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: March 21, 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 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	23CV410278	TriNet HR III, Inc. v. Seeloz Inc.	Order of examination: parties to appear.
LINE 2	19CV359905	Derrick Hix v. RealPage, Inc. et al.	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 3	19CV359905	Derrick Hix v. RealPage, Inc. et al.	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 4	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 5	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 6	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 7	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 8	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 9	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 10	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.

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LINE 11	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 12	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 13	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 14	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 15	22CV407844	Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.	Click on LINE 4 or scroll down for ruling in lines 4-15.
LINE 16	22CV398311	Javier Jose Cruz v. Eric C. Hansen	Motion for leave to amend answer and cross-complaint: defendant Hansen filed this motion with the wrong hearing date (March 25, 2024, a date on which the court does not even have a law-and-motion calendar), and there is no amended notice of hearing in the file. Accordingly, notice is apparently not proper. Parties to appear to address notice.

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Calendar Lines 2-3
Case Name: *Derrick Hix v. RealPage, Inc. et al.*
Case No.: 19CV359905

I. BACKGROUND

This is a wage and hour action brought by plaintiff Derrick Hix ("Hix") against his former employers.

The original complaint, filed on December 10, 2019, named On-Site Manager, Inc. ("On-Site") and RealPage, Inc. ("RealPage") as defendants, along with various Does. That complaint stated six causes of action: (1) Failure to Pay Overtime (Violation of Labor Code Sections 510, 558 & 1194 *et seq*. and Wage Order No. 4-2001); (2) Failure to Provide Mandated Meal Periods (Violation of Labor Code Sections 226.7 & 512 and Wage Order No. 4-2001); (3) Failure to Provide Mandated Rest Periods (Violation of Labor Code Section 226.7 and Wage Order No. 4-2001); (4) Failure to Provide Itemized Wage Statements (Violation of Labor Code Sections 226 & 226.3 and Wage Order No. 7-2001); (5) Failure to Pay Wages Upon Termination (Violation of Labor Code Sections 201 & 203 and Wage Order No. 4-2001); and (6) Unfair Competition (Violation of Business & Professions Code Section 17200 *et seq*.).

On March 3, 2020, Hix filed an amendment substituting "Orchard City Holdings, Inc." ("Orchard") for Doe 1. On April 14, 2021, Hix filed an amendment substituting "Thomas Harrington" for Doe 2 and "Jonathan Harrington" for Doe 3 (collectively, the "Harrington Defendants").

On February 14, 2023, the court heard RealPage's motion for summary judgment, or in the alternative, summary adjudication. The court denied the motion for summary judgment, denied summary adjudication as to the first, fourth, fifth, and sixth causes of action, and granted summary adjudication as to the second and third causes of action.[1] As the motion was brought only by defendant RealPage, the order did not affect any causes of action as alleged against any other defendant.

Well into the case, and only a few months before the original trial date, the Harrington Defendants brought a motion for judgment on the pleadings against the original complaint, which the court heard and granted with leave to amend on May 30, 2023.[2]

Hix filed a first amended complaint ("FAC") on June 6, 2023, stating the same six causes of action. Orchard and the Harrington Defendants then brought a demurrer and motion to strike against the FAC which this court (Judge Zepeda, covering for the undersigned) heard on September 14, 2023. In an order issued the following day, Judge Zepeda overruled the demurrer on uncertainty grounds; sustained the demurrer to the first through fifth causes of action on the ground that they failed to allege adequately that either of the Harrington Defendants qualified as "an owner, director, officer, or managing agent of the employer" who participated in employment activities that contributed to a Labor Code violation, under Labor

[1] The court takes judicial notice of the February 14, 2023 order on its own motion pursuant to Evidence Code section 452, subdivision (d).
[2] The court also takes judicial notice of the May 30, 2023 order pursuant to section 452(d).

Code section 588.1; and sustained the demurrer to the (dependent) sixth cause of action for failure to state sufficient facts because the demurrer was sustained as to the preceding claims. The court granted Hix ten days' leave to amend. The court also denied the motion to strike as moot, in light of the ruling on demurrer.[3]

Hix filed the operative second amended complaint ("SAC") on September 25, 2023. The SAC alleges five causes of action: (1) Failure to Pay Overtime (Violation of Labor Code Sections 510 & 1194 *et seq*. and Wage Order No. 4-2001); (2) Failure to Provide Mandated Meal Periods (Violation of Labor Code Sections 226.7 & 512 and Wage Order No. 4-2001); (3) Failure to Provide Mandated Rest Periods (Violation of Labor Code Section 226.7 and Wage Order No. 4-2001); (4) Failure to Pay All Wages Upon Termination (Violation of Labor Code Sections 201 & 203 and Wage Order No. 4-2001); and (5) Unfair Competition (Violation of Business & Professions Code Section 17200 *et seq*.). Hix abandoned the cause of action for failure to provide wage statements.

Currently before the court is another demurrer and motion to strike by Orchard and the Harrington Defendants (collectively, the "OCH Defendants"). These were filed on October 25, 2023. After two separate continuances of the trial date at the request of the OCH Defendants, the case is now set for trial on June 24, 2024.

II. REQUESTS FOR JUDICIAL NOTICE

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

A demurrer cannot be turned into an evidentiary hearing by attempting to have the court take judicial notice of the disputed contents of documents:

> For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper. A court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer. In short, a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present

[3] The court takes judicial notice of the September 15, 2023 order pursuant to section 452(d).

[4] As Judge Zepeda previously made clear to the parties, there is no authority for the filing of separate briefs in support of or in opposition to requests for judicial notice. Yet, the attorneys for both sides persist in disregarding the court's prior orders. The court has not considered the memorandum and declaration submitted in support of the OCH Defendants' request, nor has it considered Hix's "objections" thereto.

> documentary evidence and the opposing party is bound by what that evidence appears to show.

(*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 114-115 [internal citations omitted] (*Fremont Indemnity Co.*); see also *New Livable California v. Assoc. of Bay Area Governments* (2020) 59 Cal.App.5th 709, 716 [citing *Fremont Indemnity Co.* among other decisions].) That is precisely what the OCH Defendants have attempted to do here with their filings.

A. The OCH Defendants' Request

The OCH Defendants request judicial notice of seven documents, submitted as Exhibits 1-7 to a 392-page appendix of exhibits, pursuant to "Evidence Code § 452." (Request at p. 2:9.) The request is made in support of both the demurrer and the motion to strike.

The court DENIES judicial notice of Exhibits 1 and 2, which are copies of special interrogatories propounded on Hix in October 2021 and Hix's amended interrogatory responses on April 6, 2022. In ruling on a demurrer, the court may take judicial notice of discovery responses that directly contradict a party's pleading. (See *Bockrath v. Aldrich Chem. Co., Inc.* (1999) 21 Cal.4th 71, 83; *Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 477.) This is strictly construed. (See *Fremont Indemnity Co.*, *supra*.) The proferred basis for judicial notice of these interrogatory responses is not that they directly contradict Hix's allegations. Rather, it is that they sometimes *omit* listing Thomas Harrington or Jonathan Harrington. The court finds that an omission does not establish a clear contradiction, and that judicial notice of the interrogatory responses is therefore inappropriate.

Furthermore, this exact argument was previously rejected by Judge Zepeda:

> At the hearing the OCH Defendants urged this court to reconsider its ruling on their request for judicial notice, contending that the entirety of Exhibit 2 shows that Hix cannot allege that the Harrington Defendants knew that Hix was not an exempt employee because of what was not stated in the responses. The OCH Defendants admitted they did not and could not point to a specific citation within the exhibits that definitively supports their argument, and essentially asks this court to arrive at the proffered conclusion through *inference*. As stated at the hearing, the court declines to do so.

(September 15, 2023 Order at p. 5, fn. 4, emphasis in original.)

As for Exhibits 3-7, which are copies of witness declarations and excerpts from deposition testimony, the court also DENIES judicial notice of these documents.

Deposition transcripts and declarations cannot be judicially noticed as to the truth of their contents. (See *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81 (*Oh*) [truth of contents of court records cannot be judicially noticed]; *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057 [court may take judicial notice of existence of declaration but not of facts asserted in it]; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 [court may not notice the truth of declarations or affidavits filed in court proceedings].) The only purpose of the OCH Defendants' submission here is for the court to take judicial notice of the truth of the contents of the declarations and of the submitted

deposition testimony. This is a singularly inappropriate use of judicial notice, particularly in relation to a pleading challenge. While the court could take judicial notice of the mere existence and dates of the declarations and depositions under Evidence Code section 452, subdivision (d), those bare facts are irrelevant to the central issue before the court, which is whether the causes of action in the SAC have now been sufficiently amended to address the specific concerns identified in Judge Zepeda's September 15, 2023 order.

B. Hix's Request

With his oppositions to the demurrer and motion, Hix has submitted a request for judicial notice of five documents, attached as Exhibits 1-5. Exhibit 1 is a copy of Judge Zepeda's September 15, 2023 order on the prior demurrer, of which the court has already taken notice on its own motion. Exhibit 2 is a copy of the undersigned's February 14, 2023 order on RealPage's motion for summary judgement. Exhibit 3 is a copy of the May 30, 2023 order on the motion for judgment on the pleadings. Exhibit 4 is a copy of a December 13, 2022 order of the court (Judge Kirwan) denying a motion to disqualify plaintiff's counsel, brought by Orchard. Exhibit 5 is a copy of the California Industrial Welfare Commission's (IWC's) Wage Order No. 4-2001.

Hix seeks judicial notice of Exhibits 1-4 pursuant to Evidence Code section 452, subdivision (d). He does not identify a specific basis for taking judicial notice of Exhibit 5. (See Request at p. 2:3-17.)

The court GRANTS judicial notice of Exhibits 1-4 (even though it is somewhat redundant as to Exhibits 1-3, as the court has already taken judicial notice of these orders) under section 452, subdivision (d). The court takes notice of their contents and legal effect but not the truth of any factual findings. (See *Oh, supra*, 53 Cal.App.5th at pp. 79-81.) The court GRANTS judicial notice of Exhibit 5 under section 452, subdivision (c). (See *Morales v. 22nd Dist. Agricultural Assn*. (2016) 1 Cal.App.5th 504, 539-540 fn. 9 [taking judicial notice of wage order and official notices regarding wage orders under section 452, subdivision (c)]; see also *Rodriguez v. E.M.E., Inc*. (2016) 246 Cal.App.4th 1027, 1037, fns. 3 & 4 [taking judicial notice of wage orders and official opinion letters].)

III. DEMURRER TO THE SAC

A. General Standards

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

The court considers only the pleading under attack, any attached exhibits, and any facts or documents for which judicial notice is properly requested. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. The court has only considered the declaration from the OCH Defendants' counsel, Elana Levine, to the extent that it discusses

the required meet-and-confer efforts, as this is the only authorized use of a declaration in connection with a demurrer or motion to strike. The court has not considered the unauthorized declaration from Levine in support of Defendants' request for judicial notice. The court has also not considered the declaration from Hix's counsel, Patricia Murphy, filed with the opposition, or the declaration from Defendants' counsel, Michael Saltz, filed with the reply.

B. Analysis

The OCH Defendants contend that each cause of action fails "as a matter of law because it fails to allege facts to constitute a cause of action against the Orchard Defendants and cannot be cured by amendment." (See Notice of Demurrer and Demurrer at p. 2:10-11, 13-14, 16-17, 19-20, 22-13 and p. 4:8-9, 11-12, 14-15, 17-18 and 20-21.) To the extent that the OCH Defendants rely on the extrinsic evidence submitted in their denied request for judicial notice, the court disregards those arguments, which make up a large part of the demurrer.

1. Improper Arguments That Ignore the Court's Order on the Prior Demurrer

The supporting memorandum recycles arguments, sometimes verbatim, from the OCH Defendants' August 9, 2023 memorandum in support of their prior demurrer. For example, the OCH Defendants' argument that the SAC fails to plead "ultimate facts" and engages in "impermissible group pleading" is a thinly disguised and ill-advised attempt to present a successive demurrer. This exact argument was previously rejected by Judge Zepeda, which makes it particularly uncompelling. (See September 15, 2023 Order, pp. 7:15-10:25.)

To the extent that the OCH Defendants now demur to the first through fourth causes of action on the basis of arguments previously rejected by Judge Zepeda, those arguments remain unpersuasive, and the court overrules the demurrer based on those arguments—again. These repeat arguments are not barred by Code of Civil Procedure section 430.41, subdivision (b), as Hix suggests in his opposition; section 430.41(b) applies only to new arguments not raised in a prior demurrer. Rather, a repeat demurrer on grounds previously overruled constitutes a request by a party that the court *reconsider* an interim order:

> We cannot prevent a party from communicating the view to a court that it should reconsider a prior ruling (though any such communication should never be ex parte) . . . . But a party may not file a written motion to reconsider that has procedural significance if it does not satisfy the requirements of section 437c, subdivision (f)(2), or 1008. The court need not rule on any suggestion that it should reconsider a previous ruling and, without more, another party would not be expected to respond to such a suggestion . . . . Unless the requirements of section 437c, subdivision (f)(2), or 1008 are satisfied, any action to reconsider a prior interim order must formally begin with the court on its own motion.

(*Le Francois v. Goel* (2005) 35 Cal 4th 1094, 1108, internal citations omitted.) Having chosen not to file a motion for reconsideration of Judge Zepeda's order, the OCH Defendants cannot simply repeat arguments that she expressly overruled and expect a different result, particularly given Defendants' failure to make any showing of a material change of fact or law.

In addition, the court overrules any demurrer to the first through fourth causes of action by *Orchard*. The prior demurrer to these causes of action was sustained *only* as to the

individual Harrington Defendants and *only* on the ground that the FAC insufficiently alleged that either of them qualified as "an owner, director, officer, or managing agent of the employer" who participated in employment activities that contributed to a Labor Code violation, under Labor Code section 588.1. (See September 15, 2023 Order, pp. 12:17-13:20.) This is the only basis on which the Harrington Defendants may continue to assert that the first through fourth causes of action in the SAC fail to state sufficient facts.

2. The Sufficiency of the Factual Allegations in the SAC

The OCH Defendants' argument that the SAC "violates" Judge Zepeda's September 15, 2023 order is unpersuasive. (See Memorandum at p. 1:14; see also *id.* at pp. 1:14-4:7.) Judge Zepeda's order explicitly authorized amendment of the causes of action in the FAC to cure the insufficiency of the allegations, and none of the causes of action in the SAC constitutes an "entirely new" or "entirely unrelated" cause of action. To the extent that the OCH Defendants contend that isolated allegations are inconsistent with the prior order, they fail to identify any material inconsistency, and in any event, "a general demurrer may not be sustained, nor a motion for judgment on the pleadings granted, as to a *portion* of a cause of action." (*Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1167 [emphasis added] [overruled in part on other grounds by *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905].)

Having reviewed the amendments made by Hix in the SAC, the court finds that they sufficiently address the concerns expressed in the September 15, 2023 order, including factual allegations that the Harrington Defendants managed the overall operations of the company and were specifically involved in Hix's hiring, the terms of his employment, and his employee classification. (See SAC at ¶¶ 10-12, 19, 24, and 32-22 [incorporated into all causes of action]; see also ¶¶ 40, 48-49, 56-57, 62, 64, 65, and 73-74.) The court reads the SAC as a whole, and the factual allegations are accepted as true on demurrer. Hix's ability to prove them at trial is irrelevant at the pleading stage.

The court therefore OVERRULES the demurrer to the first through fourth causes of action. As for the fifth cause of action under the Unfair Competition Law, because the causes of action upon which it depends now state sufficient facts, the court OVERRULES the OCH Defendants' demurrer to this cause of action on the ground that it fails to state sufficient facts.

IV. MOTION TO STRIKE THE SAC

A. General Standards

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading, or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.)

A motion to strike may be brought against a portion of a cause of action that is purportedly defective—for example, because it seeks an improper remedy. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680.) At the same time, the Courts of Appeal have observed that "we have no intention of creating a procedural 'line item veto' for the civil

defendant." (*Id*. at p. 1683.) Rule 3.1322(a) of the California Rules of Court requires that "[a] notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count or defense. Specifications in a notice must be numbered consecutively."

In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63 [citing *Clauson v. Super. Ct*. (1998) 67 Cal.App.4th 1253, 1255].) The court may not consider extrinsic evidence in ruling on a motion to strike. The court has therefore not considered the improper declaration from plaintiff's counsel, Patricia Murphy, submitted with the opposition, or the improper declaration from defense counsel, Michael Saltz, attached to the reply.

B. Analysis of the Motion to Strike

The OCH Defendants move to strike the entire SAC and each cause of action on a single basis: that the SAC is "a sham pleading that cannot be cured through amendment." (See Notice of Motion at p. 2:8, 14-15, 17-18, 20-21, 23-24 and 26.)

The court DENIES the motion.

As an initial matter, the argument that the SAC and each cause of action "violate" Judge Zepeda's September 25, 2023 order—an argument repeated verbatim from the demurrer—was not listed in the notice of motion as a basis for striking the SAC or any cause of action. Accordingly, it must be rejected. (See supporting memorandum at pp. 1:13-4:14.) In addition, it is not persuasive: even if this issue had been properly raised, the court would find that the filing of the SAC does not violate the September 25, 2023 order, as that order expressly authorized amendment of all causes of action and the SAC does not allege any "entirely new" or "entirely unrelated" cause of action.

The argument that the SAC and each cause of action should be stricken because they are contrary to "submitted evidence" is also unpersuasive. (See Memorandum at pp. 4:22-9:9.) As noted above, the court has denied defendants' request for judicial notice, and so arguments in support of the motion that depend upon the extrinsic evidence submitted for judicial notice are not a basis for granting any part of the current motion. Indeed, this is nothing less than a transparent attempt to obtain a summary adjudication under the guise of a motion on the pleadings. Contrary to what the OCH Defendants appear to believe, pleading challenges may not be transformed into de facto motions for summary judgment or adjudication through the submission of requests for judicial notice or the submission of extrinsic evidence. (See *Fremont Indemnity Co.*, *supra*.)

As for the sham pleading doctrine, it only arises:

> [W]here a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citation.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint.

(*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.)

"The purpose of the doctrine is to enable the courts to prevent an abuse of process. [Citation.] The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751.) The rule "is intended to prevent sham pleadings omitting an incurable defect in the case." (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 946.) Nevertheless, the rule "cannot be mechanically applied." (*Id*., [citing *Contreras v. Blue Cross of California* (1988) 199 Cal.App.3d 945, 950].) The sham pleading rule is not applicable where a plaintiff "seeks to change his legal theory of recovery and the legal conclusions he seeks to draw from underlying factual events, and also seeks to omit factual allegations that are irrelevant and immaterial to the new legal theories asserted." (*Berman v. Bromberg*, *supra*, 56 Cal.App.4th at 949.)

The court finds the OCH Defendants' reliance on the sham pleading doctrine to be uncompelling. First, the suggestion that any part of the SAC is a sham because it asserts claims that were purportedly "stricken" by the February 14, 2023 order on RealPage's motion for summary judgment is incorrect as a matter of law. (See Memorandum at p. 4:17-19.) That order only applied to causes of action as alleged against RealPage. Having chosen not to join in that motion, the OCH Defendants cannot now argue that it has any impact on the causes of action alleged against them.

Second, as Hix's opposition points out, the SAC adds facts that clarify the allegations against the Harrington Defendants, something that was expressly authorized by the September 15, 2023 order. When compared directly with the allegations of the earlier FAC or the original complaint, the court does not find any of the new allegations in the SAC to be so directly or materially inconsistent as to constitute a "sham." This includes the allegations regarding the roles of the Harrington Defendants, as well as the allegations regarding a failure to provide Hix with consistent meal or rest breaks (even if Hix was sometimes urged to take such breaks or sometimes chose not to do so). The alleged "inconsistencies" identified by Defendants are actually either disputed facts or disputed inferences arising out of the facts that must be resolved by a factfinder.

In light of the court's order overruling the demurrer and denying the motion to strike, and in light of the approaching trial date, the court orders the OCH Defendants to file an answer to the SAC by no later than April 2, 2024.

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Calendar Lines 4-15
Case Name: *Steven Meyer et al. v. The Board of Trustees of the Leland Stanford Junior University et al.*
Case No.: 22CV407844

Plaintiffs Steven and Gina Meyer (the "Meyers") bring these motions to compel further responses to form interrogatories and requests for production of documents from the six individual defendants in this case: Marc Tessier-Lavigne, Susie Brubaker-Cole, Debra Zumwalt, Lisa Caldera, Tiffany Gabrielson, and Alyce Haley. Co-defendant Stanford University is not a subject of these motions.

The court's limited understanding as to the individual defendants, based on the parties' papers (which barely differentiate between the defendants), is as follows: (1) Tessier-Lavigne was the President of Stanford at the time of Katie Meyer's suicide—he is no longer President but is still employed by Stanford; (2) Brubaker-Cole is the Vice Provost for Student Affairs; (3) Zumwalt is the General Counsel; (4) Caldera is the Associate Dean, Student Support, Residential Education; (5) Gabrielson is the former Associate Dean of Students & Director, Office of Community Standards; and (6) Haley is the former Assistant Dean of Group Accountability. All six are defendants in this case because of their employment (or former employment) at Stanford—they do not have any other connection to Katie Meyer.

For the reasons that follow, the court GRANTS in part and DENIES in part the Meyers' motions to compel further responses to form interrogatories. The court DENIES the Meyers' motions to compel further responses to the document requests. In addition, the court GRANTS Stanford's request for monetary sanctions against plaintiffs' counsel, in the amount of $8,325.00.

1. Form Interrogatories

The six motions to compel further responses to form interrogatories are virtually identical as to the six individual defendants. As such, they are presented at a very high level of generality, with no specifics as to any unique information that may be in the possession of any single individual. They each seek further responses to Form Interrogatories Nos. 12.1, 12.2, 12.3, 12.4, 12.5, 12.6, and 12.7. They each take issue with the same objections raised by the defendants. And they make the same legal arguments.

The court has reviewed the defendants' responses to the form interrogatories. The court finds that the responses are sufficiently responsive on their face, with one exception, discussed below. Although defendants have raised numerous objections to the interrogatories, it does not appear that any of these objections are completely baseless or asserted in bad faith. More critically, the Meyers have not identified any *responsive information that may potentially have been withheld* on the basis of any of these objections. The purpose of discovery is to obtain relevant information and, ultimately, to ascertain the truth. There is no point in complaining about objections that an opponent has asserted but that have no impact on the truth-seeking function of discovery. Unfortunately, such immaterial complaints comprise the bulk of the Meyers' motions:

- The Meyers take issue with objections that the interrogatories are "vague" or "overbroad," but they fail to identify any information that may have been withheld

on the basis of these objections. They ask that the court "strike" these objections, but the court sees no point in doing so.

- They complain that defendants "improperly" refer to Stanford's responses to similar form interrogatories, which contain additional information from Stanford. The court does not find anything improper in the individual defendants' references to corresponding interrogatory answers from co-defendant Stanford. This is not similar in any way to the vague statements that were found to be insufficient in *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783 (*e.g.*, "See my deposition" or "See my pleading"). Here, the cited interrogatory answers from Stanford are directly responsive to these same interrogatories. More important, the Meyers already have this information, and so there is nothing to be gained by making the individual defendants repeat that information by cutting and pasting these answers verbatim into their individual responses. The court agrees with Stanford that this is an exaltation of form over substance, particularly as it is not even useful or necessary form. Again, this argument loses sight of the goals of discovery.

- As to Interrogatory No. 12.6, the Meyers complain that defendants "improperly . . . exclude the [OCS] proceedings," but the court has read the responses to Interrogatory No. 12.6 and discerns no responsive information that may have (even potentially) been withheld from the response. Defendants identify a "formal written report regarding the circumstances underlying the OCS proceedings" prepared by Caldera, and they also profess not to understand what a report *of* the OCS proceedings would be, apart from what may have already been identified in Stanford's corresponding interrogatory answer. This appears to be everything that could possibly be responsive. Once more, this argument appears to be complaining for the sake of complaining, rather than promoting anything that would actually advance the goals of discovery.

- They argue that defendants' "privilege and attorney work product protection objections are without merit," but then they do not set forth any grounds for this assertion. To the extent that any of the individual defendants had communications with attorneys about Katie Meyer—including learning relevant facts about the case *from* the attorneys—those communications would undoubtedly be privileged. Similarly, any work product that was generated once there was a reasonable anticipation of litigation (including interviews of third parties) would also be protected. The court does not understand the Meyers' argument that defendants "provide[] no authority" to support the assertion of privilege—it is the Meyers themselves who have provided no authority to negate the assertion of an obvious and well-established privilege.

The court perceives one apparent deficiency in defendants' responses, and that is in the provision of third-party witness contact information in response to Interrogatory No. 12.1. The Meyers argue that "directory information" is not protected by FERPA, and defendants counter that even directory information may not be disclosed under FERPA "if doing so would reveal other, non-directory information about that student (here, that the student is a witness)." (Opposition at p. 6:3-4.) At the same time, defendants acknowledge that "Plaintiffs have access to a copy of the complete OCS file and the police report that provides names of student witnesses to the facts underlying Katie's OCS process." (*Id.* at p. 7:12-16.) As a result, that

"non-directory information" has already been disclosed to the Meyers (or at least their counsel), and so the court sees no impediment to producing the directory information *for those individuals identified in the OCS file and police report*, particularly under the stipulated protective order that is now in place. Accordingly, the court GRANTS the motion with respect to that "directory information" concerning potential third-party witnesses. Defendants shall supplement their answers to Interrogatory No. 12.1 within 20 days of this order and may designate this information as "confidential" under the protective order.

Finally, the court rejects the Meyers' argument that they are entitled to personal contact information for the individual defendants. The court does not see any relevance or utility in obtaining this information. The court agrees with the individual defendants that because they are represented by counsel, they can be contacted through counsel. There is nothing about their personal contact information that has any bearing on this case, particularly given that their only connection to this case is via their employment at Stanford.

Apart from the one aspect identified above, the court DENIES the motions to compel further responses to the form interrogatories.

2. Requests for Production of Documents

The six motions to compel further responses to requests for production of documents are not identical to each other in the way that the form interrogatory motions are, but they are still substantially the same, with minor variations depending on whether, for example, the defendant is still employed at Stanford (Tessier-Lavigne, Brubaker-Cole, Zumwalt, Caldera) or no longer at Stanford (Gabrielson, Haley). Again, the court finds this approach to be unhelpful, because the arguments are presented at an exceedingly high level, rather than at a detailed defendant-by-defendant or request-by-request level. Indeed, the opening briefs are so generic that they do not address or even refer to *any* of the text of *any* of the requests for production, leaving all of that specific information for the six 115-to-130-page separate statements submitted with each of the six motions. This defeats the purpose of having briefs and having page limits on briefs. Rather than focusing carefully and thoughtfully on information that they need in order to pursue their case, the Meyers have brought an overbroad motion to compel further responses to 30 different requests for production (Nos. 1, 2, 4-14, 17, 26-35, 37, 48, 65, and 67-69). The court finds these motions to be ill-considered at best.

Defendants point out that Stanford has already produced a large volume of documents in response to similar requests for production covering the same subject matter: "approximately 14,500 documents (not just pages) about Katie, including approximately 2,000 unique documents from the Individual Defendants." (Gabrielson Opposition at p. 1:18-20.) In other words, because the six individual defendants have been identified as document custodians at Stanford, and because Stanford has access to their work-related documents, all or nearly all responsive documents have either already been produced or can ultimately be produced by co-defendant Stanford. Thus, it appears that these motions, once again, are not directed to obtaining unique or relevant information in the possession, custody, or control of the individual defendants; rather, they focus on complaining about issues—*e.g.*, objections asserted in the written responses—that do nothing to advance the goals of discovery. The Meyers argue that each defendant "should be compelled to provide further responses that remove all meritless and/or over-generalized objections" (Memorandum [Caldera] at p. 6:10-11.) But once again, they do not specify any relevant or discoverable documents or categories of documents that

could potentially have been withheld on the basis of objections based on overbreadth, relevance, privacy, or privilege. It is the moving party's burden to state "specific facts showing good cause justifying the discovery sought"—*i.e.*, showing how the documents sought are relevant to a material fact in the case—under Code of Civil Procedure section 2031.310, subdivision (b)(1). The Meyers have not done so here.

The Meyers take issue with defendants' supposed argument that they and Stanford "are one [and] the same for the purposes of discovery." (Reply [Caldera] at p. 2:9-10.) The court does not read that to be the defendants' position. For purposes of interrogatories or depositions that seek information about each individual defendant's personal knowledge, the Stanford and the individual defendants are quite obviously *not* one and the same. But when it comes to documents that are generated or received by the individual defendants in the course of their employment at Stanford, where Stanford has access to all of these documents, then there is bound to be more of a unity of interest between these co-defendants, and the court would expect that the responsibility to produce responsive documents would lie primarily with the employer, not the employee, particularly if the documents are to be produced in an organized and non-duplicative way. Of course, if the individual defendants have responsive documents that are not in the possession, custody, or control of Stanford—*e.g.*, emails or text messages in personal accounts on their personal devices—then they must produce them independently of Stanford, but the Meyers have not identified any such documents in these motions.

For example, **Request for Production No. 4** seeks all text messages between each individual defendant and anyone else "about Katie Meyer." Tessier-Lavigne, Brubaker-Cole, Zumwalt, Caldera, and Gabrielson have each responded that they "do[] not have any documents responsive to this request."[5] The Meyers argue that this responsive is "evasive," but the court finds this argument to be pure sophistry. There is nothing evasive or ambiguous about saying that one does not have "any documents." "No documents" means "no documents," and nothing could be more straightforward. Indeed, the Meyers do not explain why they believe the individual defendants would have any personal communications on their personal devices about Katie, when their involvement in this case arises solely out of their work at Stanford, much less why such communications would have any potential relevance to the issues in this case.

The court also agrees with defendants that it is appropriate to have a "cutoff date" for the logging of privileged communications or work product on a privilege log, and that it is reasonable to use the date upon which the parties asked that their future communications be transmitted through counsel—*i.e.*, March 18, 2022. In their replies, the Meyers argue that the "parties do not have a global agreement regarding discovery in this matter," and they complain about the lack of "justification for unilaterally imposing a March 18, 2022 cutoff date." (Reply [Caldera] at pp. 3:23-4:3.) But then they completely and utterly fail to propose any alternative. Rather than come up with solutions for the parties' discovery issues, the Meyers' motions simply complain about the other side and leave it at that. The court finds that approach to be totally unproductive.

The court addresses several (but not all) of the individual requests for production as follows:

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[5] Haley responds that she no longer has access to any potentially responsive documents.

Requests for Production Nos. 28-30: The court strains to see how communications with third-party Robert Ottilie are relevant or potentially relevant to this case. As far as the court can tell, Ottilie had no involvement in Katie's OCS proceedings. Any complaints that he may have raised in other cases regarding the OCS process as a whole are of tangential interest, at best, to the question of whether Katie's own OCS proceedings were "harsh" or "punitive." DENIED.

Requests for Production Nos. 31-34: The individual defendants argue that they do not personally have access to any "Student of Concern" submissions sought by these requests, and that Stanford has already produced the "Notice of Concern" filed by Caldera regarding the "hot coffee" incident. If responsive documents have already been searched for and produced by Stanford, then the court does not understand why the individual defendants—who profess not to have the ability to search for and produce these documents in any event, have any further obligations regarding these requests. DENIED.

Requests for Production Nos. 48 & 67: Similarly, these requests seek information about the OCS process generally, and the individual defendants argue that these requests impose a burden on them to produce documents to which Stanford has access, not they. In addition, they note that Stanford already agreed to produce responsive documents. DENIED.

The court declines to provide a specific request-by-request ruling for items that are not called out in the parties' briefs. (Indeed, the foregoing requests—Nos. 4, 28-30, 31-34, 48, and 67—are called out only in the opposition and reply briefs, not in the opening briefs.) Nevertheless, the court has reviewed all of the requests set forth in the voluminous separate statements, and it finds that none of the requests and responses depart in any way from the general themes discussed above. Specifically, the court finds that all of these requests call for documents that are either: (1) in the possession, custody, or control of Stanford, and as to which Stanford has the primary obligation to produce responsive documents, or (2) outside the scope of each individual defendant's employment, and as to which each individual defendant has already indicated that they do not have responsive documents.

For the foregoing reasons, the court DENIES the motions to compel further respnoses to requests for production of documents.

3. Requests for Monetary Sanctions

When it comes to the imposition of monetary sanctions, the court finds that it is a close call regarding the form interrogatory responses. On the one hand, the court has denied further responses to the vast majority of these interrogatories. On the other hand, the court has ordered defendants to supplement their answers to Interrogatory No. 12.1. Accordingly, the court declines to impose monetary sanctions on either side for these motions as to the interrogatory responses.

As for the responses to the requests for production, the court finds that it is not a close call. Plaintiffs' motions to compel are singularly lacking in merit. The Meyers argue that "[l]osing a discovery motion alone is not sufficient cause to impose sanctions," and they emphasize the "due process" restrictions on ordering discovery sanctions. (Reply [Brubaker-Cole] at p. 7:17-20; Reply [Haley] at pp. 6:25-7:1.) But this is not exactly the right emphasis. Under the Discovery Act, monetary sanctions are typically awarded to the prevailing party,

unless the court finds that a party acted with substantial justification in taking its positions. "Substantial justification" means "well grounded in both fact and law." (*Kwan Software Engineering, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 75.) The purpose of monetary sanctions is compensatory, not punitive. (*Id.* at p. 74.)

The court finds that the motions to compel as to the requests for production were not "well grounded in both fact and law." In fact, the court finds that they were not well grounded in either fact *or* law. Defendants have requested a total of $21,304.60 for the costs of opposing the six document-related motions, or $3,550.76 per opposition. While the court has no doubt that these amounts (and probably even more) were indeed incurred by defendants in preparing their responses to the Meyers' voluminous motions—filings that exceed 1,800 pages for the document request motions alone (the interrogatory motions are another 800-1,000 pages)—the court will reduce this amount, given that it is on the high side. Further, this is the first time that the court is imposing sanctions in this case, and so counsel for plaintiffs (who are all from out of county or even out of state) may not be familiar with the court's expectations regarding discovery motions. The court reduces the amount of sanctions to **$8,325.00** (4.0 hours at $844/hour plus 7.0 hours at $707/hour), payable within 30 days of notice of entry of this order. Because it does not appear that the discovery decisions on these motions were driven by the Meyers, but rather by counsel, and because the Meyers are represented by five different law offices in this case, the court orders these particular sanctions only against counsel for the Meyers, not the Meyers themselves.

IT IS SO ORDERED.

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