sub-acute and rehabilitation center. (Compl., ¶ 34.) Plaintiff now requires the assistance of multiple caregivers, is unable to do many activities, and still experiences pain at the site of her pressure ulcer. (Compl. ¶ 35.)

On May 17, 2024, Plaintiff filed her complaint against Defendants, alleging the following causes of action:

1) Elder Abuse/Neglect;
2) Violation of Patient Bill of Rights; and
3) Negligence.

On July 23, 2024, Defendants filed a demurrer and motion to strike portions of the complaint. Plaintiff opposes the motions and Defendants filed a reply.

II. Demurrer

Defendants demur generally to the first and second causes of action on the ground they fail to state sufficient facts and specially demur to the first and second causes of action on the ground they are uncertain.[1]

a. Legal Standard

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

b. Elder Abuse/Neglect – First Cause of Action

"The purpose of the [Elder Abuse and Dependent Adult Civil Protection Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 (*Delaney*).) "The elements of a cause of action under the Elder Abuse Act [Welfare and Institutions Code sections 15600, et seq.] are statutory, and reflect the Legislature's intent to provide enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect." (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82.) Because a court tests for liability under the Elder Abuse Act, a statutory cause of action, it applies "the general rule that statutory causes of action must be pleaded with particularity." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*).) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

Welfare and Institutions Code section 15610.07, subdivision (a)(1) states, "Abuse of an elder or a dependent adult" means . . . "[p]hysical abuse, *neglect*, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering." (Welf. & Inst. Code, § 15610.07 [emphasis added].)

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[1] While the notice of demurrer states that Defendants are specially demurring on uncertainty grounds, the memorandum of points and authorities in support of the demurrer does not contain an uncertainty argument.

Welfare and Institutions Code section 15610.57 states:

(a) "Neglect" means either of the following:

(1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.

(2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

(2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.

(3) Failure to protect from health and safety hazards.

(4) Failure to prevent malnutrition or dehydration.

(5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

(Welf. & Inst. Code, § 15610.57; see also CACI, No. 3103.)

> In short, neglect as a form of abuse under the Elder Abuse Act refers "to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 34, 82 Cal.Rptr.2d 610, 971 P.2d 986 (*Delaney*).) Thus, when the medical care of an elder is at issue, "the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783, 11 Cal.Rptr.3d 222, 86 P.3d 290 (*Covenant Care*); see also *id.* at p. 786, 11 Cal.Rptr.3d 222, 86 P.3d 290 ["statutory elder abuse may include the egregious withholding of medical care for physical and mental health needs"].)

(*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404-405 (*Carter*) [emphasis original].)

> . . . [W]e distill several factors that must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act and thereby trigger the enhanced remedies available under the Act. The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant: (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care [citations]; (2) knew of conditions that made the elder or dependent adult unable

> to provide for his or her own basic needs [citations]; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness) [citations]. The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering. [Citations.] Finally, the facts constituting the neglect and establishing the causal link between the neglect and the injury "must be pleaded with particularity," in accordance with the pleading rules governing statutory claims.

(*Carter*, *supra*, 198 Cal.App.4th at pp. 406-407 [emphasis added].)

"In order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages. (Compare Welf. & Inst. Code, § 15657 [requiring "clear and convincing evidence that a defendant is liable for" elder abuse and "has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse"] with Civ. Code, § 3294, subd. (a) [requiring "clear and convincing evidence" that the defendant has been guilty of oppression, fraud, or malice].)" (*Covenant Care*, *supra*, 32 Cal.4th at p. 789.)

"'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. [Citations.]" (*Delaney*, *supra*, 20 Cal.4th at pp. 31-32; see also *Cochrum v. Costa Victoria Healthcare, LLC* (2018) 25 Cal.App.5th 1034, 1045.) Recklessness, unlike negligence, involves more than "inadvertence, incompetence, unskillfulness, or a failure to take precautions" but rather rises to the level of a "conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it." (*Ibid.*)

Defendants argue 1) the complaint is devoid of specific facts demonstrating how Defendants or its employees engaged in conduct that constituted acts of egregious abuse or neglect directed at Plaintiff and 2) the complaint does not allege facts demonstrating the alleged corporate authorization or ratification of any wrongful conduct related to her care. (Demurrer, p. 9:14-18.)

i. Specific Facts

As to their first argument, Defendants contend that the complaint does not sufficiently allege the *Carter* factors. (Demurrer, p. 11:5-6.) Instead, they argue, the complaint vaguely states that improper treatment to prevent pressure injury was provided by the facility staff. (*Id.* at p. 11:6-8.) Defendants further argue there are no facts demonstrating a specific act or omission to act on Defendants' part that was carried out with malice, oppression, or fraud as required by the Elder Abuse Act. (*Id.* at p. 8-10.)

In opposition, Plaintiff argues the allegations of the pleading are sufficient to show that Defendants neglected Plaintiff. (Opposition, p. 8:19-22.) In support, Plaintiff relies on Paragraphs 25-35, 29, 38-48 of the complaint.

The Court first notes that despite both Defendants and Plaintiff's assertions in their papers, on a demurrer, the Court is not concerned with Plaintiff's evidence or her ability to prove her allegations. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [court reviewing propriety of ruling on demurrer is not concerned with the "plaintiff's ability to prove . . . allegations, or the possible difficulty in making such proof"]; see also *SKF Farms v. Superior Ct.* (1984) 153 Cal.App.3d 902, 905 [a demurrer or motion to strike tests the pleadings alone and not the evidence or other extrinsic matters].) Moreover, cases such as *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, deal with elder abuse claims on a motion for summary judgment, where the court considered evidence in reaching its decision. That is not the case here. The only issue before this Court is whether Plaintiff has sufficiently alleged elder abuse. The Court is persuaded by Defendants' arguments that as currently pled, the complaint does not sufficiently allege elder abuse with the requisite particularity.

Here, Paragraphs 25 and 26 merely allege that Plaintiff was admitted to a hospital for pain and thereafter was admitted to the Nursing Facility for rehabilitation. (Compl., ¶¶ 25-26.) Paragraph 27 indicates that Plaintiff developed injuries as a direct result of severe neglect and abuse by Defendants, but does not allege how Defendants neglected or abused Plaintiff. (See Compl., ¶ 27.) Paragraphs 29 and 30 allege that Defendants delayed changing Plaintiff's diapers and that Defendants repeatedly failed to follow Plaintiff's doctor's care plan and failed to document care plan changes in condition. (Compl., ¶¶ 29-30.) Plaintiff must allege with more specificity in what way Defendants failed to follow Plaintiff's care plan and what the care plan required Defendants to do. (See *Carter, supra*, 198 Cal.App.4th at p. 410 ["Facts, not conclusions, must be pleaded. Further, where, as here, statutory remedies are invoked, the facts must be pleaded with particularity."][internal citations and quotations omitted].) Paragraph 38 and 39 likewise lack specificity and include conclusory allegations that there was a "tendency to leave residents unsupervised, failure to follow physicians' orders, and failure to follow care plans due to insufficient staffing and training. . ." (Compl., ¶ 38) and that Defendants "withheld essential medical care" (Compl., ¶ 39). Similarly, the remaining Paragraphs cited by the opposition, do not specifically identify how or in what way Defendants neglected Plaintiff in particular.

Accordingly, the complaints allegations are insufficient and the demurrer to the first cause of action may be sustained on this basis.

ii. Corporate Authorization

As for their second argument, Defendants assert that Plaintiff must allege facts showing that an officer, director, or managing agent of Defendant was involved in the abuse, authorized the abuse, ratified the abuse, or hired the person who did the abuse with advance knowledge of the persons unfitness and hired that person with a conscious disregard of the rights and safety of others. (Demurrer, p. 14:12-15, citing Welf. & Inst. Code, § 15657, subd. (c); Civ. Code, § 3294, subd. (b).) Again, the Court notes that a portion of Defendants' argument addresses evidentiary requirements not proper on a demurrer. Defendants additionally contend that the complaint is devoid of facts establishing that any officer, director, or managing agent of Defendants had advance knowledge of the unfitness of any employee who engaged in recklessness, malice, oppression, or fraud. (See Demurrer, p. 15:14-15, 23-24, 27-28.) They argue Plaintiff has not sufficiently alleged authorization or ratification.

In opposition, Plaintiff contends the pleading contains allegations that Defendants committed egregious acts of abuse and neglected Plaintiff and that this was authorized or ratified by Defendants' managing agents, including administrators or a lead charge nurse. (Opposition, p. 8:19-23; see also Compl., ¶ 44.)

As noted above, the Court finds Plaintiff has not sufficiently alleged facts showing elder abuse. Plaintiff therefore necessarily could not have pled facts showing ratification of such abuse, as she has not pled the abuse in the first instance. Moreover, the allegations related to administrators and a lead charge nurse are conclusive. With that said, the Court will reserve ruling on the ratification issue for such time when Plaintiff has met the threshold burden to plead elder abuse.

Based on the foregoing, the demurrer to the first cause of action is SUSTAINED with 15 days leave to amend.

c. Violation of Patient Bill of Rights – Second Cause of Action

Defendants next demur to the second cause of action for violation of patient bill of rights. They argue the second cause of action lists statutory violations without any factual support aside from incorporating the prior allegations, which are not specifically alleged. (Demurrer, p. 16, subd. (V).) In opposition, Plaintiff merely contends that she properly incorporates prior allegations into the second cause of action and that she then lists various code sections she believes have been violated. (Opposition, p. 13:14-16.)

The Court finds that Plaintiff's argument is without merit. The second cause of action states that Plaintiff "had the following rights, among others:" and then lists numerous code sections. (Compl, ¶ 12.) While the prior allegations are incorporated, it is unclear which allegations are directed at which code sections. Furthermore, the second cause of action attempts to allege statutory violations, which, as noted above, require specificity. (See e.g., *Feingold v. County of Los Angeles* (1967) 254 Cal.App.2d 622, 625 ["Since the liability sought to be imposed . . . is statutory, it is necessary to plead facts to support each of the requirements of the statute."].) The second cause of action does not sufficiently allege any allegations with specificity. Finally, and also noted above, the Court has sustained the demurrer to the first cause of action for lack of specificity, thus, Plaintiff cannot rely on those allegations to support the second cause of action.

Accordingly, the demurrer to the second cause of action is SUSTAINED with 15 days leave to amend.

d. Damages

In addition to the arguments related to the first and second causes of action, Defendants have also included an argument demurring to Plaintiff's request for punitive damages and attorneys' fees. First, this was not included in Defendant's notice of motion. Additionally, a demurrer is not the proper procedural vehicle for challenging the sufficiency of punitive damages allegations. (See *Grieves v. Superior Ct*. (1984) 157 Cal.App.3d 159, 163 [no cause of action for punitive damages; such damages are a remedy.]; see also *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047 ["a demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy."].) As such, the demurrer to Plaintiff's request for punitive damages and attorneys' fees is OVERRULED.

III. Motion to Strike

Defendants move to strike portions of the complaint on the ground these portions are improper pursuant Code of Civil Procedure sections 435, subdivision (b)(1) and 436, subdivision (b). In light of the Court's ruling on the demurrer, the motion to strike is MOOT.

IV. Conclusion and Order

The demurrer to the first and second causes of action is SUSTAINED. The demurrer to Plaintiff's request for punitive damages and attorneys' fees is OVERRULED. The motion to strike is MOOT.

The Court shall prepare the final order.

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Calendar Line 5
Case Name: *Carol Louie v. Deer Run at Frontier Village Association, et al.*
Case No.: 22-CV-404409

Motion for Summary Judgment to the Complaint by Defendant Deer Run at Frontier Village Association

Factual and Procedural Background

This is a personal injury action based on a trip and fall incident brought by plaintiff Carol Louie ("Plaintiff") against defendants Deer Run at Frontier Village Association ("Deer Run") and Eagle Rock at Frontier Village Association ("Eagle Rock") (collectively, "Defendants").

The allegations of the complaint are summarized as follows:

> "Defendants, and each of them, by their acts and omissions, negligently designed, installed, maintained, repaired, or replaced its landscaping including its borders along walkways, so as to cause to permit to exist, a dangerous trip hazard for persons using adjacent property. Plaintiff made contact with that trip hazard when walking on the sidewalk in a foreseeable manner causing her to fall to the ground and suffer serious bodily injury. The condition was concealed by overgrown shrubbery, which was directly in the path of travel from the sidewalk to the open gate for public access to Edenvale Gardens Regional Park." (See Complaint at GN-1, Prem. L-1.)

On September 15, 2022, Plaintiff filed a judicial council form complaint against Defendants alleging causes of action for negligence and premises liability.

On December 2, 2022, defendant Deer Run filed an answer denying allegations of the complaint and asserting affirmative defenses.

On April 13, 2023, Plaintiff dismissed defendant Eagle Rock from this action without prejudice.

On July 17, 2024, defendant Deer Run filed the motion presently before the court, a motion for summary judgment to the complaint. Plaintiff filed written opposition and evidentiary objections. Deer Run filed reply papers and evidentiary objections.

Trial is scheduled for November 4, 2024.

Motion for Summary Judgment

Defendant Deer Run moves for an order of summary judgment to the complaint as there are no triable issues of material fact with respect to Plaintiff's claims for negligence and premises liability.

Plaintiff's Evidentiary Objections

In opposition, Plaintiff filed various objections to evidence submitted in the moving papers. Having reviewed and considered the objections, the court OVERRULES the objections in their entirety.

Deer Run's Evidentiary Objections

In reply, Deer Run submitted objections to Plaintiff's declaration included with the opposition papers. The court SUSTAINS objection numbers 1-5 and 7-14 on the grounds of relevance and/or inconsistent with Plaintiff's deposition testimony or the undisputed facts in the case. Objection number 9 is also sustained on the ground of lack of personal knowledge. The court OVERRULES objection number 6.

Legal Standard

Any party may move for summary judgment. (Code Civ. Proc., § 437c, subdivision (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 Civ. Proc., § 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 Evid. 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.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 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,* 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

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.)

"[S]ummary judgment is a drastic remedy and should be used with caution. [Citation.] Because summary judgment is a drastic procedure all doubts as to the propriety of granting a motion for summary judgment should be resolved in favor of the party opposing the motion. [Citations.]" (*Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 660;

see *Kernan v. Regents of University of California* (2022) 83 Cal.App.5th 675, 684 [“The drastic remedy of summary judgment may not be granted unless reasonable minds can draw only one conclusion from the evidence.”].)

Negligence/Premises Liability

“The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting injury. [Citations.] Premises liability ‘ “is grounded in the possession of the premises and the attendant right to control and manage the premises” ’; accordingly, ‘ “mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act.” ’ [Citations.] But the duty arising from possession and control of property is adherence to the same standard of care that applies in negligence cases.” (*Kesner v. Super. Ct.* (2016) 1 Cal.5th 1132, 1158.)

Thus, “ ‘[t]he 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 ….’ [Citation.] This requires persons ‘to maintain land in their possession and control in a reasonably safe condition. [Citations.]’ [Citation.]” (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156.)

Defendant Deer Run argues the claims for negligence and premises liability fail, as a matter of law, on the grounds of causation and lack of duty.

Causation

“In a negligence action the plaintiff must show the defendant’s act or omission (breach of duty) was a cause of the plaintiff’s injury. [Citation.] The element of causation generally consists of two components. [Citation.] The plaintiff must show (1) the defendant’s act or omission was a cause in fact of the plaintiff’s injury, and (2) the defendant should held responsible for negligently causing the plaintiff’s injury. [Citation.] The second component is a normative or evaluative one that asks whether the defendant should owe the plaintiff a legal duty of reasonable care under the circumstances of the case. [Citation.]” (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 288 (*Vasquez*).)

“The first component of causation in fact generally is a question of fact for the jury. Causation in fact is shown if the defendant’s act or omission is ‘*a substantial factor*’ in bringing about the plaintiff’s injury. [Citations.] This issue ordinarily may not be resolved on summary judgment. [Citations.]” (*Vasquez, supra*, 118 Cal.App.4th at p. 288.) “[B]ut where reasonable men will not dispute the absence of causality, the court may take the decision from the jury and treat the question as one of law.” (*Starr v. Mooslin* (1971) 14 Cal.App.3d 988, 998; see *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1687 [“The issue of causation may be decided as a question of law only if, under undisputed facts, there is no room for a reasonable difference of opinion.”].)

As a preliminary matter, on summary judgment, "the pleadings frame the issues to be resolved. ' "The purpose of a summary judgment proceeding is to permit a party to show that material factual claims arising from the pleadings need not be tried because they are not in dispute." [Citation.] "The function of the pleadings in a motion for summary judgment [adjudication] is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." [Citations.]' [Citations.]" (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 477 (*Snatchko*).)

Thus, "[t]he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493; see *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 182 ["We do not require [defendant] to negate elements of causes of action plaintiffs never pleaded."].)

In addition, "[a] plaintiff may not avoid summary judgment by producing evidence to support claims outside the issues framed by the pleadings." (*Snatchko, supra,* 187 Cal.App.4th at p. 477.) Rather, "[a] plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing." (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 90.)

According to the complaint, Plaintiff made contact with the trip hazard when walking on the sidewalk in a foreseeable manner causing her to fall to the ground and suffer serious bodily injury. (See Complaint at GN-1, Prem. L-1.) Here, the undisputed evidence shows the alleged "tripping hazard" was a bender board at that location. (See Deer Run's Separate Statement of Undisputed Facts ["SSUF"] at Nos. 11-15.) The undisputed evidence also demonstrates that the bender board which Plaintiff tripped over **did not extend** into the sidewalk. (Id. at No. 15, emphasis added.) Therefore, if Plaintiff made contact with the tripping hazard while walking on the sidewalk, and the bender board did not extend into the sidewalk, then the bender board could not be the cause of Plaintiff's injuries.

In response, Plaintiff fails to refute this undisputed evidence in opposition to the motion. Instead, Plaintiff argues the court cannot consider the declaration of Joanne Mills and the subpoenaed records, submitted as evidence in the moving papers, to address the issue of causation. (See OPP at p. 10:6-10.) The court however has overruled the objections to this evidence as explained above. And, despite that evidence, Plaintiff's opposing separate statement does not dispute material fact numbers 11 through 15 which demonstrate a lack of causation in this action.

Finally, Plaintiff attempts to dispute this evidence stating she tripped and fell on a "raised edging" that was obscured by overgrown foliage as she traveled on an unpaved pedestrian pathway that intersected with the sidewalk. (See Plaintiff's Additional Facts at Nos. 2, 4-16; Plaintiff's Decl. at ¶¶ 4-17.) But, the opposition does not proffer evidence establishing the unpaved pedestrian pathway was owned or maintained by defendant Deer Run. Nor does Plaintiff's complaint allege that her injuries occurred as she encountered an unpaved pedestrian pathway. Again, a plaintiff may not avoid summary judgment by producing evidence to support evidence on issues raised outside the pleadings. (*Snatchko, supra,* 187 Cal.App.4th at

p. 477.) Furthermore, the undisputed facts demonstrate that Plaintiff admitted, during deposition, that she tripped over the bender board, not a "raised edging" which cannot be contradicted by her declaration in opposition to a motion for summary judgment. (See Deer Run's SSUF at Nos. 12-13; Deer Run's Evidentiary Objections; *Barton v. Elexsys Internat., Inc.* (1998) 62 Cal.App.4th 1182, 1191 ["To the extent these descriptions directly contradict his discovery responses, they must be disregarded."]; *Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613 ["Admissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment."]; see also *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 573 ["[A] party cannot rely on contradictions in his own testimony to create a triable issue of fact."].)

Based on the foregoing, the court finds Plaintiff does not raise a triable issue of fact on the issue of causation.

Duty

"As a general rule, each person has a duty to use ordinary care and 'is liable for injuries caused by his failure to exercise reasonable care in the circumstances…' [Citations.] Whether a given case falls within an exception to this general rule, or whether a duty of care exists in a given circumstance, 'is a question of law to be determined on a case-by-case basis.' [Citation.]" (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472 (*Parsons*).)

The element of duty is not an immutable fact of nature but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.) "Some of the considerations that courts have employed in various contexts to determine the existence and scope of duty are: 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' [Citations.]"[2] (*Parsons, supra,* 15 Cal.4th at pp. 472-473.) In determining whether a duty of care exists, the court engages in a weighing and balancing of these factors.

"Duty, being a question of law, is particularly amenable to resolution by summary judgment. [Citation.]" (*Parsons, supra,* 15 Cal.4th at p. 465.)

In support, defendant Deer Run engages in an analysis of the *Rowland* factors to explain why there is no legal duty to support Plaintiff's claims for negligence and premises liability. (See Motion at pp. 16-17; Deer Run's SSUF at Nos. 15-16, 19-22.) The court however need not consider this argument as Plaintiff's complaint does not allege facts in support of a duty with respect to negligence or premises liability and thus such claims fail, on their face, as a matter of law. (See *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 662, fn. 4 ["A necessary element of claims for both negligence and premises liability is the existence of a legal duty to the plaintiff."].) Plaintiff also appears to concede the duty element as she fails to

[2] These factors were examined by the California Supreme Court in *Rowland v. Christian* (1968) 69 Cal.2d 108 and are often referred to as the "*Rowland*" factors.

advance any substantive argument addressing the issue in her opposition. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is equivalent to a concession].)

Accordingly, the motion for summary judgment is GRANTED.

Disposition

The motion for summary judgment to the complaint is GRANTED.

The court will prepare the Order.

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Calendar Line 6

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Calendar Line 7
Case Name: Greenberg Development & Construction, Inc., et al. vs Pio M. Construction, Inc. et al.
Case No.: 23CV421818

Plaintiff Greenberg Development & Construction, Inc. ("Plaintiff")'s motion to compel further discovery responses to set one special interrogatory ("SI") Nos. 2 and 7 and set one request for production of documents ("RPD") No. 3 from defendant Pio M. Construction, Inc. ("PMC") is DENIED.

Plaintiff's request for monetary sanctions is DENIED. The one subject to the sanction acted with substantial justification or other circumstances make the imposition of sanctions unjust.

Introduction

Plaintiff's complaint filed 8/28/2023 is for breach of contract, negligence, express indemnity and violation of Business & Professions Code ("B&P") section 7031.

Plaintiff's complaint alleges, in part:

> PMC is a California corporation with its principal offices in Salinas, California. (¶ 2.) Defendant Fernando Pio-Molinero is the chief executive officer, secretary and chief financial officer of PMC. (¶ 3.) Defendant Ken Chatham ("Chatham") is the responsible managing officer ("RMO") of PMC. (¶ 4.)
>
> Plaintiff is a general contractor doing high end remodels and ne whom construction in the South Bay and Peninsula. Plaintiff's customary practice is to hire subcontractors to perform the majority of the scope of work of any one project. (¶ 11.)
>
> To that end, Plaintiff hired PMC under a master subcontract agreement dated February 19, 2020, to provide framing and general construction services on some of Plaintiff's projects. (¶ 12.)
>
> PMC holds a general B license from the Contractors State License Board, under number 1058721. Because it is a corporation, PMC is licensed through an RMO, identified as Chatam. (¶ 14.)
>
> Plaintiff and PMC entered into several written or oral agreements regarding the scope of work from February 19, 2020, and in 2021, for which Plaintiff paid PMC. (¶¶ 16-26.)

The fourth cause of action alleges, in part:

> That PMC was effectively unlicensed during the time it worked for Plaintiff under the master subcontract. (¶ 59.)

> Specifically, PMC, a corporation, is licensed through an RMO, Chatham. An RMO must be a bona fide officer of the corporation with which he or she is associated. (¶ 60.)
>
> On information and belief ("I&B") that Chatham is not an officer of PMC (¶ 61) and that Chatham does not exercise supervision or control of PMC's construction operations, making him a sham RMO (¶ 61.)
>
> Plaintiff has never met Chatham and has never seen him on any of the specified projects. On I&B that Chatham works in Templeton, more than 100 miles from PMC's offices and that he lives in San Luis Obispo County, while PMC's offices are in Monterey County, and it works primarily in Santa Clara County. (¶ 66.)
>
> Pursuant to California law, a corporation that is licensed only through a sham RMO is effectively unlicensed. (See *Vascos Excavation Group, LLC v. Gold* (2022) 87 Cal.App.4th 842, 851-852; *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 517.) (¶ 66.)
>
> On I&B that PMC was effectively unlicensed while it worked on all of the specified projects under the master subcontract and scope of work agreements. (¶67.)

The Prayer

The prayer of the complaint seeks a judgment for actual damages according to proof; disgorgement of $3,236,189.22 pursuant to B&P section 7031, subdivision (b); additional statutory damages pursuant to Code of Civil Procedure ("CCP") section 1029.8; attorneys' fees pursuant to contract and CCP section 1029.8; for interest and costs; and for such other relief deemed just and proper.

Plaintiff's Broad Right to Discovery

Plaintiff is entitled to discovery of any matter "that is relevant to the subject matter involved in the pending action or to be determinative of any motion made in that action, if the matter is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (CCP § 2017.010.)

> For discovery purposes, information is relevant if it "might reasonably assist a party in *evaluating* the case, *preparing* for trial, or *facilitating* settlement." [Citation.] Admissibility is *not* the test and information, unless privileged, is discoverable if it might reasonably *lead* to admissible evidence. [Citation.] The phrase "reasonably calculated to lead to the discovery of admissible evidence" makes it clear that the scope of discovery extends to *any information* that reasonably might lead to other evidence that would be admissible at trial. "Thus, the scope of permissible discovery is one of *reason, logic and common sense*." [Citation.] These rules are applied liberally in favor of discovery. [Citation.]

(*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1611-1612 [internal citations omitted; emphasis original]; see also *Union Mut. Life Ins. Co. v. Superior Court* (1978) 80 Cal.App.3d 1, 10 ["Relevancy of the subject matter is determined by the potential as well as actual issues in the case"].)

The Discovery Requests

Here, PNC was formed in 2017. (See Mengarelli Dec., ¶ 9 & Ex. H.) According to the complaint, Plaintiff entered a master contract with PMC on February 19, 2020, and scope of work agreements on or after that date. All three of the discovery requests seek information since PMC was formed in 2017.

Footnote 1 of Plaintiff's MPA states, in part: "All of Defendant's work for Plaintiff occurred before 2024, so Chatham's current status with Defendant does not matter."

SI No. 2

IDENTIFY ALL YOUR past officer, directors, and shareholders who are no longer associated with YOU.

Plaintiff's separate statement acknowledges that PMC was formed in 2017. Plaintiff's complaint alleges that it entered into a master subcontract with PMC on February 19, 2020, and scope of work agreements on or after that date. All of Defendant's work for Plaintiff occurred before 2024. Defendant's objections that this request is overbroad and not reasonably calculated to lead to the discovery of admissible evidence are SUSTAINED.

SI No. 7

IDENTIFY ALL payments YOU have made to Ken Chatham since YOUR formation.
Plaintiff's separate statement acknowledges that PMC was formed in 2017.

Plaintiff's complaint alleges that it entered into a master subcontract with PMC on February 19, 2020, and scope of work agreements on or after that date. All of Defendant's work for Plaintiff occurred before 2024. Defendant's objections that this request is overbroad and an invasion of privacy of Chatham are SUSTAINED. A request for all payments between PMC and Chatham since its formation in 2017 is simply too overbroad and unfairly intrudes into the privacy rights of Chatham as an individual.

Chatham's Financial Information.

To invoke the constitutional protection, it is sufficient to show that the information has been sought, and that the information is in a protected zone of privacy. (*Davis v. Superior Court* (1992) 7 Cal.app.4th 1008, 1018-1019.) PMC has met its burden to show that Chatham's financial information being sought is in a protected zone of privacy.

The right to privacy extends to an individual's confidential financial information in whatever form it takes, e.g., tax returns, checks, statements, or other account information. (*Look v. Penovatz* (2019) 34 Cal.App.5th 61, 73; *SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal.App.4th 741, 754; *Overstock. Com, Inc. v. Goldman Sacks Group, Inc.* (2014)

231 Cal.App.4th 503. In the face of an objection based on privacy, the party seeking discovery of another party's financial information must show that this information is directly relevant to a cause of action or defense, such that the disclosure is essential to affair resolution of the lawsuit. (*Look v. Penovatz, supra,* 34 Cal.App.5th at 73.) Plaintiff has *not* met this burden on this overbroad request.

Seeking evidence of all payments between PMC and Chatham is *not* narrowly tailored to the sham RMO issue when balanced with the intrusion into his privacy rights.

RPD No 3

Please produce ALL DOCUMENTS RELATING TO all payments YOU have made to Ken Chatham.

Plaintiff's separate statement acknowledges that PMC was formed in 2017. Plaintiff's complaint alleges that it entered into a master subcontract with PMC on February 19, 2020, and scope of work agreements on or after that date. All of Defendants work for Plaintiff occurred before 2024. Defendant's objections that this request is overbroad and an invasion of privacy of Chatham are SUSTAINED. A request for all payments between PMC and Chatham is simply too overbroad and unfairly intrudes into the privacy rights of Chatham as an individual.

Chatham's Financial Information.

To invoke the constitutional protection, it is sufficient to show that the information has been sought, and that the information is in a protected zone of privacy. (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1018-1019.) PMC has met its burden to show that Chatham's financial information being sought is in a protected zone of privacy.

The right to privacy extends to an individual's confidential financial information in whatever form it takes, e.g., tax returns, checks, statements, or other account information. (*Look v. Penovatz* (2019) 34 Cal.App.5th 61, 73; *SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal.App.4th 741, 754; *Overstock. Com, Inc. v. Goldman Sacks Group, Inc.* (2014) 231 Cal.App.4th 503. In the face of an objection based on privacy, the party seeking discovery of another party's financial information must show that this information is directly relevant to a cause of action or defense, such that the disclosure is essential to affair resolution of the lawsuit. (*Look v. Penovatz, supra,* 34 Cal.App.5th at 73.) Plaintiff has *not* met this burden on this overbroad request.

Seeking evidence of all payments between PMC and Chatham is *not* narrowly tailored to the sham RMO issue when balanced with the intrusion into his privacy rights.

Monetary Sanctions

Plaintiff's request for monetary sanctions under CCP sections 2030.300(d) and 2031.310(h) is DENIED. The one subject to the sanction acted with substantial justification or other circumstances make the imposition of sanctions unjust.

Conclusion

Plaintiff's motion to compel PMC's further discovery responses to SI Nos. 2 and 7 and RPD No. 3 is DENIED**.**

Plaintiff's request for monetary sanctions is DENIED. The one subject to the sanction acted with substantial justification or other circumstances make the imposition of sanctions unjust.

The court will prepare the order.

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Case Name: *Farid Shahrivar v. Federated City Employees' Retirement Plan System et al.*

Case No.: 20CV366329

I. Factual and Procedural Background

Plaintiff Farid Sharivar ("Plaintiff") filed his Second Amended Complaint ("SAC") against defendants City of San Jose ("the City"), Federated City Employees' Retirement Plan System ("FCERS"), and Federated City Employees' Retirement System Board of Administration ("the Board"). FCERS and the Board are also collectively referred to as "Defendants."

According to the allegations of the SAC, Plaintiff is an Iranian and Muslim American male who was employed by the City from approximately November 25, 2001 through February 20, 2009. (SAC, ¶¶ 2, 12.) FCERS was established to fulfill the City's disability and retirement benefits to employees of the City, including Plaintiff. (SAC, ¶ 4.) The Board has exclusive authority to administer the City's retirement benefits and disability benefits and is responsible for approving or denying applications of pension plan members for pension benefits. (SAC, ¶ 5.)

During Plaintiff's employment, he was subjected to discrimination and harassment based on his race, national origin, and perceived religion that increased in severity over the years. (SAC, ¶ 14.) In August 2005, Plaintiff complained about the discrimination to his supervisor and in response, the City retaliated with harassment and denial of his employment benefits. (SAC, ¶ 15.) During his employment, Plaintiff also filed complaints with the Department of Fair Employment and Housing ("DFEH") and the Equal Employment Opportunity Commission ("EEOC"). (SAC, ¶ 17.)

Plaintiff then sought to submit an application for a disability retirement and he was required to turn in an application with the City's Department of Retirement Services. (SAC, ¶ 19.) In or around July 2008, the City's Department of Retirement Services refused to accept Plaintiff's application for disability retirement on behalf of the Board, without Plaintiff's wife's signature, despite their separation. (SAC, ¶ 20.)

On December 1, 2008, Plaintiff filed his application for disability retirement. (SAC, ¶ 21.) On February 20, 2009, the City terminated Plaintiff's employment in retaliation for complaining to his supervisor, the DFEH, and the EEOC. (SAC, ¶ 23.)

On October 26, 2010, a medical examiner found that Plaintiff's symptoms of severe depression were caused by his work environment, that he was disabled, and that he could not work. (SAC, ¶ 26.) On December 18, 2014, the Board appointed a doctor to evaluate Plaintiff's application. (SAC, ¶ 28.)

On November 23, 2015, Plaintiff wrote a letter to the Board to request that it order the Department of Retirement Services to forward Plaintiff's case packet and medical records to the Board so it could make a ruling on his application. (SAC, ¶ 49.)

The SAC alleges that because Plaintiff was Iranian American, the City aided and abetted the Board and FCERS' racial discrimination by not passing Plaintiff's application to the Board. (SAC, ¶ 58.)

On March 18, 2022, Plaintiff filed his SAC, asserting the following causes of action:

1) Racial Discrimination [against the City];

2) Retaliation [against the City];

3) Violation of Government Code section 12940, subdivision (k) [against the City]; and

4) Retaliation [against all defendants].

On April 17, 2024, FCERS and the Board filed a demurrer to the SAC's fourth cause of action. On July 8, 2024, Plaintiff filed his opposition to the demurrer. On July 24, 2024, this Court (Hon. Monahan) issued its order sustaining the demurrer to the fourth cause of action without leave to amend.

Currently before the Court is Plaintiff's August 6, 2024 motion for reconsideration of the Court's order on the demurrer.

II. Legal Standard on Motion for Reconsideration

Motions for reconsideration are generally governed by Code of Civil Procedure section 1008 ("Section 1008"), which represents the Legislature's attempt to regulate what the Supreme Court has referred to as "repetitive motions." (See *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 885.) Section 1008, subdivision (a), "requires that any such motion be (1) filed within 10 days after service upon the party of written notice of entry of the order of which reconsideration is sought, (2) supported by new additional facts, circumstances or law, and (3) accompanied by an affidavit detailing the circumstances of the first motion and the respects in which the new motion differs from it." (*Ibid*.) The legislative intent was to restrict motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not offering it earlier. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500; see *Baldwin v. Home Sav. Of America* (1997) 59 Cal.App.4th 1192, 1198.) Thus, the burden under Section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212-213.)

III. Discussion

Plaintiff argues he is entitled to reconsideration of the order on the demurrer on the grounds there is new law and new facts.

A. New Law

Plaintiff first argues that after his SAC was filed, the California Supreme Court clarified who can be held liable under FEHA in *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268 (*Raines*). (Motion, ¶ 1.) Plaintiff appears to imply that because the case was decided after he filed his amended pleading, it should be considered new law.

As Defendants note in their opposition, *Raines* was decided on August 21, 2023, almost one year before Plaintiff filed his opposition to the demurrer. (See Opposition, pp. 1:21-23; 5:7-9.) New law in the context of a motion for reconsideration requires case or statutory law that became effective after a court ruled on the ***contested motion***. Plaintiff had every

opportunity to address *Raines* in his opposition but did not do so. Likewise, he did not address *Raines* at the hearing on the demurrer.

Furthermore, *Raines* does not create new law but rather clarifies "the meaning of the term 'employer' as used in the [FEHA]." (*Raines, supra,* 15 Cal.5th a p. 273.) Finally, Plaintiff admits in his declaration that, because he is self-represented, he did not become aware of *Raines* until after submitting his opposition to the demurrer and thus it is, "new information." (Sharivar Decl., ¶ 20 ["I am *pro se* . . . I ***became aware*** of the *Raines* decision after submitting my opposition . . . The findings in *Raines* are new information[.]"][emphasis added]; see also Reply, p. 3:20-21 ["If Plaintiff knew about Raines before filing his Opposition to Defendants' demurrer, he would have surely used it."].) As this Court has previously noted, self-represented litigants are 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.) The fact that Plaintiff did not become aware of *Raines* until after his opposition was filed is not a ground to reconsider the order on demurrer.

Accordingly, the motion for reconsideration will not be granted on the ground there is new law.

B. New Facts

Plaintiff next argues that there are two facts that warrant reconsideration of the Court's order: 1) in or about December 2014, Defendants obtained Plaintiff's HR and personnel records, professing their reasons for their actions were pretextual; and 2) on June 14, 2024, the City provided the Board with personnel records without any indemnification or authorization. (Motion, ¶¶ 7-8.)

First, Plaintiff does not explain either in his motion or his declaration how these facts are "new," or why he failed to timely present them in the opposition to the demurrer, or when he learned these new facts. (See *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 383 ["a moving party must give a satisfactory explanation for the previous failure to present the allegedly new or different evidence or legal authority offered in the second application."]; see also *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457 ["The party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time."]; *Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342 [stating same].)

Second, this Court sustained the demurrer to the SAC's fourth cause of action for Retaliation in Violation of 42 U.S.C. section 1981 on the ground the SAC alleged in multiple paragraphs that *the City* was his employer, but did not allege that Plaintiff was employed by FCERS. (See July 24 Order, p. 5:5-7.) The Court explained that Plaintiff did not allege that the protected activity he engaged in was related to FCERS or the Board as an employer of Plaintiff. (*Id.* at p. 5:13-15.) As Defendants state in their opposition, Plaintiff does not explain how these facts would alter the employment relationship analysis. (Opposition, p. 11:1-2.) Finally, Defendants note in their opposition, the June 14, 2024 fact occurred before Plaintiff filed his opposition and could have been included in the opposition. (See Opposition, p. 10:20-24, citing Shahrivar Decl., ¶ 17.) Moreover, Plaintiff does not address Defendants' arguments regarding the "new facts" in his reply. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].)

As such, the Court declines to grant the motion for reconsideration on the ground there is new facts.

Based on the foregoing, the motion for reconsideration is DENIED.

The court will prepare the order.

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Case Name: *Farid Shahrivar v. Federated City Employees' Retirement Plan System et al.*

Case No.: 20CV366329

IV. Factual and Procedural Background

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According to the allegations of the SAC, Plaintiff is an Iranian and Muslim American male who was employed by the City from approximately November 25, 2001 through February 20, 2009. (SAC, ¶¶ 2, 12.) FCERS was established to fulfill the City's disability and retirement benefits to employees of the City, including Plaintiff. (SAC, ¶ 4.) The Board has exclusive authority to administer the City's retirement benefits and disability benefits and is responsible for approving or denying applications of pension plan members for pension benefits. (SAC, ¶ 5.)

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Plaintiff. (*Id.* at p. 5:13-15.) As Defendants state in their opposition, Plaintiff does not explain how these facts would alter the employment relationship analysis. (Opposition, p. 11:1-2.) Finally, Defendants note in their opposition, the June 14, 2024 fact occurred before Plaintiff filed his opposition and could have been included in the opposition. (See Opposition, p. 10:20-24, citing Shahrivar Decl., ¶ 17.) Moreover, Plaintiff does not address Defendants' arguments regarding the "new facts" in his reply. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].)

As such, the Court declines to grant the motion for reconsideration on the ground there is new facts.

Based on the foregoing, the motion for reconsideration is DENIED. Defendants shall prepare the final order.

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