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: September 5, 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	23CV425445	Fortune Vieyra v. San Jose Day Nursery et al.	Click on LINE 1 or scroll down for ruling in lines 1-4.
LINE 2	23CV425445	Fortune Vieyra v. San Jose Day Nursery et al.	Click on LINE 1 or scroll down for ruling in lines 1-4.
LINE 3	23CV425445	Fortune Vieyra v. San Jose Day Nursery et al.	Click on LINE 1 or scroll down for ruling in lines 1-4.
LINE 4	23CV425445	Fortune Vieyra v. San Jose Day Nursery et al.	Click on LINE 1 or scroll down for ruling in lines 1-4.
LINE 5	24CV428991	Great Owl Lightening v. Andrew Nguyen	Motion to strike: this motion was incorrectly noticed for hearing in Department 20 instead of Department 10. In addition, the court has received no response to the motion. Parties to appear to address these irregularities.
LINE 6	24CV438758	Eftychios Theodorakis v. DFINITY Stiftung et al.	Click on LINE 6 or scroll down for ruling.
LINE 7	20CV362159	Bhupindar S. Dhillon et al. v. Kulwant Singh	Click on LINE 7 or scroll down for ruling.
LINE 8	22CV396170	Christian Humanitarian Aid, Inc. v. AM Star Construction, Inc. et al.	Click on LINE 8 or scroll down for ruling in lines 8-9.
LINE 9	22CV396170	Christian Humanitarian Aid, Inc. v. AM Star Construction, Inc. et al.	Click on LINE 8 or scroll down for ruling in lines 8-9.
LINE 10	23CV427462	Xiaoxue Wu et al. v. Xiang Wang et al.	Click on LINE 10 or scroll down for ruling.
LINE 11	23CV409876	Rodrigo Perez Rodriguez v. Santa Clara Valley Transportation Authority	Motion to be relieved as counsel: parties to appear.
LINE 12	23CV412455	Joseph Garcia Susbilla v. Crescent Oaks Memory Care	Click on LINE 12 or scroll down for ruling.

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LINE #	CASE #	CASE TITLE	RULING
LINE 13	24CV429076	Jane AAY Doe v. Alum Rock Union School District et al.	Click on LINE 13 or scroll down for ruling.
LINE 14	24CV435170	In re: Kabir Tax LLC	Application of Julie R. Vacura to appear pro hac vice: notice is proper. If no party or third-party (*e.g.*, the State Bar of California) appears at the hearing to object to the application, the court will GRANT it. Petitioner must then e-file a new proposed order for the court's signature.

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Calendar Lines 1-4
Case Name: *Fortune Vieyra v. San Jose Day Nursery et al.*
Case No.: 23CV425445

I. BACKGROUND

This is an action by self-represented plaintiff Fortune Vieyra against defendants San Jose Day Nursery ("SJDN") and Angela Gomez (an employee of SJDN) (collectively, "Defendants"). As the court has previously noted, this action appears to be related to a child custody case in family court between Vieyra and Elizabeth Jorgensen (Santa Clara County Case No. 21CP000545), in which Vieyra and Jorgensen have a fundamental disagreement over custody of their child, E.V., as well as over E.V.'s gender identity. E.V. is currently four years old.[1]

According to the operative second amended complaint ("SAC"), E.V. attended SJDN's daycare for at least a year, during which time Defendants allegedly sided with Jorgensen and against Vieyra in affirming a male gender identity upon E.V., contrary to Vieyra's express wishes and instructions. (SAC, ¶¶ 2-5.) From October 4, 2022 to November 2, 2022, Vieyra exchanged a series of emails with SJDN and Gomez about his wishes, but he was allegedly excluded from critical conversations. According to the SAC, Defendants held secret meetings with Jorgensen and favored communications with her, neglecting Vieyra's parental rights and causing harm to both him and E.V. (*Ibid*.)

Vieyra filed the child custody case in family court on September 8, 2021. Over two years later, on November 7, 2023, he filed the original complaint in this case, stating causes of action for: violation of parental rights; intentional infliction of emotional distress; civil conspiracy; negligence; fraudulent concealment; discrimination based on race in violation of the California Unruh Civil Rights Act; child abuse; and discrimination based on race and gender. On December 12, 2023, he filed a first amended complaint ("FAC"), with causes of action for: violation of parental rights; intentional infliction of emotional distress; civil conspiracy; common law negligence; fraudulent concealment; race discrimination; child abuse and discrimination; and breach of contractual obligations.

On May 14, 2024, this court heard a demurrer to and motion to strike the FAC filed by Defendants, as well as a motion for protective order filed by Vieyra. The court sustained the demurrer on the grounds of uncertainty and failure to state sufficient facts; denied the motion to strike as moot given the ruling on the demurrer; and denied Vieyra's motion for protective order as premature at best.[2] The order granted Vieyra 20 days' leave to amend. The order also contained five specific admonishments to Vieyra. First, the court instructed Vieyra that it was not granting leave to add new claims or parties; second, any amended complaint was required to be "a single, unitary pleading"; third, any amended complaint would have to comply with rule 2.112 of the California Rules of Court; fourth, any moving or opposing briefs were required to be single, unitary documents (instead of multiple opposition briefs); and fifth,

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[1] The court refers to the child as "E.V." based on the child's birth name. As noted in the court's prior order on May 14, 2024, the court takes no position regarding the correct name for the child, as that is one of the fundamental disputes between the child's parents in family court.
[2] The court takes judicial notice of the May 14, 2024 order on its own motion, under Evidence Code section 452, subdivision (d).

unauthorized papers filed without prior leave of court would not be considered. (See May 14, 2024 Order, pp. 10:13-11:6.)

As mentioned above, Vieyra is self-represented. Self-represented parties are entitled to the same consideration as other litigants or attorneys, and no greater. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the Code of Civil Procedure and Rules of Court. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."].)

On May 24, 2024, Vieyra filed the operative second amended complaint ("SAC"). The SAC states seven properly labeled causes of action, in accordance with rule 2.112: (1) Negligent Supervision and Hiring; (2) Intentional Infliction of Emotional Distress; (3) Civil Conspiracy; (4) Fraudulent Concealment; (5) Race and Gender Discrimination; (6) "Child Psychological Abuse"; and (7) Breach of Contractual Obligations. Nevertheless, the SAC also improperly attempts to add E.V. as a plaintiff and is replete with references to causes of action, such as declaratory judgment and unfair business practices, that Vieyra was not granted leave to add.[3]

Currently before the court are four opposed matters: (1) a motion to compel further responses to discovery, filed by Vieyra on April 24, 2024; (2) a motion for leave to file a SAC, filed by Vieyra on April 29, 2024; (3) a motion for protective order, filed by Vieyra on May 28, 2024; and (4) Defendants' demurrer to the SAC, filed on June 26, 2024.[4] The motions were originally noticed for different dates, but on July 25, 2024, the court granted Defendants' request to have the motions heard together. The court will address the motions in the order in which they were filed.

II. VIEYRA'S MOTION TO COMPEL FURTHER DISCOVERY RESPONSES

A. General Standards

A party propounding a request for production may move for an order compelling a further response if a statement of compliance is incomplete, a representation of inability to comply is inadequate, or an objection is without merit. (Code Civ. Proc., § 2031.310, subd. (a).) The motion must set forth "specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Proc., § 2031.310, subd. (b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) A party propounding interrogatories and requests for admission may similarly move for an order compelling further responses if an answer is

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[3] The SAC is also unreasonably long (102 pages), and the first cause of action does not even get addressed until page 86. "A complaint (or cross-complaint) is supposed to consist of '(1) a statement of the facts *constituting the cause of action*, in *ordinary and concise language*,' and '(2) a demand for judgment . . . .' (Code Civ. Proc., § 425.10, subd. (a).) A pleading is no place to quote, paraphrase, or even allude to the testimony of witnesses." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 867 fn. 1, emphasis in original.)

[4] Vieyra's opposition to the demurrer is labeled a "Declaration," but it is not signed under penalty of perjury. The court treats it as an opposition brief.

evasive or incomplete and/or an objection is without merit or too general. (Code Civ. Proc., §§ 2030.300, subd. (a) and 2033.290, subd. (a).)

B. Discussion

In this motion, Vieyra seeks to compel further responses to requests for production, special interrogatories, and requests for admissions propounded on both SJDN and Gomez. (See April 24, 2024 Notice of Motion). There are several significant problems with the motion.

1. Request for Judicial Notice

First, Vieyra has included with the notice of motion a request for judicial notice, a document that is supposed to be separately filed. (See Cal. Rules of Court, rule 3.1113(*l*) ["Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with rule 3.1306(c)."].) Rule 3.1306(c) further provides: "A party requesting judicial notice of material under Evidence Code sections 452 or 453 must provide the court and each party with a copy of the material." In addition, Evidence Code section 453, subdivision (b), requires a party seeking judicial notice to provide the court "with sufficient information to enable it to take judicial notice of the matter." Vieyra's request does not include copies of any of the material of which he is requesting judicial notice. From the description that Vieyra does provide, the material (correspondence between the parties and discovery responses) sounds like it would *not* be a proper subject of judicial notice in any event. The request for judicial notice is therefore denied.

2. Memorandum of Points and Authorities

Second, Vieyra's supporting memorandum, with 21 pages of text in unusually small font, exceeds the limit set forth in Rule of Court 3.1113(d): "Except in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages."

3. Separate Statement

Third, as Defendants point out in their opposition, Vieyra's separate statement in support of the motion is also materially defective. Rule 3.1345(c) of the California Rules of Court provides:

> (c) Contents of separate statement
>
> A separate statement is a separate document filed and served with the discovery motion that provides all the information necessary to understand each discovery request and all the responses to it that are at issue. The separate statement must be full and complete so that no person is required to review any other document in order to determine the full request and the full response. Material must not be incorporated into the separate statement by reference. The separate statement must include—for each discovery request (e.g., each interrogatory, request for admission, deposition question, or inspection demand) to which a further response, answer, or production is requested--the following:
>
> (1) The text of the request, interrogatory, question, or inspection demand;

(2) The text of each response, answer, or objection, and any further responses or answers;

(3) A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute;

(4) If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it;

(5) If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth; and

(6) If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them must summarize each relevant document.

Vieyra's separate statement fails to provide the text of any of the interrogatories, requests, or demands for production or the text of any of the responses from SJDN or Gomez. A court has discretion to deny a motion to compel for failure to provide a code-compliant separate statement. (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 893 (*Mills*).) In this case, exercising such discretion would not simply be enforcing a technicality: Vieyra simply has not provided enough information for the court to understand the nature of the parties' dispute. For example, in his memorandum of points and authorities, Vieyra complains about the objections that Defendants have asserted in their responses to the requests for production of documents, saying (repeatedly): "This objection should be overruled." (Memorandum, pp. 4-6.) But he does not identify what information he believes to have been withheld on the basis of any of these objections, or even what documents he believes still need to be produced. As such, the court does not have a sufficent basis for determining what needs to be compelled, and the court is simply left with *objections about objections*. The issues with the interrogatories and requests for admissions are similarly inadequately explained in the separate statement. (See *Quantum Cooking Concepts, Inc. v. LV Assocs., Inc*. (2011) 197 Cal.App.4th 927, 934 (*Quantum*) [stating that the trial court is not required to comb the record and the law for factual and legal support that a party has failed to identify or provide]; see also *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409 (*Huong*) [a court is not obligated to undertake independent examination of record when a party "'has shirked his responsibility in this respect"'].)

Based on the failure to provide sufficient information on this motion, including an adequate separate statement, the court DENIES Vieyra's motion to compel further responses to requests for production, special interrogatories, and requests for admission from SJDN and Gomez. (See *Mills, supra,* 166 Cal.App.4th at p. 893; see also *Neary v. Regents of University of California* (1986) 185 Cal.App.3d 1136, 1145 [denial of motions to compel discovery because of a nonconforming separate statement].)

Defendants have requested a monetary sanction in the amount of $875.00 for the cost of having had to oppose the motion to compel. Under Code of Civil Procedure sections 2030.300, subdivision (d), 2031.310, subdivision (h), and 2033.290, subdivision (d), the court

"shall" impose a monetary sanction against any party who unsuccessfully makes a motion to compel further responses unless it finds that the moving party acted with substantial justification, or circumstances make the imposition of the sanction unjust. In this case, the court finds that Vieyra's meet-and-confer efforts were subpar, at best, based on the meet-and-confer correspondence attached to the opposition. In addition, the court finds it difficult to believe that a motion to compel further responses to *over 100 different discovery requests* could be deemed to be even remotely reasonable, given the nature of this suit. Accordingly, the court GRANTS the request for sanctions and orders Vieyra to pay **$875.00** to Defendants within 30 days of notice of entry of this order. As a reminder, the purpose of discovery sanctions is compensatory, not punitive.[5]

III. VIEYRA'S MOTION FOR LEAVE TO FILE A SAC

The court DENIES Vieyra's motion for leave to file an SAC as MOOT, as it was filed on April 29, 2024, 15 days *before* the court sustained the demurrer to the FAC with leave to amend. In its May 14, 2024 order, the court set forth the permissible scope of any amendments to the FAC, admonishing Vieyra that leave to add additional causes of action or parties was not being granted at the time. Vieyra then filed the operative SAC on May 24, 2024.

Even if the motion were not moot, the court would have significant doubts about the propriety of an amended pleading that purports to add E.V. as a plaintiff in the case, given that such an amendment presupposes that Vieyra has standing to prosecute a cause of action against Defendants on behalf of E.V. as E.V.'s guardian ad litem. Vieyra has previously submitted a request to be appointed as E.V.'s guardian ad litem, which the court denied on the ground that E.V. was not a party to this case. (See Order dated July 2, 2024.) The present motion to amend only reinforces the court's doubts as to the appointment of a guardian ad litem for E.V. in this civil case, as the gravamen of the complaint here (including the SAC) is that Defendants misgendered E.V., and that is also one of the core disputes between Vieyra and E.V.'s mother in the ongoing custody case in family court. In other words, it is not clear at all to the court whether there is a conflict of interest between Vieyra and E.V. on the issue of E.V.'s gender—that is something that the family court must decide—but in the meantime, this civil court must remain aware as to the possibility of such a conflict and must avoid making any order that would undermine the authority of the family court. (See *Berg v. Traylor* (2007) 148 Cal. App. 4th 809, 821-822 [if a parent's interest diverges from a minor's interest, someone else should be appointed as guardian ad litem].) In this case, the court does not yet know which parent's interest is aligned with the minor's and which parent's interest is in conflict.

At any rate, because the motion is now moot, it is not necessary for the court to address the request for judicial notice submitted with the motion.

IV. VIEYRA'S MOTION FOR PROTECTIVE ORDER

As noted above, on May 14, 2024, this court denied a previous motion for protective order by Vieyra as premature. While the current motion (labeled a "second amended" motion for protective order) provides some more detail as to what material Vieyra wishes to have sealed or redacted, and more specifically identifies what preventative measures he would like

[5] The declaration of Defendants' counsel also states that Defendants will seek additional sanctions to cover the costs of appearing at the hearing. The court DENIES any further sanctions in connection with this motion.

the court to impose, it is still in many ways the same motion as before because it is still, at best, premature. Though not labeled as such, the current motion once again combines a motion to seal with a motion for a protective order. Vieyra seeks to redact the full name of E.V. (who is incorrectly referred to as a plaintiff) from various documents, most of which were filed by Vieyra himself.

A. General Standards

1. Motion to Seal

"Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, rule 2.550(c).) "The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

A party moving to seal a record must file a memorandum and a declaration containing facts sufficient to justify the sealing. (Cal. Rules of Court, rule 2.551(b)(1).) A declaration supporting a motion to seal should be specific, not conclusory, as to the facts supporting the overriding interest. If the court finds that the supporting declarations are conclusory or otherwise unpersuasive, it may conclude that the moving party has failed to demonstrate an overriding interest that overcomes the right of public access. (See *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 305 (*Providian*).) Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (d)(5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian*, *supra*, 96 Cal.App.4th at p. 309.)

2. Motions for Protective Order

Motions for protective orders are usually brought in response to the receipt of a subpoena, written discovery requests, or a request for the exchange of expert witness information. (See Code Civ. Proc., §§ 2017.020, 2025.420, 2030.090, 2031.060, 2033.080, and 2034.250.) Code of Civil Procedure section 2017.020, subdivision (a), generally provides that the court shall limit the scope of discovery pursuant to a motion for protective order if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.

In deciding whether there is good cause for a protective order, a court should evaluate whether the moving party has made "a factual exposition of a reasonable ground for the order sought." (*Goodman v. Citizens Live & Cas. Ins. Co*. (1967) 253 Cal.App.2d 807, 819.) The moving party carries the burden of proving the existence of such a reasonable ground by a

preponderance of the evidence. (*Standish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1145.) In deciding whether the moving party has met his or her burden, a court should accord no evidentiary weight to declarations containing conclusory statements that the discovery sought is calculated to cause unwarranted annoyance, embarrassment, or oppression. (*People v. Superior Court* (1967) 248 Cal.App.2d 276, 281.) In granting a motion for a protective order, a court should craft an order that is no broader than necessary to address the specific harm that the moving party seeks by his or her motion to avoid. (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1761.)

A motion for a protective order must be accompanied by a meet-and-confer declaration under Code of Civil Procedure section 2016.040, and the declaration must state facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion. (Code Civ. Proc., §§ 2016.040, 2025.420, subd. (a), & 2031.060, subd. (a).)

B. Discussion

The court DENIES Vieyra's second motion for a protective order. Regarding his efforts to seal information contained in already-filed documents, such as E.V.'s full birth name, the failure to submit the required supporting declaration, as well as the failure to submit any proposed redacted versions of the filed documents, means the motion cannot be granted. In addition, the court already determined in its May 14, 2024 order that it would refer to the minor as "E.V." going forward, rather than by first or last name.

Regarding the request for a protective order, Vieyra has failed to demonstrate that good cause for such an order exists, again because of the failure to submit any supporting declaration, as well as a failure to identify anything that calls for a prospective confidentiality order or an in-camera review. There continues to be no evidence that anything has occurred in this case to date that might require the issuance of a protective order.

The court "shall" impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion for protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (See Code Civ. Proc., §§ 2017.020, subd. (b), 2019.030, subd. (c), 2030.090, subd. (d), 2031.060, subd. (h), 2033.080, subd. (d).) Vieyra has not acted with substantial justification in bringing this repetitive motion, but the court will refrain from ordering any monetary sanctions for this particular motion, especially as Defendants have not requested any.

V. DEFENDANTS' 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.) Facts appearing in exhibits attached to the complaint

are given precedence over inconsistent allegations in the complaint. (See *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."].)

Where a demurrer is to an amended complaint, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer."]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

The court considers only the pleading under attack, any attached exhibits, and any facts or documents of which the court may take judicial notice. The court cannot consider extrinsic evidence in ruling on a demurrer.

Code of Civil Procedure section 430.60 states that "[a] demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The rules of court also require that the demurrer itself (distinct from a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

Finally, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1273; See also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

B. Threshold Issues

As an initial matter, the court addresses two preliminary issues. First, it appears that Defendants, for the second time, have failed to meet and confer, as required by Code of Civil Procedure section 430.41, subdivision (a). The declaration of Defendants' counsel (Nicole Meredith) in support of the demurrer does not mention any meet-and-confer efforts prior to this demurrer having been filed. The Meredith declaration itself is otherwise extrinsic evidence, and the court has not considered it or any of the attached exhibits. Nevertheless, because Code of Civil Procedure section 430.41, subdivision (a)(4), provides that insufficient meet-and-confer efforts "shall not" be grounds for overruling a demurrer, the court will still consider the merits of the demurrer.

Second, under Code of Civil Procedure section 436, subdivisions (a) and (b), the court may "at any time in its discretion, and upon terms it deems proper: [¶] (a) Strike out any irrelevant, false or improper matter inserted in any pleading. [¶] (b) Strike out all or any 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." Portions of a pleading that violate a court order are both "improper" and not "filed in conformity" with a court order. As noted above, the court's prior order expressly stated: "The court does not grant leave to add new claims or parties." (May 14, 2024 Order, p. 10:14.)

Therefore, the court now strikes the following portions of the SAC on its own motion, based on the fact that they were added to the FAC without leave:

- All references to E.V. as a party or plaintiff, such as in paragraphs 1 and 12.
- All references to "plaintiffs" (plural). Those references shall be read as "plaintiff" (singular) going forward.
- Any allegations that Vieyra seeks a declaratory judgment (a statutory cause of action codified in Code of Civil Procedure section 1060 that was not in the FAC), including paragraphs 5, 6, 22, 23, 30-36, 41, 46, 49, 50-54, 62, 63, 65, 73, 88-101, 105, 108, 111, 114, 116, 121-123, 128-130, 135-143, 145, 149, 151-158, 160, 162, 163, 166-167, 169-172, 174, 180-182, 190, 196, 202, 204, 208, 211, 217, and 223, as well as the portion of paragraph 226 beginning "In conclusion . . . ."
- Paragraph "E" of the prayer, which also refers to a declaratory judgment cause of action.
- Any allegations that Defendants violated various sections of the Penal Code, the Health and Safety Code, the Welfare and Institutions Code, or the California Code of Regulations, including paragraphs 17, 23, 31, 32, 34, 39, 41, 44, 45, 47, 48, 53, 63, 65, 90, 95, 118-119, 121, 123, 128, 133, 135, 137, 138, 139, 142, 144, 183, 187, 189, 191, 196, 202, 204, 208, 216, 217, 224, 226, 227, 231-240, 251, 257-258, 261-263, 265, 266, 271, and 300-311.
- Any cause of action for violation of the Bane Act (Civil Code section 52.1) including the allegations pertaining to the Bane Act in paragraphs 95, 105, 108, 111, 116, 139, 166, 169-170, 182, 208, and 259-260.
- All references to a cause of action for Unfair Business Practices, a statutory cause of action codified in Business and Professions Code section 17200 *et seq.*, including paragraphs 267 and 268, and paragraph "C" of the prayer.
- Any cause of action for sexual harassment, and to the extent not already covered by striking the allegations listed above, all references to sexual harassment in the SAC, including those in paragraphs 291-292.

These allegations are all stricken without leave to amend.

C. The Basis for Defendants' Demurrer to the SAC

Defendants assert that each cause of action in the SAC fails to state sufficient facts, that the SAC as a whole is uncertain, and that the seventh cause of action for breach of contract also fails to allege whether the alleged contract is written, oral, or implied by conduct. (See June 26, 2024 Notice of Demurrer and Demurrer.)

D. Discussion

1. Uncertainty

The court OVERRULES Defendants' demurrer to the entire SAC on the ground of uncertainty.

"'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' 'A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.'" (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695 [citations omitted].)

Defendants' only basis for arguing uncertainty is that the SAC "attempts to add the child as a plaintiff, but the child is not a plaintiff. Plaintiff claims damages on behalf of himself and the child, but the child is not a party. The SAC alleges that plaintiff is the child's guardian ad litem for this action, but he has not been so appointed." (Memorandum, p. 10:5-7.)

While the SAC is certainly not a model of clarity, and the attempts to add E.V. as a party and to add numerous causes of action in violation of the May 14, 2024 order have further confused the issues presented, the court finds that the SAC is not otherwise so "incomprehensible" that Defendants cannot reasonably respond.

2. Failure to State Sufficient Facts

a) First Cause of Action: Negligent Supervision and Hiring

The first cause of action alleged in the FAC was for general negligence only, not negligent supervision and hiring. The court will allow the modification of Vieyra's negligence theory to one of negligent supervision and hiring, but Vieyra is now bound by this decision. As already noted, E.V. is not a party, and Vieyra does not presently have standing to bring a cause of action on E.V.'s behalf.

Defendants' demurrer to the first cause of action on the ground that it fails to state sufficient facts is SUSTAINED, for the reasons that follow.

"'As a general rule, one owes no duty to control the conduct of another . . .' More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326, internal citations omitted [discussing aiding & abetting liability].) Negligent supervision is simply a specific variety of common law negligence.

Negligent supervision is usually framed as an issue of whether a business/organization adequately supervised a specific adult employee or agent who intentionally or negligently injured someone else. Typically, in order for there to be liability for negligent supervision, the defendant must be the employer of the individual alleged to have been negligently supervised. (See, e.g., CACI No. 426; *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1187-1188.) "An employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee. Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes. To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had *prior* knowledge of the actor's propensity to do the bad act." (*Alexander v. Community Hospital of Long Beach* (2020) 46 Cal.App.5th 238, 264, internal citations omitted, emphasis in original.)

Here, the first cause of action alleges that "Defendants" failed to train staff on "gender identity issues" properly, ignored "directives" from Vieyra, failed to inform him about "incidents" involving E.V., and excluded him from "communications and decisions" regarding E.V., causing him to suffer "distress and confusion." (See SAC, ¶¶ 228-242 generally.) These allegations fail to state a cause of action for negligent supervision and hiring.

To begin with, the first cause of action fails to state sufficient facts as against defendant Angela Gomez because she is not alleged to be an employer. (See SAC, ¶ 14.) As for defendant SJDN, the first cause of action fails to identify any specific employee or employees who intentionally or negligently injured Vieyra and fails to allege SJDN's prior knowledge of such employee's "propensity" to injure someone intentionally or negligently, an essential element of this cause of action.

A plaintiff bears the burden of demonstrating that an amendment would cure the defect identified on demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) Vieyra has not met this burden. Vieyra's opposition argues that the demurrer should be overruled but does not suggest how any cause of action could be amended.[6]

Nevertheless, the court will grant 20 days' leave to amend the first cause of action, as it is not (yet) apparent to the court that it would be completely impossible for Vieyra to amend it to state a proper cause of action. At the same time, the court cautions Vieyra against any further disregard for the court's orders. The court authorizes an amendment to a cause of action for negligent supervision and hiring and nothing else. No allegations of separate statutory or regulatory violations or additions of parties are permitted without further leave.

[6] Vieyra's repeated claims that the SAC does not violate the court's May 14, 2024 order are singularly unpersuasive.

b) Second Cause of Action: Intentional Infliction of Emotional Distress

The court SUSTAINS Defendants' demurrer to the second cause of action on the ground that it fails to state sufficient facts.

"A cause of action for intentional infliction of emotional distress exists when there is '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' And the defendant's conduct must be 'intended to inflict injury or engaged in with the realization that injury will result.' [¶] Liability for intentional infliction of emotional distress 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities . . . .' [¶] With respect to the requirement that the plaintiff show emotional distress, this court has set a high bar. 'Severe emotional distress' 'means emotional distress of such a substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 [internal quotations and citations omitted].)

"[I]t is 'not . . . enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' [Citation.]" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496 [internal citations omitted]; see also *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 945 [manager of severely obese employee mocked her need for properly sized uniform, asked if she was considering weight loss surgery, and told kitchen staff, within her hearing, not to give her extra food; comments were inappropriate but not severe, and manager's official actions were not outrageous conduct].)

"[M]any cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235.) "[T]he trial court initially determines whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Where reasonable men can differ, the jury determines whether the conduct has been extreme and outrageous to result in liability. Otherwise stated, the court determines whether severe emotional distress can be found; the jury determines whether on the evidence it has, in fact, existed." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1614.)

The second cause of action alleges that "Defendants" (plural) intentionally caused Vieyra emotional distress by misgendering E.V., following directives from Jorgensen, over Vieyra's protests. (E.g., SAC, ¶ 116 ["Given that Gomez explicitly stated that the 'mother informed' SJDN of E.V.'s supposed wish to be called '[redacted],' it is evident that Defendants were actually taking directives from Jorgensen without considering or consulting Vieyra."].)

This alleged conduct cannot support an intentional infliction of emotional distress cause of action, as it is not sufficiently extreme and outrageous. The notion that a daycare's employees listened more to one parent than the other does not come anywhere close to alleging conduct that is so "extreme as to exceed all bounds of that usually tolerated in a civilized community."

Vieyra does not advance any potential amendment to this cause of action in the opposition, and no potentially effective amendment is apparent to the court. The court DENIES further leave to amend the second cause of action.

c) Third Cause of Action: Civil Conspiracy

The court SUSTAINS the demurrer to the third cause of action for civil conspiracy on the ground that it fails to state sufficient facts.

"Conspiracy is not an independent tort: it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 514.) "As we read *Applied Equipment* and the antecedent case authorities on which it builds, in California a civil conspiracy to commit tortious acts can, as a matter of law, only be formed by parties who are already under a duty to the plaintiff, the breach of which will support a cause of action against them—individually and not as conspirators—in tort. Restated, in cases where the plaintiff alleges the existence of a civil conspiracy among the defendants to commit tortious acts, the source of substantive liability *cannot* arise out of participation in the conspiracy alone." (*Chavers v. Gatke Corp*. (2003) 107 Cal.App.4th 606, 614, emphasis in original, internal citations omitted.)

Liability for civil conspiracy requires three elements: (1) formation of the conspiracy (an agreement to commit wrongful acts); (2) operation of the conspiracy (commission of the wrongful acts); and (3) damage resulting from operation of the conspiracy. (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 47; see also CACI, No. 3600.) In addition, "[Plaintiffs] must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree—expressly or tacitly—to achieve it. Unless there is such a meeting of the minds, 'the independent acts of two or more wrongdoers do not amount to a conspiracy.'" (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [citation omitted].)

Stripped of the unauthorized amendments to the SAC, the third cause of action here alleges that "Defendants" intentionally excluded Vieyra from "communications and decisions about E.V.'s care," ignored his "directives," and failed to inform Vieyra about "significant incidents." This does not state sufficient facts to support a cause of action for civil conspiracy against SJDN or Gomez.[7] While the court has doubts that any conspiracy cause of action can be stated, it GRANTS 20 days' leave to amend, as it is not (yet) apparent that it would be

[7] The allegation in the SAC that by admitting to "conversations in passing at pick-up or drop-off of the child" Gomez admitted "to being a co-conspirator" does not support the cause of action as it is merely an unfounded legal conclusion. (SAC, ¶ 119.)

impossible to state sufficient facts. Again, this cannot be construed as leave to add new parties or allegations of additional statutory or regulatory violations.

d) Fourth Cause of Action: Fraudulent Concealment

The court SUSTAINS Defendants' demurrer to the fourth cause of action for fraudulent concealment on the ground that it fails to state sufficient facts.

"The elements of fraudulent concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if the plaintiff had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage." (*Burch v. CertainTeed Corp*. (2019) 34 Cal.App.5th 341, 348, citing *Bigler-Engler v. Breg, Inc*. (2017) 7 Cal.App.5th 276, 310-311.) "With respect to concealment, there are four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. The latter three circumstances presuppose the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. This relationship has been described as a transaction, such as that between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement." (*Id*. at pp. 349-350, internal quotations and citations omitted.)

As a general rule, each element in a fraud cause of action must be pleaded with specificity. (*Lazar v. Super. Ct*. (1996) 12 Cal.4th 631, 645; *Cadlo v. Owens-Illinois, Inc*. (2004) 125 Cal.App.4th 513, 519.) The specific pleading requirement can be significantly relaxed in the case of fraud by concealment or omission because, as one court has explained, "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Alfaro v. Community Housing Imp. System & Planning Ass'n., Inc*. (2009) 171 Cal.App.4th 1356, 1384.)

Stripped of unauthorized amendments, the fourth cause of action alleges that Defendants engaged in fraudulent concealment by "failing to disclose incidents of misgendering and distress" regarding E.V. and by concealing "the true nature of E.V.'s treatment and care from Vieyra." This fails to state sufficient facts. Even by the lowered standards applicable to fraudulent concealment, these allegations lack critical facts. There are no allegations of Defendants' intent to defraud Vieyra by concealing or suppressing certain facts, and no allegations of reliance by Vieyra leading to cognizable damages *to Vieyra*.

While the court has doubts that any cause of action for fraudulent concealment can be properly stated, it GRANTS 20 days' leave to amend one more time, as it is not (yet) apparent that it is impossible for Vieyra to state a cause of action.

e) Fifth Cause of Action: Race and Gender Discrimination (Unruh Act)

The court SUSTAINS Defendants' demurrer to fifth cause of action for race and gender discrimination on the ground that it fails to state sufficient facts.

The Unruh Civil Rights Act (the "Unruh Act") provides that all persons in California are "free, equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).) The Unruh Act is generally aimed at business practices directed towards the public.

Stripped of any unauthorized amendments, the fifth cause of action in the SAC alleges that Defendants violated the Unruh Act by "favoring communications with Jorgensen, a White female, over Vieyra, a Black male, despite both having joint legal custody," by excluding Vieyra "from important decisions and meetings about E.V.'s care," and by failing "to provide equal treatment and respect to Vieyra's directives regarding his daughter's care." (See SAC, ¶¶ 288, 293.)

As noted in the May 14, 2024 order on the prior demurrer, statutory causes of action must be pled with particularity. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) While this is not the same level detail required for a fraud claim, the current allegations are still too general to support a claim for violation of the Unruh Act. That is particularly the case with defendant Gomez, who is not a business establishment under the Act.

An additional factor to consider is that the Unruh Act generally does not apply to schools or school districts. (See *Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 684 [holding public school district was not a business establishment under the Unruh Act]; *Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828, 839 [concluding that a private, religious high school was not a business establishment under the Unruh Act because it was a nonprofit that lacked any "significant resemblance to an ordinary for-profit business"].) While the court is not aware of authority specifically addressing whether a daycare facility can be considered a business establishment for purposes of the Unruh Act, the SAC does admit that SJDN is a tax-exempt nonprofit corporation. (See SAC, ¶ 13.)

The court DENIES further leave to amend the fifth cause of action as to Gomez, as she cannot, in her individual capacity, be considered a business establishment for purposes of the Unruh Act. The court GRANTS 20 days' leave to amend the fifth cause of action as to SJDN, as it is not (yet) apparent to the court that no cause of action can be stated.

f) Sixth Cause of Action: "Child Psychological Abuse"

The court SUSTAINS Defendants' demurrer to the sixth cause of action for "child psychological abuse" on the ground that it fails to state sufficient facts.

"Child Psychological Abuse' is not a recognized civil cause of action and, once stripped of unauthorized amendments (which mostly consist of legal conclusions), there is

nothing left in the SAC but allegations of harm to E.V., who is not a party, rather than harm to Vieira, the only authorized plaintiff in this case. Because no effective amendment appears to be possible, the court DENIES further leave to amend as to this cause of action.

g) Seventh Cause of Action: Breach of Contractual Obligations

The court SUSTAINS Defendants' demurrer to the seventh cause of action for breach of contractual obligations (breach of contract) on the ground that it fails to state sufficient facts.

"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.) A non-party to a contract cannot be sued for breach of that contract. (See *Gold v. Gibbons* (1960) 178 Cal.App.2d 517, 519 ["Breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations."]; see also *Clemens v. American Warranty Corp*. (1987) 193 Cal.App.3d 444, 452 ["Under California law, only a signatory to a contract may be liable for any breach."].)

The SAC is replete with references to "contractual obligations" purportedly breached by "Defendants," but the seventh cause of action does not identify any contract between Vieyra, SJDN, and Gomez, other than the SJDN Parent Handbook. (See SAC at ¶¶ 156, 218-220, and 224.) While the court understands that under certain circumstances, a "student handbook" or "parent handbook" may sometimes constitute an enforceable agreement, Vieyra does not identify any circumstances that would permit the court to find that Exhibit I-1 to the SAC constitutes such an enforceable document. In addition, the SAC fails to allege any specific term of the contract, and it fails to allege how any specific term was breached by Defendants. Indeed, Exhibit I-1 to the SAC consists of a collection of different materials, many of which are plainly not intended to constitute a binding agreement, and so without any more specific allegations regarding any possible breach, the seventh cause of action is insufficient. Indeed, there is no apparent support for the notion that the seventh cause of action—which has been asserted against "All Defendants"—is somehow enforceable against Gomez, who is not named anywhere in the main section of the parent handbook (and appears only in a letter pertaining to a "licensing deficiency" at the end of Exhibit I-1).

Because the SAC fails to identify specific contractual terms that were allegedly breached by either of the Defendants, the court sustains the demurrer but GRANTS 20 days' leave to amend.

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Calendar Line 6
Case Name: *Eftychios Theodorakis v. DFINITY Stiftung et al.*
Case No.: 24CV438758

I. BACKGROUND

This is an action by plaintiff Eftychios Theodorakis against defendants DFINITY Stiftung ("DFINITY Foundation") and DFINITY USA Research LLC ("DFINITY USA") (collectively, "Defendants").[8]

On or around August 27, 2018, Theodorakis became employed as a software engineer by DFINITY USA. (Complaint ("Compl."), ¶ 9.) As a condition of employment, he was required to sign a written employment contract and a Restricted DFN Agreement (the "Token Agreement") with DFINITY Foundation. (*Ibid*.) Defendants countersigned the Token Agreement.

The Token Agreement gave Theodorakis the right to buy a certain quantity of DFINITY Tokens (also known as "ICP Tokens," or simply, "tokens"). (Compl., ¶ 11.) After starting his employment, Theodorakis attempted to "make the required nonrefundable donation to DFINITY Foundation for the "Tokens," but Defendants failed or refused to accept the purchase and transfer them. (*Id.* at ¶ 12.) In or around 2019, Theodorakis demanded that Defendants allocate and deliver the tokens under the Token Agreement, but Defendants again did not perform. (*Id.* at ¶ 13.) In 2020, all of the conditions for allocation of the tokens pursuant to the Token Agreement had allegedly been met, but Defendants still failed or refused to allocate and deliver them. (*Id.* at ¶¶ 14, 15.) Later in 2020, DFINITY declared that Theodorakis's Token Agreement was "void" and asserted that he would need to sign an amendment. (*Id.* at ¶¶ 16-18.)

In December 2020, when Theodorakis "again tendered his donation to Defendants" for the tokens, Defendants demanded that he pay $1.579671 per token, rather than the $0.417902 per token specified in the Agreement. (Compl., ¶ 19.) Additionally, Defendants only allowed Theodorakis to purchase 41,666 tokens, rather than the 80,000 specified in the Agreement. (*Ibid*.)

On April 1, 2021, after fulfilling all conditions of his employment and the terms of his employment agreement, Theodorakis left the employment of DFINITY but did not receive the promised tokens. (Compl., ¶ 21.) Thereafter, Defendants demanded that Theodorakis sign a Separation Agreement that added additional conditions for the distribution of the balance of the tokens, and he alleges that he was forced to agree to these terms "under severe duress." (*Id.* at ¶ 22.) On April 30, 2021, he signed the Separation Agreement. (*Id.* at ¶ 23.)

On May 10, 2021, DFINITY Foundation transferred 41,666 tokens to Theodorakis but has yet to distribute the remaining 12,608 tokens under the Separation Agreement. (Compl., ¶¶ 25, 26.) On May 25, 2021, DFINITY Foundation demanded that Theodorakis sign an Amended and Restated RTU Agreement that was not required by the Separation Agreement;

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[8] Theodorakis identifies the defendants as DFINITY Foundation and DFINITY USA. (See Compl., ¶¶ 2-3.) At the same time, he frequently refers only to "DFINITY" in the complaint and does not clarify which defendant he is referring to. (See, e.g., Compl., ¶¶ 16, 21.)

and then it demanded that he sign a "Side Agreement" in order to receive the additional tokens to which he was already entitled. (*Id.* at ¶¶ 27, 28.) On April 30, 2021, the date Theodorakis signed the Separation Agreement, each token was valued at $221. The value of the tokens reached a high of $630 per token on May 9, 2021 and then proceeded to "plummet" to $30.35/token on June 26, 2021. (*Id.* at ¶¶ 30, 34.) The current value of a token is $5.32. (*Id.* at ¶ 34.)

DFINITY Foundation sold a large number of the tokens with the knowledge that doing so would hurt the value of Theodorakis's tokens. (Compl., ¶ 35.) Additionally, DFINITY Foundation failed to provide its employees with cash in lieu of tokens, forcing the employees to liquidate a large number of their tokens immediately to pay income taxes. (*Id.* at ¶ 36.)

II. PROCEDURAL HISTORY

The procedural history between the parties is unusually convoluted for what would otherwise appear to be a simple and straightforward dispute. The following summary is based on the succinct timeline contained in Defendants' memorandum of points and authorities, which Theodorakis does not appear to contest.

On August 26, 2022, Theodorakis initiated Case No. 22CV403734 against Defendants (the "First Filed Action") in Santa Clara County Superior Court. On March 23, 2023, the court (Judge Pennypacker) entered an order compelling arbitration and denying Theodorakis leave to amend. On April 28, 2023, Theodorakis filed an ex parte application seeking to amend his complaint to add new allegations and causes of action, which the court denied. Judge Pennypacker confirmed that the matter was stayed pending arbitration and that if Theodorakis had any additional claims, they would have to be brought before an arbitrator.

On May 10, 2023, Theodorakis filed a new case in the U.S. District Court for the Northern District of California (Case No. 3:23-cv-02280), including identical allegations as those contained in the proposed amended complaint in the First Filed Action.

On October 25, 2023, Theodorakis filed a demand for arbitration with JAMS in accordance with Judge Pennypacker's prior orders.

On March 20, 2024, upon a request for clarification (or in the alternative, request to certify a question of law) filed by Defendants, Judge Pennypacker reconsidered the April 28, 2023 ex parte order denying Theodorakis's application for leave to file an amended complaint in the First Filed Action, retroactively granting the request based on Theodorakis's representation that the amended pleading was necessary to toll the statutes of limitations. On April 2, 2024, Theodorakis filed the amended complaint. On April 4, 2024 Theodorakis filed a proposed amended arbitration demand with JAMS. The First Filed Action remained stayed pending arbitration.

According to Defendants, Theodorakis continued to pursue his federal court complaint on the merits. The federal court granted Defendants' motion to dismiss for lack of jurisdiction, with leave to amend by May 30, 2024.

On May 2, 2024, Theodorakis filed an ex parte application for leave to file a second amended complaint in the First Filed Action, seeking to add claims for conversion, trespass, and violation of Penal Code section 296, subdivision (c). These claims were already asserted

in the ongoing federal action. On May 8, 2023, Judge Pennypacker denied the application based on the existence of the federal court action and holding that there was no ground for ex parte relief.

The next day, on May 9, 2024, Theodorakis filed the present action (Case No. 24CV438758), a.k.a. the "Second Filed Action," asserting the same causes of action he attempted to raise in his proposed second amended complaint in the First Filed Action:

1) Conversion;
2) Trespass to Chattels; and
3) Violation of Penal Code Section 496, Subdivision (c).

On May 30, 2024, Theodorakis amended his federal court case, naming DFINITY Foundation and removing claims for conversion, negligence, unfair competition, intentional misrepresentation, and leaving a claim for violation of Penal Code section 296, subdivision (c).

On June 11, 2024, Defendants filed the present "special demurrer" to the complaint in this case under Code of Civil Procedure section 430.10, subdivision (c).

III. REQUESTS FOR JUDICIAL NOTICE

A. Defendants' Request

With their demurrer, Defendants request judicial notice of the following documents:

1) Exhibit 1: 8/26/2022 Complaint in First Filed Action.

2) Exhibit 2: 3/23/2023 Arbitration Order I in First Filed Action

3) Exhibit 3: 4/28/2023 Declaration of Evan Livingstone and the attached Proposed First Amended Complaint in First Filed Action.

4) Exhibit 4: 4/28/2023 Arbitration Order II in First Filed Action.

5) Exhibit 5: 5/10/2023 Federal Court Complaint.

6) Exhibit 6: 1/30/2024 Order in First Filed Action.

7) Exhibit 7: 3/20/2024 Order in First filed Action.

8) Exhibit 8: 4/2/2024 First Amended Complaint in First Filed Action.

9) Exhibit 9: 4/30/2024 Federal Court Order.

10) Exhibit 10: 5/8/2024 Order in First Filed Action.

11) Exhibit 11: 8/31/2023 Federal First Amended Complaint.

The court grants judicial notice of these documents, but it does not take judicial notice of any disputed facts contained in these documents. (Evid. Code, § 452, subds. (c), (d).)[9]

B. Theodorakis's Request

Theodorakis requests judicial notice of the following documents:

1) Exhibit A: 3/20/2024 Order on Reconsideration Denial of Motion to Amend Plaintiff's Complaint in Case No. 22CV403734.

2) Exhibit B: 4/30/2024 Order Granting Motions to Dismiss in Federal Court in Case No. 23-cv-02280-AMO.

3) Exhibit C: 4/28/2023 Defendants' Opposition to Plaintiff's Ex Parte Application Permitting the Filing of an Amended Complaint in Case No. 22CV403734.

The court similarly grants judicial notice of the existence of these documents but not any disputed facts contained therein. (Evid. Code, § 452, subds. (c), (d).)

IV. MEET-AND-CONFER EFFORTS

As a threshold matter, Theodorakis argues that Defendants' special demurrer should be overruled for failing to comply with Code of Civil Procedure section 430.41, subdivision (a), which requires the demurring party to meet and confer before filing the pleading challenge. (Opposition, p. 5:1-10.) Subdivision (a)(3) requires the demurring party to file and serve a declaration with its demurrer stating: (1) the means by which the demurring party met and conferred and that the parties did not reach agreement; or (2) that the party who filed the pleading failed to respond or otherwise failed to meet and confer in good faith. (Code Civ. Proc., § 430.41, subd. (a)(3).)

Here, there is no declaration describing any meet-and-confer discussions between the parties. In reply, Defendants appear to concede that there were none. (See Reply, p. 14.) But they assert that they are not aware of an obligation to meet and confer where a plaintiff's complaint is filed for an improper purpose. The court does not find this argument to be persuasive—there is no "improper purpose" exception in the Code, nor is "improper purpose" a recognized basis for a demurrer. Nevertheless, even though Defendants have not fulfilled their statutory obligation, the Code of Civil Procedure also makes it clear that an insufficient meet-and-confer process is not itself a basis for overruling a demurrer. (See e.g., *Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 515 ["Indeed, subdivision (a)(4) [of Code of Civil Procedure section 430.41] provides that 'any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer.'"]; see also *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds].) The court will therefore consider the merits of the demurrer.

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[9] The Court declines to grant judicial notice of the exhibits included with Defendants' reply brief. (See e.g., *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."].)

V. THE MERITS OF THE DEMURRER

Defendants bring their demurrer to the entire complaint under Code of Civil Procedure section 430.10, subdivision (c), which allows a demurrer if there is another action pending between the same parties on the same causes of action. If the parties stand in the same relationship in each action and identical causes of action are involved—i.e., judgment in the first action would be res judicata as to the second—then the court can stay the second action until the first one is resolved. (See *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 789 (*Plant Insulation*); *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1384 (*Bush*).) The identity of the "cause of action" is determined by a comparison of the facts alleged in each complaint. (*Bush, supra,* 10 Cal.App.4th at p. 384.) "Where a demurrer is sustained on the ground of another action pending, the proper order is not a dismissal, but abatement of further proceedings pending termination of the first action." (*Plant Insulation, supra,* 224 Cal.App.3d at p. 788.)

In support of their demurrer, Defendants contend: 1) that Theodorakis's First Filed Action arises from the same primary rights as his Second Filed Action, and 2) that Theodorakis cannot evade the court's prior rulings in the First Filed Action by initiating this Second Filed Action.

A. Primary Rights

"California has consistently applied the 'primary rights' theory in defining a cause of action. Under this theory, the invasion of one 'primary right' gives rise to a single cause of action, even though several remedies may be available to protect the primary right." (*Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299-1300.) "In particular, the primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of the primary right." (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589.)

"[T]he 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief.'" (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795 [internal citations omitted, emphasis original].) "Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798.)

Defendants argue that Theodorakis has admitted that the allegations in the Second Filed Action—i.e., that Defendants failed to honor their obligations under the Separation Agreement—are the same as those alleged in the First Filed Action; accordingly, the primary rights asserted in the Second Filed Action are exactly the same as those sought to be included in the proposed second amended complaint in the First Filed Action. (Demurrer, pp. 13:19-23; 14:9-14, citing Theodorakis's Notice of Related Case, filed 5/9/2024 [admitting that the Second Filed Action involves the same parties, similar claims, the same events, required

determining the same questions of law or fact, and involved the same claims and damages as the First Filed Action].)[10]

The court has reviewed the pleadings in the First Filed Action and the Second Filed Action, including the proposed second amended complaint in the First Filed Action and it agrees with Defendants: the primary rights in both cases are the same. Specifically, Theodorakis seeks redress for Defendants' violations of the Token Agreement and the Separation Agreement in both cases. In addition, the general allegations in the operative pleadings or proposed pleadings in both cases are exactly the same. (See Compl., ¶¶ 9-38; see also Defendants' RJN, Ex. 8, ¶¶ 9-38.) Furthermore, Defendants are correct that Theodorakis's Notice of Related Case essentially admits as much. (See Notice of Related Case, 5/9/2024, p. 1.)

In opposition, Theodorakis concedes that both actions involve the same parties, same claims, arise from the same events requiring determination of the same questions of law or fact, and involve claims against or damages to the same property. Indeed, he does not object to the abatement of the Second Filed Action, because he argues that he never intended to serve Defendants with the Second Filed Action, and it is his intention to move to consolidate both actions under the First Filed Action. (Opposition, p. 4:9-10 ["Therefore, Plaintiff does not object to the Court abating the pending action until such consolidation can be accomplished."].) Accordingly, the parties are essentially in agreement that the demurrer may be sustained under Code of Civil Procedure section 430.10, subdivision (c).

B. Evasion of the Court's Prior Rulings in the First Filed Action

While the court also finds persuasive Defendants second argument that the Second Filed Action was an attempt to circumvent Judge Pennypacker's denial of leave to amend in Theodorakis's May 2, 2023 ex parte application, the court declines to sustain the demurrer on this basis, as it is unnecessary.[11] (See Demurrer, p. 10, citing RJN, Ex. 10, p. 2; Opposition, p. 2:13-18.)

The court SUSTAINS Defendants' special demurrer to the complaint. The sustaining of Defendants' demurrer ABATES further proceedings in this matter until the outcome of the First Filed Action.[12] (See e.g., *Plant Insulation, supra*, 224 Cal.App.3d at p. 788.)

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[10] On its own motion, the court takes judicial notice of the Notice of Related Case, on file with this court. (See *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752 ["the court may take judicial notice on its own volition"]; *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].)

[11] Any argument by Theodorakis that Judge Pennypacker was "misled" into denying his ex parte application is not well taken. (See Opposition, pp. 4:3-4, 6:14-17.) The application was denied on the ground that it did not demonstrate entitlement to ex parte relief, and because Theodorakis continued to pursue his federal action with the intent to file an amended complaint. (See May 9, 2024 Order on Ex Parte Application, p. 2.) Also, this Second Filed Action was filed *only one day* after Judge Pennypacker's ex parte order. Finally, even if Theodorakis was concerned about preserving the statutes of limitations on his various legal theories (which all ultimately appear to revolve around the same basic facts), he could have simply filed a noticed motion in the First Filed Action or amended his arbitration demand with JAMS, as Defendants rightly note.

[12] In reply, Defendants raise several arguments not addressed in their motion, including: a sham pleading argument (Reply, pp. 7-8); a request that the court strike the complaint in the Second Filed Action (Reply, p. 6:19-20); and a request that the court dismiss the Second Filed Action (Reply, p. 9:17-19). Defendants do not say anything about sham pleading in their opening papers. (See *Proctor v. Vishay Intertechnology, Inc.* (2013) 213

VI. SANCTIONS

In their opening memorandum of point and authorities, Defendants request sanctions against Theodorakis and his counsel under Code of Civil Procedure sections 128.5 and 177.5.

Section 128.5 provides: "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (a).) As Theodorakis correctly points out in opposition, however, such a request must be made by means of a *separately noticed motion*. (See Code Civ. Proc., § 128.5, subd. (f)(1)(A) ["A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay."].) Here not only is there no separately noticed motion, even Defendants' *notice of demurrer* makes no mention of sanctions under either section 128.5 or section 177.5. Thus, the request must be DENIED, without prejudice.

Moreover, sanctions under Code of Civil Procedure section 177.5 are inappropriate here. Section 177.5 provides:

> A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, *payable to the court*, for *any violation of a lawful court order* by a person, done without good cause or substantial justification. This power shall not apply to advocacy of counsel before the court. For the purposes of this section, the term "person" includes a witness, a party, a party's attorney, or both.

(Code Civ. Proc., § 177.5 [emphasis added].) Defendants appear to contend that Theodorakis violated Judge Pennypacker's May 8, 2024 order denying leave to file a second amended complaint in the First Filed Action. But the court does not find that filing the present action directly violated that order, as Theodorakis did not attempt to file a second amended complaint in that case. At best, the filing of a new complaint in this second action would be deemed an "end run" around that order, rather than a direct violation. Accordingly, the court denies sanctions under section 177.5.

This case is currently set for an initial case management conference on October 29, 2024 at 3:30 p.m. in Department 10. In view of the court's order abating this action, the court VACATES that date and instead sets this matter for a case management conference on **March 11, 2025 at 10:00 a.m.** in Department 10. At that time, if this case is still assigned to Department 10 (i.e., if Theodorakis has not filed a motion to consolidate in Case No.

Cal.App.4th 1258, 1273 ["points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before"].) Additionally, no motion to strike was properly noticed before this court. Finally, in sustaining a demurrer under Code of Civil Procedure section 430.10, subdivision (c), the result is abatement of further proceedings, not a dismissal of the action. (*People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 771 ["Where abatement is required, the second action should be stayed, not dismissed."]; see also *Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574 ["Abatement of the second action is a matter of right."].)

22CV403734, as he claims he was planning to do—or if the parties have not so stipulated), then the court expects the parties to explain at that time why the case should not be reassigned to Department 6.

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Calendar Line 7
Case Name: *Bhupindar S. Dhillon et al. v. Kulwant Singh*
Case No.: 20CV362159

This is a motion by defendant Kulwant Singh to compel the depositions of third party Pritpal Kaur "and others," but in reality, it is a motion to allow Singh to bring members of the "public" to attend these depositions without limitation. The motion is not entirely clear as to who the "others" to be deposed are, but the list appears to consist of third parties Rajinder Singh Manger, Gurinderpal Singh, and Simrit Kamhoe. (Memorandum, p. 2:10-11.) The three members of the "public" identified in the motion are Baljeet Bainiwal, Harpal Chahal, and Surinder Sangha. All of these non-parties are apparently members of the same gurdwara, which is a Sikh place of worship.

Plaintiffs agreed to the depositions of Kaur and the "others," but then they balked when Bainiwal, Chahal, and Sangha showed up to Kaur's June 26, 2024 deposition without advance warning. Singh contends that these public observers did not cause any disturbance or intimidation—rather, "they sat quietly as observers" (Memorandum, pp. 4:23-5:1)—and Singh argues that members of the public are generally allowed to observe depositions, just as they are allowed to attend public court proceedings. Plaintiffs respond that these observers were "only present to intimidate, influence, and/or distract the witness from testifying," noting that Sangha "is currently under a restraining order from entering the Gurdwara," Bainiwal "is the ex-wife of Plaintiff, Sukhdev Singh Gainiwal," and Chahal currently has a defamation case pending against the plaintiffs (and others). (Opposition, pp. 4:6-5:6.)

In the end, the court finds that neither side has provided an adequate explanation for their respective positions. On the one hand, Plaintiffs do not fully explain why the presence of these observers caused (or would cause) intimidation, distraction, or undue influence. On the other hand, Singh fails to explain why he needed these observers to attend the deposition at all. It would be one thing if these observers had unique information that would assist Singh's counsel in asking questions of the witnesses, but that rationale has not been articulated here. On the other hand, if these observers simply want to know what the witness's sworn testimony is going to be, they could easily get that from reviewing the transcript or watching a video of the deposition. In the end, the court discerns no good reason for these third-party observers to attend the deposition in person, and if the deposition witnesses could potentially be intimidated or distracted by their presence, then that unnecessary risk must give way to the fundamental purpose of a deposition, which is to *obtain relevant pretrial discovery* to prepare for a trial. Contrary to Singh's contention, a deposition is not the same as a public courtroom, because in a courtroom, there is a neutral referee (or judge) present, and there is also courtroom security in the form of a bailiff (usually). In the unregulated conference room setting of a deposition, by contrast, it is far too easy for matters to get out of hand if there are disagreements between the parties and non-parties, and especially so if there are multiple "observers" present who have hostile views of one of the parties or of the deposition witness. In the end, Plaintiffs have argued that the presence of these observers could potentially lead to intimidation, distraction, or undue influence, and that is enough for the court, given the apparent hostility between these members (or former members) of the gurdwara.

The court therefore DENIES Singh's motion. The depositions are to proceed *with each side agreeing in advance as to who may attend each deposition*. If no agreement is reached in

advance, then the depositions shall proceed with only the essential participants: the witness, the attorneys, the court reporter, and the videographer (if any).

It is so ordered.

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Calendar Lines 8-9
Case Name: *Christian Humanitarian Aid, Inc. v. AM Star Construction, Inc. et al.*
Case No.: 22CV396170

Presently before the court are motions by Christian Humanitarian Aid, Inc. ("CHA") to compel further responses to form interrogatories and to compel further responses to special interrogatories from defendant Michael Achkar. These motions arise from the same circumstances as CHA's motion to compel further responses to document requests from Achkar, which the court heard last week, on August 29, 2024. The parties have filed substantially similar and overlapping briefs for all three motions.

1. Form Interrogatories

As with the motion on the document requests, Achkar's opposition does not dispute that his prior responses were deficient; instead, Achkar argues that his "failure to comply with the request for documents was justified [because] Defendant had tendered this matter to his insurance carrier[,] and it was during this transition period that Plaintiff filed the instant motion to compel." (Opposition, p. 6:18-21.) Achkar goes on to argue that once insurance defense counsel was assigned, "both defense counsel and Mr. Achkar worked diligently to prepare, revise, finalize and serve his supplemental responses to the three sets of discovery propounded by Plaintiff." (*Id.* at p. 6:21-23.) Achkar ultimately served supplemental answers on August 20, 2024. (Declaration of Kathryn T. Camerlengo, ¶ 13.)

CHA argues that several of Achkar's supplemental answers are still inadequate, and the court agrees. Achkar must supplement his answer to **Form Interrogatory No. 8.6** to identify the dates he "did not work and for which [he] lost income as a result of the Incident." He must supplement his answer to **Form Interrogatory No. 8.7** to identify how the amount of his claimed losses ("$100,000-$200,000") was calculated. He must supplement his answer to **Form Interrogatory No. 14.1** must more specifically identify the "Person" and the "statute, ordinance, or regulation" at issue.

Finally, CHA argues that Achkar must supplement his answer to **Form Interrogatory No. 17.1** with respect to those requests for admissions that were "[a]dmitted in part and denied in part." The court disagrees and finds that the answer to Form Interrogatory No. 17.1 is adequate because the portions of the RFAs that were denied in part require no further explanation.

GRANTED in part and DENIED in part. Achkar shall supplement his answers to Nos. 8.6, 8.7, and 14.1 within 20 days of notice of entry of this order.

2. Special Interrogatories

As with the motions on the document requests and form interrogatories, Achkar's opposition to this motion repeats the same arguments and purported justifications for the late substantive responses. CHA's reply again takes issue with at least one of Achkar's supplemental answers—the response to Special Interrogatory No. 20. The court once again agrees that the description of Achkar's injuries is insufficiently responsive. Achkar must supplement his answer to specify the exact injuries he received—not just that they occurred to his neck, back, or wrists—within 20 days of notice of entry of this order.

3. Sanctions

As with the document request motion, CHA requests monetary sanctions from Achkar for his late and deficient responses. As with that motion, the court finds that Achkar did not act with substantial justification in connection with the interrogatories, but also that the requested sanctions are excessive. For both of the interrogatory motions, collectively, the court orders Achkar to pay CHA a total monetary sanction of **$2,727.50** (representing two hours at $535/hour plus four hours at $350/hour plus the two filings fees of $128.75 for each motion) within 30 days of notice of entry of this order.

Again, the purpose of discovery sanctions is compensatory, not punitive.

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Calendar Line 10
Case Name: *Xiaoxue Wu et al. v. Xiang Wang et al.*
Case No.: 23CV427462

This is a motion to compel further responses to numerous special interrogatories and document requests propounded by plaintiffs Xiaoxue Wu and Rui Su on defendant Jin Li Yuan, Inc. ("JLY"). The court has reviewed the requests, responses, and amended responses and now rules as follows:

Wu Special Interrogatories Nos. 1, 12, and 18: the court finds that these interrogatories seek information that is reasonably calculated to lead to the discovery of admissible information. Although answering fully will impose some burden on JLY, the court does not find that it would be unduly burdensome. JLY's arguments in opposition regarding the burden involved are conclusory and without substantiation, as are its arguments regarding "trade secrets" and third-party privacy. GRANTED.

Wu Special Interrogatory No. 19: JLY's answer is not sufficiently responsive. It is not enough to say that "Responding Party is producing documents concurrently." The interrogatory asks JLY to identify those documents. Although the court does not necessarily see the value in identifying the "telephone number of each person who prepared each document" or "the date each document was prepared," the court does find that JLY needs to identify the documents. GRANTED IN PART.

Wu Special Interrogatories Nos 20 & 21 / Su Special Interrogatories Nos. 13 & 14: these interrogatories are broad and generic, and so JLY's broad and generic answers are sufficiently responsive. So long as JLY has produced the relevant documents, discussed below, the court finds that no further response to the interrogatories is necessary. DENIED.

Wu Special Interrogatories Nos. 24 & 25: it is not clear from the parties' papers whether JLY has produced Tang's pay stubs (including tips) for the entire time period at issue. The court does not understand JLY's argument that "[a]sking JLY to produce over 400 work days for Troy Tang's working hours is for harassing purpose and not for purpose for [sic] proving or disproving Wu's claims." The court finds that JLY does need to produce the pay stubs (with tips) for this period of time. On the other hand, if JLY has done so, then further answers to these interrogatories are unnecessary. PROVISIONALLY DENIED.

Wu Special Interrogatories Nos. 28-31 / Su Special Interrogatories Nos. 19-22: again, it is not clear from the parties' papers whether JLY has produced the Clover POS reports for the time period in question. Wu and Su argue that these reports "will show the total daily tips." If so, then JLY's responses to these interrogatories are adequate. If not, then JLY either needs to provide responsive answers or produce the documents in question. PROVISIONALLY DENIED.

Wu Special Interrogatory No. 37: this response is inadequate. JLY must provide a verified answer stating what software was used during the relevant time period. If it was only Clover, then the verified answer must say so. GRANTED.

Wu Requests for Production Nos. 1-2 / Su Requests for Production Nos. 1-2: JLY's written responses are ambiguous and do not comply with Code of Civil Procedure sections 2031.210, 2031.220, 2031.230, and 2031.240, which require either a clear (and verified)

statement of compliance *or* a statement of inability to comply. JLY's responses are filled with caveats and other hedging language that are improper. If JLY has indeed produced all responsive documents in its possession, custody, and control—as it contends in its opposition papers—then it must clearly say so in a verified response. GRANTED.

Wu Request for Production No. 10: JLY's responses fail to address this request. In addition, the court disagrees with JLY's contention that this "interrogatory[sic]" seeks "irrelevant information." (JLY's Separate Statement, p. 15:19.) At the same time, the court finds that this request for production is overbroad, and so the court narrows it to the following: "Documents sufficient to show the shareholders of Jin Li Yuan, Inc." As narrowed, JLY must respond. GRANTED IN PART.

Wu Request for Production No. 12 / Su Request for Production No. 12: these responses are adequate. DENIED.

Verifications for the Discovery Responses: signing the verifications with "/s/" rather than a physical signature is inadequate. JLY must provide signed verifications for all of its discovery responses. GRANTED.

For those interrogatories or document requests as to which the court has granted the motion, JLY shall provide supplemental and verified responses within 30 days of notice of entry of this order.

Although the court is granting the motion in part and denying it in part, some of JLY's responses were clearly inadequate and unjustified, and so the court GRANTS plaintiffs' request for monetary sanctions IN PART. The court finds that 10 hours of attorney time for this motion is excessive—especially as it includes amounts for meet-and-confer efforts, as to which the court will not grant monetary sanctions, and speculative amounts for a reply brief and oral argument. The court orders JLY to pay monetary sanctions in the amount of **$1,410.00** (consisting of three hours at $450/hour plus the $60 filing fee) within 30 days of notice of entry of this order. As a reminder, the purpose of discovery sanctions is compensatory and not punitive.

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Calendar Line 12
Case Name: *Joseph Garcia Susbilla v. Crescent Oaks Memory Care*
Case No.: 23CV412455

This is a motion for a preferential trial setting under Code of Civil Procedure section 36. Plaintiff Joseph Garcia Susbilla is over 70 years old and suffers from poor health, including dementia, according to his counsel's declaration, and so he argues that he is entitled to a trial within 120 days under section 36, subdivision (a). Notice is proper for this motion, and it remains unopposed. There is no dispute that plaintiff meets the statutory requirements.

At the same time, the court is somewhat puzzled by this motion. The trial in this case is already set for Monday, January 6, 2025, which is 123 days from the date of this hearing. Therefore, the court does not fully understand why plaintiff feels the need to advance the trial date, which is already coming up quite soon. Nevertheless, the provisions of section 36 are mandatory, and the court's civil trial departments are not available during the weeks of December 23, 2024 and December 30, 2024 because of the holidays, and so the court has no choice but to reset this trial to **December 16, 2024**. That means the mandatory settlement conference will now be on **December 11, 2024** (time TBD) and the trial assignment conference will be on **December 12, 2024** at 1:30 p.m. in Department 6.

The motion is GRANTED under section 36

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Calendar Line 13
Case Name: *Jane AAY Doe v. Alum Rock Union School District et al.*
Case No.: 24CV429076

This is a motion for a preferential trial setting under Code of Civil Procedure section 36. Plaintiff Jane AAY Doe is under 14 years of age, and so she argues that section 36, subdivision (b), applies to the present case. Defendant Alum Rock Union School District (the "District") opposes the motion on the merits, and defendant Maria Gutierrez objects to the motion on the ground that she was never served with the motion and has not had time to prepare a response.

Gutierrez has a point. At the time Doe filed this motion—May 29, 2024—Gutierrez was not a named defendant in this case, and she was not added until the end of July 2024. There is no proof of service in the file showing that she ever received notice of this motion. Code of Civil Procedure section 36, subdivision (c), requires that a motion for preferential trial setting be accompanied by a declaration stating that "all essential parties have been served with process or have appeared." (Code Civ. Proc., § 36, subd. (c).) Although Doe submitted such a declaration with her motion, it was apparently premature and erroneous.

Thus, assuming that all essential parties have *now* been served with process or have appeared, the court CONTINUES the hearing on this motion to **October 17, 2024 at 9:00 a.m.** Gutierrez will have until October 4, 2024 to file a substantive response to the motion, and Doe may file an optional reply by October 10, 2024.[13]

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[13] The parties and counsel should keep in mind that if the court ultimately grants the motion, then section 36 will *mandate* the setting of a trial within 120 days, and counsel's stated unavailability (including the "prepaid vacations" described in Gutierrez's Objections at p. 2:8-14 and the Velez Declaration at paragraph 3) will have to give way to the Legislature's mandate.