**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: 7/18/2024 TIME: 9:00 A.M.**

**TO CONTEST THE RULING: Before 4:00 p.m. today (7/17/2024) 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 | 20CV366329 | Farid Shahrivar vs City of San Jose et al | Hearing: Demurrer to Plaintiff's Second Amended Complaint by Defendants Federated City Employees' Retirement System and its Board of Administration<br><br>Ctrl Click on Lines 1-2 for tentative ruling.<br>The court will prepare the order. |
| LINE 2 | 20CV366329 | Farid Shahrivar vs City of San Jose et al | Hearing: Demurrer to Plaintiff's Second Amended Complaint by City of San Jose<br><br>Ctrl Click on Lines 1-2 for tentative ruling.<br>The court will prepare the order. |

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|---|---|---|---|
| LINE 3 | 23CV426482 | SANTA CLARA VALLEY OPEN SPACE AUTHORITY vs EDGAR ANDRADE et al | Motion: Summary Judgment/Adjudication by Plaintiff SANTA CLARA VALLEY OPEN SPACE AUTHORITY<br><br>Ctrl Click (or scroll down) on Line 3 for tentative ruling.<br>The court will prepare the order. |
| LINE 4 | 23CV416112 | Patrick Ng vs Hongyi Marston et al | Motion: Compel Plaintiff Patrick Ng's Further Discovery Reponses Confirmation by Defendant Hongyi Marston<br><br>Ctrl Click (or scroll down on Line 4 for tentative ruling.<br>The court will prepare the order. |
| LINE 5 | 23CV420090 | Why Systems LLC vs Emodo, Inc. | Motion: Compel Defendant Emodo Inc.'s Further Response to Special Interrogatories, Set One, Nos. 1-61, and Request for Sanctions by Plaintiff/Cross-Defendant Why Systems LLC<br><br>OFF CALENDAR. |
| LINE 6 | 22CV406880 | Sriadhibhatla Chainulu vs Ajit Sanzgiri et al | Motion: Leave to Amend the [First Amended] Complaint and file Second Amended Complaint by Plaintiff Sriadhibhatla Chainulu<br><br>Unopposed and GRANTED WITH 15 DAYS LEAVE TO AMEND. Moving party to submit order for signature by court. |
| LINE 7 | 23CV413944 | Xiufeng Xie vs Silin Chen et al | Motion: Change of Venue to the County of Sacramento by Defendant Silin Chen (In Pro Per)<br>[C/F 6/11/2024.]<br><br>Ctrl Click (or scroll down) on Line 7 for tentative ruling.<br>The court will prepare the order. |
| LINE 8 | 24CV428768 | Maria Trovo Plancarte vs Moreno & Associates, Inc. | Hearing: Compel Arbitration and for Stay<br><br>OFF CALENDAR. (See Order and Notice of Reassignment of Cases filed 7/11/2024 that rescheduled this motion for 9/5/2024 at 1:30 pm in Dept. 7.) |
| LINE 9 | 24CV432453 | JOHN COOPER vs OUSMANE CABA et al | Motion: Leave to Amend Complaint and file First Amended Complaint by John William Cooper<br><br>Unopposed and GRANTED WITH 15 DAYS LEAVE TO AMEND. Moving party to submit order for signature by court. |
| LINE 10 | 22CV398389 | Charito Rosario et al vs Jerilyn Alfred et al | Motion: Enforce Settlement by Plaintiffs<br>[**per order signed 7/3/2024**]<br><br>OFF CALENDAR. No proof of service of order shortening time. |

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**DATE: 7/18/2024 TIME: 9:00 A.M.**

| | | | |
|---|---|---|---|
| LINE 11 | | | |
| LINE 12 | | | |

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**Calendar Lines 1-2**
**Case Name:** *Farid Shahrivar v. City of San Jose et al.*
**Case No.:** 20CV366329

## I. Factual and Procedural Background[1]

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.)

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[1] The Second Amended Complaint contains numerous factual allegations. For clarity, the Court refers to the allegations most relevant to the instant demurrer.

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. On the same day, the City filed its own demurrer to the SAC. Plaintiff has filed a single opposition to FCERS/the Board's demurrer. The City's demurrer is unopposed.

## II. Requests for Judicial Notice

### a. Defendants' Request

In support of their demurrer, Defendants request judicial notice of the City of San Jose Policy No. 3.3.4 Regarding Employee Personnel Files. The Court finds it unnecessary to take judicial notice of this exhibit. Accordingly, the request is DENIED. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 (*Jordache*) [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

### b. Plaintiff's Request

In support of his opposition to the demurrer, Plaintiff requests the Court take judicial notice of:

1) The City's Charter, updated February 2021;
2) A Public-Record Memo of a request made by Plaintiff; and
3) A Copy of the Final Meeting Minutes of the Board's.

Plaintiff's request is DENIED as unnecessary. (*Jordache, supra,* 18 Cal.4th at p. 748, fn. 6.)

## III. FCER and the Board's Demurrer

FCERS and the Board demur generally to the fourth cause of action on the ground it fails to state facts sufficient to constitute a cause of action.

### a. Legal Standard

In ruling on a demurrer, the court 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. Fourth Cause of Action – Retaliation in Violation of 42 U.S.C. section 1981**

To establish a prima facie case under 42 U.S.C. section 1981, Plaintiff must allege "(1) [he] engaged in a protected activity; (2) [he] suffered an adverse employment action; ***and*** (3) there was a causal connection between the two." (*Surrell v. Cal. Water Serv.* (9th Cir. 2008) 518 F.3d 1097, 1108 [emphasis added].)

Defendants assert that Plaintiff cannot establish any of the elements to support a violation of Section 1981. (Demurrer, p. 5:13-14.)

**a. Protected Activity**

Defendants first argue that Plaintiff must plead he participated in a statutorily protected activity, i.e., opposed an unlawful employment practice under section 1981. (Demurrer, p. 6:6-8, citing *Andrews v. Pride Indus.* (E.D. Cal 2016) 21 F.Supp.3d 1288, 1309.) They contend the SAC fails to allege Plaintiff engaged in a protected activity in opposing an unlawful employment practice arising from FCERS and the Board's conduct. Instead, the SAC alleges Plaintiff filed a lawsuit alleging racial discrimination against the City and its employees and that he complained about racial harassment to "DEFENDANTS including but not limited to filing a racial discrimination lawsuit against the CITY in 2010." (Demurrer, p. 6:11-14, citing SAC, ¶¶ 81, 94.)

In opposition, Plaintiff contends he engaged in protected activity by reporting or making a charge or participating in a charge of race and ancestry-based employment discrimination, which is prohibited under section 1981. (Opposition, p. 11:19-22, citing *Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1197 (*Raad*).) Plaintiff is correct that reporting discrimination or retaliation can be considered a protected activity. As the *Raad* Court explained, "[p]rotected activity includes the filing of a charge or a complaint, or providing testimony regarding an employer's alleged unlawful practices, as well as engaging in other activity intended to 'oppose' an employer's discriminatory practices." (*Ibid*.) However, as Defendants explain in detail, the SAC does not allege that FCERS and the Board are Plaintiff's employer. Rather, Plaintiff specifically alleges that the City is his employer. (SAC, ¶¶ 3, 12, 56.) The only allegation in the SAC that suggests Plaintiff was employed by FCERS can be found at Paragraph 11, where Plaintiff alleges that all references to "employer" will mean the City, FCERS, and the Board. (See SAC, ¶ 11.) However, this allegation contradicts the more specific allegation that Plaintiff is employed by the City. (See *Chen v. PayPal, Inc.* (2021) 61 Cal.App.5th 559, 571 ["California courts have adopted the principle that specific allegations in a complaint control over an inconsistent general allegation."].) Therefore, while Plaintiff may sufficiently allege he engaged in a protected activity, he does not sufficiently allege that the protected activity was related to FCERS or the Board as an employer of Plaintiff.

Accordingly, Plaintiff cannot establish the first element of a claim under Section 1981. As such, the Court need not address Defendants' remaining arguments.

Based on the foregoing, the demurrer to the fourth cause of action is SUSTAINED.

**c. Leave to Amend**

The pleading party "bears the burden of proving there is a reasonable possibility of amendment." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).) To satisfy this burden, the party "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The party "must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, [the party] must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw*, *supra*, 81 Cal.App.4th at pp. 43-44.)

Here, the Court has already afforded Plaintiff an opportunity to amend and he has been unable to state a valid claim to overcome a pleading challenge on demurrer. Further, Plaintiff has not explained how any further amendments will change the legal effect of his pleading. As such, leave to amend is DENIED. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].)

## IV. The City's Demurrer

Plaintiff failed to timely oppose the demurrer filed by the City.[2] Despite being self-represented, Plaintiff is held to the same standard as an attorney. (See *County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444 [Self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys.].) In this case, there have been prior demurrers and timely oppositions filed and so Plaintiff is likely aware of the motion process. Further, Plaintiff has been given multiple opportunities to amend his pleading. Given these circumstances, the Court may treat the unopposed demurrer as meritorious and thus, the City's demurrer is SUSTAINED without leave to amend. (See *Sexton v. Superior Court*, 58 Cal.App.4th 1403, 1410 [failure to file opposition creates an inference that the motion or demurrer is meritorious]; *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"].)

## V. Conclusion and Order

Defendants' demurrer to the fourth cause of action is SUSTAINED without leave to amend. The City's demurrer is SUSTAINED without leave to amend.

The Court shall prepare the final order.

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[2] An opposition to the demurrer needed to be filed by July 3, 2024, and was not filed until July 11, 2024. While the City had the opportunity to file a reply, it was not filed ntil two days before the hearing on this matter.

**Calendar Line 3**
**Case Name:** *Santa Clara Valley Open Space Authority v. Edgar Andrade, et al.*
**Case No.:** 23-CV-426482

Motion for Summary Adjudication to Affirmative Allegations in the Answer by Plaintiff Santa Clara Valley Open Space Authority

## Factual and Procedural Background

This is an action for eminent domain asserted by plaintiff Santa Clara Valley Open Space Authority ("OSA") against Edgar Andrade, Suleyma Lesley Andrade (collectively, "the Andrades") and other defendants.

According to the complaint, the OSA is vested with the power of eminent domain to acquire property for public use, including for the purpose of preserving open-space, creating a greenbelt, and encouraging agricultural activities in Santa Clara County ("County"). (Complaint at ¶ 1.) Public Resources Code section 35153 authorizes the OSA to exercise eminent domain to acquire "lands in agricultural production" that are "threatened by imminent conversion to developed uses." (Ibid.)

Coyote Valley is a low-lying 7,400 acre area between the Santa Cruz Mountains to the west and the Diablo Range Mountains to the east. (Complaint at ¶ 3.) The Valley is sparsely developed and consists primarily of agricultural land, including remnant orchards, row crop land, hayfield, as well as parks and open space lining Coyote Creek, which flows north through Coyote Valley to San Francisco Bay. (Ibid.) Coyote Valley is a critical wildlife linkage between the Santa Cruz Mountains and the Diablo Range, connecting more than 1.1 million acres of core habitat. (Id. at ¶ 4.)

The OSA identified Coyote Valley as one of the highest priority landscapes for conservation the Authority's 2014 Santa Clara Valley Greenprint ("Greenprint"). (Complaint at ¶ 6.)

In 2019, the State Legislature enacted Assembly Bill 948, thereby creating the "Coyote Valley Conservation Program." (Complaint at ¶ 8.) The Legislature found and declared in part the following with respect to Coyote Valley:

- Coyote Valley is a unique landscape providing agricultural, wildlife, recreational, climate, and other natural infrastructure benefits, covering an area of about 17,200 acres in southern Santa Clara County;
- Coyote Valley is a resource of statewide significance. The Coyote Valley has been subject to intense development pressure and is in need of restoration, conservation, and enhancement;
- The establishment of the Coyote Valley Conservation Program pursuant to this chapter will provide a necessary structure to implement restoration and preservation projects and recreational opportunities, and enhance the overall condition of Coyote Valley. (Ibid.)

In 2021, the OSA launched the Coyote Valley Conservation Areas Master Plan ("CVCAMP"), a multi-year integrated planning effort focused on conserving lands in Coyote Valley. (Complaint at ¶ 6.)

The OSA seeks to continue to preserve high-quality farmland, help maintain the rural character of Coyote Valley and Santa Teresa Blvd., a scenic transportation corridor, and protect Coyote Valley's function as a critical wildlife linkage, thereby implementing the Greenprint, the Coyote Valley Conservation Program (A.B. 948), the Ag Plan, the County General Plan, and the CVCAMP (collectively, the "Project"). (Complaint at ¶ 9.)

On October 5, 2021, the Andrades, the owners of record of the vacant parcel adjacent to the OSA's 60-acre land holding located at Laguna Avenue and Santa Teresa Blvd., formerly known as APN 712-18-017, now known as APN 712-18-029 ("Property"), submitted a Planning Development Application to the County for development of the Property. (Complaint at ¶ 10.) The Andrades sought permission to construct a single-family house, two accessory dwelling units, two garages, a driveway, and multiple covered patios on the Property ("Proposed Development"). (Ibid.) The Proposed Development however would effectively eliminate agricultural use of the Property, contributing to the loss of high-quality farmland, in addition to disrupting the Santa Teresa Blvd. scenic corridor and interfering with the safe passage for wildlife across Coyote Valley. (Ibid.)

To advance the Project, OSA's Board of Directors ("Board") duly and regularly convened a meeting, at which the Board passed and adopted, by a unanimous vote, Resolution 23-51, declaring that the public interest and necessity require the acquisition by the OSA of the Property. (Complaint at ¶ 11, Ex. 2.) In particular, the OSA Board determined in Resolution 23-51 that:

- The public interest and necessity require the Project;
- The Project is planned and located in the manner that will be most compatible with the greatest public good and least private injury;
- The Property is necessary for the Project; and
- OSA has made the offer as required by California Government Code section 7267.2 to the owner of record of the Property. (Id. at ¶ 13.)

Thereafter, the Andrades filed an objection to the OSA Board's approval of Resolution 23-51 with the County, requesting that the County Board of Supervisors consider the objection at a public hearing. (Complaint at ¶ 14.) On November 7, 2023, the County Board, at its regular meeting, considered and rejected the objection. (Id. at ¶ 15, Ex. 3.)

OSA alleges the use of the Property for the Project is a use authorized by law, and the taking by the OSA of the rights, titles, and interest in the Property for this purpose is necessary to such use. (Complaint at ¶ 17.)

On November 17, 2023, OSA filed the operative complaint against defendants for eminent domain.

On January 24, 2024, the Andrades filed an answer admitting and denying allegations of the complaint while adding 12 paragraphs of affirmative allegations.

On April 10, 2024, OSA filed the motion presently before the court, a motion for summary adjudication to the Andrades' answer. The Andrades filed written opposition, a request for judicial notice and evidentiary objections. OSA filed reply papers.

A further case management conference is set for October 29, 2024.

## Motion for Summary Adjudication

Plaintiff OSA moves for summary adjudication as to the affirmative allegations in the Andrades' answer on the ground that there are no triable issues of material fact and thus judgment should be entered as a matter of law.

**Request for Judicial Notice/Evidentiary Objections**

The court declines to consider the Andrades' request for judicial notice and evidentiary objections as they are not material 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"]; see also Code Civ. Proc., § 437c, subd. (q) ["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."].)

**Legal Standard**

"When a plaintiff moves for summary adjudication on an affirmative defense, the court shall grant the motion 'only if it completely disposes' of the defense. [Citation.] The plaintiff bears the initial burden to show there is no triable issue of material fact as to the defense and that he or she is entitled to judgment on the defense as a matter of law. In so doing, the plaintiff must negate an essential element of the defense, or establish the defendant does not possess and cannot reasonably obtain evidence needed to support the defense. [Citations.]" (*See's Candy Shops, Inc. v. Super. Ct.* (2012) 210 Cal.App.4th 889, 899-900 (*See's Candy Shops*).)

"If the plaintiff does not make this showing, ' "it is unnecessary to examine the [defendant's] opposing evidence and the motion must be denied." ' [Citation.] ' "However, if the moving papers establish a prima facie showing that justifies a [ruling] in the [plaintiff's] favor, the burden then shifts to the [defendant] to make a prima facie showing of the existence of a triable material factual issue." ' [Citation.]" (*See's Candy Shops, supra,* 210 Cal.App.4th at p. 900.)

"Summary adjudication is a drastic remedy and any doubts about the propriety of summary adjudication must be resolved in favor of the party opposing the motion." (*See's Candy Shops, supra,* 210 Cal.App.4th at p. 900.)

**Improper Notice of Motion**

"If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (Cal. Rules of Court, rule 3.1350(b).)

"If a party desires adjudication of particular issues or subissues, that party must make its intentions clear in the motion... [Citation]. There is a sound reason for this rule: '... the opposing party may have decided to raise only one triable issue of fact in order to defeat the motion, without intending to concede the other issues. It would be unfair to grant a summary adjudication order unless the opposing party was on notice that an issue-by-issue adjudication might be ordered if summary judgment was denied.' [Citation.]" (*Gonzalez v. Super. Ct.* (1987) 189 Cal.App.3d 1542, 1546.)

Similarly, in *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, the Sixth Appellate District states:

> "**A motion for summary adjudication tenders only those issues or causes of action specified in the notice of motion, and may only be granted as to the matters thus specified**. The movant must 'state [] specifically in the notice of motion and … repeat [], verbatim, in the separate statement of undisputed material facts,' 'the specific cause of action, affirmative defense, claims for damages, or issues of duty' as to which summary adjudication is sought. [Citations.] **The motion must be denied if the movant fails to establish an entitlement to summary adjudication of the matters thus specified; the court cannot summarily adjudicate other issues or claims, even if a basis to do so appears from the papers**." (*Id.* at pp. 743-744, emphasis added.)

As stated above, the Andrades' answer alleges a total of 12 affirmative allegations which are construed by plaintiff OSA as "affirmative defenses." In the notice of motion, OSA requests summary adjudication of each of the affirmative allegations (or defenses) in the answer challenging the OSA's adoption of Resolution of Necessity 23-51. (See Notice of Motion at p. 2.) The notice of motion however is improper as it fails to specify exactly which affirmative defenses are the subject of the motion for summary adjudication. Stated another way, it is not clear from the notice if OSA seeks summary adjudication of some or all of the affirmative defenses alleged in the answer.

**Defective Separate Statement**

The court notes also that plaintiff OSA filed a defective separate statement in support of the motion for summary adjudication.

(1) "The Separate Statement of Undisputed Material Facts in support of a motion must separately identify:

(A) Each cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion; and

(B) Each supporting material fact claimed to be without dispute with respect to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion.

(2) The separate statement should include only material facts and not any facts that are not pertinent to the disposition of the motion.

(3) The separate statement must be in the two-column format specified in [California Rules of Court, rule 3.1350] (h). The statement must state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column. Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers." (Cal. Rules of Court, rule 3.1350(d).)

"The requirement of a separate statement from the moving party and a responding statement from the party opposing summary judgment serves two functions: to give the parties notice of the material facts at issue in the motion and to permit the trial court to focus on whether those facts are truly undisputed." (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1210.) As one appellate court explained:

> "Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for SAI and summary judgment to determine quickly and efficiently whether material facts are disputed." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335.)

" ' "Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement*." ' [Citation.] And if the separate statement does not contain all material facts on which the motion is based, the moving party has failed to meet its initial burden of production and is 'not entitled to summary adjudication as a matter of law.' [Citations.]" (*California-American Water Co. v. Marina Coast Water Dist.* (2022) 86 Cal.App.5th 1272, 1297.)

Here, the separate statement submitted by plaintiff OSA fails to comply with the Code of Civil Procedure or the California Rules of Court. As stated above, a separate statement must include, verbatim, the affirmative defenses where summary adjudication is requested. The separate statement does not reference any of the affirmative defenses from the answer. Nor does the separate statement include a **single material fact** in support of the motion. Instead, the separate statement provides only the following:

> "Attached as Exhibit 1 to the Evidence in Support of Plaintiff's Motion for Summary Adjudication of the Andrade Defendants' Challenge to the Right to Take is the certified record of proceedings for the following proceeding:
>
> Santa Clara Valley Open Space Authority Resolution 23-51; A Resolution of the Governing Board of the Santa Clara Valley Open Space Authority Authorizing the Use of Eminent Domain to Protect Agricultural Land in Coyote Valley (September 14, 2023)

> Evidence in Support of Plaintiff's Motion for Summary Adjudication of the Andrade Defendants' Challenge to the Right to Take, Ex. 1." (See OSA's Separate Statement.)

While the separate statement directs the court to consider evidence in the certified record of proceedings, there are no material facts connecting this evidence to the Andrades' affirmative defenses. And, without such material facts, there is no basis for the court to grant a motion for summary adjudication. (See *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182, 201 ["Without facts set forth in a separate statement to support a ground for summary judgment, summary judgment cannot be granted on that ground"].) In reply, plaintiff OSA asserts "[t]here are no individual 'material facts' the Court must adjudicate as would be required in a typical civil trial." (See Reply at p. 12:4-5.) OSA however fails to support this assertion with citation to legal authority explaining why material facts are not required in a separate statement on a motion for summary adjudication under circumstances similar to this case. (See *Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939 ["The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived."]; *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153 [court may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he or she wants us to adopt].)

Finally, the failure to comply with the separate statement requirement may, in the court's discretion, constitute grounds for denying the motion. (Code Civ. Proc., § 437c, subd. (b)(1); see *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118 ["[T]he court's power to deny summary judgment on the basis of failure to comply with California Rules of Court, rule 3.1350 is discretionary, not mandatory."].) It may be that, despite the nonconforming separate statement, that plaintiff OSA expects the court to consider the evidence contained in the certified record of proceedings along with arguments raised in the memorandum. But, to do so here, without the benefit of an adequate separate statement, would require this court to consider numerous documents contained in five volumes of supporting evidence. Thus, carrying out that function, in this instance, defeats the intended purpose of the separate statement requirement. And, at least one appellate court has found that, where evidence is not referenced, is hidden in voluminous papers and not called to the attention of the court, a summary judgment should not be reversed on grounds the court should have considered such evidence. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316; see also *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 94 ["Only when a case involves a single, simple issue with minimal evidentiary support will a trial court consider the merits unaccompanied by a separate statement."].)

Therefore, the court exercises its discretion to deny the motion for summary adjudication based on plaintiff OSA's failure to comply with the separate statement requirement.

Accordingly, the motion for summary adjudication is DENIED. Having done so, the court declines to consider the Andrades' request in opposition to continue the motion under Code of Civil Procedure section 437c, subdivision (h).

## Disposition

The motion for summary adjudication to the affirmative allegations in the answer is DENIED.

The court will prepare the Order.

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**Calendar line 4**
**Case Name:** *Patrick Ng vs Hongyi Marston, et al.*
**Case No.:** 23CV416112

Defendant Hongyi Marston ("Defendant")'s motion to compel further discovery responses from Plaintiff Patrick Ng ("Plaintiff") is DENIED.

Defendant's motion to compel Plaintiff's further responses to request for admission, set one ("RFA") Nos. 1-10 is DENIED. The court agrees with Plaintiff's objection and argument that the language "as used in paragraph __ of Plaintiff's Second Amended Complaint [("SAC')]" in each of these RFAs requires the responding party to reference that outside document (the SAC) to respond which violates Code of Civil Procedure ("CCP") section 2033.060(d) ["Each request for admission shall be full and complete in and of itself." (See Plaintiff's Opp., pp. 3-8.)

Defendant's motion to compel Plaintiff's further responses to form interrogatories, set one ("FI"), Nos. 2.11, 2.12, 12.2, and 17.1 is DENIED. A motion to compel further responses to interrogatories must be accompanied by declaration showing a "reasonable good faith attempt" to resolve the issues before filing the motion. (CCP §§ 2016.040, 2030.300(b)(1) [interrogatories].) Plaintiff failed to meet and confer about a further response to any FI before filing this motion. Plaintiff's reply completely ignores this argument in the opposition papers.

Defendant's motion to compel Plaintiff's further response to request for production of documents ("RPD") set one Nos. 1-40 is DENIED. A motion to compel further responses to RPDs must be accompanied by declaration showing a "reasonable good faith attempt" to resolve the issues before filing the motion. (CCP §§ 2016.040, 2031.310(b)2) [inspection demand].) Here Defendant did not meet and confer regarding any further response to RPDs before filing this motion. Plaintiff's reply completely ignores this argument in the opposition papers.

Furthermore, as discussed in the opposition papers FI Nos. 17 (a),(b) and (c) do *not* ask for identification of documents. Accordingly, RPD Nos. 1-10 (based on FI No. 17(a)), RPD Nos. 2-20 (based on FI No. 17(b) and RPD Nos. 21 to 30 (based on FI No. 17(c)) were *not* valid document requests. Plaintiff's reply completely ignores this argument in the opposition papers.

Defendant's motion to compel further responses is DENIED. There is no request for monetary sanctions in the Defendant's notice of motion or memorandum of points and authorities filed 6/13/2024. Any request for sanctions by Defendant is DENIED.

Plaintiff's request for monetary sanctions against defendant HONGYI MARSTON and/or her attorneys JAMES DAWSON, WILLIAM KRULL and/or GATES ESENHART DAYSON is GRANTED in the reasonable amount of **9 hours** at $500 per hour for a total of **$4,500**. This amount shall be paid in full to Plaintiff within 15 days of this order.

The dispute over the RFA Nos. 1-10 was in good faith and the parties met and conferred in good faith about the RFAs. (See Ex. A and B to Dec. of W. Krull.) The number of hours requested by Plaintiff was reduced to reflect this and for Plaintiff's estimated time. [3]

The court will prepare the order. [Please note that footnote 3 will be renumbered footnote 1 in the order. The number was changed by the Word program because of footnotes in a prior tentative.]

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[3] The court also notes that:

The RFA's end on page 38 of Defendant's separate statement. The FIs and RPDs take up 99 pages of Defendant's separate statement (plus a signature page that's on page 138. Plaintiff's opposition memorandum was 15 pages. About 1/3 of the pages dealt with RFAs and 2/3 dealt with RPDs and FIs.)

**Calendar Line 5**

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**Calendar Line 6**

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**Calendar Line 7**

**Case Name:** XiuFeng Xie v. Silin Chen et al

**Case No.:** 23-CV-413944

Defendant Silin Chen, Pro Se Doe ("Defendant")'s motion for change of venue to the Superior Court in the County of Sacramento under Code of Civil Procedure ("CCP") sections 395 and 397 and for monetary sanction is DENIED.

Defendant brought this motion for change of venue on two grounds:

1. This Court is not the proper court for the trial of this action under the general venue rule and the Superior Court in the County of Sacramento is a proper court under that rule. [CCP § 395(a).]

2. Litigating in the Court will increase significant burden and inconvenience to non-party witnesses. [CCP § 397(c).]

(Defendant's Notice of Motion, p. 2.) However, Defendant failed to file any declarations (or evidence) with her moving papers.

As the moving party, Defendant "must overcome the presumption that the plaintiff has selected the proper venue. (*Mitchell v. Superior Court* (1986) 186 Cal.App.3d 1040, 1046.) Thus, '[i]t is the moving defendant's burden to demonstrate that the plaintiff's venue selection is not proper under any of the statutory grounds.' (*Ibid*.)" (*Fontaine v. Superior Court* (2009) 175 Cal.App.4th 830, 836.)

"The burden is on the moving party to establish whatever facts are needed to justify transfer. Normally this requires declarations containing admissible evidence. But the court may also consider facts alleged in the moving party's *verified complaint* if *uncontroverted* by opposing affidavits." (Weil & Brown, (2023 The Rutter Group) Civil Practice Guide: Civil Proc. Before Trial ¶ 3:575 ("Weil & Brown") citing *Mission Imports, Inc. v. Sup. Ct. (Monterey Bay Co. Inc.)* (1982) 31 Cal.3d 921, 929.) Here, Plaintiff's complaint and first amended complaint ("FAC") were unverified. (See Complaint filed 4/3/2024: FAC filed 6/6/2024.) The classification of the action as local or transitory is determined at the outset of the action from the allegations of the plaintiff's original complaint. (See Weil & Brown ¶ 3:464.)

"Where the complaint alleges defendant's local residence as the basis for venue, defendant must establish he or she resided elsewhere at the time the action was commenced; and if there are several defendants, that *no codefendant* resided in the county in which plaintiff filed suit." (Weil & Brown, *supra*, ¶3:575:5 citing *Sequoia Pine Mills, Inc v. Sup.Ct. (Avram)* (1968) 258 Cal.App.2d 65, 68.)

> "A much more extensive factual showing is required for motions based on the 'convenience of witnesses and the ends of justice.' [CCP § 397(c).] Declarations must show (*Juneau v. Juneau* (1941) [45 Cal.App.2d 14, 16]:
> The *names* of each witness expected to testify for *both* parties;
> The *substance of their expected testimony*.

> Whether the witness has been deposed or has given a statement regarding the facts of the case (and if so, the date of the deposition or statement);
> The *reasons* why it would be "inconvenient' for the witnesses to appear locally; and
> The *reasons* why the 'ends of justice' would be promoted by transfer to a different county (e.g., to permit view of the scene or make other material evidence available."

(Weil & Brown, *supra*, ¶ 3:576 [paragraph dots omitted].)

All evidence that will be presented to the court [by the moving party] at a motion hearing must be served along with the notice of motion and points and authorities. (CCP §1005(b); *David S. Karton, a Law Corp. v. Musick, Peeler & Garrett LLP* (2022) 83 Cal.App.5th 1027, 1048; Weil & Brown, *supra*, ¶9:44.)

Defendant failed to file any declaration (or evidence) with her moving papers. Accordingly, Defendant's moving papers failed to overcome the presumption that plaintiff has selected the proper venue. Defendant also failed to show any factual basis for her claim that "the convenience of witnesses and ends of justice" would be served by the change of venue with her moving papers.

"The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. . . . '[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case . . .' and if permitted, the other party should be given the opportunity to respond. [Citations.]" (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1538.)

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.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985 ["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."].)

Defendant's declaration (and evidence) filed with her reply papers on June 4, 2024, should have been filed with her moving papers to be considered. No justification is provided for the withholding of evidence until the reply. The evidence was available to Defendant at the time she filed her the moving papers. For the reasons stated, this is not an exceptional case. However, at the previous hearing held on June 11, 2024, the court overruled Plaintiff's objection and granted Defendant's request to continue the hearing so it could consider the evidence she filed with her reply papers on 6/4/2024.

At the previous hearing held on June 11, 2024, the court continued the hearing to July 18, 2024, at 9:00 A.M. in Department 3. The court allowed further opposition papers to be filed by Plaintiff by July 5, 2024, and the Defendant to file a further reply by July 12, 2024. Both sides waived notice.

**Discussion**

"[T]he superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action." (CCP § 395.) "A judge may, on motion, transfer an action … [and] [t]he motion shall be supported by a declaration stating facts showing that the actions meet the standards specified …." (CCP § 403.)

As the moving party, Defendant has "[t]he burden of proof in a motion to change venue, [since it] is on the moving party to show that the present venue is improper. There is a presumption that the plaintiff has selected the proper venue." (*Mitchell v. Superior Court* (1986) 186 Cal.App.3d 1040, 1042.) "Where the complaint alleges defendant's local residence as the basis for venue, defendant must establish he or she resided elsewhere at the time the action was commenced; and if there are several defendants, that *no co-defendant* resided in the county in which plaintiff filed suit." (Weil & Brown, (2023 The Rutter Group) Civil Practice Guide: Civil Proc. Before Trial ¶ 3:575:5 citing *Sequoia Pine Mills, Inc v. Sup. Ct.* (Avram) (1968) 258 Cal.App.2d 65, 68.)

Here, Defendant fails to establish *where* she resided at the time the action commenced on 4/3/2023. In her declaration, Defendant stated that she is currently a resident of Sacramento County and was not a resident of Santa Clara County when the action was commenced. However, she failed to provide the location where she resided when the action was commenced in her declaration. Defendant mentioned in her reply papers that she "abandoned her domicile" in Santa Clara County in 2021, sought housing in Sacramento with an intent to live there indefinitely, but then settled in Texas before securing residence in Sacramento. Defendant never clearly stated nor provided evidence in her papers regarding when she established domicile in Sacramento County, only confirming that she moved to Texas after abandoning her domicile in Santa Clara County in 2021. Defendant's declaration references a police report filed in Texas on Sept. 27, 2022. "If none of the defendants reside in the state or if they reside in the state and the county where they reside is unknown to the plaintiff, the action may be tried in the Superior Court in any county that the plaintiff may designate in his or her complaint…." (CCP § 395(a).)

The complaint alleges that an individual co-defendant Guang Chen was a resident or did business in Santa Clara County. (Complaint ¶ 4.) Defendant failed to provide any evidence in her declaration that the individual co-defendant Guang Chen did not reside in the county in which plaintiff filed suit when the action commenced.

Therefore, the venue in Santa Clara County is proper in either case, where *either* the co-defendant Guang Chen resided in Santa Clara County when the action was commenced; or Defendant resided in the state of Texas when the action was commenced.

Defendant also failed to meet the burden for "convenience of witnesses and the ends of justice" that she claimed in her reply. "On a motion for change of venue on the ground of residence of the defendant, a counter-affidavit [or declaration] seeking to retain the action in the original county on the ground of convenience of witnesses should contain the names of the witnesses, together with the testimony expected from each so that the court may, from the issues, judge of the materiality of their testimony and afford opposing counsel an opportunity to stipulate to the testimony proposed." (*Juneau v. Juneau* (1941) 45 Cal.App.2d 14, 17.)

Here, while Defendant alleged "convenience of witnesses and the ends of justice," claiming in her papers that witnesses such as her children, social workers, and her children's

teacher are all residents of Sacramento, she fails to provide the information required to meet this burden in her supporting declaration. Therefore, by failing to meet the burden of establishing "convenience of witnesses and the ends of justice" grounds in CCP section 397(c), the venue remains proper.

Lastly, "[s]elf-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.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985 ["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."].)

Defendant's declaration (and evidence) filed with her reply papers on 6/4/2024, should have been filed with her moving papers to be considered. No justification was provided for the withholding of evidence until the reply. The evidence was available to Defendant at the time she filed her moving papers. Here, the court continued the motion over Plaintiff's objection, so that it could consider her evidence. The court considered the evidence but finds Plaintiff still failed to meet her burden of proof for a transfer of venue and continues to make numerous factual arguments in her papers that are *unsupported* by her declaration or evidence.

**Conclusion**

Defendant's motion for change of venue is DENIED.

Defendant's motion for monetary sanction is DENIED.

The court will prepare the order.

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