SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: February 27, 2024 TIME: 9:00 A.M.

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

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

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV394084	Ronny Morell v. BT Properties et al.	Demurrer to second amended complaint: notice is proper, and the demurrer is unopposed. The court has reviewed the second amended complaint and agrees with defendants that it does not cure the deficiencies identified in the court's prior order sustaining the demurrer to the first amended complaint with leave to amend. In fact, the second amended complaint merely repeats many of the same allegations as in the prior pleading. Accordingly, the court SUSTAINS the demurrer WITHOUT leave to amend.
LINE 2	22CV397314	Xinxing Ren et al. v. We Party, Inc. et al.	Click on LINE 2 or scroll down for ruling in lines 2-4.
LINE 3	22CV397314	Xinxing Ren et al. v. We Party, Inc. et al.	Click on LINE 2 or scroll down for ruling in lines 2-4.
LINE 4	22CV397314	Xinxing Ren et al. v. We Party, Inc. et al.	Click on LINE 2 or scroll down for ruling in lines 2-4.
LINE 5	22CV403081	CamHong Pham v. David Glen Abel et al.	Click on LINE 5 or scroll down for ruling in lines 5-6.
LINE 6	22CV403081	CamHong Pham v. David Glen Abel et al.	Click on LINE 5 or scroll down for ruling in lines 5-6.
LINE 7	2013-1-CV-239998	Resurgence Capital, LLC v. Joanne M. Yi	Claim of exemption: DENIED. The court finds that the amount held by the sheriff in excess of the statutorily exempt amount ($383.99) is not exempt and should be released to the judgment creditor.

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LINE 8	19CV341058	Michael Jadali et al. v. Cigna Health and Life Insurance Company et al.	Motion to file the request for commission for out-of-state deposition under seal: parties to appear. Notice is apparently not proper, as defendants filed the motion without a hearing date and then failed to file an amended notice of the February 27, 2024 hearing date.
LINE 9	20CV364578	Bryan Thuerk v. Kia Motors America, Inc.	Click on LINE 9 or scroll down for ruling.
LINE 10	21CV376809	Travelers Property Casualty of America v. Critchfield Mechanical, Inc. et al.	Click on LINE 10 or scroll down for ruling.
LINE 11	21CV382347	Kateryna Pomogaibo v. Ekaterina Berman	Motion to disqualify counsel: on November 14, 2023, the Presiding Judge of the Santa Clara Superior Court (Judge McGowen) denied plaintiff's request to file this motion under Code of Civil Procedure section 391.7. Accordingly, this motion is OFF CALENDAR.
LINE 12	21CV391013	Elizabeth Gonzalez v. Rogelio Pena et al.	Click on LINE 12 or scroll down for ruling.
LINE 13	23CV421549	John McEnery IV v. Tom McEnery et al.	Click on LINE 13 or scroll down for ruling.

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Calendar Lines 2-4
Case Name: *Xinxing Ren et al. v. We Party, Inc. et al.*
Case No.: 22CV397314

I. BACKGROUND

This consolidated action is primarily a dispute over the ownership of a restaurant, brought by plaintiffs Xinxing Ren ('Ren") and Zhiming Zhou ("Zhou") against defendants Anjiang Wu ("Wu"), Baiyu Hu ("Hu"), Yinghai Li ("Li"), and We Party, Inc. ("We Party").

A. Procedural History

Ren filed her original complaint on April 26, 2022, while she was represented by counsel. That complaint stated claims for: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Promissory Estoppel; (4) Fraud; (5) Unfair Business Practice; (6) Unjust Enrichment; (7) Money Paid; (8) Accounting; and (9) Conspiracy. She alleged that defendants Wu, Hu, and Li were all the alter egos of We Party.

We Party brought a demurrer to Ren's original complaint, as well as a motion to strike the complaint's request for punitive damages. Ren, as a self-represented litigant, opposed both motions and separately filed a motion for leave to file a first amended complaint ("FAC"). This court (Judge Kirwan) heard the demurrer and motion to strike on September 8, 2022. Judge Kirwan sustained the demurrer with leave to file the proposed FAC and denied the motion to strike as moot in light of the demurrer ruling. A formal order to that effect was signed on September 9, 2022.[1]

On August 25, 2022, Zhou, also self-represented, filed a separate complaint against Wu, Hu, Li, and We Party (Case No. 22CV402387), alleging the same causes of action as Ren, as well as a tenth cause of action for "Unpaid Wages." Zhou's allegations in many respects duplicated Ren's, with much of the same text apparently cut and pasted from one pleading into the other.

On September 29, 2022 Wu, Hu, Li, and We Party filed and served a cross-complaint against both Ren and Zhou. This operative cross-complaint states claims for: (1) Declarative Relief; (2) Breach of Contract; (3) Breach of Good Faith Covenant; (4) Breach of Fiduciary Duty; and (5) Accounting. Ren filed an answer to the cross-complaint on November 2, 2022.[2]

After Ren requested and received an extension of time, she filed her FAC on November 3, 2022, adding a tenth cause of action for "Failure to Pay Wages."

On May 9, 2023, this court (the undersigned) heard defendants' motion to consolidate the two cases (Nos. 22CV397314 & 22CV402387) and Ren's motion to strike the cross-complaint. The court granted consolidation and denied Ren's motion to strike as "exceedingly

[1] The court on its own motion takes judicial notice of the September 9, 2022 order, pursuant to Evidence Code section 452, subdivision (d).
[2] The court on its own motion also takes judicial notice of the cross-complaint, the attached proof of service, the additional proof of service filed on November 15, 2022, and Ren's answer to the cross-complaint, pursuant to section 452(d).

untimely." The court further noted that at least one motion for relief from entry of default had already been filed by one of the defendants (Wu) and that the court "routinely grants such motions under section 473(b) of the Code if Civil Procedure, particularly when they are caused by understandable confusion with the clerk's office."[3]

Subsequently, the court heard and denied a motion by Ren to disqualify defense counsel on May 23, 2023. On June 6, 2023, the court (Judge Geffon, covering for the undersigned) then heard and denied a similar motion to disqualify by Zhou. Judge Geffon's signed order (dated June 7, 2023) also overruled Zhou's demurrer to defendants' amended answer. On June 15, 2023, the court (the undersigned) denied as moot a motion by Zhou to strike defendants' original answer. On June 29, 2023, the court (Judge Alloggiamento, covering for the underigned) heard and granted a motion by Wu to set aside entry of default as to him.

Finally, on September 26, 2023, this court (the undersigned) heard and denied Zhou's motion for reconsideration of the May 9, 2023 order and granted defendants We Party, Hu, and Li's motion for relief from default. The court's September 26 order again noted that motions for relief from default are routinely granted.[4]

B. The Present Motions

Currently before the court are three matters. The first is a demurrer by Ren to defendants' September 29, 2023 amended answer to the FAC. The second is a motion by Zhou for entry of default against defendants Wu, Hu, and Li, based on the same argument as in Ren's demurrer to the amended answer. (Defendants' opposition to this motion refers to the motion as a "demurrer.") The third matter is a motion for relief from default by defendant Wu, opposed by Ren.

II. REN'S DEMURRER TO DEFENDANTS' AMENDED ANSWER

A. General Standards

"When any ground for objection to a[n] . . . answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading." (Code Civ. Proc., § 430.30, subd. (a).) A party against whom an answer has been filed may demur to that answer upon any one or more of the following grounds: "(a) The answer does not state facts sufficient to constitute a defense. [¶] (b) The answer is uncertain. [¶] (c) Where the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral." (Code Civ. Proc., § 430.20.)

B. Analysis of Ren's Demurrer

As an initial matter, Ren has failed to comply with Code of Civil Procedure section 430.41, subdivision (a). This statute requires a demurring party to meet and confer "in person

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[3] The court takes judicial notice of the May 9, 2023 order on its own motion under section 452(d).
[4] The court takes judicial notice of the September 26, 2023 order under section 452(d).

or by telephone" before filing a demurrer. The mere sending of emails, as described in Ren's declaration, does not comply with the express terms of the statute. Self-represented parties, like Ren and Zhou, are held to same rules of procedure as attorneys. (See *Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267.) "A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985.) Nevertheless, because a failure to comply with section 430.41 is not a basis, on its own, for overruling a demurrer, the court will consider the merits. (See Code Civ. Proc., § 430.41, subd. (a)(4).)

The sole basis for Ren's demurrer is a claim of uncertainty. According to Ren: "The filed Answer raises significant concerns related to the identity of the answering parties. While the 'Filed by' of the Answer on the docket only lists 'We Party, Inc.,' the content of the Answer mentions additional defendants Yinghai Li and Baiyu Hu. This discrepancy has caused confusion and uncertainty regarding the true answering parties of the Answer." (Demurrer at p. 2:5-7.)

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

The court OVERRULES the demurrer. The amended answer does not come close to being so uncertain as to necessitate a re-pleading. To begin with, the description of a pleading or answer on the court's docket is not a part of the pleading and has no bearing on whether it is comprehensible or adequately pled. A demurrer only examines the face of the pleading itself. More critically, the amended answer clearly states that "Defendant[s] We Party, Inc., Baiyu Hu and Yinghai Li (collectively 'Defendants') hereby file this Amended FAC to the First Amended Complaint ('FAC') filed by Plaintiff Xinxing Ren ('Plaintiff') herein, as follows . . . ." (Amended Answer at p. 1:18-20.) It goes on to state that "Defendants each deny generally and specifically, each and every purported cause of action contained therein," and then lists several affirmative defenses asserted by "Defendants." While it is not a model of clarity, as there are various typographical errors, no one reading the amended answer could reasonably believe that it had been filed on behalf of We Party only and was not also filed on behalf of defendants Hu and Li.

III. ZHOU'S MOTION FOR ENTRY OF DEFAULT

Zhou's motion for entry of default against defendants Wu, Hu, and Li states that it is brought pursuant to Code of Civil Procedure section 412.20. (See Memorandum at p. 2:5.) This is the wrong statute, as section 412.20 merely describes the required contents and approved form of a *summons* and does not discuss or authorize any type of motion, much less authorize the entry of default.

Zhou's argument in support of the motion is essentially the same as that made in Ren's demurrer. She claims that the motion was brought "due to uncertainty regarding whether the answer filed on April 17 represents Anjiang Wu ('Wu'), Baiyu Hu ('Hu'), Yinghai Li ('Li') and also Wu, Hu . . . . Despite the summon[s] being served on April 4, 2023, only an answer

'filed by' We Party, Inc., through Ms. Shanshan Zou on April 17, 2023 shown on the docket, while claiming to represent all defendants in the content." (Memorandum at p. 2:6.13.) Zhou claims "this lack of clarity prevented the plaintiff from requesting entry of default by submitting form to clerk office [sic], necessitating this motion for relief." (*Id.* at p. 2:18-20.) The motion concludes by "request[ing] a determination of whether Zou's April 17th, 2023 [sic] answer was filed on behalf of Anjiang Wu, Baiyu Hu, Yinghai Li or not." (*Id.* at p. 4:12-14.)

Assuming for purposes of argument that this "motion for entry of default" is even procedurally possible, the court DENIES it as follows.

The April 17, 2023 amended answer to the FAC filed in Case No. 22CV402387 quite clearly states that "Defendant[s] We Party, Inc., Anjiang Wu, Baiyu Hu, and Yinghai Li (collectively 'Defendants') hereby file this amended FAC to the First Amended Complaint ('FAC') filed by Plaintiff Zhiming Zhou," and that the "Defendants each deny generally and specifically, each and every allegation contained in the FAC against Defendants." It goes on to list several affirmative defenses asserted by "Defendants." While this amended answer, like the nearly identical one that was later filed in Case No. 22CV397314, contains various typographical errors, no one reading it could reasonably believe that it was not filed on behalf of all four defendants: We Party, Wu, Hu, and Li.

The court would also emphasize that even if the amended answer were materially deficient as a pleading, the correct remedy would not be a default. Indeed, the remedy is *never a default* when the opposing party is clearly trying to participate in the case. This court has repeatedly tried to explain to Ren and Zhou that a "default" is not proper where the other side is actively participating, or at least attempting to participate, in the case. Yet, Ren and Zhou continue to bring motions seeking one or more "defaults" against one or more defendants, contrary to the court's clear statement. The court will remind the plaintiffs one more time: there is a strong public policy in California that favors deciding cases *on the merits*, not on the basis of a default or other procedural pitfall. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 685.) Litigation is not a game of "gotcha," even if the other side keeps making preventable mistakes.

The court will also remind the plaintiffs once more that self-represented parties are not entitled to any exceptional treatment in civil litigation and are held to the same standards as represented parties. Code of Civil Procedure section 128.7, subdivisions (b) and (c), providing for the issuance of sanctions where motions and demurrers have been filed for an improper purpose, applies to both self-represented parties and attorneys. Both Ren's demurrer to the amended answer and Zhou's motion for entry of default could potentially be viewed as bad-faith filings under that statute.

IV. WU'S MOTION FOR RELIEF FROM DEFAULT

As already noted several times in this case, the court "may, upon any terms as may be just, relieve a party . . . 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).) "The trial court has discretion under section 473(b) on a showing of mistake, inadvertence, surprise or excusable neglect to grant relief from a judgment, dismissal or other order based on its evaluation of the nature of the mistake or error alleged and the justification proffered for the conduct that occurred." (*Austin v. Los Angeles Unified School*

Dist. (2016) 244 Cal.App.4th 918, 928.) "The general underlying purpose of section 473(b) is to promote the determination of actions on their merits." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.)

The granting of timely motions for relief from default under Code of Civil Procedure section 473(b) is fairly routine. "Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations 'very slight evidence will be required to justify a court in setting aside the default.' [Citations.] [¶] Moreover, 'because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default.' [Citation.] An order denying a motion for relief under section 473 is therefore 'scrutinized more carefully than an order permitting trial on the merits. [Citation.]'" (*Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal.App.4th 379, 385.)

As noted above, Judge Alloggiamento previously granted a motion by Wu to set aside entry of default on June 29, 2023. Despite this order, Ren again had a default entered against Wu on August 9, 2023, as Wu delayed in filing an answer.

Having reviewed Wu's current motion and the supporting declaration from counsel, the court finds that setting aside the August 9, 2023 default entered against Wu is proper and it therefore GRANTS the motion for relief from default.

While Wu clearly could have acted more quickly than he did after Judge Alloggiamento issued her order, he has again demonstrated that the entry of default against him may have been caused *in part* by inadvertent errors and/or mistakes and delays in the clerk's office in processing documents submitted for e-filing, in comparison to documents submitted for filing in person, as well as errors and/or delays in processing fees. Wu's attorney also shares some of the blame. The resulting confusion once again provides good cause for granting the motion. Ren's opposition to the motion fails to show that granting the motion will result in any prejudice against her. The opposition states that Ren has opposed the motion because "the moving party is unknown to Plaintiff." (Opposition at p. 1:13.) The court finds that this explanation defies credulity, and it provides no basis for denying the motion.

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Calendar Lines 5-6
Case Name: *CamHong Pham v. David Glen Abel et al.*
Case No.: 22CV403081

Plaintiff CamHong Pham has filed two motions to compel: (1) for further answers to special interrogatories (and for $2,880.00 in monetary sanctions); and (2) for further responses to, and to compel compliance with, requests for production of documents (and for $3,280.00 in monetary sanctions). Notice is proper, but defendant David Glenn Abel has not filed any response to either motion.

The court finds that Abel's answers to Special Interrogatories Nos. 8, 9, and 21 are insufficient and GRANTS the motion to compel. Abel shall provide supplemental answers within 20 days of notice of entry of this order. In addition, the court GRANTS IN PART the request for sanctions in the amount of $880 (two hours at $400/hour plus filing fees).

The court finds that Abel's responses to Requests for Production Nos. 9 and 31 are inadequate and GRANTS the motion to compel further responses within 20 days of notice of entry of this order. The court overrules Abel's objections on the basis of undue burden. The court DENIES the motion to compel a further response to Request No. 22, which implicates the tax return privilege. The court GRANTS the motion to compel compliance and orders Abel to fix his production with the missing Bates ranges (308-321 and 565-579), as well as to provide an identification of which Bates ranges are responsive to which requests for production. This shall be done within 20 days of notice of entry of this order. Finally, the court GRANTS IN PART the request for sanctions in the amount of $1,280 (three hours at $400/hour plus filing fees).

IT IS SO ORDERED.

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Calendar Line 9
Case Name: *Bryan Thuerk v. Kia Motors America, Inc.*
Case No.: 20CV364578

Defendant Kia Motors America, Inc., which is apparently now called Kia America, Inc. (but will be referred to herein as "Kia"), moves to strike or tax costs contained on plaintiff Bryan Thuerk's memorandum of costs. The court previously issued an order granting in part and denying in part Thuerk's motion for attorney's fees, on December 21, 2023.[5] The court expressly reserved the issue of costs in that order, given that Kia had just recently filed its motion to tax costs.

As a threshold matter, the court rejects Thuerk's argument that Kia's motion is untimely. Rule 3.1700(b)(1) requires that a motion to strike or tax costs be served within 15 days after service of the memorandum of costs. That was done here, and so that ends the inquiry. It does not matter that an amended notice of motion was served later with an updated hearing date for the motion.

As for the costs challenged by Kia, the court GRANTS IN PART and DENIES IN PART the motion. As a general matter, Kia bears the burden of showing that amounts on the memorandum of costs are unreasonable, and the law does not require that invoices and receipts be attached to a memorandum of costs, contrary to Kia's argument. The court specifically rules as follows:

Filing Fees: Filing fees are expressly allowable as recoverable costs, under Code of Civil Procedure section 1033.5, subdivision (a)(1). Kia argues that filing fees for discovery motions in this case were unnecessary, because the discovery disputes were ultimately resolved by an informal discovery conference. The court rejects this argument—the fact that the discovery motions were resolved before proceeding to a contested hearing does not mean that they were "unnecessary." DENIED.

Expert Fees: Expert fees are recoverable for experts "ordered by the court"—*i.e.*, experts appointed under Evidence Code section 730. They are disallowed for experts "not ordered by the court." (Code Civ. Proc., § 1033.5, subds. (a)(8) & (b)(1).) In this case, Thuerk has not identified any statutory basis for recovery of the expert witness fees he incurred in this case, notwithstanding section 1033.5(b)(1). GRANTED.

Court Reporter Fees: Court reporter fees are recoverable under section 1033.5, subdivision (a)(11). Kia fails to provide any support for its conclusory argument that the reporter fees here were "excessive on their face." They were not. DENIED.

Other Costs: Kia argues without citation to any authority that CourtCall costs are disallowed. They are *expressly permitted* under Code of Civil Procedure section 367.6, subdivision (c). As for mediation and travel costs, the court concludes that they were "reasonably incurred" in connection with the prosecution of this case. (Civ. Code, § 1794, subd. (d).)

[5] In that order, the court apparently misspelled plaintiff's first name as "Brian" instead of "Bryan."

Attorney's Fees: The court denies Thuerk's request for the attorney's fees incurred in opposing this motion, given that the court has disallowed the largest amount contained on the memorandum of costs.

In sum, the court grants the motion in part and strikes (or taxes) the expert witness fees on Thuerk's memorandum of costs ($4,077.50). In all other respects, the court denies the motion and awards the costs sought by Thuerk in his memorandum.

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Calendar Line 10
Case Name: *Travelers Property Casualty of America v. Critchfield Mechanical, Inc. et al.*
Case No.: 21CV376809

This is a motion for attorney's fees arising out of an appeal of an anti-SLAPP ruling by this court (Judge Kirwan) on September 7, 2021, as well an appeal of a related ruling on attorney's fees and costs by the court (Judge Monahan) on November 2, 2021. The Court of Appeal affirmed both rulings.[6] The California Supreme Court then denied a petition for review.

The prevailing party, plaintiff Travelers Property Casualty Company of America ("Travelers"), requests a total of $60,994.50 in fees and costs, representing the amounts incurred in responding to both appeals and the petition for review. Defendant Critchfield Mechanical, Inc. ("Critchfield") opposes the motion on two discrete grounds, discussed below.

As a threshold matter, Travelers has submitted a request for judicial notice of various court filings and orders under Evidence Code section 452, subdivision (d). The court grants the request but does not take judicial notice of any disputed facts or of the correctness of any legal arguments contained in these documents. With its reply, Travelers has also submitted a request for judicial notice of an "Attorney's Fees Matrix" from the U.S. Attorney's Office for the District of Columbia. The court denies the latter request, as the court finds this exhibit to be irrelevant to its consideration of the issues on this motion. In addition, the court generally does not consider new evidence submitted in reply.

1. Use of Litigation and Activity Codes

First, Critchfield argues that instead of using "objective" litigation and activity codes from the ABA Uniform Task-Based Management System—such as "L500 Appeal"—Travelers used "subjective" methodology to segregate billing entries for appeal-related work and non-appeal-related work. Travelers responds that there were only 11 time entries that did not use an L500 code, and they total only $415.50. Travelers is willing to concede this $415.50 amount. (Reply at pp. 1:25-2:5 & 6:7-7:4.) The court agrees with Travelers that its "subjective" review of the billing entries was not *per se* improper, but in light of its concession in the briefing, the court will not address the propriety of the methodology any further and will simply reduce the requested amount by $415.50.

2. Amounts Incurred for the Appeal of the Award of Attorney's Fees and Costs

Second, Critchfield argues that Travelers spent too much time on the appeal of the attorney's fee order, because "the second proceeding was just a 'placeholder' [and] required no briefing of any substantive issue not already set forth in the appeal of the Anti-SLAPP Order." (Opposition at p. 5:20-23.) Critchfield particularly takes issue with 12.5 hours spent researching "case law for appeal" of the attorney's fees order, noting that its substantive arguments in its opening brief were "contained in less than three pages."

The court has taken judicial notice of, and has reviewed, the briefs on the appeal, and it is true that Critchfield's opening brief on the attorney's fees appeal was extremely short and

[6] The Second Appellate District was specially assigned to the appeals.

essentially non-substantive. It is also true that Travelers' appellate opposition was much longer (over 12 pages of argument) and cited 15 published cases. Given the non-substantive nature of Critchfield's "follow on" attorney's fees appeal, the court does find that Travelers' response was overkill. Given the specific objection raised by Critchfield, the court will reduce the 12.5 hours spent researching case law on this second appeal by 9.0 hours, for a total of 3.5 hours instead. Based on a billing rate of $195/hour, the court reduces the amount requested by $1,755. (Declaration of V. René Daley, Exhibit Q.)

3. Conclusion

Apart from these two issues, Critchfield does not contest any of the other amounts claimed by Travelers, including the reasonableness of counsel's hourly billing rates or of the number of hours expended on various tasks. The court finds that the billing rates were reasonable and the overall amount of time spent on the appeals were reasonable, under the lodestar method, apart from the one issue identified above. Accordingly, the court GRANTS the motion in large part and DENIES it in small part. Instead of a total of $60,994.50, the court awards a total of **$58,824.00** in fees and costs associated with the appeals.

Finally, the court notes that with its reply papers, Travelers submits new evidence and raises a completely new argument: that Critchfield has resisted paying post-judgment interest on the original attorney's fee award from 2021, and that the court should order it to do so. This new evidence and argument are obviously improper, and the court declines to consider them. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.)

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Calendar Line 12
Case Name: *Elizabeth Gonzalez v. Rogelio Pena et al.*
Case No.: 21CV391013

Plaintiff Elizabeth Gonzalez moves for monetary, evidentiary, and issue sanctions against defendant Piazza's Fine Foods, Inc. ("Piazza's"), based on the apparent loss of a security video that showed an alleged battery on Gonzalez by defendant Rogelio Pena, her former co-worker at Piazza's. Even though a litigation demand was not made against Piazza's until 60 days after the incident, which fell outside the 45-day window during which Piazza's normally maintained its video footage, Gonzalez argues that litigation was reasonably foreseeable in this instance, and so the failure to preserve the video constituted spoliation of evidence.

Although it is a much closer call than either side is willing to admit, the court finds that litigation was reasonably foreseeable before Gonzalez made a formal demand, and that Piazza's was negligent in failing to preserve the video. At the same time, the court finds that the sanctions sought by Gonzalez are overbroad and unreasonable. The court GRANTS IN PART and DENIES IN PART Gonzalez's motion, as discussed below.

1. "Reasonably Foreseeable"

The parties agree that the case of *Victor Valley Union High School District v. Superior Court* (2023) 91 Cal. App. 5th 1121 (*Victor Valley*) is controlling authority. In that case, the plaintiff sought terminating, evidentiary, and issue sanctions against a school district for its failure to preserve a video that showed "some of the events surrounding [an] alleged sexual assault" on the plaintiff by two other students. (*Id.* at p. 1132.) The trial court found that the district should have reasonably anticipated litigation arising out of the sexual assault allegations, that "the erasure of the video was the result of negligence and not intentional wrongdoing," and that evidentiary, issue, and monetary sanctions should be granted. (*Id.* at p. 1133.) The Court of Appeal agreed with the conclusion that sanctions were warranted, holding that the trial court applied the correct standard for whether litigation is "reasonably foreseeable"—*i.e.*, that "future litigation is 'probable' or 'likely.'" (*Id.* at p. 1144.) Nevertheless, the Court also held that the trial court's evidentiary and issue sanctions were excessive because they "were tantamount to terminating sanctions." It remanded the case to the trial court "to reconsider what sanction or sanctions are appropriate." (*Id.* at p. 1159.)

This case has a number of parallels to *Victor Valley*. First, there does not appear to be any evidence that the failure of Piazza's to preserve its video was the result of deliberate wrongdoing. Although Gonzalez tries to raise the inference that Piazza's engaged in intentional destruction, the entirety of this argument is speculative at best. Second, the court finds that Piazza's should have reasonably anticipated litigation from Gonzalez, given the totality of the circumstances. Piazza's argues that Gonzalez's claim that Pena inappropriately touched her with his penis arose out of an investigation *of Gonzalez*, following "several complaints" from her co-workers *about her*. (Opposition at p. 2:16-17.) In addition, Piazza's argues that Gonzalez's claim that she was afraid of Pena simply because he "worked with knives" was objectively baseless, and that her claim that Pena committed "battery" by hitting her ankle with the food cart was not corroborated by the video footage itself, which showed "contact at low speed," rather than a violent attack "multiple times." (Opposition at pp. 3:1-

4:10.) Piazza contends that litigation was not reasonably foreseeable based on these objectively minor complaints.

Notwithstanding the foregoing arguments, which are not without some merit, the court finds that there were other circumstances that should have led Piazza's to realize that litigation was "probable," regardless of the merits of the claims:

- A month before the "food cart incident," Gonzalez had requested a transfer from the Palo Alto store to the San Mateo store, based on her fear of Pena, and "threaten[ed] 'legal action.'" This quote comes from the Piazza's Store Director's own characterization of his conversation with Gonzalez. (October 5, 2019 Email.)

- Gonzalez claims that she repeatedly asked to be transferred—"at least four (4) times." (Gonzalez Declaration, ¶ 8.)

- Gonzalez's alleged injury arising out of the food cart incident was apparently severe enough that she sought medical treatment for her ankle from a doctor.

- Gonzalez told her treating doctor about her allegations of sexual harassment against Pena, and then the doctor contacted Piazza's HR Director, who, in turn, wrote a concerned email to the Store Director and Gary Piazza about these allegations.

- Piazza's made a copy of the video on a USB thumb drive and showed it to multiple people, including Gonzalez.

Based on the totality of these circumstances—including the fact that Gonzalez had already previously articulated her claim of having been touched by Pena's penis months earlier—the court finds that litigation was reasonably foreseeable.

2. The Appropriate Sanction

Just as in *Victor Valley*, the court finds that a sanction for losing the video should be granted. Even if the loss was not intentional, it was clearly negligent on the part of Piazza's not to exercise due care to preserve the video, particularly in light of the fact that Piazza's had already made a copy of the video onto a USB thumb drive and showed it to Gonzalez and others. Just as in *Victor Valley*, however, the court also finds that plaintiff's proposed monetary, issue, and evidence sanctions are grossly excessive, given that Gonzalez actually saw the video, and her account of it and Piazza's account of it are not that far off.

Indeed, the court notes that even though Gonzalez claimed to Piazza's that Pena ran the food cart into her ankle "more than once" (Gonzalez Declaration at ¶ 9), she describes the video as showing "Pena hit me, stop, my reaction, and Pena backing up to move around me" (*Id.* at ¶ 10), which indicates being *hit just once*: these descriptions in Gonzalez's declaration are internally inconsistent. Her statement in Paragraph 10 of her declaration is in line with the description from the Store Manager (David Paolinelli), which indicates contact, but not "multiple times," as originally alleged by Gonzalez.

It appears that the primary difference between Gonzalez's and Piazza's accounts of the video are the speed or force with which Pena made contact with Gonzalez's ankle. Gonzalez claims it was "hard"; Piazza's (Paolinelli) claims that it was at "low speed." This dispute can

be addressed via testimony from these witnesses (and any other witnesses), as well as potentially corroborated by any evidence regarding the severity of Gonzalez's ankle injury from Gonzalez and her treating physician.[7] The video, although undoubtedly a key piece of evidence, is not essential to adjudicating this issue. Moreover, there is nothing to prevent Gonzalez from presenting evidence to the ultimate factfinder that a video existed, that she saw the video once, and that the USB copy of it somehow mysteriously disappeared several weeks later while still at Piazza's.

Indeed, this video relates to only a small part of the overall allegations in this case. It has nothing to do with Gonzalez's allegations regarding Pena's other misconduct, especially his sexual misconduct or other threatening behavior: rubbing his (clothed) penis against her body, singing "obscene Spanish songs," "glaring" at her "while loudly sharpening his knives," and grabbing Gonzalez's co-worker's thigh. Just as in *Victor Valley*, this video hardly shows the full story or even most of the story of the case.

Accordingly, it appears that the most appropriate remedial sanction would be an adverse inference jury instruction at trial, if Gonzalez makes a sufficient prima facie showing. Even though the court *currently* finds the evidence insufficient to show that Piazza's intentionally destroyed the video, Gonzalez may still try to prove that Piazza's did so to the ultimate factfinder, and then seek the appropriate jury instruction. Again, the parties have not presented all of the potentially relevant evidence in this motion, and so the court's findings are based solely on what is in the parties' papers. A fuller story is likely to emerge at trial, if this case is tried. CACI 204 ("Willful Suppression of Evidence") states: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to the party." The propriety of giving this instruction is ultimately for the judge who tries this case to decide.

3. Conclusion

Thus, even though the undersigned is granting in part and denying in part Gonzalez's motion today, the present order is ***fully modifiable*** by the trial judge who is ultimately assigned to try this case. That trial judge will be in the best position to determine whether a jury instruction such as CACI 204 is appropriate, or whether any other sanctions are necessary to remedy the prejudice to Gonzalez arising from the loss of the video. For today, the court simply concludes that the issue of the missing video can be tried to the jury, and that a jury instruction such as CACI 204 *may* be appropriate.

The court DENIES Gonzalez's proposed issue sanctions and evidence sanctions.

The court GRANTS monetary sanctions to Gonzalez for *part* of the costs of having had to bring this motion. Because the relief sought in the motion was overbroad and the memorandum is filled with unnecessary argument, the court grants $3,660.00 in sanctions (nine hours at $400/hour plus the $60 filing fee), payable by Piazza's to Gonzalez within 30 days of notice of entry of this order.

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[7] Neither side has presented any evidence about this in their papers, one of many reasons why this motion is potentially premature until it is ready to be tried.

Calendar Line 13
Case Name: *John McEnery IV v. Tom McEnery et al.*
Case No.: 23CV421549

This is a petition to vacate an arbitration award filed by petitioner John McEnery IV ("John") against respondents Tom McEnery ("Tom") and MCM Diversified, Inc. ("MCM"). Because the court finds that the petition fails to set forth any valid basis for vacating the award, the court denies the petition.

1. The Parties

The relationship between the parties and the various entities they control is not adequately explained in the parties' briefs, and so the court turns to the arbitrator's interim and final awards for an explanation. John is apparently Tom's nephew. The three parties (John, Tom, and MCM) hold membership interests in Urban Markets, LLC ("UM") and Urban Markets Entertainment, LLC ("UME"), which are the entities that operate San Pedro Square Market, a food hall in downtown San Jose. John and Tom's economic interests in UM are held indirectly through SPS Market Partners, LLC ("SPS"), in which John has a 44.5% ownership interest, Tom has a 51.5% ownership interest, and third parties own 5%. Although John and Tom transferred their *economic* interests in UM to SPS, they apparently retained their direct *membership* interests in UM; therefore, SPS is not itself a member of UM. In addition, MCM has no interest, economic or otherwise, in SPS. (Interim Award, dated March 8, 2023, at p. 1, fn. 1 & p. 5.)

2. Timeliness of the Petition

On July 2, 2021, respondents Tom and MCM submitted a demand for arbitration with the American Arbitration Association ("AAA"). On December 13, 2021, John filed a complaint for damages against Tom, MCM, and the owner of MCM (Martin Menne) in the U.S. District Court for the Northern District of California, based the same facts at issue in the already-pending arbitration. On August 17, 2022, the federal court ordered John's claim to arbitration and stayed the case pending resolution of the arbitration. After an evidentiary hearing on December 12-15, 2023, the arbitrator issued an interim award on March 8, 2023. The arbitrator then heard and denied John's motions to modify or reconsider the interim award, issuing a final award on May 15, 2023. Tom and MCM then submitted a request to correct four "typographical errors" in the final award, which the arbitrator granted in a "Corrected Final Award" on June 12, 2023.

Based on the foregoing timeline, John's deadline to serve a petition to vacate the arbitration award on Tom and MCM in the already-pending federal court case was apparently August 15, 2023—*i.e.*, "within three months after the award is filed or delivered" (9 U.S.C. § 12)—given the case law in the federal courts that holds that the deadline runs from filing and delivery of the *final award*, rather than any *corrected final award*. (See Opposition at p. 8, fn. 7 [citing cases].) Thus, three months from May 15, 2023 was Tuesday, August 15, 2023. John apparently did not meet this deadline.

John's deadline to serve and file a petition to vacate the arbitration award on Tom and MCM in *this* court, initiating a new action, was September 20, 2023—*i.e.*, "not later than 100 days after the date of the service of a signed copy of the award on the petitioner." (Code Civ.

Proc., § 1288.) In California, the Code of Civil Procedure expressly provides that the deadline runs from service of the *corrected* final award, if an application has been made for correction of the award. (See Code Civ. Proc., § 1288.8.) Thus, 100 days from June 12, 2023 was September 20, 2023. John apparently *did* meet this deadline, because he filed the present petition on August 23, 2023, and he served it by email on Tom and MCM on September 13, 2023. The parties had a preexisting agreement regarding email service for the arbitration, and counsel for John asked counsel for Tom and MCM if they would formally accept service for this petition, as well. (Declaration of James McManis at ¶ 3.) It appears that there was some delay in a response from respondents' counsel, given a need to consult with their client, compounded by counsel's having contracted COVID-19. (*Id.* at ¶¶ 4-7.) Although the court finds that the more prudent course of action would have been for John to serve respondents formally with this petition before September 20, 2023, the court finds that John's counsel's efforts to serve the petition were sufficient here.

The court therefore rejects the contention by respondents Tom and MCM that the petition was untimely.

3. Merits of the Petition

Code of Civil Procedure section 1286.2 sets forth the grounds upon which a petition to vacate an arbitration award may be granted. John's petition relies on subdivisions (a)(4) and (a)(5):

> (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
>
> (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(Code Civ. Proc., § 1286.2, subds. (a)(4) & (a)(5).)

John's argument that the arbitrator "exceeded" his authority in this case is based on the notion that "(1) the arbitrator did not have subject matter jurisdiction over [John's] membership interest in SPS and (2) the arbitrator's disposition of petitioner's membership interest in SPS violated the rights of SPS and its members, particularly its minority members who were never provided notice . . . ." (Petition, Attachment 10C(2), at p. 6:15-19.) The court agrees with Tom and MCM that this contention is nothing more than an effort to relitigate the merits of the arbitration, as these claims regarding John's indirect ownership interest in UM through SPS were presented to the arbitrator in attorney arguments, testimony, *and* documentary evidence; were directly within the scope of the issues to be arbitrated; and were explicitly addressed by the arbitrator in his findings and conclusions. (See, e.g., Interim Award at pp. 4 & 14.) Normally, an argument that an arbitrator "exceeded [his] powers" under subdivision (a)(4) is accompanied by a showing that what the arbitrator did falls outside the scope of the parties' arbitration agreement, but there is no such showing here. Indeed, John's petition completely fails to explain how the arbitrator—or a court—would not have the "subject matter jurisdiction" to override the alleged contractual "rights of first refusal" and "rights to notice of a bona fide offer" of the 5% minority owners of SPS, in light of John's potentially conflicting

contractual obligations to Tom and MCM under the UM and UME operating agreements. (Petition, Attachment 10C(2), at p. 7:1-12.)

As for John's argument under section 1286.2, subdivision (a)(5), he does not contend that the arbitrator refused "to postpone the hearing" for good cause but rather that the arbitrator "refus[ed] . . . to hear evidence material to the controversy." Again, the court finds that this is another improper effort to relitigate the merits of the arbitration. The arbitrator held a full evidentiary hearing over the course of four days (December 12-15, 2022), during which there is no allegation that the arbitrator refused to consider evidence. It was only after the arbitrator issued an interim award on March 8, 2023 that John requested modification and reconsideration of that award by submitting new evidence. In his final award, the arbitrator rejected John's requests for three separate reasons: (1) the new evidence was "untimely" under the AAA rules, (2) the new evidence was an effort to "redetermine the merits of claims already decided in the Interim Award," which was a "violation of Rule 52," and (3) even after consideration of the new evidence, the arbitrator found "no basis for modifying the Interim Award based on those submissions." (Corrected Final Award, dated June 12, 2023, at pp. 4-5.)

Thus, contrary to John's characterization of the arbitrator's award, the arbitrator *did* consider the new evidence. Moreover, to the extent that John claims that the arbitrator should have "reopened" the hearing more fully, that is not a basis for vacating an arbitration award under subdivision (a)(5). The purpose of a petition to vacate is to address a fundamental due process violation in the arbitration proceedings, not to allow a trial court to micromanage the conduct of the arbitration under a *de novo* microscope. This principle applies with particular force when it comes to an arbitrator's application of the arbitration provider's own internal rules, such as AAA Rule 52.

4. Respondents' Request to Confirm the Arbitration Award

Having concluded that there is no basis to vacate the arbitration award, the court turns to Tom and MCM's argument that the court "must" confirm the award, grant attorney's fees and costs, and order specific performance. Although, under normal circumstances, the court would be inclined to confirm the award under Code of Civil Procedure section 1285.2, these circumstances are not normal, because there is already a preexisting federal court case. The court's understanding is that that case is still pending, with the parties providing status updates to the federal court every 120 days. Because that case was filed first, because that court ordered the parties to arbitrate, and because that case is still open, this court concludes that considerations of comity require it to defer to the U.S. District Court in the first instance. In the event that the parties are not able to resolve the matter in federal court, respondents can come back to this court with an updated request.

The court denies the request to confirm the arbitration award *without prejudice*. The court sets this matter for a case status review on **August 29, 2024 at 10:00 a.m.** in Department 10. In the event that the parties are able to address any and all outstanding matters in the already-pending federal court action, the court will dismiss this case under Code of Civil Procedure section 1286.

5. Conclusion

The court DENIES the petition to vacate the arbitration award. The court DENIES WITHOUT PREJUDICE respondents' request to confirm the arbitration award.

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