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

**Department 16**
**(Dept 16 is now hearing cases that were formerly in Dept 2)**
## Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

**DATE: 11-07-24 TIME: 9 A.M.**

**All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.**

**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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)**

**TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:**

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

**TO APPEAR AT THE HEARING**: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

**FINAL ORDERS:** The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 24CV441190 Hearing: Order of Examination | BALBOA CAPITAL CORPORATION vs ERIC GLENN PRIVETT, a sole proprietership et al | All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line. |
| LINE 2 | 24CV433325 Motion: Strike | FPP MB, LLC vs Jennifer Lewis et al | Off Calendar |
| LINE 3 | 24CV433325 Hearing: Demurrer | FPP MB, LLC vs Jennifer Lewis et al | Off Calendar |
| LINE 4 | 23CV425919 Motion: Summary Judgment/Adjudication | Louis Versman vs EDWARD KARPMAN et al | See Tentative Ruling. The Court will issue the final order. |
| LINE 5 | 20CV368334 Motion: Compel | Anthony Canciamilla et al vs Rumit Kotak | See Tentative Ruling. Plaintiffs shall submit the final order. |
| LINE 6 | 19CV356372 Hearing: Claim of Exemption | Navy Federal Credit Union vs Donna Smith Brown | The court has not received any claim for exemption and thus the matter is taken off calendar. If this is incorrect, the debtor must appear at the hearing and must notify judgment creditor no later than 4 p.m. today that it also needs to appear at the hearing. |
| LINE 7 | 23CV410157 Motion to Appoint Discovery Referee | Jane Doe vs Support Systems Homes, Inc. et al | The motion is mooted by the stipulation of the parties filed 10/29/24. All discovery motions currently on calendar are stayed pending the parties' going to the discovery referee. |

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**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)**

| | | | |
|---|---|---|---|
| LINE 8 | 24CV435239 Motion to Compel Arbitration and Stay Proceedings | Nancy Duenkel vs Palo Alto Networks, Inc. | See Tentative Ruling. Defendant shall submit the final order. |
| LINE 9 | | | |
| LINE 10 | | | |
| LINE 11 | | | |
| LINE 12 | | | |
| LINE 13 | | | |
| LINE 14 | | | |
| LINE 15 | | | |
| LINE 16 | | | |
| LINE 17 | | | |

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**Calendar line 4**
**Case Name:** ***Versman v. Karpman, et al.***
**Case No.:** **21CV383578**

This is a medical malpractice action. According to the allegations of the complaint, plaintiff Louis Versman ("Plaintiff") underwent a cystoprostatectomy procedure for urothelial cancer treatment in which his bladder, prostate and urethra were removed. (See complaint, ¶¶ 18-19.) Plaintiff had a full recovery; however, the procedure left Plaintiff impotent and unable to achieve a penile erection. (See complaint, ¶ 19.) Because Plaintiff's erectile dysfunction began impacting his mental health, he sought treatment and on March 14, 2023, Plaintiff had a penile implant procedure performed by defendant Dr. Edward Karpman ("Karpman"). (See complaint, ¶¶ 19-27.) Unbeknownst to Plaintiff, during the surgery, Karpman incorrectly punctured Plaintiff's colon and placed the reservoir into Plaintiff's colon instead of the lateral retroperitoneal space on the side opposing his stoma. (See complaint, ¶ 28.) Karpman assured Plaintiff that the surgery went well and was without complications; however, three days later, Plaintiff's scrotum became severely swollen and Plaintiff was in severe pain. (See complaint, ¶¶ 29-30.) Plaintiff called Karpman to inform him of the swelling and pain and Karpman told Plaintiff to wait a week and if he was still in pain, that he should come to see him. (See complaint, ¶ 31.) Plaintiff remained in excruciating pain for a week, and saw Karpman on March 21, 2023, who made him wait for over an hour in the waiting room. (See complaint, ¶¶ 31-32.) Plaintiff's pain continued to increase and after the front office staff noticed Plaintiff's moaning in agony, they brought him to an exam room. (See complaint, ¶ 34.) Karpman examined Plaintiff's scrotum and was shocked to see that it was swollen, black and blue, and told him to give it a week, did not perform any diagnostic tests and scolded Plaintiff that he was not wearing tight enough underwear. (See complaint, ¶¶ 35-36.) When Plaintiff informed Karpman that the pamphlet that Karpman gave him specifically instructed him to not wear tight underwear, Karpman looked at the pamphlet and told Plaintiff that the information was wrong. (See complaint, ¶ 37.) After a week passed by, Plaintiff was still in immense pain, and was instructed then to go to El Camino Hospital for a CT scan. (See complaint, ¶ 38.) After the CT scan, on the return trip back home, Plaintiff received a call instructing him to return to the hospital immediately. (*Id.*) Back at El Camino Hospital, Karpman informed Plaintiff that he needed emergency surgery because the reservoir was placed in his colon instead of the lateral retroperitoneal space on the side opposing his stoma. (See complaint, ¶¶ 39-40.) Plaintiff thus underwent emergency surgery on March 28, 2023 to have the implant removed from his penis and colon to correct Karpman's mistake, necessitating recovery for a week after the surgery; a colostomy bag was also placed due to Karpman's puncturing of Plaintiff's colon. (See complaint, ¶ 41.) On April 7, 2023, while Plaintiff was recovering from the emergency surgery, Plaintiff had a CT scan, which showed the presence of a malignant cancerous tumor on Plaintiff's stomach; however, Karpman either failed to review the CT scan or failed to communicate that a possibly cancerous mass was found. (See complaint, ¶¶ 42-44.) Nearly six months later, Plaintiff had another CT scan at UCSF which found the presence of the cancerous tumor, and in comparing both CT scans, noticed that the tumor was also present in the April 2023 CT scan. (See complaint, ¶ 46.) By the time that the UCSF doctor, Dr. Emily Finlayson, diagnosed the cancer in Plaintiff's stomach, it had spread to his liver. (See complaint, ¶ 47.) Additionally, Plaintiff was never given any instruction for the colostomy bag, and none of the nurses at El Camino Hospital or the Santa Cruz Post-Acute at the knew how to properly change Plaintiff's colostomy bag, so Plaintiff woke up covered in his own feces on multiple occasions. (See complaint, ¶¶ 50-52.) Plaintiff's sleep, diet, and social life

have been negatively impacted by the colostomy bag, and Plaintiff may never have it removed. (See complaint, ¶¶ 53-59.)

On November 8, 2023, Plaintiff filed a complaint against Karpman and El Camino Hospital ("ECH"), asserting causes of action for:

1) Medical battery (against Karman and ECH);
2) Medical negligence (against Karpman and ECH); and,
3) Abandonment (against Karpman and ECH).

On October 22, 2024, Plaintiff filed a request for dismissal as to defendant ECH.

Defendant Karpman moves for summary judgment, or, in the alternative, moves for summary adjudication of the cause of action for medical negligence.

DEFENDANT KARPMAN'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF CAUSE OF ACTION FOR MEDICAL NEGLIGENCE

Defendant's burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Defendant Karpman fails to meet his initial burden.

"The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Johnson v. Super. Ct. (Rosenthal)* (2006) 143 Cal.App.4th 297, 305, citing *Hanson v. Grode* (1999) 76 Cal.App.4th 601. 606; see also *Budd v. Nixen* (1971) 6 Cal.3d 195, 200; see also *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122.)

California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.

(*Munro v. Regents of the University of California* (1989) 215 Cal.App.3d 977, 984-985, quoting *Hutchison v. United States* (9th Cir. 1988) F.2d 390, 392).)

Defendant Karpman argues that the cause of action for professional negligence lacks merit as to him because Plaintiff cannot demonstrate causation of injuries or the breach of the standard of care. In support of his motion, Karpman presents the declaration of prosthetic urologist Dr. Steven Wilson, Dr. Wilson's curriculum vitae and Plaintiff's medical records.

Dr. Wilson states that: Karpman discussed the possible erosion of component and possibility of bowel injury as an adverse event in patients who previously had required cysto-prostatectomy and Plaintiff nonetheless decided to proceed with the surgery; Plaintiff agreed to the surgery and gave a consent including the consent form for the medical procedure; on March 22, 2023, Karpman saw Plaintiff who had scrotal swelling but noted that Plaintiff's abdomen was soft, non-tender and that no inguinal hernia was noted; on March 27, 2023, Plaintiff received a CT scan which was read as reservoir partially herniated into scrotum and partially perforated into Sigmoid and thereafter, Karpman instructed Plaintiff to return for an emergency surgery; Wilson believes it is unlikely that the reservoir was placed inside the colon at time of the implantation because his abdomen was soft and Plaintiff was not sick within 24 hours post operation; and, it is likely that the reservoir herniated from a high submuscular location in the abdominal wall down though the inguinal ring into the upper scrotum after surgery which is a complication that would not be below the standard of care. (See Wilson decl. in support of motion for summary judgment, ¶¶ 6-12.)

As to the placement of the reservoir inside Plaintiff's colon, Dr. Wilson says:

I believe it is unlikely that the reservoir was placed inside the colon at the time of the implantation….

A likely explanation as to why complications after the surgery arose, is that post operatively the reservoir herniated from a high submuscular location in the abdominal wall down though the inguinal ring into the upper scrotum. The sigmoid colon because of the cystoprostatectomy had migrated from deep in the pelvis to the place previously occupied by the bladder and a loop of bowel became fixed to the anterior abdominal wall. No harm was caused initially by the reservoir but over time the pressure from the inflated reservoir on the sigmoid which was adhered to the area of the inguinal ring trapped a small segment of bowel.

The sigmoid was unable to move because of adherence of the bowel because of adhesions precipitated by the removal of the bladder. Eventually a tiny segment (.5 x 1 inch) of the colon became necrotic. Loss of continuity of the bowel caused exit of feces into the space and drainage of the bowel contents into the scrotum causing scrotal abscess and a very sick patient. This complication arising from a very difficult surgery would not qualify the treatment and care given by Dr. Karpman to be below the standard of care.

(Karpman decl., ¶¶ 8-9.)

"The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case." (*Jones v. Ortho Pharm. Corp*. (1985) 163 Cal.App.3d 396, 402; see also *Kline v. Zimmer, Inc*. (2022) 79 Cal.App.5th 123, 129 (stating that "[u]nder California law, causation 'in a personal injury action … must be proven within a reasonable medical probability based upon competent expert testimony'"); see also *Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 971 (finding that "[t]his declaration is insufficient to raise a triable issue of fact on the element of causation: 'a chance' does not amount to a reasonable medical probability").) Here, Wilson provides a "likely explanation," but this possibility does not demonstrate that it must have occurred within a reasonable medical probability. Accordingly, Karpman fails to meet his initial burden that he met the standard of care in the subject procedures, and thus did not breach any standard of care, and also that no act or omission on Karpman's part was a substantial factor in harm or injury to Plaintiff, to a reasonable degree of medical probability.

Plaintiff's objections to Wilson's declaration are not the basis for the Court's ruling.

Even if Karpman had met his initial burden, Plaintiff demonstrate the existence of a triable issue of material fact.

Even if Karpman had met his initial burden, Plaintiff demonstrates the existence of a triable issue of material fact. In opposition, Plaintiff presents the declaration of urologist Dr. Andrew G. Rosenberg, M.D., who states that "[w]ithin a reasonable degree of medical probability, the iatronic event—accidental implantation of the reservoir into the colon during the procedure, was a substantial factor—and thus a 'legal cause'—of Louis Versman's bowel perforation and resulting colostomy." (Rosenberg decl. in opposition to Karpman's motion for summary judgment ("Rosenberg decl."), ¶ 12.) Rosenberg strongly disagrees with the possibility proffered by Wilson, stating that "in my medical opinion, it would be physically impossible for the reservoir, inflated to 75cc after placement during implantation, to migrate through the 'tiny segment (.5 x 1 inch) of the colon. Additionally, pathology performed on the 'colon with 'reservoir hole'' at El Camino Hospital indicates perforation and 'associated granulation tissue'—an indicator that the injury was several days old and not the result of a migration episode." (Rosenberg decl., ¶ 10.) Rosenberg further states: "In my opinion, the only possible explanation for the location of the reservoir… is that it was placed there intraoperatively, for a reservoir filled to 75cc after implantation could not physically herniate and erode into the bowel through such a small opening as described above [in Wilson's declaration]. In other words, the only medical explanation for the location of the reservoir on explanation is that this was the result of an iatrogenic event—something caused unintentionally by a medical professional or treatment and not a natural result of the patient's condition. Said iatrogenic bowel perforation resulted from Dr. Edward Karpman's breach of the applicable

standard of care of a urologist in his position performing placement of multi component inflatable penile prosthesis." (Rosenberg decl., ¶ 11.) Here, this evidence demonstrates the existence of a triable issue of material fact as to Karpman's actions being within the standard of care, and the causation of Plaintiff's injury. Dr. Rosenberg also states that Karpman failed to advise Plaintiff to consider implanting a semirigid device or an Ambicor or self-contained inflatable device, demonstrating the existence of a triable issue of material fact as to informed consent. Plaintiff thus meets his burden to demonstrate the existence of a triable issue of material fact.

In reply, Karpman argues that Plaintiff's responses to requests for admissions presented for the first time in reply establish that Plaintiff cannot demonstrate the existence of a triable issue of material fact despite Rosenberg's declaration. (See Karpman's reply brief in support of motion for summary judgment ("reply brief"), pp.2:17-28, 3:1-16.) However, the Court declines to consider this evidence filed for the first time in reply. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 (stating that "[i]n considering this evidence [filed for the first time in reply], the court violated assignee's due process rights… [w]here a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail"); see also *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1266 (stating same); see also M*oore v. William Jessup University* (2015) 243 Cal.App.4th 427, 432, fn. 3 (stating that "a party moving for summary judgment may not rely on new evidence filed with its reply papers").)

Karpman also argues that Plaintiff fails to address the issues of abandonment and medical battery. (See reply brief, pp.4:3-28, 5:1-5.) As to medical battery, Plaintiff does specifically present evidence regarding the issue. (See Rosenberg decl., ¶ 8.) Regardless, Karpman does not move for summary adjudication of the first and third causes of action—only to the second cause of action for medical negligence. (See Karpman's notice of motion for summary judgment, or, in the alternative, for summary adjudication, pp.2:3-21 (stating that, in the alternative, Karpman moves for summary adjudication of "Plaintiff's Cause of Action for Medical Negligence… Because the Undisputed Material Facts Demonstrate Defendant's Actions Were Within the Standard of Care" and "Plaintiff's Cause of Action for Medical Negligence… Because the Undisputed Material Facts Demonstrate a Lack of Causation"); see also Karpman's Separate Statement of Undisputed Facts, pp.2:3-5 (listing "ISSUE ONE: "Plaintiff's Cause of Action for Medical Negligence… Because the Undisputed Material Facts Demonstrate Defendant's Actions Were Within the Standard of Care"), 7:16-18 (stating that "Plaintiff's Cause of Action for Medical Negligence… Because the Undisputed Material Facts Demonstrate a Lack of Causation"); see also *San Diego Watercrafts, Inc*., *supra*, 102 Cal.App.4th at p.316 (stating that "[t]he due process aspect of the separate statement requirement is self evident--to inform the opposing party of the evidence to be disputed to defeat the motion").)

As multiple triable issues of material fact exist, Karpman's motion for summary judgment is DENIED.

The Court will issue the final order.

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**Calendar Line 5**
**Case Name:** *Anthony Canciamilla et al v. Rumit Kotak et al.*
**Case No.:** 20CV368334

**Facts**

Plaintiffs Anthony Canciamilla and Maria Canciamilla ("Plaintiffs") bring this action against defendant Rumit Kotak ("Defendant").

Since 2011, Plaintiffs have owned and resided at the real property located on Hillcrest Drive in San Jose ("the Canciamilla Property"). (First Amended Complaint ("FAC"), ¶ 7.) In 2018, Defendant purchased the adjacent property ("the Kotak Property"). (*Id.* at ¶ 8.)

Thereafter, Defendant began performing construction on his property without permits as required by the City of San Jose ("the City"). (See FAC, ¶¶ 14, 26, 50, 56.) This construction altered the water runoff patterns and significantly increased the volume and concentrated flow of water from the Kotak Property onto the Canciamilla Property. (*Id.* at ¶¶ 19, 20, 63.) Prior to any construction, water runoff was released to a separate lot or to the street. (*Id.* at ¶ 11.) This water runoff resulted in flooding of the Plaintiffs' yard, basement, and under their home. (*Id.* at ¶¶ 30, 34, 52.) Additionally, the water runoff washed out the support for Plaintiffs' raised pool and patio and has caused the pool area and patio to crack and pull away from their home. (*Id.* at ¶ 34.) Further, while Defendant was re-grading his property, he stored tools against Plaintiffs' fence causing a section of the fence to fall over. (*Id.* at ¶ 45.)

Through counsel, Plaintiffs informed Defendant of the harm he was causing. (FAC, ¶ 56.) They requested that Defendant cease construction until he could get the proper permits and put in place safeguards for the construction. (*Ibid.*) Plaintiffs also requested that Defendant repair the destroyed fence; however, Defendant conditioned the repairs on the Plaintiffs contributing to the cost. (*Ibid*.) Defendant declined to make any changes to his construction or conduct and has continued the unpermitted construction despite being aware of the damage the construction and waterflow is causing to Plaintiffs. (*Ibid*.)

On July 3, 2023, Plaintiffs filed their verified FAC, asserting the following causes of action against Defendant:

1) Trespass;
2) Private nuisance;
3) Negligence;
4) Injunctive relief;
5) Abandonment of easement;
6) Declaratory relief; and
7) Quiet title.

On June 7. 2024, Plaintiffs filed a motion to compel further responses to Plaintiffs' interrogatory requests, SROG 25 and FROG s10.2, 12.4, 12.5(c), and 12.6 and for sanctions.[1] Defendant opposes the motion.

**Analysis**

SROG 25: IDENTIFY all DOCUMENTS that reflect the dates upon which all DRAINAGE PIPE was INSTALLED on the PROPERTY after April 27, 2018.

Defendant points out that this interrogatory no longer appears to be in dispute as it is not one of the interrogatories mentioned in Plaintiffs' last meet and confer letter of May 8, 2024. See Ex. 11 to Decl. of Shaw. Moveover, the questions asks Defendant to identify documents, not to provide the date of the pipe installation. Defendant has identified the documents. This request is DENIED.

FROG 10.2: List all physical, mental, and emotional disabilities you had immediately before the INCIDENT. (*You may omit mental or emotional disabilities unless you attribute any mental or emotional injury to the INCIDENT*.)

Plaintiff responded "not applicable." The request is relevant because Plaintiff makes a claim of intentional infliction of emotional distress in his First Amended Cross-Complaint. "Not applicable" does not have the same meaning as "none." Because the question is relevant and Plaintiff has not squarely answered the question, he is required to do so. "A party cannot state, 'not applicable' where the interrogatory is clearly applicable to him." *Deyo v. Kilbourne* (1978) 84 Cal. App. 3d 771, 783. This request is GRANTED.

FROG 12.4(c): Do YOU OR ANYONE ACTING ON YOUR BEHALF know of any photographs, films, or videotapes depicting any place, object, or individual concerning the INCIDENT or plaintiff's injuries? If so state: (c) the date the photographs, films, or videotapes were taken.

While Defendant has identified the various photographs and videos requested, he has failed to indicate the date of the photos. He claims that he would be required to make a summary under CCP 2030.230. But examining the metadata to provide the date of a photograph would not require a summary of the photographs. Rather it requires Defendant to obtain information from his computer which is not readily available to Plaintiffs. This is a reasonable part of discovery, as "a party has a general duty to conduct a reasonable investigation to obtain responsive information . . . and must furnish information from all sources under his or her control." *Regency Health Servs. v. Superior Court* (1998) 64 Cal. App. 4th 1496, 1504; see also *Deyo*, 84 Cal. App. 3d at 782 (one "cannot plead ignorance to information which can be obtained from sources under [one's] control"). Defendant cites no authority suggesting he is not required to provide this information. The request for the date of the photographs, films, or videos under Plaintiff's control request is GRANTED.

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[1] Plaintiffs request judicial notice of the FAC. The request is DENIED. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

FROG 12.5(c): Do YOU OR ANYONE ACTING ON YOUR BEHALF know of any diagram, reproduction, or model of any place or thing (except for items developed by expert witnesses covered by Code of Civil Procedure section 2034.210-2034.310) concerning the INCIDENT? If so, for each item state: (c) the name, ADDRESS, and telephone number of each PERSON who has it.

Plaintiffs claim that Defendant's answer is incomplete as it does not include the engineers who rendered the construction drawings. Defendant claims that because he is not certain whether or not his engineers have a copy of these documents, and because the names and contact information of all of his engineers were made available to plaintiffs, he need not include them in his response. This is incorrect. Defendant knows who made the drawings for him and he is required to provide those names to Plaintiffs, regardless of whether he knows if those individuals still have the drawings. Simply having provided the names of all engineers does not specify for Plaintiffs the ones who provided constructions drawings or diagrams or models. This request is GRANTED.

FROG 12.6: Was a report made by any PERSON concerning the INCIDENT? If so, state:
(a) the name, title, identification number, and employer of the PERSON who made the report;
(b) the date and type of report made;
(c) the name, ADDRESS, and telephone number of the PERSON for whom the report was made; and
(d) the name, ADDRESS, and telephone number of each PERSON who has the original or a copy of the report.

Defendant objects to this request on the basis that "incident" is vague and ambiguous and because the request seeks the premature disclosure of expert witness information. Incident, in this request and any other, is not vague or ambiguous. To the extent any reports exist which are not expert reports, in other words those undertaken for the work performed or permitted in the first place, those must be turned over. The Court agrees with Plaintiffs that engineers hired to plan Defendant's construction are *percipient* witnesses and any of their reports must be turned over. Defendant must produce reports that were not created by experts retained specifically for this litigation. This request is GRANTED.

Sanctions are appropriate, as Defendant has failed to successfully oppose the motion or provide substantial justification for his opposition to all questions other than SROG 25. Defendant and his counsel are required to pay Plaintiffs $1,320 (3 hours at $440) in sanctions. Code-complaint further responses and sanctions are due within 20 days of receipt of the final order. Plaintiffs are required to submit the final order.

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**Calendar Line 8**
**Case Name: Duenkel v. Palo Alto Networks**
**Case No.:** 24CV435239

Defendant Palo Alto Networks ("Defendant") moves to compel arbitration asserting that Plaintiff Nancy Duenkel agreed to arbitrate by clicking the "I agree" button when onboarding with the company. Plaintiff opposes the motion arguing that she did agree to arbitrate and denies doing so through the onboarding process and further claims that because Defendant cannot produce a signed arbitration agreement, she should not be compelled to arbitrate.

**Evidentiary Objection**

Plaintiff claims that the declaration of Defendant's business analyst, Janet Uyenco, is inadmissible because Uyenco lacks personal knowledge of Plaintiff's onboarding. This objection is overruled. Uyenco does purport to provide information requiring her personal knowledge. Rather her declaration describes the login and security system required to use Defendant's onboarding system. She describes how the user is required to use a unique login and password and is required to go through a two-step authentication process. She further describes, based on the onboarding system, how she can see all of the different information entered under Plaintiff's username and password, including contact information, tax information, confirmation of receipt of the employee handbook, as well as the response to the arbitration agreement. She states that she can tell at exactly what time each piece of information was entered. From her declaration one can infer or choose not to infer whether it was Plaintiff who entered the information. The question of whether it was Plaintiff is one of weight, not admissibility. Uyenco's declaration as to the system, how it works, and what information can be gleaned from it is all admissible evidence. The objection is OVERRULED.

**Requests for Judicial Notice**

Defendant's requests for judicial notice are DENIED. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

**Legal Standard**

A heavy presumption weighs the scales in favor of arbitrability, *Cione v. Foresters Equity Servs., Inc*. (1997) 58 Ca1.App.4th 625, 642, and courts will indulge every intendment to give effect to arbitration proceedings, *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1109.

**Analysis**

Before arbitration can be compelled, the moving party must demonstrate that the opposing party is a willing and knowing party to an arbitration agreement. The burden of persuasion is always on the moving party to prove the existence of an arbitration agreement. The moving party bears the burden of producing "prima facie evidence of a written agreement to arbitrate the controversy." *Gamboa v. Northeast Community Clinic* (2021) 72 Cal. App. 5th 158, 164.

Plaintiff claims that Defendant has failed to meet its burden because it has attached no signed arbitration agreement to its motion. Rather, Defendant has attached a copy of the agreement and provided evidence demonstrating that a party "signs" the arbitration agreement through an online portal for which the employee has a unique and secured password that requires two-factor authentication. Defendant provides evidence that once in the portal the employee is given the opportunity to review and agree to the arbitration agreement, is told that he or she is not required to sign the arbitration agreement, and is told that he or she can opt out of arbitration and given instructions for how to do so. Defendant asserts that Plaintiff agreed to arbitration by clicking the "I agree" button for the arbitration agreement and has provided the records of the online system demonstrating on what date and at one time the arbitration agreement was agreed to. See Decl. of Uyenco. This is sufficient to meet Defendant's initial burden.

Plaintiff now bears the burden of producing evidence to challenge the authenticity of the agreement. *Gamboa*, 72 Cal.App.5th at 165. She can do this by declaring under penalty of perjury that she never saw or does not remember seeing the agreement, and never signed it. *Id*. Plaintiff meets her burden as she states in her declaration that she does not recognize the agreement, does not recall it, and does not recall signing it. Decl. of Duenken at ¶¶ 9-10.

As such, it is Defendant's burden to establish with admissible evidence that a valid arbitration agreement exists between the parties. *Gamboa*, 72 Cal.App.5th at 165-66. "Civil Code section 1633.7, subdivision (b), provides electronic and handwritten signatures have the same legal effect and are equally enforceable. (Civ. Code, § 1633.7, subd. (a) ["A record or signature may not be denied legal effect or enforceability solely because it is in electronic form."].)" *Gamboa v. Northeast Community Clinic* (2021) 72 Cal. App. 5th 158, 168. Here, Defendant has proffered evidence that shows that someone, using Plaintiff's password, agreed to the arbitration agreement. See Decl. of Uyenco at ¶¶ 14-16. In paragraph 14 of her Declaration, Uyenco writes that "[i]f, and only if, an employee clicked 'I Agree' to the Arbitration Agreement, did Workday record that action with a date and time entry. As noted above, only with the correct username and unique password along with Plaintiff confirming network access through the two factor authentication process, could she access the Arbitration Agreement linked to her particular Workday profile and click 'I Agree.'" The records further show that the online system, Workday, recorded the date and time entry of July 30, 2021 at 3:06 pm as when the "I Agree" button was clicked. See Decl. of Uyenco ¶ 16 and Exs. D and E.

This is sufficient to authenticate Plaintiff's signature. Civil Code section 1633.9 addresses how a proponent of an electronic signature may authenticate the signature. The statute states: "(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." (Civ. Code, § 1633.9, subd. (a), italics added; see also *Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal. App. 4th 1047, 1061.) Here, Uyenco explains how the "I agree" button could only be clicked by someone using Plaintiff's unique login and password and two-factor authentication, she explains the security measures used by the system, and she explains that at or near the same time, Plaintiff signed many other documents and provided other information that Plaintiff does not dispute, such as her contact information and tax information. This is similar to the

information found sufficient to authenticate the signature in *Espejo v. Southern California Permanente Medical Group*, (2016) 46 Cal. App. 4th 1047, 1062. Defendant's evidence included and attached to the Declaration of Uyenco is sufficient to show by a preponderance of evidence that it was in fact Plaintiff who clicked the "I agree" button.

Here, the arbitration agreement was available for Plaintiff to read, instructions as to how to access the document were clear, the onboarding process made clear that signing the agreement was not required and that Plaintiff could opt out of the agreement, and the process for opting out was also made clear. See Decl of Uyenco ¶¶ 12-13 and Ex. F. The instructions made clear that by clicking "I agree" Plaintiff was agreeing that she read, understood, and agreed to the arbitration agreement. The Worksday system records show that the "I agree" button was clicked while using Plaintiff's login on July 30, 2021 at 3:06 p.m. This is sufficient to show that Plaintiff knowingly signed the arbitration agreement, despite her declaration that she did not consent to arbitration.

Because Defendant has established that Plaintiff signed the agreement through the Workday system, its motion to compel arbitration and stay pending arbitration is GRANTED. Defendant shall submit the final order within 10 days of the hearing.

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