SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: March 19, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: **Before 4:00 PM 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 at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC et al	Parties are ordered to appear for the debtor's examination.
2	20CV370520	AMELIA GLISSMAN et al vs DILBER IRAHETA et al	Sellers' Motion to Strike is DENIED. Scroll to calendar line 2 for complete ruling. Court to prepare formal order.
3	23CV417119	Reza Tirgari vs Reza Kazemipour et al	Sayur's Demurrer to the Fifth Cause of Action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Scroll to calendar lines 3, 4 & 19 for complete ruling. Court to prepare formal order.
4	23CV417119	Reza Tirgari vs Reza Kazemipour et al	Sayur's Motion to Strike is GRANTED WITH 20 DAYS LEAVE TO AMEND. Scroll to calendar lines 3, 4 & 19 for complete ruling. Court to prepare formal order.
5	22CV398490	Beverly Paulson et al vs Grace Baptist Church et al	Defendant's Motion for Summary Judgment as to Mr. Chelley is GRANTED. Scroll to calendar line 5 for complete ruling. Court to prepare formal order.
6	23CV420188	MEDTRONIC, INC vs GEORGE TRIADAFILOPOULOS MD INC.,	Plaintiff Medtronic, Inc.'s Motion for Summary Judgment is OFF CALENDAR. The Court is unable to locate a proof of service of an amended notice of motion with this hearing date and time. The California Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (*Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) The moving party can obtain a new hearing date by using the online tool Court Schedule which can be found on the court's website and serve proper notice to have this matter heard.
7	21CV384685	Jeremy Witt vs Sherry Ross et al	Defendants' Motion to Compel Further Responses to Interrogatories and Requests for Production of Documents and for Sanctions is GRANTED. A notice of motion with this hearing date was served by electronic mail on February 14, 2024. Plaintiff did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) This discovery was duly served, several extensions were granted, and when Defendants finally received responses, they consisted only of objections. Defendants' numerous attempts to meet and confer and to otherwise obtain substantive responses and documents failed. To date, Plaintiff has produced no documents and served no substantive responses. Accordingly, Defendants' motion is granted. The Court will award the relief listed at page 9 of Defendants' memorandum. Moving party to prepare formal order.

8	23CV412732	ANGELICA GODINEZ MOLINA et al vs GENERAL MOTORS LLC, a Delaware Limited Liability Company	Plaintiff's Motion to Compel Person Most Knowledgeable Deposition and Production of Documents is GRANTED. Plaintiff's motion for sanctions is DENIED. The topics and document categories in Plaintiff's Deposition Notice comport with the Court's relevance rulings set forth in its January 25, 2024 order Denying and Granting in Limited Part Plaintiff's Motion to Compel. Thus, GM is ordered to (1) provide Plaintiff with 3 potential deposition dates for its Person Most Knowledgeable to testify about the topics listed in Plaintiff's deposition notice and (2) produce any non-privileged, non-work product documents GM has not already produced in response to Plaintiff's request for production within 20 days of service of this formal order. Plaintiff's motion for sanctions is DENIED. The Court finds Plaintiff failed to adequately meet and confer before bringing the present motion, thus sanctions are not warranted. While Defendant did not seek sanctions and the Court will thus not award them here, Plaintiff is cautioned that Under Code of Civil Procedure section 2023.020, "the court *shall* impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as result of that conduct." (Emphasis added; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 448 (failure to participate in meet and confer process in good faith is independent discovery abuse for which sanctions are authorized by statute); *Ellis v. Toshiba Am. Info. Sys., Inc.* (2013) 218 Cal.App.4th 843, 879-880 (substantial monetary sanction appropriate for failure to cooperate in setting protocol for expert inspection as ordered).) This monetary sanction is mandatory regardless of how the court rules on the offending party's motion. (Code Civ. Proc. §2023.020.) Court to prepare formal order.
9	23CV415313	CITLALY RUEDA et al vs GENERAL MOTORS LLC	Plaintiff's Motion to Compel Further Responses to Requests for Production of Documents and for Sanctions is DENIED. Defendant apparently produced the requested documents, and Plaintiff fails to articulate facts to support, much less demonstrate good cause, for an order directing a further production. The Court further finds Plaintiff failed to adequately meet and confer before bringing this motion. While Defendant did not seek sanctions and the Court will thus not award them here, Plaintiff is cautioned that Under Code of Civil Procedure section 2023.020, "the court *shall* impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as result of that conduct." (Emphasis added; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 448 (failure to participate in meet and confer process in good faith is independent discovery abuse for which sanctions are authorized by statute); *Ellis v. Toshiba Am. Info. Sys., Inc.* (2013) 218 Cal.App.4th 843, 879-880 (substantial monetary sanction appropriate for failure to cooperate in setting protocol for expert inspection as ordered).) This monetary sanction is mandatory regardless of how the court rules on the offending party's motion. (Code Civ. Proc. §2023.020.) Court to prepare formal order.

10	23CV418058	Modesta Castaneda vs AMERICAN HONDA MOTOR CO., INC., a California Corporation	Plaintiff's Motion to Compel the Deposition of the Person Most Knowledgeable and Production of Documents is DENIED. The topics for examination and document production are overbroad for this case, particularly in light of this Court's February 1, 2024 order denying Plaintiff's motion to compel. Defendant also offered an August 22, 2024 deposition date. There is no trial date in this case, and Plaintiff fails to explain why Defendant's provision of this deposition date is inadequate. If Plaintiff serves a new deposition notice for the August 22, 2024 or some other agreed upon deposition date, Plaintiff is cautioned to limit its topics and document requests to (1) Defendant's pre-litigation analysis as to whether the subject vehicle should be repurchased, (2) all repairs and service performed on the subject vehicle, (3) Defendant's policies and procedures for determining whether a vehicle qualifies for a repurchase or replacement under the Song-Beverly Act, and (4) Defendant's training for evaluating a pre-litigation repurchase under the Song-Beverly Act. Plaintiff is also cautioned that under Code of Civil Procedure section 2023.020, "the court *shall* impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as result of that conduct." (Emphasis added; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 448 (failure to participate in meet and confer process in good faith is independent discovery abuse for which sanctions are authorized by statute); *Ellis v. Toshiba Am. Info. Sys., Inc.* (2013) 218 Cal.App.4th 843, 879-880 (substantial monetary sanction appropriate for failure to cooperate in setting protocol for expert inspection as ordered).) This monetary sanction is mandatory regardless of how the court rules on the offending party's motion. (Code Civ. Proc. §2023.020.) Plaintiff should thus take care to engage in Code compliant meet and confer before filing further discovery motions in this case. Court to prepare formal order.
11	16CV293279	Ardent ERP Solutions, Inc. vs Incoln Corporation	Nick Heimlich's motion to be relieved as counsel is GRANTED. Court to use form of order on file.
12	21CV382331	Becky Edwards et al vs Tesla, Inc. et al	Plaintiff's Motion for Sanctions Against Tesla, Inc. is GRANTED, IN PART. Tesla and its counsel are ordered to pay Plaintiff's $9,513.00 in fees incurred to bring this motion for sanctions within 20 days of service of this formal order. The Court denies <u>without prejudice</u> the further sanctions Plaintiff seeks. Scroll to calendar line 12 for complete ruling. Court to prepare formal order.
13	21CV382933	Better Built Truss, Inc. vs 88 Lumber et al	Defendant/Cross-Complainant's Motion for Leave to Substitute Parties and File an Amended Cross-Complaint is GRANTED. Even if any of the procedural issues raised in the Opposition were grounded in fact or law, none of them prevents the Court from granting the simple, straightforward relief sought here. The Court has discretion to consider late filed papers. (*Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168.) And, where a party provides a substantive response to a late filing, the party waives all defects in service. (*Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 10.) Moving party to prepare formal order.
14	21CV387250	Patrick Lamb vs Vi Xuan Vu et al	Motion withdrawn by moving party on March 12, 2024.

15	22CV397756	Discover Bank vs Evan Bell	Plaintiff's Motion for Entry of Judgment Pursuant to Code of Civil Procedure section 664.6 is GRANTED. A notice of motion with this hearing date was served by U.S. Mail on January 25, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The parties also agreed to permit entry of judgment if Defendant failed to continue making payments according to the settlement agreement terms. Defendant made some payments but stopped making those payments on May 30, 2023. The current outstanding principal balance is $812.94. Accordingly, judgment in Plaintiff's favor is appropriate. This ruling to be reflected in the minutes; Plaintiff to submit form of judgment.
16	22CV403734	Eftychios Theodorakis vs DFINITY Stiftung et al	Defendant's Request for Clarification, or in the alternative, to Certify a Question of Law Pursuant to Code of Civil Procedure sections 128(a)(8), 166.1 is DENIED. However, on its own motion, the Court RECONSIDERS its April 28, 2023 Order on Plaintiff's ex parte application to amend his complaint, and that ex parte application is now GRANTED. Within 10 days of service of the formal order, Plaintiff is ordered to (1) file and serve the amended complaint in this case, (2) amend his petition in the pending JAMS arbitration, and (3) file a notice of this order in the federal action. Scroll to calendar line 16 for complete ruling. Court to prepare formal order.
17	22CV408165	Andrew Mo vs Samsung Research America, Inc.	Plaintiff's Motion to Lift Discovery Stay is GRANTED. Scroll to line 17 for complete ruling. Court to prepare formal order.
18	23CV414483	Jesse Razo, Jr. vs Bernard Lopez	Vacated (set in wrong department).
19	23CV417119	Reza Tirgari vs Reza Kazemipour et al	Plaintiff's ex parte application for nun pro tunc order is DENIED without prejudice to Plaintiff bringing a regularly noticed motion. Scroll to lines 3, 4 & 19 for complete ruling. Court to prepare formal order.

Calendar line 3
Case Name: *Amelia Glissman, et al. v. Dilber Iraheta, et al.*
Case No.: 20CV370520 (Consolidated with 21CV3818764)

Before the Court is defendants' Douglas Michaud and Deborah Michaud (the "Sellers") motion to strike portions of plaintiffs' Amelia Glissman and Michael Contolini's third amended complaint ("TAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for fraud and negligence. According to the TAC, on April 22, 2019, Plaintiffs purchased real property located at 710 North Winchester Boulevard in Santa Clara (the "Property"). (TAC, ¶ 1.) Samantha Landon was the Sellers' real estate agent and Excel was the real estate broker for the Sellers. (TAC, ¶ ¶ 4, 5.) Walter E. Mc Guire Real Estate was the real estate broker. (TAC, ¶ 6.) Morgan Ann Amos Manos was Plaintiffs' real estate agent on the Property under the brokerage of McGuire. (TAC, ¶ 7.)

On April 22, 2019, Plaintiffs offered to purchase the Property. (TAC, ¶ 19.) In the Transfer Disclosure Statement ("TDS"), the Sellers were asked if they were aware of any room additions, structural modifications, or other alterations or repairs made without necessary permits and they answered "No.". (TAC, ¶ 20.) By signing the TDS, the Sellers certified that the information was true and correct to the best of their knowledge. (*Ibid*.) After purchasing the Property, Plaintiffs discovered that the Sellers' representation was false. (TAC, ¶ 21.) Contrary to their representation, there was unpermitted work in the Property's basement, basement bathroom, outdoor kitchen structure, outdoor kitchen with plumbing and electrical, outdoor spa structure, spa, outdoor structure attached to the garage, A/C unit, and a furnace. (*Ibid*.)

Around August 2019, Plaintiffs hired Pure Remodeling Inc. ("Pure"), a general building contractor, to perform work on the Property that included the basement. (TAC, ¶ 30.) Shortly after Pure started working on the basement, the City of Santa Clara (the "City") inspected the Property and issued a citation for the unpermitted basement and other unpermitted violations at the Property. (*Ibid*.) The discovery of unpermitted work caused problems and led to Pure abandoning the project. (*Ibid*.)

Plaintiffs initiated this action on April 19, 2021, asserting intentional misrepresentations, among other claims. On March 7, 2022, they filed their first amended complaint ("FAC"), asserting intentional

misrepresentation, and other claims. On August 26, 2022, Plaintiffs filed the SAC, asserting: (1) actual fraud: intentional misrepresentation; (2) actual fraud: negligent misrepresentation against the Sellers, Landon, and Excel; (3) actual fraud: negligent misrepresentation against Defendants; (4) actual fraud: concealment; (5) breach of fiduciary duties; (6) constructive fraud; (7) actual fraud: deceit; (8) violation of Civil Code section 1088; (9) negligence against the Sellers, Landon, and Excel; and (10) negligence against Defendants. On March 23, 2023, this case was consolidated with Case No. 20CV370520, with the latter designated as the lead case. [1] On April 20, 2023, the Court issued its order granting Mc Guire and Manos' motion to strike in part and denying in part.

On June 12, 2023, Plaintiffs filed their TAC, asserting: (1) intentional misrepresentation; (2) negligent misrepresentation against the Sellers, Landon, and Excel; (3) negligent misrepresentation against Manos and Mc Guire; (4) concealment; (5) breach of fiduciary duties; (6) constructive fraud; (7) deceit; (8) violation of Civil Code section 1088; (9) Negligence against the Sellers, Landon, and Excel; (10) Negligence against Manos and Mc Guire; and (11) breach of contract. On January 31, 2024, the Sellers filed the instant motion, which Plaintiffs oppose.

II. Legal Standard

Under section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assuming the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing

[1] The lead case is brought by Plaintiffs against Dilber Isabel Iraheta, David Gabay, Pure, Wesco Insurance Company, and Delsur Construction Inc.

that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Motions to strike are generally disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"While under Code of Civil Procedure section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. [Citation.] Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike. [Citation.]" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281.)

The Sellers move to strike the following paragraphs 126-129; 140-143; and 165-167from the TAC.

III. Analysis

Plaintiffs allege they are entitled to damages under Civil Code section 3333 for the eighth cause of action for violation of Civil Code section 1088 (¶¶ 126-129) and ninth cause of action for negligence (¶¶ 140-143), and they are entitled to damages under Civil Code section 3300 for their eleventh cause of action for breach of contract (¶¶ 165-167). The Sellers argue Plaintiffs are not entitled to damages under Civil Code sections 3333 and 3300 because Civil Code section 3343 sets forth the exclusive measure of damages in an alleged fraudulent property action.

Civil Code section 3343, provides:

> (a) One defrauded in the purchase, sale, or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with additional damage arising from the particular transaction, including any of the following:
>
> (1) Amounts actually and reasonably expended in reliance upon the fraud.
>
> (2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

(Civ. Code, § 3343, subdivision (a)(1) & (2).)

This statute has been held to define the exclusive measure of damages for most forms of fraud in connection with the sale of property. (*Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 762-763; *Cory v. Villa Properties* (1986) 180 Cal.App.3d 592, 599.) The statute authorizes recovery for "out-of-pocket" loss, which is "the difference between the consideration paid for the property and the actual value of the property, with additional damage, if any." (*McNeill v. Bredberg* (1961) 192 Cal.App.2d 458, 467-468.) It does not permit recovery of "benefit of the bargain" damages, which represents the harm to the plaintiff's "expectancy interest," and are measured by the difference between the value received and the value promised. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240, quoting *Stout v. Turney* (1978) 10 Cal.4th 718, 725.)

In addition to out-of-pocket losses, a party defrauded in the purchase of real estate is entitled to recover "any additional damage arising from the particular transaction, including…[a]mounts actually and reasonably expended in reliance on the fraud," and "[a]n amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that such loss was proximately caused by the fraud." (Civ. Code, § 3343, subd. (a)(1) & (2).) These "additional damages" may be recovered even without evidence of a difference in value, so long as the plaintiff can show the expenses were directly related to defendants' fraud or concealment. (*Stout,* 22 Cal.3d at 729-730.)

Civil Code section 3300, provides:

> For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate

> the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. (Civ. Code, § 3300.)
>
> Civil Code section 3333, provides:
>
> For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, where it could have been anticipated or not. (Civ. Code, § 3333.)

None of the authorities relied on by the Sellers involved cases where the plaintiffs also brought separate claims for negligence or breach of contract. (See *Bagdasarian,* 31 Cal.2d 744 [fraudulent misrepresentation]; *McNeill,* 192 Cal.App.2d 458, 467-468 [rescission based on fraud and money had and received]; *Stout,* 22 Cal.3d 718 [fraud in the sale of real property]; *Saunders v. Taylor* (1996) 42 Cal.App.4th 1538 [intentional fraud, suppression of fact, and negligent misrepresentation].) And, none of these cases were at the pleading stage, most were decided post-judgment.

The Sellers contend that *Saunders,* 42 Cal.App.4th 1538, is on all fours with this case. In *Saunders*, the plaintiffs purchased a house and prior to the close of escrow they received a disclosure form in which the sellers denied being aware of any work on the property that did not comply with building codes. (*Id*. at p. 1540.) Thereafter, the buyers learned this was false and sued the sellers for intentional fraud, suppression of fraud, and negligent misrepresentation. The trial court granted the seller's motion for nonsuit, which the appellate court affirmed. (*Id*. at pp. 397-398.) The appellate court held that the term "actual damages" in Section 1102.13 meant compensatory damages as measured by Section 3343. (*Id*. at p. 1545.) *Saunders* is distinguishable because the holding regarding Section 3343 hinged on the court's reading of the term "actual damages," which is not used in Section 3333 or 3300. *Saunders* is also distinguishable because it only involved fraud claims whereas here, the Plaintiffs allege negligence and breach of contract. The Sellers fail to provide any authority that precludes Plaintiffs from recovering other measures of damages for *nonfraud claims*, much less that would preclude them from alleging such measures at the pleading stage. Thus, the motion to strike is DENIED.

Calendar Lines 3, 4 & 19
Case Name: *Reza Tirgari v. Reza Kazemipour, et al.*
Case No.: 23CV417119

Before the Court is: (1) Defendant Timila Sayar's demurrer to the first amended complaint ("FAC"); (2) Sayar's motion to strike portions of the FAC; and (3) Plaintiff Reza Tirgari's application for *Nunc Pro Tunc* order. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This matter arises out of an alleged multi-year fraud scheme from 2018 to 2022, in which defendant Reza Kazemipour lied about investment opportunities, which caused Plaintiff to invest money with him that Kazemipour spent on unauthorized personal expenses and travel. (FAC, ¶ 21.) With the assistance of defendant Troy Foster, Kazemipour defrauded Plaintiff out of approximately $750,638. (*Ibid*.) On information and belief, Tirgari alleges from 2019 to 2021, Kazemipour used funds from their joint investment account for his own personal benefit and the benefit of Kazemipour's family members. (FAC, ¶ 27.) He further alleges from 2019 to 2021, Kazemipour withdrew approximately $279,727.07 from the funds Tirgari deposited into their joint investment account. (FAC, ¶ 29.) Kazemipour was the manager and director for Defendant 1792 Partners, Inc. ("1792 Partners"). (FAC, ¶ 11.) Sayar was married to Kazemipour from July 20, 1995, until October 1, 2019. (FAC, ¶ 36.) She filed for divorce on September 7, 2022. (FAC, ¶ 38.)

Plaintiff initiated this action on June 2, 2023, asserting: (1) Fraudulent Conveyance-Actual Intent (Civ. Code, § 3439.04, subd. (a)(1)); (2) Fraudulent Conveyance-Constructive (Civ. Code, § 3439.04, subd. (a)(2)(B)); (3) Aiding and Abetting Violations of the Uniform Voidable Transactions Act ("UVTA"); (4) Declaratory Relief; (5) Conspiracy to Fraudulently Transfer Assets (Pen. Code, § 192); (6) Receiving Stolen Property (Civ. Code §§ 484, 496, & 503); and (7) Appointment of a Receiver. On November 29, 2023, the Court issued its order (the "November 29 Order") sustaining Sayar's demurrer to each cause of action with 30 days' leave to amend.

On December 28, 2023, Tirgari filed his FAC, asserting: (1) Fraudulent Conveyance-Actual Intent (Civ. Code, § 3439.04, subd. (a)(1)); (2) Fraudulent Conveyance-Constructive (Civ. Code, § 3439.04, subd. (a)(2)(B)); (3) Conspiracy to Commit Fraudulent Transfer(s); (4) Aiding and Abetting

Violations of the Uniform Voidable Transactions Act ("UVTA"); (5) Receiving Stolen Property (Civ. Code §§ 484, 496, & 503); and (6) Declaratory Relief. On January 30, 2024, Sayar filed the demurrer and motion to strike, which Plaintiff opposes. On February 9, 2024, Plaintiff filed his ex parte application for *Nunc Pro Tunc,* and he filed an amendment to the complaint naming additional parties.

II. Sayar's Demurrer

Sayar demurs to the fifth cause of action on the ground it fails to state sufficient facts to constitute a cause of action. (Code Civ. Proc., §430.10, subd. (e).)

A. Request for Judicial Notice

1. Sayar's Request

Sayar requests judicial notice of the court docket in *Tirgari v. Kazemipour* filed in San Diego Superior Court. Tirgari objects to judicial notice of the entirety of the docket, its contents, and the truth of the matters asserted therein.

Courts can take judicial notice of a docket or register of actions. (See *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 961 [taking judicial notice of "superior court docket"]; *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 872, fn. 3 [taking judicial notice of "superior court's public record docket entries"]; *In re Estevez* (2008) 165 Cal.App.4th 1445, 1452, fn.4 [taking judicial notice of "docket (register of actions) entries)"]; *County of Los Angeles v. American Contractors Indemnity Co.* (2011) 198 Cal.App.4th 175, 178, fn 4 [taking judicial notice of "electronic docket"].) Therefore, Sayar's request is GRANTED. However, the law is settled that "the court will not consider the truth of the documents' contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375 (*Joslin*).)

2. Plaintiff's Request

Plaintiff requests judicial notice of following facts:

(1) Sayar admitted that Kazemipour "transferred funds from his financial accounts to [her] from January 2019 to the present day.": Exhibit 1;

(2) She admitted she "transferred funds from her financial accounts to Kazemipour from January 2019 to the present day": Exhibit 1;

(3) She admitted "Reza Kazemipour gave her a purse valued at approximately $1,500.00—which he said he gifted her on behalf of their children—in December of 2020 for Christmas": Exhibit 2; and

(4) Sayar's demurrer filed on August 11, 2023: Exhibit 3.

There is a split in authority as to whether a plaintiff can request judicial notice of a defendant's admissions. (See *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485 ["[i]t is true that a court may take judicial notice of a party's admissions or concessions, but only in cases where the admission 'cannot reasonably be controverted,' such as in answers to interrogatories or requests for admission, or in affidavits and declarations filed on the party's behalf"]; but see *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605 ["The court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, only where they contain statements of *the plaintiff or his agent* which are *inconsistent* with the *allegations of the pleading* before the court."]

Here, items 1 through 3 are Sayar's responses to requests for admission and special interrogatories, which cannot be controverted. Item 4 is a court record, therefore the Court may take judicial notice of it. (See Evid. Code, 452, subd. (d).) Accordingly, Plaintiff's request is GRANTED.

B. Legal Standard for a Demurrer

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

C. Analysis

Penal Code section 496 states,

> (a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.

(Pen. Code, § 496, subd. (a).)

The elements of this claim are: "(1) that the particular property was stolen, (2) that the accused received, concealed, or withheld it from the owner thereof, and (3) that the accused knew that the property was stolen. (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 213.) A violation of the statue requires some form of criminal intent. (*Siry Investment L.P. v. Farkenhondehpour* (2022) 13 Cal.5th 333, 361-362 (*Siry Investment L.P.*).) In general, statutory causes of action must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*).)

Sayar argues Plaintiff fails to allege sufficient facts to state a claim because he fails to establish (1) any particular property was stolen from him; (2) Sayar received it; and (3) she knew it was stolen when she accepted the property.

1. Waiver

Plaintiff argues Sayar waived any argument regarding criminal intent because she did not raise such argument in the prior demurrer.

Code of Civil Procedure section 430.41, subdivision (b), states,

> A party demurring to a pleading that has been amended after a demurrer to an earlier version of the pleading was sustained *shall not* demur to *any portion* of the amended complaint, cross-complaint, or answer *on grounds that could have been raised* by demurrer to the earlier version of the complaint, cross-complaint, or answer.

(Code Civ. Proc., § 430.41, subd. (b) [emphasis added].)

Code of Civil Procedure section 430.10 enumerates 8 grounds for a demurrer to a complaint or cross-complaint. As she does here, Sayar demurred to the fifth cause of action for failure to state sufficient facts in the prior demurrer. (See Code Civ. Proc., § 430.10, subd. (e).) Thus, she did not waive any *grounds for demurrer* pursuant to Section 430.41, subdivision (b).

2. Property under Section 496

"The Penal Code defines property to include 'both real and personal property' and further defines personal property to include 'money, goods, chattels, things in action, and evidences of debt.' The statutory definition makes no reference to labor or other services. Nor is there any indication of any intent to use the term 'property' in section 496 more broadly than the definition of the same term already provided by the Penal Code. 'When the Legislature uses a term of art, a court construing that use must assume that the legislature was aware of the ramifications of its choice of language.'" (*Siry Investment, L.P.,* 13 Cal.5th 333, 352, fn. 13 [internal citations omitted].)

Plaintiff alleges Sayar "received property - including but not limited to, flights and hotel accommodations, luxury items, cell phone, and monthly insurance payments – obtained by Kazemipour's, 1792 Partners', and Foster's theft." (FAC, ¶ 110.) While the Penal Code's definition of personal property includes "goods", Plaintiff does not allege an ownership interest in the luxury items and/or cell phone, such that they would constitute his personal property.

The Court is not persuaded by Plaintiff's reliance on federal money laundering statutes and definitions to avoid this issue because he does not assert money laundering or federal claims, and the Penal Code already provides a definition of property. Plaintiff also alleges Kazemipour transferred money to Sayar via Venmo from 2018 to 2022 and made various transfers from 1792 Partners to her in 2019 and 2021; that such actions were undertaken to hinder, delay, and/or defraud Kazemipour's

creditors, including Plaintiff; and that the property Sayar received was obtained by Kazemipour, 1792 Partners, and Foster's theft under Penal Code section 484. (FAC, , ¶¶ 51-52, 110.)

3. Whether the Property was Stolen

Sayar argues Plaintiff cannot allege that she *received the transfer* of funds in a manner constituting theft. Sayar is misreading the statute. Plaintiff's allegation is that Sayar received property (the funds) that had been *obtained by Kazemipour*, et al., *in a manner constituting theft*. (See FAC, ¶ 110; see also Pen. Code, § 496 ["[e]very person who buys or *receives any property* that has been stolen or *that has been obtained in any manner constituting theft*..."].) The conduct Plaintiff alleges clearly falls under the statute.

4. Knowledge and Criminal Intent

Sayar argues Plaintiff cannot establish Sayar knew the received items were stolen when she accepted them. While Plaintiff is correct that he does not have to prove Sayar's criminal intent at the pleading stage, he must allege sufficient facts to support knowledge and the alleged criminal intent. "The critical factor is the defendant's intent *at the time* he receives or initially conceals the stolen property from the owner." (*People v. Wielograf* (1980) 101 Cal.App.3d 488, 494.)

Plaintiff argues the following text conversation Sayar had with her brother in August 2022 is sufficient to establish that Sayar was withholding information from Tirgari and she was otherwise aware that Kazemipour had embezzled, defrauded, and stole from Tirgari:

> "…I'm going to hold off on lawyer[.] Not sure if I should call [Tirgari] back[.] To hear what he has to say and then determine if I need a lawyer[.]"…
>
> "***I wouldn't be stupid to give answers*** but want to know[,] [w]hat [Tirgari] wants[.]…"
>
> "Spoke to [Tirgari.]"
>
> "He was fishing for info on [Kazemipour] and how he got money before[.] ***I didn't answer*** and said we were not really communicating or together. I don't know[.] It was smooth and I don't think he wants anything from me but he's definitely going after [Kazemipour] and everyone he knows…***If I were [Kazemipour] I would stay in Dubai[.]***"

(FAC, ¶ 32; Opp., p. 12:19-25.)

The text conversation occurred years after the alleged transfers and the receipt of any stolen property, therefore it is insufficient to support Sayar's criminal intent when she received the property. And, Plaintiff only offers conclusory allegations as to Sayar's knowledge. Plaintiff thus fails to allege sufficient facts to state this claim. However, the opposition details some specific facts that could support Sayar's alleged knowledge of the nature of the property at the time she received it. (Opp., p.15:18-22.) Thus, the demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend.

III. Sayar's Motion to Strike[2]

Sayar moves to strike the addition of Creative Learning Center, LLC ("CLC"), Savannah Kazemipour, and Sabrina Kazemipor as parties in the FAC.

A. Legal Standard

Under section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assuming the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.) Code of Civil Procedure section 436, subdivision (b), permits a court to 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.

B. Analysis

[2] Although Sayar submitted a request for judicial notice with her moving papers, she withdrew the request in her reply. (See Reply, p. 2, fn. 1.)

In the November 29 Order, the Court granted Plaintiff 30 days leave to amend his claims. While the order did not state that Plaintiff could not add new claims or parties, the Court did not grant Plaintiff leave to add any new claims or new parties. (See *People ex rel. Dept. Pub. Wks. V. Clausen* (1967) 248 Cal.App.2d 770, 785 [when a demurrer is sustained with leave to amend, the leave "*must be* construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained"]; see also *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.) Plaintiff's counsel Charles Whitman concedes he should have filed the amendment naming the doe defendants contemporaneously with the FAC, however he failed to do so. (Whitman Decl., ¶ 5.)

Plaintiff contends the new defendants are properly substituted in the place of the doe defendants, however, the FAC still lists "DOES 1-100", therefore, if the new defendants were previously doe defendants, the FAC should reflect that (i.e., "DOES 4 through 100"). In fact, the FAC still alleges the "true names and capacities…of DOES 1 through 100, inclusive, are *unknown to Tirgari*." (FAC, ¶ 9.) Causes of action one through five also state they are asserted against each individual defendant and "DOES 1-100". Therefore, the new defendants were not properly substituted in the place of the doe defendants. Moreover, it does not appear the new defendants were added to address the deficiencies identified by the November 29 Order.

Code of Civil Procedure section 472, subdivision (a), provides:

> A party may amend its pleading once without leave of court at any time *before the answer*, demurrer, or motion to strike is filed, or after a demurrer or motion to strike is filed but before the demurrer or motion to strike is heard if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike. A party may amend the pleading after the date for filing an opposition to the demurrer or motion to strike, upon stipulation by the parties.

(Code Civ. Proc., § 472, subd. (a) [emphasis added].)

Here, Plaintiff could have amended his pleading to name the doe defendants prior to the hearing on the demurrer, however, he did not. Plaintiff also could have sought leave to amend to name them after the Court issued the November 29 Order, but he did not do that either. There is no stipulation

between the parties to allow Plaintiff's addition of the new defendants. Therefore, Plaintiff was required to request leave of Court to amend his pleading and he failed to do so.

Plaintiff contends a motion to strike is not the proper vehicle for the requested relief, instead a motion to quash is. However, Sayar is not seeking to challenge *service of summons* on the new defendants' behalf, rather she is challenging the fact that Plaintiff added them in this matter without leave of court. Plaintiff's authorities are unhelpful as they pertain to challenges to service. A motion to strike is procedurally proper. (See Code Civ. Proc., § 473, subd. (a); Code Civ. Proc., § 436, subd. (b).) Nor is the Court persuaded by Plaintiff's standing argument because Sayar is a party to this action, and she can challenge Plaintiff's amendment of the pleading without leave of Court.

Both parties rely on *Yelp Inc. v. Superior Court* (2017) 17 Cal.App.5th 1, in which Yelp, a third party, challenged a subpoena. The court reiterated a three-part test established by the United States Supreme Court in *Powers v. Ohio* (1991) 499 U.S. 400, to establish an exception to the general rule "that…litigants must assert their own legal rights rather than rely on the rights or interests of third parties." (*Id*. at p. 7.) The three criteria are: "(1) the litigant suffers a distinct and palpable injury in fact, thus giving him or her a concrete interest in the outcome of the dispute; (2) the litigant has a close relationship to the third party such that the two share a common interest; and (3) there is some hindrance to the third party's ability to protect his or her own interest." (*Ibid*.) Based on the nature of Yelp as an online review website and First Amendment interests, the court concluded that Yelp had standing. Unlike Yelp, Sayar is not a third party in this matter, and she asserts her own legal rights, thus, the three-part criteria are not applicable.

However, Sayar's arguments regarding the sufficiency of the allegations as to the new defendants are improper on this motion; only the new defendants can challenge the sufficiency of the allegations against them when such allegations are properly before the Court. Sayar's familial relationship with her adult children does not establish standing to assert arguments on their behalf.

Plaintiff requests leave to amend his pleading to add the new defendants, and although Sayar responds, her arguments pertain to possible prejudice from Plaintiff's failure to request leave, not prejudice if Plaintiff is granted leave to amend. Plaintiff should file a noticed motion so that both parties

can properly present their arguments to the Court. Thus, the motion to strike is GRANTED with 20 days leave to amend.

IV. Plaintiff's Ex Parte Application for *Nunc Pro Tunc* Order Substituting New Defendants

Plaintiff requests an order permitting him to substitute new defendants as Doe defendants in the FAC.

A. Request for Judicial Notice

Plaintiff requests judicial notice of:

(1) *Imperium Energy v. Dirschel*, (2021) 2021 Cal.Super. LEXIS 76645; and

(2) *Sam v. Kwan* (2021) 2021 Cal.Super. LEXIS 1359.

The request is GRANTED under Evidence Code section 452, subd. (d), but only as to the fact of the ruling. An order of the Superior Court of California may be judicially noticed, but not as to the correctness of the ruling or the truth of the factual findings. (See *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [a written trial court ruling has no precedential value]; *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 [there is no "horizontal stare decisis"].)

B. Analysis

The California Rules of Court require an ex parte applicant to "make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or *any other statutory basis for granting relief ex parte*. (Cal. Rules of Court, rule 3.1202(c) [emphasis added].) A court will not grant ex parte relief in any but the plainest and most certain of cases. (*People ex. Rel. Allstate Ins. Co. v. Suh* (2019) 37 Cal.App.5th 253, 257.)

Plaintiff does not argue or show any irreparable harm or immediate danger but it appears he asserts relief may be granted pursuant to Code of Civil Procedure sections 473 and 474. (See Plaintiff's Counsel Charles Whitman's Decl., ¶ 6.)

Code of Civil Procedure section 473, subdivision (a), provides:

> The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may

> likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

(Code Civ. Proc., § 473, subd. (a).)

Code of Civil Procedure section 474 provides:

> When the plaintiff is ignorant of a name of a defendant, he must state that fact in the complaint… and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly…

(Code Civ. Proc., § 474.)

Plaintiff appears to argue ex parte relief is warranted because the requested relief cannot be obtained through regularly noticed motion, however, this is untrue as he can file a motion for leave to amend his pleading.

Plaintiff argues the Court can grant relief to substitute the new defendants based on excusable neglect.

Code of Civil Procedure section 473, subdivision (b), provides,

> The court may, upon any terms as may be just, relieve a party or his or her legal representative from a *judgment, dismissal, order, or other proceeding* taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.

(Code Civ. Proc., § 473, subd. (b).)

Plaintiff does not identify a judgment, dismissal, order, or other proceeding from which he seeks relief. It appears Plaintiff seeks relief from the procedural requirements of amending his pleading, which is not addressed in section 473, subdivision (b), thus, Plaintiff cannot rely on excusable neglect.

The Court is not persuaded by Plaintiff's assertion that ex parte relief is necessary here for the sake of judicial efficiency. Plaintiff did not follow the procedure for amending his pleading beyond the addressing the deficiencies identified by the Court in the November 29 Order and he cannot escape the procedural requirements with the instant motion. Moreover, as the Court explained above, the FAC does not reflect proper substitution of the doe defendants with the new defendants. Therefore, ex parte

relief is not warranted here. Thus, Plaintiff's application is DENIED. However, as the Court stated above, Plaintiff can file a noticed motion for leave to amend.

Calendar Line 5
Case Name: *Beverly Paulson, et.al. v. Grace Baptist Church, et.al*
Case No.: 22CV398490

Before the Court is Defendant, Grace Solutions', motion for summary judgment against Plaintiff, James Quadee Chelley's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This claim arises from a tragic stabbing incident that took place at Grace Solutions on November 22, 2020, in which Mr. Lopez is alleged to have injured three victims and killed two others. Grace Solutions provides emergency shelter for the unhoused throughout San Jose, CA. (RSSUF Nos. 1 & 2) In 2021, Grace Solutions entered into an agreement with Defendant GRACE BAPTIST CHURCH to utilize their space for Grace Solutions' emergency shelter for the unhoused. (RSSUF No. 3)

At the time of the incident, Grace Solutions had seven employees, including Mr. Chelley, and a number of volunteers working at the program. (RSSUF No. 4) Mr. Chelley has been an employee of Grace Solutions since February 5, 2020. (RSSUF No. 5) At the time of the incident, Mr. Chelley was working in the course and scope of his employment at Grace Solutions. (RSSUF No. 7) While working on the second floor, he heard loud screaming and yelling and went to the stairwell to investigate. From the stairwell, he could see a man lying down on the floor bleeding, along with another injured woman. Mr. Chelley went downstairs to help and proceeded to attempt mouth to mouth resuscitation on the man lying on the floor. (RSSUF No. 7). As he was doing so, Mr. Lopez reportedly stabbed Mr. Chelley in the back three times and continued to physically attack him. Mr. Chelley was able to flee the area and go to the "Women's Room" to assist women hiding from Mr. Lopez. Eventually, Mr. Chelley was able to escape from the subject premises. The police apprehended Mr. Lopez half a block from the church. (RSSUF No. 7)

At the time of the incident, Grace Solutions had workers' compensation insurance through the State Compensation Insurance Fund. (RSSUF No. 8) On November 30, 2020, Grace Solutions received notification from the insurance company that Mr. Chelley filed a claim for workers' compensation. (RSSUF No. 8) Grace Solutions provided the information requested for the claim, and then received an additional notification on December 23, 2022, that Mr. Chelley had received temporary and permanent

disability benefits through his workers' compensation claim. The letter also notified Grace Solutions that these benefits would be ending. (RSSUF No. 9)

On June 14, 2023, Mr. Chelley filed the First Amended Complaint against his employer, Grace Solutions, alleging causes of action for (1) negligence, and (2) negligent hiring, supervision, and retention of unfit employees.

II. Legal Standard

A defendant moving for summary judgment has the initial burden to make prima facie showing there is no merit to a cause of action and that therefore the defendant is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (p)(2); *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) To satisfy this burden, the moving defendant must show that at least one of the elements of the cause of action has not been established by the plaintiff and cannot reasonably be established or must establish the elements of a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar, supra*, at p. 849; *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480.(*Jessen*)) If the moving defendant meets this burden, then the burden shifts to the plaintiff to show that there is at least one triable issue of material fact regarding the cause of action or as to the complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849; *Jessen, supra*, at p. 1484.)

Summary judgment is appropriate if there are no triable issues of material fact, and the moving party is entitled to judgment as a matter of law. (Code of Civ. Proc. § 437c, subds. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607. 618) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted; accord, *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003, 4 Cal. Rptr. 3d 103.) Courts are required to liberally construe the opposing party's evidence and resolve any doubts about the evidence in favor of that party. (*Regents of University of California v. Superior Court*, supra, 4 Cal.5th 607 at 618).

III. Preliminary Matters

A. Defendant's Evidentiary Objections

Grace Solutions objects to the original Declaration of Salim Khawaja as follows:

- paragraph 4- Philip Mastrocola knew Mr. Lopez and allowed him to work at Grace Solutions is speculative; SUSTAINED
- paragraph 5 –Peggy Hogg is the board president of Defendant is false; SUSTAINED
- paragraph 7 – declaration of Ruben Ramos, attached as exhibit 1, includes hearsay statements, lacks any relevance to Mr. Chelley's employment, and provides no value to the opposition; SUSTAINED. Mr. Ramos' description of witnessing various individuals under influence and violent inside and outside of the shelter premises is not relevant to Mr. Chelly's employment and worker's compensation claim. Mr. Ramos' only relevant statement is that in November of 2020 he spoke to Mr. Lopez, who was acting as a volunteer for the church, and appeared to be intoxicated or on drugs. However, this statement is merely a speculation of Mr. Ramos' position with Grace Solutions. However, this statement is speculative as to both intoxication and Mr. Lopez's status with Grace Solutions. Mr. Ramos' statements also fail to provide evidentiary support for Plaintiff's argument that Grace Solutions employed Mr. Lopez, knew of his history of violence, and continued his employment irrespective of his history.
- paragraph 8 – declaration of Maurice Coprich's, attached as Exhibit 2, includes hearsay statements, lacks any relevance to Mr. Chelley's employment, and provides no value to the opposition; SUSTAINED. Mr. Coprich declaration's that he has witnessed number of events where people were intoxicated and violent on or near the church's premises are not relevant. Mr. Coprich's only reference to Mr. Lopez is that he punched him just hours before the November 22, 2020, attacks while being near the church premises. This statement is not relevant to Mr. Chelley's employment or his workers' compensation claim, Mr. Lopez's status with Grace Solutions, or to whether Grace Solutions knew Mr. Lopez had a history of violence.

B. Plaintiff's Evidentiary Objections

In responding to Grace Solutions' original Statement of Undisputed Material Facts, Plaintiff filed a document titled "Plaintiff's Response and Objection and Opposition to Defendant's Separate Statement." The document contains no objection. Responding to certain statements, Plaintiff states

his inability to admit or deny the information since he has not conducted discovery. These statements do not constitute objections upon which the Court can rule.

C. Mr. Chelley's Separate Statement

Mr. Chelley's supplemental separate statement of material disputed facts in opposition to Grace solutions' motion fails to comply with the format requirement of the Cal. Rules of Court, Rule 3.1350(h). However, it is within the discretion of the Court to consider Plaintiff's evidence. The Court does admonish Plaintiff's counsel, Mr. Khawaja, for failure to comply with the local rules and expects him to comply with all requirements imposed by the California Rules of Court and Code of Civil Procedure going forward.

III. Analysis

Grace Solutions argues it is entitled to summary judgment against Mr. Chelley because his claims are barred by the worker's compensation exclusivity provisions set forth in Labor Code §§ 3600 and 3602.

A. Workers' Compensation Exclusivity of Remedy

"The worker's compensation exclusivity rule is embodied in Labor Code sections 3600, 3601 and 3602, that with certain exceptions, an injury sustained by an employee arising out of and in the course of his or her employment is compensable by way of a worker's compensation insurance award only, not by a tort judgment." (*Lee v. W. Kern Water Dist.*, (2016) 5 Cal. App. 5th 606, 624 (*Lee*).) Section 3600 provides that, with exceptions, worker's compensation liability exists "in lieu of any other liability whatsoever" "against an employer for any injury sustained by his or her employees arising out of and in the course of the employment" if specified "conditions of compensation concur[.]" (Cal. Lab. Code § 3600(a).) There are 10 conditions of compensation. Relevant here are conditions 2 and 3: "Where, at the time of injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment" (*Id.* § 3600 (a)(2)); and "[w]here the injury is proximately caused by the employment, either with or without negligence" (*Id.* § 3600(a)(3)).

"The requirements that an injury arise out of employment or be proximately caused by employment are sometimes referred together as the requirement of industrial causation." (*Lee*, 5 Cal.

App. 5th at 624 (citing *Nash v. Workers' Comp. Appeals Bd*. (1994) 24 Cal. App. 4th 1793, 1809.) "It is a looser concept of causation than the concept of proximate cause employed in tort law." (*Id.*) "In general, the industrial causation requirement is satisfied if the connection between work and the injury is a contributing cause of the injury." (*Id.*) (internal quotation marks and citations omitted).

The requirement that the employee be acting "in the course of employment" is distinct; it is met when the "injury happened at a time when the employee was working and in the place of employment." (*Id.*) (citing *Atascadero Unified School Dist. v. Workers' Comp. Appeals Bd*. (2002) 98 Cal. App. 4th 880, 883.) "It further requires that the employee, when injured, was doing 'those reasonable things which his contract with his employment expressly or impliedly permits him to do.'" (*Id.* at 625 (citing *Maher v. Workers' Comp. Appeals Bd*. (1983) 33 Cal. 3d 729, 733.) "Even if it is conceded that an employee was injured while performing job tasks in the workplace during working hours, the exclusivity rule applies only if it also is shown that the work was a contributing cause of the injury." (*Id.*)

"Whether an employee's injury arose out of and in the course of [his or] her employment is generally a question of fact to be determined in light of the circumstances of the particular case. [Citations.] However, where the facts are undisputed, resolution of the question becomes a matter of law. [Citations.]" (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353; See also, *Mason v. Lake Dolores Group,* (2004) 17 Cal. App. 4th 822, 830.)

Here, Grace Solutions' admissible evidence establishes:

1. Mr. Chelley was hired as a full-time employee by Grace Solutions on February 5, 2020, and was a Grace Solutions' employee on the date the attacks occurred. (Mastrocola's Decl., Ex. 1; Chelley's Depo. Transcript, pp. 44, 45, 47, 48, 122-123.)
2. At the time of his employment, Mr. Chelley resided in a room, located in the sanctuary building, which was provided by the church. (Chelley's Depo. Transcript p. 69)
3. Mr. Chelley listed his job title as the "shift manager" on his claim for the State Compensation Insurance Fund. However, he has testified in his deposition that he was an assistant manager. (Mastrocola's Decl. Ex. 2; Chelley's Depo. Transcript pp. 44-45.)

4. Mr. Chelley was "on [shelter] ground 24/7" since he was the shift manager / assistant manager and resided on the second floor. (Chelley's Depo. Transcript, pp. 44-45.)
5. Mr. Chelley's duties were "basically everything a shelter worker do (sic)" including intakes of clients, kitchen duties, bathroom services, going to food banks, working with and assisting clients. Working night-shifts required him to make sure no one came in after hours, no violence occurred on the premises, maintain peace and monitor. (Chelley's Depo. Transcript, pp. 48, 101-102.)
6. According to the information Mr. Chelley provided to the State Compensation Insurance Fund's notification, he began his shift at 6:00 p.m. on the date of the attacks; approximately 2 hours prior to the attacks. (Mastrocola's Decl. Ex. 2.)
7. Mr. Chelley assisted with clients' intake at 7:00 p.m. and took a break after its completion. Mr. Chelley usually takes a break between 7:30 and 8:00 p.m. to pray. (Mr. Chelley's Depo. Transcript, p. 123.)
8. On the date of the attacks, Mr. Chelley heard screams during his prayer break and ran downstairs to the shelter area, where he was subsequently injured while assisting shelter guests. (Mr. Chelley's Depo. Transcript, p. 124.)
9. Mr. Chelley filed a claim for worker's compensation benefits and Grace Solutions was notified of the claim on November 30, 2020. In his claim, Mr. Chelley stated that "*an unprovoked guest of the shelter started to assault and stab people…*" (Mastrocola's Decl., Ex. 2, line 26; emphasis added.)
10. Mr. Chelley received temporary and permanent disability benefits pursuant to his worker's compensation claim (Mastrocola's Decl., Exs. 3 & 4.).

There is no dispute that Mr. Chelley was an employee of Grace Solutions when he was injured. On this record, Grace Solutions satisfies its burden of demonstrating that no triable issue of material fact exists as to Mr. Chelley's employment and that his injuries arose out of and in the course of his employment. The burden, thus, shifts to Mr. Chelley to show that there is at least one triable issue of material fact regarding his claims. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849; *Jessen, supra*, at p. 1484.)

Mr. Chelley argues worker's compensation exclusivity rule does not apply because:

1. He was a tenant of Grace Solutions, and his claims are based on his tenancy and not his employment.
2. His injuries did not occur in the course of his employment because he was on his break and off work when the attack happened. Grace Solutions has failed to submit time-sheets proving the incident occurred while he was "on the clock".
3. His injuries did not arise from his employment because the attack was not incidental to his work and was not a risk reasonably encompassed within his compensation bargain. Mr. Chelley relies on *Mason v. Lake Dolores Group, LLC* (2004) 117 Cal. App. 4th 822 (*Mason*) citing *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701(*Fermino*).

The Court is not persuaded.

First, Mr. Chelley's operative FAC only pleads against Grace Solutions claims for (1) general negligence in owning, managing, operating, and controlling the subject premises and (2) negligent hiring, supervision and retention of unfit employees. Mr. Chelley's factual allegations encompass Grace Solutions' negligence in operating the property and hiring Mr. Lopez when they knew or should have known about his violent history and propensity. Nowhere in the FAC does Mr. Chelley mention his tenancy or any related claims. Mr. Chelley raises this tenancy claim for the first time in his supplemental opposition to Grace Solutions' motion for summary judgment. "[A] summary judgment motion necessarily is addressed to the pleadings." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 172.) "[A] party cannot successfully resist summary judgment on a theory not pleaded." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541.) "[T]he [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings." [Citation.] (*Hutton v. Fidelity National Title Company* (2013) 213 Cal.App.4th 486, 493.)

Second, whether an injury arises out of and in the course of employment requires a two-prong analysis: (a) the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette v. Workers' Comp. Appeals Bd*. (1998) 17 Cal. 4th 644 (*LaTourette*).) An employee is acting within the course of employment when he does those reasonable things which his contract with his employment expressly or impliedly permits him

to do. (*Id.* at p. 651), (b) the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment, [however], the injury need not be of a kind anticipated by the employer nor peculiar to the employment in the sense that it would not have occurred elsewhere." (*Employers Mut. Liability Ins. Co. v. Industrial Acci. Com.* (*Gideon*) (1953) 41 Cal. 2d 676, 679–680.) "[T]he employment and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a "contributory cause." (*Maher v. Workers' Comp. Appeals Bd*. (1983) 33 Cal. 3d 729, 736.)

Here, Mr. Chelley's break was cut short when he left his room and went back to the shelter area to resume his duties as shift-manager or an assistant manager in providing aid to the shelter guests. Mr. Chelley's injuries occurred during his shift i.e., the time he was signed in and while he was performing a service for his employer in the place of his employment. Even if the Court was to accept Mr. Chelly was injured while "off-duty" or outside his work hours, his injuries occurred still within the course of his employment because he was assisting and protecting his employer's guests in furtherance of his employer's interests, which was reasonably expected. (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal. App. 4th 346.)

It has also long been recognized by the California Supreme Court that in doing the natural and humane thing in an emergency an employee does not step outside the course of employment because his actions are within the scope of what is contemplated he may do or is reasonably expected to do under the circumstances. (*Ocean Accident & Guarantee Corp. v. Industrial Acc. Com*. (1919) 180 Cal. 389 [an employee's injuries occurring while rescuing a child from being run over by a car on the employer's premises arise out of and in the course of his employment. It is reasonably within the course of employment that an employee should attempt to prevent an accident on his employer's premises, particularly where the employer would not improbably be responsible for the accident.]

Having concluded that Mr. Chelley's injuries arose out of and in the course of his employment, the Court addresses his argument that an exception under Section 3602(b)(1) negates the exclusivity rule.

B. **Exceptions to the Exclusivity Rule**

Labor Code Section 3602(b) lists three exceptions to the exclusivity rule (and therefore, defining instances where an employee may initiate a civil damages action against the employer in addition to receiving WCA benefits). The one pertinent exception here is, "[w]here the employee's injury or death is proximately caused by a willful physical assault by the employer." (Lab. Code § 3602(b)(1).) Ratification of an employee's wrongful conduct by the employer can trigger the employer exception to worker's compensation preemption. (*Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608, 1617–1618.)

To invoke this exception, Mr. Chelley argues:

1. Mr. Lopez, the assailant, was a volunteer working for Grace Solutions at the time of his attacks. Volunteers are considered employees under Labor Code §3602.
2. Grace Solutions was aware or should have been aware of Mr. Lopez's history of violence.
3. Grace Solutions ratified Mr. Lopez's violent attack through inaction, turning a blind eye toward his history of violence, and continued employment.
4. This motion must be "denied" since additional discovery is needed.

To benefit from this exception, Mr. Chelley must make an independent showing, via admissible evidence, that (1) Mr. Lopez was an employee of Grace solutions, (2) Grace Solutions had knowledge of his violent history, (3) Grace Solutions failed to take actions and continued to employ Mr. Lopez irrespective of his history. Mr. Chelley has not done so. The conjectures, inferences, and arguments presented in his opposition, supplemental opposition, declaration, and deposition testimony do not equate to admissible evidence. In his deposition testimony, Mr. Chelley merely provides inferences that Mr. Lopez was a volunteer because he helped around the shelter on occasions, had access to the kitchen when it was open, and had helped Phil Mastrocola diffuse problematic clients on 2 occasions when none of the staff were available. (Chelley's Depo. Transcript pp. 90, 310, 313-314, 353-354.) Mr. Chelley also infers Mr. Lopez had a violent history because he heard that from shelter guests on one occasion and Mr. Lopez had a probation officer contacting him at the shelter. (Chelley Depo. Transcript pp. 94-96, 98, 331-332.) Mr. Chelley also testified, however, that (1) unlike formal/official volunteers, Mr. Lopez did not receive any training, (2) he was unaware if Mr. Lopez was listed as an official volunteer, (3) he just perceived Mr. Lopez as a volunteer and treated him as such, (4) prior to the attack, Mr. Lopez

was not hostile or violent toward him or other shelter guests, (5) Mr. Lopez acted as a peace maker and helped diffuse situations where a client posed a threat, and (6) he believed Mr. Mastrocola knew about Mr. Lopez's violent history since he had done his intake and seen the probation officer. (Chelley Depo. Transcript pp. 94-95, 98, 100, 306-308, 331-332.) Mr. Chelley also described the event as "an unprovoked *guest of the shelter* started to assault and stab people…" in his worker's compensation claim. (Mastrocola's Decl., Ex. 2, line 26; (emphasis added).)

Mr. Coprich's and Mr. Ramos' declarations are comprised of speculative, irrelevant statements, and inadmissible hearsay. Even if the Court were to accept those declarations, however, neither provides support or proof that (1) Mr. Lopez was an employee of Grace Solutions at the time of the attack, (2) Mr. Lopez had a history of violence, or that (3) Grace Solutions had any knowledge of Mr. Lopez's alleged history of violence.

Mr. Chelley has not met his burden of showing at least one triable issue of material fact regarding his claims against Grace Solutions. Therefore, Grace Solutions' motion for summary judgment is GRANTED.

C. Timeliness of the Summary Judgment Motion

Mr. Chelley again asks the Court to "deny" the summary judgment motion on the ground that essential discovery is needed for him to oppose Grace Solution's presented facts and evidence. Plaintiff submits declaration of attorney Khawaja's, which declares:

- He was recently substituted into the case and while limited written discovery was conducted, no depositions were taken prior to his involvement.
- Written discovery is needed to obtain information about witnesses, past incidents, past assaults, security issues, Mr. Lopez, Defendant's employees, videos of this and past incidents, and policy and procedure documents.
- Plaintiff needs to propound subpoenas to the San Jose Police Department and other governmental agencies.
- Depositions of Grace Solutions' employees Anthony Mastracola and Daniel Zapien have been scheduled for March 21, and 27, 2024. These deponents know the policies and procedures of Grace Solutions and the problems at the shelter.

Grace Solutions contends that Plaintiff's argument and need for additional discovery are disingenuous. The Court agrees. This motion was originally heard on December 19, 2023, and Mr. Khawaja, attorney for Mr. Chelley, made the same argument and claimed essential discovery and depositions were needed. The Court narrowed the issue on this motion to whether Mr. Lopez was an employee and if so, did Grace Solutions ratify his known violent behavior. To address the issue, the Court continued the hearing to allow Mr. Khawaja to conduct depositions of Mr. Mastrocola, Ms. Hogg, and Dennis Clover, which were already scheduled for January 2024.

Grace Solutions asserts Mr. Khawaja attended depositions of his own clients as well as Phil Mastrocola's, Penny Hogg's from Grace Solutions, Dennis Glover's from Grace Baptist Church, and Plaintiff Paulson's. Mr. Khawaja has failed to issue any written discovery, failed to notice any depositions himself during this two-month period, and failed to take any affirmative steps toward the discovery he claims is essential for defeating the motion for summary judgment. Furthermore, neither of the two employees of Grace Solutions, whom Mr. Khawaja seeks to depose, would have any relevant testimony to defeat this motion.

The Court finds Mr. Chelley has had ample time to conduct his discovery and gather facts to support his claims. Propounding subpoenas to the San Jose Police Department and other governmental agencies and/or deposing additional employees of Grace Solutions or others will not change the undisputed facts that Mr. Chelley was an employee of Grace Solutions and his injuries rose out of and in the course of his employment. No additional testimony from Grace Solutions employees will establish Mr. Lopez as an employee of Grace Solution. The Court does not find good cause to continue this matter for further discovery, treats Plaintiff's inability to dispute Grace Solutions' Undisputed Material Facts as admissions, and GRANTS the motion for summary judgment.

Calendar Line 12
Case Name: *Becky Edwards et al vs Tesla, Inc. et al*
Case No.: 21CV382331

Before the Court is Plaintiff's Motion for Sanctions Against Tesla, Inc. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

Code of Civil Procedure section 2031.310(i) provides: "if a party fails to obey an order compelling further [discovery] responses, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction." (See also *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154.) There are four types of terminating sanctions: (1) striking pleadings in whole or in part; (2) staying further proceedings by a party until it obeys a discovery order; (3) dismissing the action or part of it; and (4) rendering a default judgment. (Code of Civ. Pro. §2023.030(d).) An issue sanction either orders that designated facts be taken as established or prohibits a party from supporting or opposing designated claims or defenses. (Code of Civ. Pro. §2023.030(b); *Kuhns v. State* (1992) 8 Cal.App.4th 982, 989; *Marriage of Chakko* (2004) 115 Cal.App.4th 104, 109-110.

The trial court has broad discretion to impose discovery sanctions; a judge's sanction order will not be reversed absent "a manifest abuse of discretion that exceeds the bounds of reason." (*Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1191.) However, a sanction should not provide a windfall to the other party by putting that party in a better position than it would have been in if the party had obtained the discovery. (*Kwan Software Eng'g, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74-75.) The basic purpose of a discovery sanction is to compel disclosure of discoverable information. (*Rutledge*, 238 Cal.App.4th at 1193.) Sanctions may not be imposed solely to punish the offending party. (*Id.*; *Kwan*, 58 Cal.App.5th at 74-75.)

While the Court is not going to order the case dispositive issue sanctions Plaintiff seeks on this motion because such sanctions would provide a windfall rather than induce compliance, the Court marks its ruling on this motion as the beginning of the journey to increasingly harsher sanctions if Tesla continues to refuse to change its discovery behavior in this case.

At Tesla's request, the Court provided a detailed order outlining the Court's relevance findings and the Court's rulings regarding what Telsa is required to produce in connection with the discovery

requests that are the subject of Plaintiff's present motion. The Court has also witnessed Tesla renege on a promise made in open court to work with Plaintiffs to design a method by which Plaintiff could review certain Tesla data. Tesla's change in position relative to that motion required the Court to once again intervene and fashion its own plan for the parties, wasting two additional months of Plaintiff's time. Here, Tesla failed to comply with the Court's discovery order—even after receiving an extension of time to do so—until Plaintiff filed this motion for sanctions. It is this Court's view that Tesla is not getting the message, so the Court will restate it here: Tesla, like every other defendant who did not choose to be in litigation, must comply with the Code of Civil Procedure's discovery requirements and this Court's orders applying those requirements to the issues in this case. Period.

Tesla and its counsel are ordered to pay Plaintiff's $9,513.00 in fees incurred to bring this motion for sanctions within 20 days of service of this formal order. The Court denies without prejudice the further sanctions Plaintiff seeks.

Calendar Line 16
Case Name: *Eftychios Theodorakis vs DFINITY Stiftung et al*
Case No.: 22CV403734

Before the Court is Defendant's Request for Clarification, or in the alternative, to Certify a Question of Law Pursuant to Code of Civil Procedure sections 128(a)(8), 166.1. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for breach of contract, declaratory relief, unfair competition, and breach of the implied covenant of good faith and fair dealing. Plaintiff Eftychios Theodorakis alleges that he was employed by Defendant Dfinity as a software engineer in August 2018. (Complaint, ¶11.) Dfinity is a wholly owned subsidiary of Dfinity Stiftung, a not-for-profit foundation with its principal place of business in Zurich, Switzerland ("Dfinity Foundation"). (Complaint, ¶¶2, 3, 11.) Dfinity is a decentralized network design whose tokens are a form of digital currently similar to bitcoin. (Complaint, ¶12.)

As a condition of his employment with Dfinity, Plaintiff was required to sign a written employment contract and a "Restricted DFN Agreement" with Dfinity Foundation, which agreement is attached to the Complaint. (Complaint, ¶11.) The Restricted DFN Agreement gave Plaintiff the right to buy a certain quantity of Dfinity tokens as an employment benefit. (Complaint, ¶13.) Plaintiff alleges Defendants failed and/or refused to allocate and/or deliver the promised tokens to him even though all conditions for such allocation/delivery had been met. (Complaint, ¶¶13-17.) In 2020, Dfinity declared that the Restricted DFN Agreement was "void" for unspecified reasons and, when pressed, advised Plaintiff that Dfinity "had voided unilaterally (employees') contracts" including Plaintiff's Restricted DFN Agreement. (Complaint, ¶18.)

The Restricted DFN Agreement expressly states that it "may be amended or modified only by a written instrument executed by both Dfinity Foundation and the Recipient." (Complaint, ¶19.) Defendants provided no consideration for the requirement that Plaintiff sign any additional agreements as a condition to receive the tokens. (Complaint, ¶20.) In December 2020, when Plaintiff again attempted to obtain the tokens, Defendants changed the terms and did not permit Plaintiff to move forward according to the terms of the Restricted DFN Agreement. (Complaint, ¶21.) On April 1, 2021,

having fulfilled all conditions of his employment, Plaintiff left Dfinity still having not received the promised tokens. (Complaint, ¶22.)

To receive any tokens at all, Defendants demanded Plaintiff sign a separation agreement that added conditions for the distribution of the balance of the tokens to which Plaintiff avers he was already entitled. (Complaint, ¶23.) Plaintiff alleges he signed the separation agreement, which imposed additional and onerous conditions to the Restricted DFN Agreement, under duress. (Complaint, ¶¶23-24.) Defendants then demanded Plaintiff execute a "Side Agreement" to obtain the additional tokens he was entitled to, but Plaintiff refused to sign. (Complaint, ¶27.)

Plaintiff filed this action on August 26, 2022, asserting claims against both Dfinity and Dfinity Foundation for breach of contract, declaratory relief, unfair competition, and breach of the implied covenant of good faith and fair dealing. By order dated March 23, 2023, the Court granted Defendants' motion to compel arbitration.

On April 28, 2023, Plaintiff moved ex parte to amend his complaint to allege additional facts. By order on that same date, the Court denied Plaintiff's ex parte application, stating: "By this Court's March 23, 2023 Order, this matter was stayed pending arbitration. If Plaintiff has additional claims, any such claims must be brought before the arbitrator, who can determine whether such claims are subject to arbitration." Plaintiff did not bring those claims or proposed amendments to the arbitrator, but instead filed them in federal court. Defendants then moved for contempt, which motion the Court denied on the basis of an ambiguity in the law regarding whether filing claims in an arbitration tolls the statute of limitations on those claims.

Apparently, the JAMS arbitration Plaintiff initiated after Defendants filed their motion for contempt is stayed by the Defendants. and Plaintiff is continuing to pursue its federal court action, in which a motion to dismiss is scheduled for May. Defendants now move for clarification of the Court's order denying their contempt motion or certification of an issue of law concerning the tolling of statute of limitations when claims are filed in arbitration.

II. Legal Standard and Analysis

Defendants' motion is denied. The post-arbitration motion Defendants brought before the Court was for contempt. Because California law is unclear as to whether the statute of limitations is applicable

in arbitration proceedings even after briefing, argument, and the Court's own research, the Court found it would be improper to find Plaintiff in contempt of the Court's order sending this case to arbitration by filing his claims in federal court, which filing would definitively toll the statute. Failing to find contempt did not undo the Court's original order sending the case to arbitration. Nor would it be helpful in this case to now certify the question of tolling and arbitration to the court of appeal; the request only highlights that Plaintiff could not have been charged with the knowledge regarding this issue at the time Plaintiff filed the federal court action.

However, the Court finds it erred when it denied Plaintiff's motion to amend the complaint as set forth in Plaintiff's April 28, 2023 ex parte application. Had the Court understood the ambiguity around this tolling issue at the time it considered Plaintiff's request, it would have permitted the amendment. The Court thus corrects that error on its own motion here.

Parties may only move for reconsideration as authorized by Code of Civil Procedure section 1008. However, Section 1008 "does not limit the court's ability, on its own motion, to reconsider its prior interim orders so it may correct its own errors" (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107) and the court has inherent power to correct its own errors when they are called to the court's attention by way of an improperly filed motion (*Marriage v. Barthold* (2008) 158 Cal.App.4th 1301, 1308). There is no time limitation on this inherent power; the court may change interim orders based on a change of law at any time before final judgment is entered. (*Blake v. Ecker* (2001) 93 Cal.App.4th 728, 739.) In considering whether to reconsider a prior order, the court should examine the extent of preparation in the case, the proximity of a trial date, and "the materiality of the change in the law and the potential for prejudice to any of the parties." (*Phillips v. Sprint PCS* (2012) 209 Cal. App. 4th 758, 769.)

There is no trial date, the arbitration is stayed, and the parties are prejudiced by the Court leaving the erroneous April 28, 2023 order in place, as is evinced by the fact that there are now three proceedings covering the same dispute. Thus, the parties would be assisted rather than prejudiced by the Court reversing its earlier interim order. That order did not take into account the ambiguity surrounding the applicability of the statute of limitations to arbitrations. Now that the Court is aware of this ambiguity in California law, the Court can correct its prior interim order to address it.

The Court thus reconsiders and now GRANTS Plaintiff's April 28, 2023 ex parte application to amend the complaint. Within 10 days of service of this formal order, Plaintiff is ordered to (1) file and serve the amended complaint in this case, (2) amend his petition in the pending JAMS arbitration, and (3) file a notice of this order in the federal action.

Calendar Line 17
Case Name: *Andrew Mo vs Samsung Research America, Inc.*
Case No.: 22CV408165

Before the Court is Plaintiff's Motion to Lift Discovery Stay. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

III. Background

This is an action for wrongful termination and retaliation. Plaintiff Andrew Mo who was a Senior Director of Software (Internal Global System Level of Principal Engineer) for Samsung Research America, Inc.'s ("Samsung"), alleges he reported discriminatory behavior by a senior executive as required by Samsung internal policies and was promptly fired in retaliation for this protected activity. Mo filed his Complaint on December 2, 2022, asserting (1) unlawful retaliation in violation of public policy, (2) wrongful termination in violation of public policy, and (3) discrimination and harassment. Samsung filed an answer on February 6, 2023, denying all allegations and asserting in its fifteenth affirmative defense that Plaintiff's claims are subject to binding arbitration. Samsung then moved to compel this matter to arbitration.

After briefing and argument, the undersigned Court denied Samsung's motion to compel arbitration by order dated August 25, 2023 ("August Order"). That order is currently on appeal, which appeal was perfected on October 26, 2023. No briefing has taken place. Samsung obtained an extension for its opening appellate brief, and the Sixth District has since vacated the briefing schedule and stayed the appeal for ninety days. Plaintiff now asks the Court to permit discovery to move forward pursuant to either Code of Civil Procedure section 1294(a) which was revised as of January 1, 2024 or the Court's discretion under Code of Civil Procedure section 128. Samsung opposes.

IV. Legal Standard and Analysis

Under the terms of the Offer Letter and the Confidentiality Agreement which contain the parties' arbitration agreement, California law applies, a finding neither party disputed in the context of the August Order. Under current California law **"**An order dismissing or denying a petition to compel arbitration [is appealable]. *Notwithstanding Section 916, the perfecting of such an appeal shall not automatically stay any proceedings in the trial court during the pendency of the appeal*.

(Code Civ Proc § 1294 (a) (emphasis added).) The italicized language came into effect as of January 1, 2024, after Samsung perfected its appeal in this case.

The legislative history for this statutory change explains:

> Senate Bill 365 allows consumers, workers, and public entities to continue their court cases when a trial court rules that a forced arbitration agreement is invalid. Current law allows corporate defendants to pause a consumer, government, or workers' case by imply filing an appeal of a trial court's denial of a motion to compel arbitration. Through this process, powerful corporations delay cases filed against them for typically one to three years. This bill allows consumers, governments, or workers to move their case forward if a company files an appeal, rather than waiting for years while the appeal is heard. SB 365 will level the playing filed for consumers, governments, and workers who deserve to move their case forward when a company or employer violates their rights. (Legislative History, Senate Judiciary Committee Hearing Date April 11, 2023 at 6.)

It is clear the California legislature intended to address cases with fact patterns like the one at bar. Mo sued Samsung. The Court denied Samsung's motion to compel arbitration. Samsung appealed that denial, and no substantive activity has taken place in the case since.

The parties spend significant time debating whether the statute can be retroactively applied and the viability of Samsung's appeal. Whether Samsung's appeal is likely to be successful does not appear to be relevant to the analysis related to the legislature's change to section 1294(a). Thus, while the Court notes that contrary to Samsung's characterization in its briefing the core of the Court's reasoning in denying the motion to compel was based in the lack of mutuality in the injunctive relief term, the likelihood of Samsung's success before the court of appeal is entirely in that court's hands and not relevant to whether a stay on discovery here should be in place.

The focus on retroactivity is similarly misplaced. This case is currently pending before the Court, and if the Court rules that discovery can now move forward, that ruling will necessarily be prospective and inapplicable to what occurred from October 2023 through the date of Plaintiff's motion.

Put another way, the Court need not apply this statute retroactively to determine how to manage a case that is still pending before it. Samsung had the right to rely on the automatic stay language in effect from October 2023 through January 1, 2024 as a basis to refuse to respond to discovery. But the law has since changed, and nothing in the statutory framework or legislative history suggests this Court is without discretion to apply the current law to this still pending case going forward.

Samsung is correct that there are some potential pitfalls in the application of this new law in the form of wasted resources on trials and summary judgment proceedings. However, the Court can manage those concerns by for now permitting only certain parts of the case to move forward. The parties would not be in a position to try this case or move for summary judgment until after discovery is conducted in any event.

Accordingly, Plaintiff's motion to lift discovery stay, or put differently, for discovery to commence is GRANTED. Samsung shall have 20 days from issuance of this formal order to respond to Plaintiff's outstanding discovery requests. It is the Court's intent that discovery move forward according to the Code of Civil Procedure (not AAA rules). If this matter is eventually ordered to arbitration as a result of Samsung's appeal of the August Order, discovery collected by the parties in this matter may be used in that proceeding subject to the Arbitrator's discretion.