**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**

**Department 10**
**Honorable Frederick S. Chung**

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

**DATE: October 15, 2024 TIME: 9:00 A.M.**

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

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

**Scheduling motion hearings**: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

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

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

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

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 21CV385243 | Yisrael 26, LLC v. Terri Le | Click on LINE 1 or scroll down for ruling. |
| LINE 2 | 22CV399887 | Dragica Kosta v. The Apricot Pit, LP et al. | Click on LINE 2 or scroll down for ruling. |
| LINE 3 | 22CV408205 | Aurel Foglein v. The Home Depot U.S.A., Inc. et al. | Click on LINE 3 or scroll down for ruling. |
| LINE 4 | 23CV416988 | Susan Wallman v. Kia America, Inc. et al. | Click on LINE 4 or scroll down for ruling in lines 4-5. |
| LINE 5 | 23CV416988 | Susan Wallman v. Kia America, Inc. et al. | Click on LINE 4 or scroll down for ruling in lines 4-5. |
| LINE 6 | 20CV368215 | People of the State of California et al. v. Ke “Jason” Wang et al. | Click on LINE 6 or scroll down for ruling. |
| LINE 7 | 22CV401668 | Steinberg Hart v. Z&L Properties, Inc. | Click on LINE 7 or scroll down for ruling. |
| LINE 8 | 23CV418788 | Alejandro Perez-Soto v. Bernice Eiko Sakuma | Click on LINE 8 or scroll down for ruling. |
| LINE 9 | 23CV427029 | George Kostal v. Abdulzia Skander et al. | Click on LINE 9 or scroll down for ruling. |
| LINE 10 | 2014-1-CV-262628 | Jeremy Forth v. Carnegie Mellon University | Motion to be relieved as counsel: parties to appear. |

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 11 | 22CV403017 | Applied Materials, Inc. v. Huu T. Vu et al. | The court GRANTS CAE's unopposed motion to seal the unredacted version of the June 11, 2024 declaration of Quyen Ta, submitted in support of Applied Materials' opposition to CAE's motion for sanctions. For the reasons set forth in its July 16, 2024 order, the court remains dubious about CAE's unsupported contention that the redacted exhibits contain "trade secrets"; nevertheless, the court finds, under rule 2.550(d) of the California Rules of Court, that the redactions to the declaration and exhibits are targeted and that an overriding interest exists to overcome the right of public access to the redacted information. The court also finds that the overriding interest supports sealing the redacted information; a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; the proposed sealing is narrowly tailored; and no less restrictive means exist to achieve the overriding interest. As a consequence, access to the unredacted version of June 11, 2024 declaration in the file—as well as to the June 11, 2024 opposition to the motion for sanctions—will remain restricted until further order of the court. |
| LINE 12 | 23CV425000 | Jack Hansen v. Armando Sanchez et al. | Click on LINE 12 or scroll down for ruling. |
| LINE 13 | 23CV425445 | Fortune Vieyra v. San Jose Day Nursery et al. | Click on LINE 13 or scroll down for ruling. |

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**Calendar Line 1**
**Case Name:** *Yisrael 26, LLC v. Terri Le*
**Case No.:** 21CV385243

## I. BACKGROUND

This is a commercial landlord-tenant dispute between plaintiff Yisrael, LLC ("Yisrael") and defendant Terri Le. Yisrael's original and still-operative complaint, filed on July 6, 2021, states a single cause of action for breach of contract against Le and various Does, seeking back rent. There are no exhibits attached to the complaint.

Le filed her answer to the complaint on October 1, 2021, while she was self-represented. The filing of this answer cut off Yisrael's ability to add any new causes of action or parties to the complaint without leave of court. (See Code Civ. Proc., § 472, subd. (a).) Counsel subsequently appeared for Le in February 2023. On May 23, 2024, the court granted Le's motion (opposed by Yisrael) for leave to file an amended answer to the complaint and a cross-complaint. In opposing the motion, Yisrael did not ask for leave to add new causes of action to its complaint, and the court's order did not grant any such leave.[1]

Le's cross-complaint, filed May 28, 2024, alleged a single cause of action for conversion. Yisrael answered the cross-complaint on June 27, 2024, but it also added a "cross-cross-complaint," alleging a new cause of action for "bad faith" against Le, as well as allegations of a violation of Commercial Code section 9625, subdivision (b). This filing was unauthorized, both because a "cross-cross-complaint" is not a recognized pleading (see Code Civ. Proc., § 422.10), and because Yisrael failed to seek leave to add any new causes of action against Le.

Currently before the court is a special motion to strike Yisrael's cross-cross-complaint under Code of Civil Procedure section 425.16.

## II. SPECIAL MOTION TO STRIKE THE CROSS-CROSS-COMPLAINT

### A. General Standards

Code of Civil Procedure section 425.16 authorizes a person to bring a special motion to strike allegations "arising from any act . . . in furtherance of [his or her] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (Code Civ. Proc., § 425.16, subd. (b)(1).) This motion is also referred to as an "anti-SLAPP" motion.

Courts evaluate anti-SLAPP motions using a two-step analysis. (*Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1116.) "First, the moving defendant must identify 'all allegations of protected activity' and show that the challenged claim arises from that activity." (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934 (citations omitted).) "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

[1] The court takes judicial notice of the May 23, 2024 order on its own motion pursuant to Evidence Code section 452, subdivision (d).

sufficient and factually substantiated.' 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.'" (*Ibid*.)

**B. The Basis of Le's Motion**

Le argues that the cross-cross-complaint's allegation of bad faith on her part arises solely from protected activity because it focuses on the notion that she overvalued the property in her cross-complaint with a "value according to proof" of $120,000. (See Cross-Complaint at ¶¶ 13-14.) The fact that the cross-cross-complaint is based solely upon the allegations of the cross-complaint is confirmed by the deposition testimony of Yisrael's designated person-most-qualified, Adam Askari. (See Exhibit A to the Declaration of James Roberts.)

As allegations in a pleading are covered by the litigation privilege, Le further argues that Yisrael cannot show a probability of prevailing on its cross-cross-complaint. The litigation privilege, which is codified in Civil Code section 47, subdivision (b), immunizes litigants from liability for torts, other than malicious prosecution, that arise from communications in judicial proceedings. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) "The litigation privilege is absolute; it applies, if at all, regardless of whether the communication was made with malice or the intent to harm." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913 (*Kashian*) [also stating that "application of the privilege does not depend on the publisher's 'motives, morals, ethics or intent'"]; see also *Silberg, supra*, 50 Cal.3d at p. 215 [stating that "[t]o effectuate its vital purposes, the litigation privilege is held to be absolute in nature"].)

In opposition, Yisrael contends, without explanation, that its cross-cross-complaint is (somehow) not based on the dollar value alleged in cross-complaint's conversion cause of action and is therefore not based on protective activity. The only evidence submitted with the opposition, a short declaration from counsel Donald Melancon, simply asserts that the conversion cause of action in the cross-cross-complaint is supported by unidentified "documentary evidence." The declaration offers no explanation for the insertion of a cross-cross-complaint into the answer to Le's cross-complaint.

**C. Discussion**

Although the court generally finds Yisrael's arguments to be unpersuasive, the court ultimately concludes that it does not need to decide whether the "cross-cross-complaint" constitutes an improper SLAPP suit. Even if the court were to assume for the sake of argument that the cross-cross-complaint is *not* based on protected activity and that the litigation privilege does *not* apply, the court may still strike a pleading "at any time in its discretion" under Code of Civil Procedure 436. The court exercises its discretion to do so here, given the basic impropriety of Yisrael's insertion of an unauthorized cause of action into its answer to the cross-complaint.

As noted above, once Le filed her answer to Yisrael's complaint on October 1, 2021, Yisrael had no ability to add any new claims or parties to the case *without leave of court*. That includes adding new causes of action or parties through an unauthorized amendment of the complaint *or* through the filing of an unauthorized pleading concealed within the answer to a

cross-complaint. In addition, a "cross-cross-complaint" by a plaintiff against a defendant is not a recognized pleading.

Accordingly, the court STRIKES paragraphs 23-35 of Yisrael's June 27, 2024 answer, as well as the answer's "prayer," on its own motion WITHOUT leave to amend. The only operative pleadings in this action remain Yisrael's complaint and Le's cross-complaint, both of which are now at issue. Neither side can add any new causes of action or parties unless the court grants leave to amend *prior* to the filing of any amended pleading.

As the court is striking the unauthorized cross-cross-complaint on its own motion, it is not necessary for the court to rule on the objections to evidence (specifically, the Melancon declaration) submitted with Le's reply papers.

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**Calendar Line 2**
**Case Name:** *Dragica Kosta v. The Apricot Pit, LP et al.*
**Case No.:** 22CV399887

Plaintiff Dragica Kosta initiated this matter against defendants The Apricot Pit, LP, Vidovich Apricot Pit II, LP, Neary-Vidovich, LP, John Vidovich, LLC, the John T. Vidovich Family Limited Partnership, and John T. Vidovich, based on their alleged non-payment of wages. After the court sustained a demurrer to four of the causes of action in the original complaint, with leave to amend, Kosta voluntarily dismissed Vidovich Apricot Pit II, LP, Neary-Vidovich, LP, and the John T. Vidovich Family Limited Partnership from this case. The remaining defendants—The Apricot Pit, LP, John Vidovich, LLC, and John T. Vidovich (collectively, "Defendants")—now demur again to the first, second, fourth, and fifth causes of action in the first amended complaint ("FAC") for failure to state sufficient facts.

## I. BACKGROUND

According to the allegations of the FAC, Kosta "entered into the services of Defendants in 2006, originally as the personal caretaker to Marilyn Vidovich." (FAC, ¶ 10.) Defendants advertised the position as a paid one with housing benefits. (*Id.* at ¶ 11.) After Kosta began working, Defendants provided housing but not any monetary pay. (*Id.* at ¶ 12.) Kosta inquired about her pay, but Defendants did not pay her even while they repeatedly assured her that they would. (*Id.* at ¶ 13.) Kosta worked for six years without pay until 2012, when Defendants began paying her a minimum salary. (*Id.* at ¶ 16.) Defendants never provided any backpay, but they led Kosta to believe that they would. (*Id.* at ¶ 17.) At the time Defendants began paying Kosta, her role had converted primarily to that of a maintenance worker carrying out janitorial duties to maintain Defendants' winery, Vidovich Vineyards. (*Id.* at ¶ 18.) Kosta received a $26,000 annual salary and regularly maintained a 40-hour week, sometimes working more than that for special events. (*Id.* at ¶¶ 19-21.) Kosta's wages fell below the City of Cupertino's minimum wage ordinances beginning in 2017, and Defendants never paid Kosta the appropriate minimum wage for her time after that. (*Id.* at ¶ 22.) Kosta's employment ended on April 15, 2022, and Defendants have not paid her any uncompensated wages since then. (*Id.* at ¶¶ 24-25.)

Kosta filed her original complaint on June 10, 2022, asserting causes of action for: (1) failure to pay minimum wages under Labor Code sections 1194 and 1197; (2) failure to pay earned wages upon separation under Labor Code sections 201 *et seq.*; (3) failure to finish accurate wage statements under Labor Code section 226; (4) unlawful and unfair business practices (Business and Professions Code sections 17200 *et seq.*); and (5) human trafficking under Civil Code section 52.5. She did not serve the summons and complaint for over a year, finally serving it on June 30, 2023. On April 22, 2024, all six original defendants filed nearly identical demurrers to the complaint. The court sustained the demurrers to the first, second, fourth, and fifth causes of action with 20 days' leave to amend. (See Order dated August 6, 2024, p. 14:13-15.)[2] The court overruled the demurrers to the third cause of action. On August 26, 2024, Kosta filed her FAC, alleging the same causes of action.

[2] The court takes judicial notice of its August 6, 2024 order on the prior demurrer under Evidence Code section 452, subdivision (d).

On September 17, 2024, Defendants filed the present demurrer to the first, second, fourth, and fifth causes of action in the FAC.

## II. DEMURRER

### A. Legal Standards

In the court's prior order, the court set forth the applicable legal standards for a demurrer. (See Order, p. 3:6-24.) The court sees no reason to repeat them here.

### B. Discussion

#### 1. Uncertainty

As with the prior demurrer, Defendants demur to the FAC on the ground of uncertainty but fail to address this point specifically in their memorandum of points and authorities. (See, e.g., Defendants' Notice of Demurrer and Demurrer to Plaintiff's First Amended Complaint, p. 2:25-26; Defendants' Memorandum of Points and Authorities in Support of Demurrer to Plaintiff's First Amended Complaint ("MPA").) For the same reasons that the court overruled the prior demurrer on the ground of uncertainty, so the court overrules the present demurrer.

#### 2. First Cause of Action: Minimum Wage Violation Under Labor Code Sections 1194 and 1197

Defendants again demur to the first cause of action on the ground that the FAC fails to plead sufficient facts: Defendants argue that the FAC still does not adequately set forth the existence of an employment relationship. (MPA, p. 5:13-7:9.) As the court noted in its prior order, Labor Code sections 1194 and 1197 require the existence of an employment relationship, and California law mandates that all statutory causes of action be pleaded with particularity, showing every fact essential to the existence of liability under the relevant statute(s). (August 6, 2024 Order, p. 6:21-7:4 [citing *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 and *Lopez v. Southern Cal. Rapid Trans. Dist.* (1985) 40 Cal.3d 780, 795].) "Where a party relies for recovery upon a purely statutory liability it is indispensable that he plead facts demonstrating his right to recover under the statute. The complaint must plead every fact which is essential to the cause of action under the statute." (*Green v. Grimes-Stassforth Stationery Co.* (1940) 39 Cal.App.2d 52, 56.)

Kosta's opposition does not address this argument directly; instead, Kosta appears to respond to the demurrer by noting that the FAC now names the proper defendants as employers and omits the now-dismissed defendants as non-employers. (See Opposition, pp. 5:15-6:10.) In a declaration submitted by Kosta's counsel, Andrew F. Pierce, Pierce states that "[o]n April 22, 2024, Defendants' counsel, Mr. Durket, phoned me to discuss the Complaint and the grounds and law supporting Defendants' demurrers to Plaintiff's initial Complaint. I was informed at that time directly by Mr. Durket that the employers were Mr. Vidovich and the Apricot Pit, LP. This makes sense as Vidovich is the one that hired Plaintiff and the Apricot Pit, LP would be related to the 'Apricot Pit Apartments.' The third defendant, i.e., John Vidovich, LLC, dba De Anza Properties, is named because it appears to be the owner of the winery facility that Plaintiff provided direct services to as alleged in her Complaint." (Declaration of Andrew F. Pierce, ¶ 3.) The problem with these opposition papers is that *the*

*FAC itself* still does not allege any of these factual circumstances. The FAC still fails to describe *the basic facts* of Kosta's alleged hiring and employment, much less specific facts. Instead, the FAC simply states that Kosta "entered the services of Defendants in 2006" and then goes on to allege alter ego liability on the part of The Apricot Pit, LP and John Vidovich, LLC. (FAC, ¶¶ 10, 26-29.) The Pierce declaration is extrinsic evidence, and the court cannot consider it on demurrer. (See *Nealy v. County of Orange* (2020) 54 Cal.App.5th 594, 597, fn. 1 [on demurrer, court's focus is limited to the facts alleged on the face of the pleading and its exhibits, and any facts subject to judicial notice].)[3]

The court tried to explain the foregoing deficiencies—which similarly plagued the original complaint—in its August 6, 2024 order, and so it is somewhat vexing that Kosta still has been unable to cure them. The court will give Kosta *one final* opportunity to remedy these issues. The court SUSTAINS Defendants' demurrer to the first cause of action *with 10 days' leave to amend*.[4]

### 3. Second Cause of Action: Failure to Pay Earned Wages (Labor Code Sections 201 *et seq*.)

Just as with the original complaint, the second cause of action in the FAC is similarly dependent on the existence of an employment relationship. For the reasons discussed above and in the August 6, 2024 order, Kosta has still failed to plead such a relationship with sufficient facts. As to this cause of action specifically, the court also notes that Kosta *again* fails to plead whether she was discharged or quit her employment, stating merely that she "was ultimately separated from her employment with Defendants on April 15, 2022" and that "Plaintiff's employment with Defendants ended on April 15, 2022." (FAC, ¶¶ 24, 43.) These vague allegations remain problematic, as the court previously observed in its August 6, 2024. (See August 6, 2024 Order, p. 9:19-24.) The court does not understand why Kosta has made no apparent effort to remedy them.

The court SUSTAINS Defendants' demurrer to the second cause of action with 10 days' leave to amend.

### 4. Fourth Cause of Action: Unfair Business Practices

The FAC's fourth cause of action alleges that Defendants engaged in unlawful business acts and practices under Business and Professions Code section 17200, commonly known as the Unfair Competition Law ("UCL"). (FAC, ¶¶ 56-65.) As noted in the court's August 6, 2024 order, these UCL allegations are dependent upon the first and second causes of action. Because the court sustains the demurrer to the first and second causes of action, it likewise SUSTAINS the demurrer to the fourth cause of action with 10 days' leave to amend.

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[3] Kosta otherwise appears to have addressed the original complaint's lack of clarity as to the time period at issue. Kosta alleges that "her wages fell below the City of Cupertino's minimum wage ordinances beginning in 2017 and Ms. Kosta has never been paid the appropriate minimum wage for her work since then." (FAC, ¶ 22.) Kosta alleges she "was ultimately separated from her employment with Defendants on April 15, 2022." (*Id.* at ¶ 24.)

[4] The court notes that the FAC fails to allege facts related to Kosta's employment, despite counsel for Kosta's having received information related to these facts four months prior to filing the FAC.

### 5. Fifth Cause of Action: Human Trafficking

Finally, Defendants demur to Kosta's fifth cause of action for human trafficking on the ground that Kosta fails to plead sufficient facts. Once again, Defendants contend that Kosta has not adequately alleged that Defendants deprived her of her personal liberty with the intent to obtain forced services. (MPA, pp. 8:12-10:13.) Defendants' argument consists almost entirely of quoting extensively from the court's August 6, 2024 order, which is not particularly helpful.

As noted in the August 6, 2024 order, Civil Code section 52.5 creates a private right of action for victims of "human trafficking," as defined by Penal Code section 236.1. (See Civ. Code, § 52.5, subd. (a) ["A victim of human trafficking, as defined in Section 236.1 of the Penal Code, may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief."].) Penal Code section 236.1 provides that "[a] person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, is guilty of human trafficking." (Pen. Code, § 236.1, subd. (a).) As "summarized in the official standard jury instructions for criminal cases, the elements of this offense are (1) the defendant either deprived another person of personal liberty or violated that other person's personal liberty; and (2) when the defendant did so, he or she intended to obtain forced labor or services from that person." (*People v. Halim* (2017) 14 Cal.App.5th 632, 643 (*Halim*).) As the phrase is used in the definition of this crime, unlawful "'[d]eprivation or violation of the personal liberty of another' includes substantial and sustained restriction of another's liberty accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out." (Pen. Code, § 236.1, subd. (h)(3).)

Kosta has now amended her human trafficking allegations, and she argues that these new allegations are sufficient to withstand a demurrer. The FAC now alleges:

- "A Croatian immigrant, Ms. Kosta learned of the position from a church posting at a Croatian church. The Vidovich family was of Croatian origins as well." (FAC, ¶ 11.)

- "The original position was advertised to Ms. Kosta as a paid position with the additional benefit of housing." (*Ibid.*)

- "After Ms. Kosta began working in 2006, she was provided housing but was not provided any monetary pay for her hours worked." (*Id.* at ¶ 12.)

- "Ms. Kosta was forced to remain employed with Defendants as they coerced her to continue her unpaid employment under the guise that she would be paid her wages if she continued to work. Ms. Kosta had a husband and minor daughter who resided with her. Because she had no funds, she could not move her family into rental housing and was, therefore, forced to continue to work for free to keep her family from becoming homeless." (*Id.* at ¶ 15).

- "The effect of [Defendants'] misrepresentations was to force Ms. Kosta to continue working for free as she and her family could not afford to move and would be homeless if she stopped working for Defendants." (*Id.* at ¶ 70.)

The court finds that these new allegations are still insufficient to plead a cause of action for human trafficking. Kosta relies again on *Halim, supra,* but as the court discussed in its prior order, *Halim* is distinguishable on its facts. In that case, the defendants recruited a foreign national to travel to the United States, helped her procure a visa, instructed her to misrepresent to federal authorities her relationship with defendants upon her entry into the country, misrepresented the terms of an employment contract to her, and told her that "she could not leave" the United States *while withholding her passport*. (*Halim, supra,* 14 Cal.App.5th at p. 638.) Here, Kosta allegedly learned of the position from Croatians who attended her church while she was already in the United States with her family. (FAC, ¶ 11.) The FAC's new allegations related to the Croatian church appear to be an attempt to analogize this case to the facts of *Halim,* but nothing in the FAC suggests these church members recruited Kosta to work for Defendants, and no allegations link these church members to the Vidovich family beyond their alleged Croatian "origins."

Although the FAC alleges that Kosta "was forced to remain employed with Defendants," it also makes clear that the only restriction on her movement was the fact that she and her family could not afford to move because she was not being sufficiently paid. The court concludes that this does not qualify as "substantial and sustained restriction of another's liberty accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury." Although the FAC alleges some "deceit" on the part of Defendants, it is not the type of deceit that would have resulted in a "substantial and sustained restriction" of Kosta's liberty—in contrast to the alleged deceit in *Halim* that prevented that victim from leaving the country (*i.e.,* having forced the victim to lie to federal immigration officials and then withholding her passport and lying to her about it). Here, the upshot of Kosta's complaint is that she was underpaid, and this is simply not enough to allege a material restriction on her liberty. Kosta has not alleged any facts to suggest that Defendants actively prevented her from leaving her employment or seeking alternative employment, in contrast to the facts of *Halim*.[5] The allegations here simply do not come close to the facts of other cases that were held to involve human trafficking. (See, e.g., *People v. Guyton* (2018) 20 Cal.App.5th 499, 507 ["we further hold that when a pimp keeps a woman's baby away from her unless she makes enough money to satisfy the pimp, that is a substantial and sustained restriction of the woman's liberty accomplished through force, fear, fraud, deceit, duress or menace"]; see also Pen. Code, § 236.1, subd. (h)(1) [defining "coercion" as including "a scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; the abuse or threatened abuse of the legal process; debt bondage; or providing and facilitating the possession of a controlled substance to a person with the intent to impair the person's judgment"].)

[5] The court notes that the FAC continues to allege that Kosta worked for Defendants in different capacities for 16 years, and Kosta did begin earning income in 2012, ten years before her employment ended. (See FAC, ¶¶ 10, 13, 16, 24.) Yet Kosta remained in Defendants' employ, and her family remained in their living arrangement, even after she allegedly started receiving a regular wage.

The court SUSTAINS the demurrer to the fifth cause of action. In its prior ruling, the court expressed some skepticism that Kosta could "amend the complaint to assert a viable cause of action for human trafficking" (see Order, p. 14:7-11), and the court now finds that Kosta's amendments in the FAC are indeed unavailing. Kosta concedes that she has no further facts to plead as to this cause of action. (See Opposition, p. 7:24-26 ["With respect to the human trafficking claims, Plaintiff has alleged the facts known to her. The Court should decide based on the allegations whether or not a human trafficking allegation has been made out."].) The court therefore denies further leave to amend the fifth cause of action.

## III. CONCLUSION

The court OVERRULES Defendants' demurrer to the entire FAC on the ground that it is uncertain. The court SUSTAINS Defendants' demurrer to the first, second, and fourth causes of action with 10 days' leave to amend. The court SUSTAINS Defendants' demurrer to the fifth cause of action WITHOUT leave to amend.

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**Calendar Line 3**
**Case Name:** *Aurel Foglein v. The Home Depot U.S.A., Inc. et al.*
**Case No.:** 22CV408205

## I. BACKGROUND

This is a products liability action brought by plaintiff Aurel Foglein ("Foglein") against defendants The Home Depot U.S.A., Inc. ("Home Depot"), Tricam Industries, Inc. ("Tricam") and various Doe defendants. Much of the procedural background of this case was described in the court's previous order on defendants' previous demurrer. The court takes judicial notice of that order, dated June 11, 2024 (see Evid. Code, § 452, subd. (d)), and incorporates it by reference. The court will refrain from repeating from that order herein.

In that order, the court sustained Home Depot and Tricam's demurrer to the first amended complaint, with 10 days' leave to amend. The court agreed with defendants that the cause of action for products liability was time-barred on its face, under Code of Civil Procedure section 335.1.

After Foglein filed his second amended complaint ("SAC") on June 13, 2024, Home Depot and Tricam filed the present demurrer. Foglein's opposition was due on October 2, 2024, but he did not file an opposition until the afternoon of October 7, 2024, five days late, after defendants had already filed a reply. "A trial court has broad discretion to under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.) While no good cause appears to exist for Foglein's late filing, the court exercises its discretion to consider the opposition.

## II. DISCUSSION

Rather than repeat the facts of this case and the applicable legal standards—all of which are already set forth in the court's June 11, 2024 order—the court will simply address whether the SAC sufficiently addresses the statute of limitations issue. The court finds that it does not.

As noted in the prior order, Code of Civil Procedure section 335.1 is the statute of limitations applicable to a products liability cause of action. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 809 fn. 3. ("*Fox*").) It states that "[a]n action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another," must be brought "[w]ithin two years." The products liability cause of action is therefore time-barred unless Foglein adequately alleges delayed discovery. "In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; '*conclusory allegations will not withstand demurrer*.'" (*Fox, supra,* 35 Cal.4th at 808, internal citations omitted, emphasis added; see also *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319, 1324-1325 [to be entitled to the benefit of the delayed discovery rule a plaintiff must specifically plead the time and manner of discovery and show the following: 1) the plaintiff had an excuse for late discovery; 2) the plaintiff was not at

fault in discovering facts late; 3) the plaintiff did not have actual or presumptive knowledge to be put on inquiry; and 4) the plaintiff was unable to make earlier discovery despite reasonable diligence].)

Attachment 1 to the SAC asserts that at the time of his injury, Foglein was "unaware of any product defects related to the Gorilla Ladder." It also states that "[o]n or about early 2021, Plaintiff encountered another version of the Gorilla Ladder at Defendant's East Palo Alto, CA store. Upon inspecting the different version of the Gorilla Ladder, Plaintiff learned that his version was much better designed and its bolts were sturdier and better placed to support the weight of the user compared to the one he had purchased in 2020. Plaintiff learned during this time that the 2020 version was designed in an unsafe manner and it had since been withdrawn from sale by Defendants." It further states that "[i]n late 2022, Plaintiff observed an improved model of the ladder, which led him to suspect a potential defect in the originally purchased ladder. Upon further investigation, Plaintiff conducted reasonable research to understand the nature of the defect, including reviewing product specifications, user manuals, and any available recalls or safety notices."

While this statement on Attachment 1 to the SAC is longer than the one in Attachment 1 to the FAC, it still consists of the same conclusory allegations, which the court does not accept as true on a demurrer. These conclusory allegations are still insufficient to establish delayed discovery. (See *Fox, supra*, 35 Cal.4th at 808.) It fails to plead specific facts describing how Foglein was unable to make an earlier discovery of defendants' alleged wrongdoing, despite reasonable diligence between the date of injury and the filing of the original complaint more than two years later.

Again, as noted in the court's June 11, 2024 order: "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Mills v. Forestex Co*. (2003) 108 Cal.App.4th 625, 642-643 [internal citations omitted].)

Because the SAC fails to cure the defect in pleading that existed in the FAC, the court SUSTAINS the demurrer without leave to amend. No potentially effective amendment to the pleading is apparent to the court, and Foglein has already had an opportunity to try to address the insufficiency of his prior pleadings, without success.

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**Calendar Lines 4-5**
**Case Name:** *Susan Wallman v. Kia America, Inc. et al.*
**Case No.:** 23CV416988

## I. BACKGROUND

This is a Song-Beverly Consumer Warranty Act action brought by plaintiff Susan Wallman ("Wallman") against defendant Kia America, Inc. ("Kia"). On February 1, 2024, the court sustained Kia's demurrer to the original complaint with leave to amend. After Wallman amended her complaint, Kia demurred again to the amended pleading, and on June 11, 2024, the court sustained the demurrer yet again, but this time it was without further leave to amend. On July 10, 2024, the court signed and entered a judgment of dismissal in favor of Kia.

After the court's June 11, 2024 order but before the July 10, 2024 judgment, Wallman filed the present motion for reconsideration. After the July 10, 2024 judgment, Wallman also filed a motion for new trial. For some reason, the motion for new trial was set for a hearing first. On September 12, 2024, the court denied the motion for new trial.[6]

In addition to the pending motion for reconsideration, Wallman also filed a motion to compel further responses to requests for production of documents, which was originally set for hearing on September 26, 2024 but continued to October 15, 2024 at a August 20, 2024 case management conference.

## II. MOTION FOR RECONSIDERATION OF THE JUNE 11, 2024 ORDER

### A. General Standards

Code of Civil Procedure section 1008 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 [disapproved on other grounds in *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830].) Motions for reconsideration are governed by Code of Civil Procedure section 1008, subdivision (a), which states that such a motion may be brought by "any party affected by" a prior order if it is (1) filed within 10 days after service upon the party of written notice of the entry of the order of which reconsideration is sought, (2) supported by new or different 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. Reconsideration cannot be granted based on arguments that the court misinterpreted the law in the prior ruling; that is not a "new" or "different" matter. (See *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500 (*Gilberd*).)

Reconsideration is properly restricted to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not offering it earlier. 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*

[6] The court takes judicial notice of the June 11, 2024 demurrer order, the July 10, 2024 judgment, and the September 12, 2024 order under Evidence Code section 452, subdivision (d).

*Times Co. v. Sup. Ct. (Wall St. Network, Ltd.)* (2005) 135 Cal.App.4th 206, 212-213.) A party seeking reconsideration of a prior order based on "new or different facts, circumstances or law" must provide a satisfactory explanation for failing to present the information at the first hearing; i.e., a showing of reasonable diligence. (See *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 689-690; *California Correctional Peace Officers Ass'n v. Virga* (2010) 181 Cal.App.4th 30, 47, fn. 15 [collecting cases].)

**B. Discussion**

Wallman's motion for reconsideration is substantively very similar to her motion for new trial, which the court denied on the merits. The court cannot consider the merits of the motion for reconsideration, however, because the court no longer has jurisdiction to grant the motion. Section 1008 only applies to orders issued *before* a judgment is entered. (See *Marshall v. Webster* (2020) 54 Cal.App.5th 275, 281-283; see also *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 265 ["A trial court may not rule on a motion for reconsideration after entry of judgment."].) "A court may reconsider its order granting or denying a motion and may even reconsider or alter its judgment so long as judgment has not yet been entered. Once judgment has been entered, however, the court may not reconsider it and loses its unrestricted power to change the judgment." (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 622 [quoting *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 181 ("*APRI*")].)

The fact that Wallman filed her motion for reconsideration before entry of judgment on July 10, 2024 does not alter this conclusion. *APRI, supra*, is directly on point: "Plaintiff attempts to distinguish the many cases holding that a trial court is without jurisdiction to grant reconsideration after judgment is entered, by pointing out that her motion was filed before the trial court entered its judgment. While that is so, the argument misses the point. The issue is jurisdictional. Once the trial court has entered judgment, it is without power to grant reconsideration. The fact that a motion for reconsideration may have been pending when judgment was entered does not restore this power to the trial court." (*APRI, supra*, 76 Cal.App.4th at p. 182.) Wallman has filed a notice of appeal, and so the merits of the case are now with the Court of Appeal, not with the trial court.

Indeed, even if the court had jurisdiction to decide the motion for reconsideration, the court would deny it for the same reasons it denied Wallman's motion for new trial. Wallman's primary argument in support of the motion for reconsideration is that the court committed error by denying further leave to amend. (See, e.g., Notice of Motion at p. 2:12-13 ["The sustaining of the demurrer without leave to amend, however, was in error."].) The argument that the court committed error by denying Wallman further leave to amend is not a valid basis for reconsideration. "Since in almost all instances, the losing party will believe that the trial court's 'different' interpretation of the law or facts was erroneous,'" the assertion that the court misapplied facts or law when ruling on a demurrer is insufficient to support a motion for reconsideration. (*Gilberd v. AC Transit, supra*, 32 Cal.App.4th at p. 1500; see also *New York Times Co., supra*, 135 Cal.App.4th at p. 213.)

## III. MOTION TO COMPEL FURTHER RESPONSES TO DOCUMENT REQUESTS

As the July 10, 2024 judgment remains in effect and Wallman has now filed a notice of appeal of that judgment, the court DENIES Wallman's motion to compel further responses to requests for production of documents, because it is moot.

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**Calendar Line 6**
**Case Name:** *People of the State of California et al. v. Ke "Jason" Wang et al.*
**Case No.:** 20CV368215

## I. BACKGROUND

This is an action by the People of the State of California (the "People") and the County of Santa Clara (the "County") (collectively, "Plaintiffs") to abate nuisances at several properties owned by defendants Ke "Jason" Wang ("Wang"), Chunyan "Cathy" Ge ("Ge"), Woodside Capital LLC ("Woodside Capital"), Walnut Venture LLC ("Walnut Venture"), Morgan Venture LLC ("Morgan Venture"), Bluebird Communities LLC ("Bluebird Communities"), Oaktree Venture LLC ("Oaktree Venture"), Snow Flower LLC ("Snow Flower"), Farming All Industries LLC, and Carmichael Jones ("Jones").

Plaintiffs filed the original complaint on July 9, 2020. They filed the operative first amended complaint ("FAC") on October 22, 2021. Plaintiffs allege that defendants purchased at least 17 distinct investment properties from 2016 to July 2020. (FAC, ¶¶ 2-3.) Four of them were allegedly purchased by Wang through defendants Woodside Capital and Walnut Venture between 2016 to 2018. (*Id*. at ¶ 5.) These four properties—the "Subject Properties"—are: (1) 355 Kirby Avenue, Morgan Hill, CA 95037 ("Kirby Avenue"); (2) 598 Palm Avenue, Morgan Hill, CA 95037 ("Palm Avenue"); (3) 0 Kalana Avenue, Morgan Hill, CA 95037 ("Kalana Avenue"); and (4) 9825 Dougherty Avenue, Morgan Hill, CA 95037 ("Dougherty Avenue").

The Subject Properties were zoned exclusively for agricultural purposes, but defendants allegedly partitioned the land for more profitable, non-agricultural uses. (FAC, ¶ 4.) In December 2018 and February 2019, the County began to receive complaints that two of the Subject Properties were partitioned for illegal use as contractors' yards, prompting a lengthy investigation by Plaintiffs and the discovery of illegal leasing of the Subject Properties for unlawful use. (*Id*. at ¶¶ 5-6.) Defendants allegedly refused to let the County's staff inspect the Subject Properties, but observations could still be made from a public road. (*Ibid*.)

From 2017 to 2019, the County gave defendants notices of violation, stop work orders, compliance orders, and notices of administrative fines for defendants' alleged violations. (FAC at ¶ 7.) The notices and orders required defendants to cease, desist, and abate any existing violations, and pay associated fines. (*Ibid*.) Defendants did not respond to the notices or pay the fines, allegedly opting to start a public relations campaign against the County to deter enforcement efforts. (*Ibid*.)

In early October 2019, the County obtained and executed a civil inspection warrant for the Subject Properties, confirming existing violations and revealing new ones. (FAC, ¶ 8.) The County warned defendants not to violate any county or zoning ordinances on a recently acquired fifth property at Scheller Avenue. (*Id*. at ¶ 9.) Wang allegedly replied by claiming that Morgan Venture LLC had replaced him with a registered agent; in reality, he had allegedly transferred ownership of Morgan Venture LLC to Ge, and Ge was registered as the agent. (*Ibid*.)

Between November 2019 and July 2020, the defendants continued to violate local ordinances, ignored notices and warnings, and failed to pay the accrued fines. (FAC, ¶ 11.) In July 2020, Plaintiffs filed the original complaint to enjoin and abate the violations on the

Subject Properties, recover unpaid fines and costs. (*Id*. at ¶ 12.) On September 25, 2020, Plaintiffs obtained a preliminary injunction from this court (Judge Kirwan) ordering defendants to abate certain violations and to apply for abatement permits by December 28, 2020. (*Ibid*.) Defendants allegedly began to solicit potential buyers for the Subject Properties without disclosing their violations. (*Ibid*.) Defendants failed to sell the properties and abide by the preliminary injunction. (*Id*. at ¶ 13.)

In February 25, 2021, this court (Judge Kirwan) entered a stipulated amended preliminary injunction extending the abatement deadline to March 31, 2021, upon agreement of the County and defendants. (FAC, ¶ 14.) Defendants also stipulated to applications for abatement permits by March 31, 2021 and the removal of remaining violations that could be abated without permit. (*Ibid*.) While defendants' attorneys were obtaining a stipulated extension from the court, Wang was allegedly signing contracts to sell the Subject Properties to avoid the fines and costs to abate the public nuisance. (*Id*. at ¶ 15.) Wang allegedly conspired with defendant Jones to transfer three of the Subject Properties to a new limited liability company, defendant Farming All Industries LLC, which was incorporated by Jones solely to create an arm's length purchaser. (*Id*. at ¶ 16.) Defendants allegedly concealed and delayed disclosure of this transfer until March 26, 2021. (*Id*. at ¶ 17.) Defendants did not comply with the extended preliminary injunction. (*Id*. at ¶ 18.)

Plaintiffs allege generally that the limited liability company defendants are alter egos for both Wang and Ge. (*Id*. at ¶ 34.) Wang and Ge jointly manage and exercise full control and ownership over Woodside Capital, Walnut Venture, Morgan Venture, Bluebird Communities, Oaktree Venture, and Snow Flower (collectively, the "LLC Defendants"). (*Ibid*.) On information and belief, Plaintiffs further allege that Wang and Ge are the only officers of the LLC Defendants and regularly commingle personal funds with the funds of these companies. (*Ibid*.) Upon incorporation of defendant Bluebird Communities in October 2019, Wang and Ge had tenants on the Kirby Avenue Property and Palm Avenue Property pay rent through Bluebird Communities' online portal. (*Ibid*.) Before Plaintiffs filed suit, all the LLC Defendants were incorporated at Wang and Ge's private residence in Los Altos, except for Bluebird Communities and Morgan Venture, which were incorporated at Ge's business address in Menlo Park. (*Ibid*.)

The FAC states eight causes of action: (1) Public Nuisance (Civ. Code, §§ 3479-3480) (against all defendants); (2) Public Nuisance per se (zoning ordinance violations) (against all defendants); (3) Public Nuisance per se (ordinance code violations—grading provisions) (against all defendants); (4) Public Nuisance per se (ordinance code violations—building code violations and incorporated state codes) (against all defendants); (5) Public Nuisance per se (ordinance code violations—environmental health provisions) (against all defendants); (6) Public Nuisance per se (ordinance code violations—fire protection provisions) (against all defendants); (7) Breach of Contract (Willamson Act contract) (against Wang and Woodside Capital); and (8) Violation of the Uniform Fraudulent Transfer Act (Civ. Code, § 3439 et seq.) (against all defendants). The FAC seeks "administrative fines and civil penalties according to proof." (See FAC, Prayer, ¶ 7.)

Previously, this court (Judge Kirwan) overruled a demurrer to the FAC by various defendants on March 29, 2022. Wang, Ge, Woodside Capital, Walnut Venture, Morgan Venture, and Bluebird Communities then filed a joint answer to the FAC on April 8, 2022. Currently before the court is Plaintiffs' motion for summary adjudication as to the first through

sixth causes of action, filed on April 30, 2024. This motion was originally set for hearing on August 13, 2024 but was continued to October 15, 2024, pursuant to a stipulation and order, signed by the court on June 3, 2024, that also continued the trial date to January 6, 2025.

On June 4, 2024, this court (the undersigned) held a hearing on Plaintiffs' motion to appoint a receiver for the Kalana Avenue and Palm Avenue properties. The court granted the motion in a signed order following the hearing.

On September 20, 2024, the LLC Defendants filed an opposition to this motion for summary adjudication. Wang and Ge have not filed any response to the motion.

## II. REQUEST FOR JUDICIAL NOTICE

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

Plaintiffs request judicial notice of 22 documents, identified as Exhibits 14-34 and 36 to the declaration of Deputy County Counsel Valerie Brender. The documents are excerpts from the Santa Clara County Ordinance Code, the Santa Clara County Zoning Ordinance, the California Building Code, the California Fire Code, the California Mechanical Code, the California Plumbing Code, the California Residential Code, and the ICC Electrical Code. Plaintiffs assert that this material can be judicially noticed under Evidence Code section 452, subdivisions (b) and (c). (See Request at p. 3:9-10.) The court agrees and grants the request for judicial notice.

## III. MOTION FOR SUMMARY ADJUDICATION

### A. General Standards

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

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

*Villas II Homeowners Association, Inc. v. Parth* (2016) 248 Cal.App.4th 268, 288.) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.)

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

The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) The court has therefore not considered the supplemental declaration of Steve Beams submitted with Plaintiffs' reply.

Where a plaintiff or cross-complainant has moved for summary judgment or adjudication, it has the burden of showing that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a).) That burden can be met if the plaintiff "has proved each element of the cause of action entitling it to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1); see *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965.) "A plaintiff moving for summary adjudication meets its burden if it proves each element of the cause of action." (*Quidel Corp. v. Superior Court* (2020) 57 Cal.App.5th 155, 163.) "If the plaintiff meets its burden, the defendant must set forth specific facts showing a triable issue of material facts exists." (*Id*. at p. 164.) It is not part of a plaintiff's initial burden to disprove affirmative defenses or cross-complaints asserted by a defendant. (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 564-565.)

**B. The Grounds for Plaintiffs' Motion**

Plaintiffs seek summary adjudication of "causes of action one through six" in the FAC against Wang, Ge, Woodside Capital, and Morgan Venture (hereinafter, the "Targeted Defendants") on the basis that "there is no genuine dispute of material fact that Defendant[s] caused or allowed hazardous conditions on their properties at (1) 355 Kirby Avenue, APN# 725-02-028; (2) 598 Palm Avenue, APN# 712-27-039; (3) 0 Kalana Avenue, APN# 712-27-021l and (4) 9825 Dougherty Avenue, APN# 712-28-005 and that these conditions violate the County's Ordinance Code and Zoning Ordinance and constitute a public nuisance under County and State law." (Notice of Motion, pp. 1:28-2:7.)

In their supporting memorandum, Plaintiffs state that they "further request that the Court grant declaratory relief, a permanent injunction against Defendants, and award fines previously imposed through an administrative proceeding and civil penalties for Defendants' egregious violations of local and state law that threatens [sic] public health, safety, and welfare in an aggregate amount of $ 4,671,000." (Memorandum, p. 7:4-7.) This "further request" is

not appropriate on a motion for summary adjudication of only a subset of the FAC's causes of action. The only request for a "permanent injunction," a general one, is in paragraph 3 of the FAC's prayer—it is not tied specifically to the first through sixth causes of action. Further, the FAC does not seek any declaratory relief, nor does it identify any specific amount of damages, fines, or penalties to be awarded. Rather, it seeks administrative fines and civil penalties "according to proof." (FAC, Prayer, ¶ 8.) Although the final paragraph in each of the first through sixth causes of action refers to "administrative fines imposed pursuant to Ordinance Code Division A37 and civil penalties imposed pursuant to Ordinance Code section A1-42," these amounts are not specified. (E.g., *id.* at ¶ 132.) Nor do the causes of action specify the amounts of the "abatement costs, including administrative costs, inspection costs, staff costs, contractor costs, and attorneys' fees" being sought. (*Ibid.*) Finally, rule 3.1350(b) of the California Rules of Court requires that if summary adjudication is sought as to specific "claims for damages," they "must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." None of Plaintiffs' requested fines and penalties are stated specifically in the notice of motion.

Indeed, *none* of Plaintiffs' "further requests" are stated specifically in the notice of motion. For this reason, the court will not issue a ruling (or express any opinion) regarding these "further requests." That includes Plaintiffs' argument that the Targeted Defendants have somehow waived the ability to challenge the amount of any fines or penalties assessed against them, based on an application of the doctrine of exhaustion of administrative remedies. The request for $4,671,000 in fines and penalties is not fairly encompassed by this motion for summary adjudication.

Plaintiffs' separate statement in support of the motion also does not comply with Rule of Court 3.1350, as it contains numerous subheadings that are not included in and "repeated verbatim" from the notice of motion. The court will still consider the motion as to the merits of the first through sixth causes of action, as those causes of action are at least properly specified in the notice of motion. Moreover, the court's power to deny summary adjudication outright for failure to comply with rule 3.1350 is discretionary, not mandatory. (See *Holt v. Brock* (2022) 85 Cal.App.5th 611, 619 [citing *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118].)

### C. Plaintiffs' Evidence

Plaintiffs' motion is supported by six declarations. The first declaration is from Steve Beams, a Senior Construction Inspector for the County. He describes how he determined that three of the properties at issue—the Kirby Avenue, Palm Avenue, and Kalana Avenue properties—contained multiple violations of the grading provisions of the County's Ordinance Code, based on inspections he performed on October 9 and 10, 2019 and January 21, 2021. The Kirby Avenue property contained non-exempt grading without a permit and the addition of approximately 3,000 cubic yards of aggregate base rock in violation of Ordinance Code sections C12-406 and C12-525. This was in direct contravention of stop work orders issued to defendants by the County. (See Beams Decl. ¶¶ 4-11 and Exhibits 1-5.) The Palm Avenue property contained non-exempt grading without a permit and the addition of approximately 5,743 cubic yards of aggregate base rock in violation of Ordinance Code sections C12-406 and C12-525, also in violation of stop work orders. (*Id.* at ¶¶ 12-18 and Exhibits 6-10.) The Kalana Avenue property contained non-exempt grading without a permit, grading that endangered adjacent property ("the creation of a large drainage/earthen swale, which risks

consolidating storm water flows and discharging them onto the neighboring properties"), and the addition of approximately 1,823 cubic yards of aggregate base rock in violation of Ordinance Code sections C12-406 and C12-525, also in violation of stop work orders. (*Id*. at ¶¶ 19-25 and Exhibits 11-16.)

The second declaration is from Maryellen Luna, a Lead Code Enforcement Officer for the County's planning department. She describes how, based on inspections conducted by County personnel and her review of County records generated after such inspections, all four properties at issue contained violations of the County Ordinance Code and Zoning Ordinance, including Zoning Ordinance sections 2.20.020 and 2.20.050, which limits the uses of property in an exclusive agricultural district. (See Luna Decl., ¶¶ 5-12.) The Kirby Avenue property contained facilities for the sale of agricultural equipment and supplies; unpermitted facilities for storage of heavy-duty commercial trucks, truck trailers, and RVs; a contractor's facility; illegal outdoor storage; and documented uses inconsistent with an exclusive agricultural district, such as the addition and spreading of approximately 3,000 cubic yards of aggregate base rock. (*Id*. at ¶¶ 17-32 and Exhibits 6-26.) The Palm Avenue property contained storage of heavy-duty commercial trucks, truck trailers, and RVs; contractor's facilities; illegal outdoor storage; and documented uses inconsistent with an exclusive agricultural district, such as the addition and spreading of approximately 5,743 cubic yards of aggregate base rock. (*Id*. at ¶¶ 38-50 and Exhibits 34-49.) The Kalana Avenue property contained an unpermitted modular home with prohibited power poles, lamp posts, and underground electrical, gas, and sewer lines, as well as storage of heavy-duty commercial trucks, truck trailers, and RVs; contractor's facilities; illegal outdoor storage; and documented uses inconsistent with an exclusive agricultural district, such as the addition and spreading of approximately 1,823 cubic yards of aggregate base rock. (*Id.* at ¶¶ 54-65 and Exhibits 53-63.) The Dougherty Avenue property contained accessory structures (greenhouses and mobile homes) used as unpermitted dwellings, contractor's facilities, illegal outdoor storage, and documented uses inconsistent with an exclusive agricultural district, such as the failure to connect to sewer or septic systems and the use of accessory structures as residences. (*Id*. at ¶¶ 70-79 and Exhibits 67-76.)

The third declaration is from Rick Gomes, a Senior Building Inspector for the County's planning department. He describes how, based on personal observations during inspections on October 9, 2019 and January 21, 2021,[7] he determined that the Kirby Avenue, Palm Avenue, Kalana Avenue, and Dougherty Avenue properties contained multiple violations of the County's Ordinance Code, the California Building Code, the California Residential Code, the California Plumbing Code, and the California Mechanical Code, among others. He states that the Kirby Avenue property contained unpermitted structures with unpermitted plumbing systems, including a cargo container used as an unpermitted business structure, several unpermitted horse stalls, and an electric gate. (See Gomes Decl., ¶¶ 5-13 and Exhibits 1-19.). He states that the Palm Avenue property contained unpermitted construction and additions to the (legal) single-family home on the property, unpermitted alterations to a barn on the property, an unpermitted storage structure, unpermitted alterations to a well on the property, and unpermitted installations of electrical equipment throughout the property. (*Id.* at ¶¶ 14-23 and Exhibits 20-37.) Regarding the Kalana Avenue property, Gomes states that it contained an unpermitted modular home used as a residence, with unpermitted water and power, an unpermitted office trailer with unpermitted electrical equipment, and unpermitted electrical and

[7] The January 21, 2021 inspection is at one point misidentified as having taken place on January 1, 2021.

plumbing systems. (*Id.* at ¶¶ 24-33 and Exhibits 38-56.) He states that the Dougherty Avenue property contained four modular homes used as residences, in violation of several state codes, and that the Dougherty Avenue property had unpermitted electrical and plumbing systems, unauthorized and unpermitted additions to a barn on the property (including an illegal, unpermitted electrical system), and an unpermitted plumbing system intended to allow the barn to be used as office space, along with the unpermitted alterations to the accessory structure and greenhouses described in the Luna declaration. (*Id*. at ¶¶ 34-43 and Exhibits 57-86.)

The fourth declaration is from Mickey Pierce, a Supervising Hazardous Materials Specialist with the County's Department of Environmental Health ("DEH"), Hazardous Compliance Division. He states that, based on his review of records and photographs taken by DEH staff during an October 9-10, 2019 inspection, he has determined that multiple violations of the environmental health provisions of the County Ordinance code existed on the Kirby Avenue and Kalana Avenue properties. Specifically, the Kirby Avenue property contained a 30-gallon diesel fuel tank, car batteries, and containers of gasoline stored without permits, and the Kalana Avenue property contained three 55-gallon fuel tanks and automobile batteries stored without a permit. (See Pierce Decl., ¶¶ 4-10 and Exhibits 1-5.)

The fifth declaration is from Jeff Camp, a Registered Environmental Health Specialist with the County's DEH, whose duties include overseeing septic systems. He states that, based on inspections he performed on October 9-10, 2019 and his review of DEH records, he has determined that all four properties at issue contained sewer or septic systems that do not comply with regulations and lack permits. (See Camp Decl., ¶¶ 4-16 and Exhibits 1-13.)

The sixth declaration is from Deputy County Counsel Valerie Brender, who describes the history of the enforcement efforts at the subject properties and authenticates attached Exhibits 1-93. Exhibits 14-16 are copies of excerpts from the 2017, 2021, and 2024 versions of the County's Ordinance Code. Each of these versions contains language (at sections C12-520 and C12-536, C12-520) stating that any violation of the chapter or codes adopted thereunder is declared to be unlawful and a public nuisance. Exhibits 17-19 are copies of excerpts from the 2017, 2021, and 2024 versions of the County's Zoning Ordinance. Section 5.80.30 of the Zoning Ordinance states: "It shall be considered unlawful and a public nuisance for any of the following to occur contrary to the provisions of the Zoning Ordinance: A. Construction, modification, moving or maintenance of a building or structure; or B. Conducting, operating, allowing or maintaining any land use, building or premises."

The only evidence offered in support of the LLC Defendants' opposition to the motion is a single declaration from Wang, in his capacity as the "former or current managing member" of the LLC Defendants. He generally denies any knowledge of any unpermitted systems and denies his responsibility for any ordinance or code violations on the four properties at issue.

**D. Discussion**

**1. First Cause of Action (Public Nuisance)**

Civil Code section 3479 defines a "nuisance" as follows: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." A nuisance may be categorized as public,

private, or both. (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341.) A public nuisance is defined as "one which affects *at the same time an entire community or neighborhood, or any considerable number of persons,* although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480, emphasis added.) "As the California Supreme Court has explained, 'public nuisances are offenses against, or interferences with, the exercise of rights common to the public.'" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 (*Melton*).) "The interference must be both substantial and unreasonable." (*Ibid.*; see also CACI No. 2020.) "A public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right." (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 79 (*ConAgra*).) Causation is also an element of a public nuisance claim (*id.* at p. 101), but not an element of a nuisance per se claim.

Plaintiffs argue that they are entitled to summary adjudication of the FAC's first cause of action because the sheer number of ordinance and code violations that have been found to exist on the subject properties are sufficient, in the aggregate, to establish a public nuisance as a matter of law. (See Memorandum, pp. 21:12-22:2.) This is not persuasive.

As the opposition points out, triable issues remain as to whether these ordinance and code violations affected "at the same time an entire community or neighborhood, or any considerable number of persons," as required by Civil Code section 3480, and also as to whether any particular violation could be construed as both a "substantial and unreasonable interference" with a right common to the public, as required by *Melton* and *ConAgra*, *supra*. The notion that the court can determine that something was "substantial and unreasonable," or that it affected a "considerable number" of people, without making findings of disputed fact is completely unsupported.

Additionally, the evidence submitted by Plaintiffs does not establish as a matter of law that the four properties at issue (Kirby Avenue, Palm Avenue, Kalana Avenue and Dougherty Avenue) can, separately or together, be considered "an entire community or neighborhood."

Accordingly, the court DENIES Plaintiffs' motion for summary adjudication as to the first cause of action.

**2. Second Through Sixth Causes of Action (Nuisance Per Se)**

In contrast to the first cause of action for public nuisance, the nuisance *per se* causes of action do not require any showing that the nuisance affected an entire community or neighborhood, or any showing of substantial or unreasonable interference.[8] Nor do they require any showing of intent. Instead, "a nuisance per se arises whenever a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular . . . activity, or circumstance, to be a nuisance." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1163, internal citations and quotations omitted.) "Where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made." (*Ibid*. [internal citations and quotations omitted].) "'Nuisances per se are so regarded because

[8] Despite the titles given to the second through sixth causes of action in the FAC, there are no "public" or "private" "nuisances per se." An action or activity is either a "nuisance per se" or it is not.

no proof is required, beyond the actual fact of their existence, to establish the nuisance.'" (*City of Costa Mesa v. Soffer* (1992) 11 Cal.App.4th 378, 382.) Further, no showing of damages is required. (See *City of Dana Point v. New Method Wellness, Inc.* (2019) 39 Cal.App.5th 985, 989-990 ["an injunction may issue against a nuisance per se without proof of an irreparable injury"].) Courts presume that legislative enactments, such as ordinances declaring nuisances per se, are valid. (*City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 496.)

Plaintiffs have established through evidence that a violation of the County's Ordinance Code or Zoning Ordinance constitutes a nuisance per se. (See Brender Declaration, Exhibits 14-19.) Plaintiffs have also submitted evidence—the Beams, Luna, Gomes, Pierce, and Camp declarations—demonstrating that County personnel determined that one or more violations of either the Ordinance Code or Zoning Ordinance (or both) existed at the Kirby Avenue, Palm Avenue, Kalana Avenue and Dougherty Avenue properties. This is sufficient to meet Plaintiffs' initial burden as to the FAC's second through sixth causes of action.

With the burden shifted to the LLC Defendants, they are unable to raise any triable issue of material fact as to these five causes of action. Indeed, the opposition offers no argument on them. As noted above, the only evidence submitted in support of the opposition, the Wang declaration, does not raise any triable issue of material fact as to the nuisance per se causes of action, because Wang's claimed lack of knowledge as to any particular violation is irrelevant to whether a nuisance per se existed. In order to be material for purposes of summary judgment or adjudication, a fact must relate to a claim or defense at issue and be in some way essential to the outcome. (See *Riverside County Community Facilities Dist. v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 653; *Kelly v. First Astri Corp*. (1999) 72 Cal.App.4th 462, 470; *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.) As damages are not a necessary element of a nuisance per se, the LLC Defendants' arguments regarding the amount of any fines or penalties sought by Plaintiffs, and whether there has been any waiver of their right to contest these fines and penalties, do not raise any triable issues of material fact as to the merits of the second through sixth causes of action.

Thus, the court GRANTS Plaintiffs' motion for summary adjudication as to the FAC's second, third, fourth, fifth, and sixth causes of action against the Targeted Defendants (Wang, Ge, Woodside Capital, and Morgan Venture).

**E. Objections to Evidence**

The LLC Defendants have submitted objections to portions of the declarations supporting the motion. Plaintiffs have submitted objections to portions of the declaration of Jason Wang.

California Rule of Court 3.1354 governs objections to evidence in the context of motions for summary judgment or summary adjudication. This rule requires the filing of two documents—evidentiary objections and a separate proposed order on the objections—and both must be in one of the two approved formats set forth in the rule. "Unless otherwise excused by the Court on a showing of good cause, all written objections to evidence in support of or in opposition to a motion for summary judgment must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed." (Cal. Rules of Court, rule 3.1354(a).) As the LLC Defendants' objections and Plaintiffs' objections both do not comply with Rule of Court 3.1354, the court will not rule on either side's objections. (See *Vineyard*

*Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) "Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c(q).)

The court will note, however, that the LLC Defendants' objections essentially go to the weight rather than the admissibility of Plaintiffs' evidence, and so they would likely be overruled, if the court were to rule on them. Plaintiffs' objections to the Wang declaration are focused on relevance, and the court has already determined that Wang's personal knowledge is irrelevant to the nuisance per se causes of action; and so these objections are largely superfluous.

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**Calendar Line 7**
**Case Name:** *Steinberg Hart v. Z&L Properties, Inc.*
**Case No.:** 22CV401668

## I. BACKGROUND

This is a contract dispute between plaintiff Steinberg Hart ("Steinberg"), an architectural design and consulting firm, and defendant Z&L Properties, Inc. ("Z&L"), owner and developer of real property known as the Patrick Henry Drive Library & Housing Development, located at 3055 Patrick Henry Drive, Santa Clara, California.

Steinberg filed the original and still-operative complaint on July 20, 2022, stating four causes of action: (1) Breach of Contract (written letters of authorization); (2) Account Stated in Writing; (3) Quantum Meruit; and (4) Declaratory Relief. The complaint alleges that Z&L hired Steinberg to provide architectural services for the Patrick Henry Drive project (the "Project"), the Steinberg firm provided those services and sent invoices to Z&L for the work provided, and Z&L has failed to pay those invoices. The complaint alleges damages in the amount of $249,301.68, plus interest. (Complaint, ¶ 19.) Attached to the complaint as Exhibit A are copies of three letters of authorization dated April 12, 2021, April 13, 2021, and May 24, 2021. The April 12 and 13 letters are signed by Yonggang Cui as CEO of Z&L. The May 24, 2021 is not signed by Z&L. Attached to the complaint as Exhibit B is a copy of a spreadsheet referred to as a "register of invoices." (*Id.* at ¶ 10.) Attached to the complaint as Exhibit C is a copy of an April 11, 2022 letter from Steinberg to Z&L demanding payment for services provided.

Currently before the court is Steinberg's motion for summary adjudication as to the first cause of action, filed on July 18, 2024. Z&L filed an opposition on October 1, 2024. This matter is currently set for trial on June 16, 2025.

## II. MERITS OF THE MOTION

### A. General Standards

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

The moving party bears the initial burden of production to show that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."]; *Palm Spring Villas II Homeowners Association, Inc. v. Parth* (2016) 248 Cal.App.4th 268, 288.) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of an opposing party's claim or defense, and the sourt resolves "any evidentiary doubts or ambiguities in [the non-moving party's] favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

Where a plaintiff has moved for summary judgment or summary adjudication, it has the burden of showing that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a). That burden can be met if the plaintiff "has proved each element of the cause of action entitling it to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1); see also *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965.) "A plaintiff moving for summary adjudication meets its burden if it proves each element of the cause of action." (*Quidel Corp. v. Superior Court* (2020) 57 Cal.App.5th 155, 163.) "If the plaintiff meets its burden, the defendant must set forth specific facts showing a triable issue of material facts exist." (*Id*. at p. 164.) It is not part of a plaintiff's initial burden to disprove affirmative defenses or cross-complaints asserted by a defendant. (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 564-565.)

**B. The Basis for the Motion**

According to Steinberg, "there exists no legal defense to Steinberg's first cause of action for breach of contract against Z&L[,] and Steinberg is therefore entitled to summary adjudication on its breach of contract cause of action as a matter of law." (Steinberg's Notice of Motion and Motion, p. 2:9-11.)

The motion is supported by two declarations. The first is from Katia McClain, a partner at the Steinberg firm and the person who negotiated the agreements with Z&L (with former Z&L Vice President Sean Kim) and oversaw the agreements on behalf of Steinberg. She states that Steinberg performed all the services in the "Scope of Work" provisions of the April 12, 2021, April 13, 2021 and May 24, 2021 written authorizations (attached to her declaration as Exhibits A-C). As to the May 24, 2021 authorization, McClain states that it "was not formally signed by either Steinberg or Z&L. Rather, Mr. Sean Kim notified me by email on May 24, 2021 to proceed with work under 'Authorization to Proceed no. 3.'" A copy of this email is attached to her declaration as Exhibit D. (See McClain Decl., ¶ 6.)[9] She further states that Z&L has not issued any payments in connection with any of the three agreements, and that as of July 19, 2024, the amount due to Steinberg from Z&L is $354,637.28. (*Id*. at ¶ 8 and Exhibit E.) Attached as Exhibit F to the McClain declaration are copies of emails between Steinberg and Z&L personnel from December 2021 through March 2022 discussing the lack of payments.

[9] A copy of this email is also included in Exhibit C to the complaint.

The second declaration is from counsel Michael McDonald, who authenticates Exhibits G-K. Of these five exhibits, only G and I are cited in Steinberg's separate statement as supporting evidence for its undisputed material facts. Exhibit G is a copy of Z&L's February 14, 2023 amended responses to requests for admissions. Exhibit I consists of excerpts from the March 27, 2024 deposition testimony of Sean Kim. In this testimony, Kim confirms that Z&L hired Steinberg to provide architectural service for the Project, that he negotiated the April 12, 2021 agreement (the first written authorization to proceed attached to the complaint) in his capacity as a Vice President of Z&L, and that Steinberg provided all of the services contracted for in that agreement. (Ex. I, pp. 13:1-10 and 15:11-20:25.) He agrees that if Steinberg were not paid by Z&L for the services rendered, that would be a breach of contract. (*Id*. at p. 22:1-15). He gives similar testimony regarding the April 13, 2021 agreement. (*Id*. at pp. 23:14-26:16). As for the May 24, 2021 authorization, he confirms Katia McClain's assertion that on behalf of Z&L, he authorized Steinberg to do the work described via email, although he did not know if that work was in fact done. (*Id*. at pp. 26:20-32:23). He also testifies that to his knowledge, Z&L did not pay Steinberg for any of the work it performed, and he did receive emails from Steinberg requesting payment while he was Vice President of Z&L. (*Id*. at pp. 33:20-40:10).

**C. Discussion**

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

The evidence submitted by Steinberg in support of the motion—the declaration of Katia McClain and the attached exhibits, and Exhibits G and I to the Michael McDonald declaration—is sufficient to meet Steinberg's initial burden on summary adjudication, as it demonstrates that the April 12, 2021, April 13, 2021 and May 24, 2021 written authorizations were contracts between Steinberg and Z&L, that Steinberg performed all of its obligations under those authorizations, that Z&L did not pay for any of that work despite Steinberg's invoices, and that Steinberg consequently suffered damages in the amount of $354,637.28 as of July 19, 2024.

In rebuttal, Z&L is unable to raise any triable issues of material fact as to the first cause of action. Its opposition states that Z&L "does not dispute that [Z&L] entered into an agreement for performance of the Project by Plaintiff, that Plaintiff made said performance at the Project, and that [Z&L] has yet to compensate Plaintiff for performance for the Project." (Opposition at p. 2:6-9.) While Z&L claims that triable issues of material fact remain, its opposition brief fails to identify any, and Z&L also fails to submit any evidence in support of its opposition. Z&L has therefore not properly raised any factual issue regarding any of Steinberg's undisputed material facts.

In its opposing separate statement, Z&L purports to dispute material fact nos. 4 and 5 in Steinberg's separate statement, but it cites no evidence to support such a dispute. Code of Civil Procedure section 437c, subdivision (b)(3), makes it very clear that each material fact contended by the opposing party to be disputed must "be followed by a reference to the supporting evidence." (Code Civ. Proc., § 437c, subd. (b)(3).) "Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's

discretion, for granting the motion." (*Ibid.*) In any event, Z&L fails to explain how any material facts are actually disputed—it merely conclusorily states that they are. This is plainly insufficient.

The court GRANTS Steinberg's motion for summary adjudication as to the first cause of action.

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**Calendar Line 8**
**Case Name:** *Alejandro Perez-Soto v. Bernice Eiko Sakuma*
**Case No.:** 23CV418788

This is a motion to compel (further) responses to form interrogatories and document requests, brought by defendant Bernice Eiko Sakuma against plaintiff Alejandro Perez-Soto.[10] Sakuma argues that it is a "motion to compel responses," because Perez-Soto did not provide verified responses to any of her requests. Perez-Soto argues that it should have been brought as a "motion to compel *further* responses," because he did submit timely objections to the discovery requests. Perez-Soto further contends that because Sakuma did not submit a separate statement in support of her motion, as required by rule 3.1345 of the California Rules of Court, the motion must be denied.

As a technical matter, Perez-Soto is correct: because he served timely objections to the discovery requests, this should have been brought as a motion to compel further responses. (In addition, because Perez-Soto did not provide any substantive responses, there was nothing to verify.) At the same time, the court does not see what the utility of a separate statement would have been in this instance, given that Perez-Soto did not provide any answers to the form interrogatories, did not provide any substantive responses to the document requests, and interposed essentially the *same boilerplate objections* in response to nearly every request. The court has all of the requests and responses in a single place—the supporting declaration of Sakuma's counsel—and a separate statement would not have assisted the court in this particular instance. The court also observes that Perez-Soto's counsel failed to respond to two meet-and-confer letters, and that this motion would have been timely even if Sakuma had filed it as a motion to compel further responses, as she appears to have filed it 31 days after receiving Perez-Soto's objections. Accordingly, the court will address the merits.

Perez-Soto's opposition does not address the substance of any of the discovery requests—his opposition is limited to the technical, procedural argument that the motion should have been brought under Code of Civil Procedure sections 2030.300 and 2031.310 instead of under sections 2030.290 and 2031.300. The court has reviewed the form interrogatories and document requests and finds that they are appropriate and seek discoverable information. The court also finds that Perez-Soto's boilerplate objections are without merit. The court therefore GRANTS the motion and orders Perez-Soto to provide substantive, verified answers to the form interrogatories and substantive, verified responses to the document requests within 30 days of notice of entry of this order.

Finally, the court finds that Sakuma's request for $322.84 in monetary sanctions is reasonable. The court orders Perez-Soto to pay this amount to Sakuma within 30 days of notice of entry of this order. The court finds that Perez-Soto did not act with substantial justification in failing to provide any substantive responses to the discovery requests, in failing to respond to Sakuma's meet-and-confer letters, and by opposing this motion on the basis of a purely procedural technicality that exalts form over substance. The court has no patience for objections and arguments that are interposed solely for the purpose of delaying the case.

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[10] Sakuma's supporting declaration (of counsel) also attaches special interrogatories and Perez-Soto's objections thereto, but her notice of motion and memorandum of points and authorities make no mention of these special interrogatories.

It is so ordered.

**- oo0oo -**

**Calendar Line 9**
**Case Name:** *George Kostal v. Abdulzia Skander et al.*
**Case No.:** 23CV427029

This is a motion for protective order—to suspend discovery deadlines—brought on behalf of defendant Abdulzia Skander (sued as Abdul Skander) by his counsel, based on the fact that counsel has been unable to reach him. Notice is proper, and the motion is unopposed.

Because the motion is unopposed, the court will grant it, although the court does not understand why the parties could not have reached an agreement without involving the court. Ordinarily, discovery issues are expected to be worked out between the parties. The court gets involved only if the parties are unable to overcome an impasse. In this case, there is no indication that the parties even met and conferred before the filing of this motion. The lack of an opposition indicates that the parties could and should have reached an agreement. The court is disappointed by the lack of communication, and quite frankly, lack of professionalism, by one or both sides.

The motion is GRANTED, and discovery deadlines are suspended until the next case management conference in this case (which is currently set for February 11, 2025 at 10:00 a.m.).

It is so ordered.

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**Calendar Line 12**
**Case Name:** *Jack Hansen v. Armando Sanchez et al.*
**Case No.:** 23CV425000

On June 25, 2024, this court granted defendants' motion to strike the first amended complaint without leave to amend. Defendants now move for a dismissal under Code of Civil Procedure section 581, subdivision (f)(3), which provides for a dismissal "[a]fter a motion to strike the whole of a complaint is granted without leave to amend." Plaintiff opposes the motion, but he fails to set forth any valid basis for ignoring the dictates of section 581. Instead, he continues to argue the merits of the case, including the validity of his evidence.

Accordingly, the motion is GRANTED, and this case is dismissed.

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**Calendar Line 13**
**Case Name:** *Fortune Vieyra v. San Jose Day Nursery et al.*
**Case No.:** 23CV425445

Plaintiff Fortune Vieyra moves for reconsideration of the court's July 2, 2024 denial of his ex parte application to be appointed the guardian ad litem of his child, E.V., in this civil case.[11] On July 2, 2024, the court noted that the denial was "without prejudice to it being re-filed in the event that the demurrer is overruled and the minor properly becomes a plaintiff in this case."

On September 5, 2024, this court denied Vieyra's motion for leave to file a second amended complaint, which included a request to add E.V. as a plaintiff in this case. The court noted its concerns that the motion for leave (and the previous application to be appointed guardian ad litem) had the potential to interfere with the ongoing family court case between the parents. That concern has not been alleviated at this time.

It is unclear whether this motion is timely under Code of Civil Procedure section 1008. It was filed on July 23, which is 21 days after the court's July 2 decision on the original application to be appointed guardian ad litem. At the same time, a ruling on an ex parte application to be appointed guardian ad litem is not ordinarily the type of "order" in which "written notice of entry of the order" is likely to be provided by an opposing party. (Instead, notice of such a denial ordinarily comes directly from the court's clerk's office.)

In any event, even if this motion is considered timely, the court would find that it does not set forth "new or different facts, circumstances, or law" to justify reconsideration at this time, particularly given that the court did rule—two months after the July 2 denial, on September 5—that there was still an insufficient basis for E.V. to be added as a plaintiff in this case. That basic circumstance has not changed.

Vieyra argues that on July 8, 2024, "the Family Law judge granted me sole legal and physical custody of my daughter" (Memorandum, p. 2:19), but no order has been submitted for consideration, and so the undersigned has no basis upon which to review the terms of this family court order. Is it a final or an interim determination? Is the family court case still ongoing? What are the remaining issues? Moreover, the court still does not have sufficient information by which to determine that E.V. should be added to this civil case. Ultimately, the undersigned does not have enough information to find that the circumstances have sufficiently and materially changed, such that an order regarding E.V. in this civil case will not interfere with the ongoing family court proceedings. The court remains concerned that Vieyra is seeking to be appointed a guardian ad litem in order to obtain an advantage in the family court proceedings. Interference with those proceedings remains the court's paramount concern.

The motion is therefore DENIED.

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[11] As noted in the court's prior orders, the minor is referred to herein as "E.V.," based on the child's birth name, and the court takes no position regarding the correct name for the child, which is one of the multiple disputes between the parents in family court.