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: October 26, 2023 TIME: 9:00 A.M.

TO REQUEST 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.)

TO APPEAR AT THE HEARING: 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

TO HAVE THE HEARING REPORTED: 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

TO SET YOUR NEXT hearing date: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed by January 2024.

Where to call for your hearing date:	408-882-2430
When you can call:	Monday to Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	23CV412192	Ralph Jackson vs County of Santa Clara	Defendants' Demurrer the Sixth Cause of Action is SUSTAINED WITHOUT LEAVE TO AMEND; Defendants' Demurrer to all other claims is SUSTAINED with 20 days leave to amend. Please scroll down to Line 1 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
2	23CV414040	Santa Clara Valley Transportation Authority, a special district vs Nguyen Nguyen, et. al.	Plaintiff's Demurrer to Defendants' Second Amended Answer is SUSTAINED with 20 days leave to amend. Please scroll down to Line 2 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
3	19CV356293	Edwina La Barbera et. al. vs Good Samaritan Health System, et. al.	Dr. Tay's Motion for Summary Judgment or, in the Alternative, Summary Adjudication is DENIED. Please scroll down to Line 3 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
4	19CV358400	Bhupinder Dhillon vs Amritsar Times, Inc., et. al.	Non-Party Sikh Gurdwara's Motion to Quash and for Sanctions is DENIED. Please scroll down to Line 4 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
5	21CV391443	Delia Ruvalcaba et. al. vs Raul Ortega, et. al.	Defendant Raul Ortega's Motion to Compel Further Responses to Request For Admission Nos. 1, 36, 37, 46, 47 and 48 and for $2,540 in sanctions is DENIED. Please scroll down to Line 5 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
6	22CV393712	Illinois National Insurance Co. vs Accellion, Inc.	Plaintiff Illinois National Insurance Co.'s Motion to Compel Further Responses to Special Interrogatories (Set One) is GRANTED. Please scroll down to Lines 6-8 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
7	22CV393712	Illinois National Insurance Co. vs Accellion, Inc.	Plaintiff's Motion to File Discovery Documents Under Seal is DENIED. Please scroll down to Line 6-8 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
8	22CV393712	Illinois National Insurance Co. vs Accellion, Inc.	Plaintiff's Motion to Seal Accellion Inc.'s Motion to Amend Its Cross-Complaint and Philip L. Gregory Declaration, including exhibits is DENIED. Please scroll down to Lines 6-8 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.

9	23CV416126	Mark Benton vs DGDG 4, LLC, et. al.	DGDG 4, LLC's Motion to Compel Arbitration and to Stay proceedings is GRANTED. Plaintiff agrees this dispute is governed by an arbitration clause and agrees to stay the case as to the non-moving defendants who are not parties to the arbitration agreement. DGDG and Plaintiff's dispute centers around the arbitral forum. The Court finds DGDG's proposal at pages 4-5 of its reply to be a reasonable approach to resolving that dispute. The Court accordingly orders (1) Plaintiff and DGDG to conduct arbitration with the AAA, (2) the discovery set forth in paragraphs 1-9 at pages 4-5 of DGDG's reply brief be permitted in that arbitration, and (3) a stay of the litigation as to the remaining defendants. The February 13, 2024 10 a.m. case management conference will remain as set in department 6. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
10	20CV372696	Anu Sharma vs Dennis Lee	Raul J. Ocampo's Motion to Withdraw is CONTINUED to November 30, 2023 at 9 a.m. in Department 6. The Court was unable to locate a proof of service demonstrating service of an amended notice of motion with the October 26, 2023 hearing date. This motion is accordingly continued to take place on the date of the status conference. It also appears to the Court that this matter has settled. Thus, the parties are ordered to appear on November 30, 2023 and show cause why this case should not be dismissed. These orders will be reflected in the minutes.

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Calendar Line 1
Case Name: *Ralph Jackson v. County of Santa Clara, et al.*
Case No.: 23CV412192

Defendant County of Santa Clara (the "County") demurs to plaintiff Ralph Jackson's complaint ("Complaint"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for workplace discrimination. Plaintiff worked for the County's Probation Department at James Ranch. (Complaint, ¶ 10.) In March 2020, he requested an accommodation to work from home because exposure to COVID-19 would exacerbate his disability. (Complaint, ¶ 13.) His request was denied without explanation, and he was denied time off under the Family Medical Leave Act ("FMLA") and paid administrative leave because his doctor's note did not have all the necessary information. (Complaint, ¶¶ 14-15.)

Although he provided the required documentation, the County changed its policy regarding paid administrative leave in April 2020. (Complaint, ¶ 16.) The County offered 80 hours of Emergency Paid Sick Leave ("EPSL"), which Plaintiff exhausted. (*Ibid*.) After that Plaintiff took leave under the Family and Medical Leave Act. ("FMLA"). (Complaint, ¶ 19.) After his FMLA leave was exhausted, he switched to health leave and his paid status was based on the amount of time in his leave banks. (*Ibid*.) The County informed Plaintiff that his status changed to unpaid leave as of November 2, 2020, and he remained on leave until he was forced to retire in October 2021. (Complaint, ¶ 20.)

Plaintiff initiated this action on February 27, 2023, asserting: (1) disability discrimination; (2) failure to accommodate; (3) failure to engage in interactive process; (4) race and sex discrimination; (5) retaliation; and (6) wrongful termination in violation of public policy. On June 5, 2023, the County filed the instant demurrer, which Plaintiff opposes.

II. Timeliness

Plaintiff contends the demurrer is untimely. The County was served via substitute service on April 24, 2023. (See May 30, 2023, Proof of Service.) Thus, the County had until May 24, 2023, to file the instant motion. The County did not file a declaration by the original due date as required by Code of Civil Procedure, section 430.41, subdivision (a)(2), to obtain an automatic 30-day extension.

County Counsel Nathan A. Greenblatt details six attempts between May 8 and May 31 to meet

and confer with Plaintiff's counsel to discuss the demurrer. (Greenblatt Decl., ¶ 6.) However, Plaintiff's counsel Vincent Tong was unable to meet because he was preparing for trial. (Tong Decl., ¶ 5.) Ultimately, Tong granted the County an extension until June 8, 2023 to file its answer, not a demurrer. (See Tong Decl., ¶ 3.) The County filed the instant motion on June 5, 2023. Thus, it is untimely.

Nevertheless, the Court has discretion to consider an untimely demurrer. (See *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 750 [appellate court determined that trial court properly exercised its discretion in considering untimely demurrer]; *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 282 [appellate court held that trial court's decision to entertain second demurrer did not affect plaintiff's substantial rights].)

Here, there is no prejudice to Plaintiff who filed a timely and substantive opposition. Thus, the Court will exercise its discretion and consider the motion.

III. Legal Standard

"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.)

A. Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "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." (*Ibid*.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Although Defendants' notice of the demurrer states each cause of action is uncertain, the County fails to offer any substantive argument regarding uncertainty. Moreover, the pleading is not so uncertain that the County cannot reasonably respond to it. (See *Khoury, supra,* 14 Cal.App.4th at p. 616.) Thus, the County's demurrer on the basis of uncertainty is OVERRULED.

B. First Cause of Action: Disability Discrimination

The Fair Employment and Housing Act ("FEHA") dictates that "it is an unlawful employment practice… for an employer because of… disability…to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).) "The specific elements of a prima facie case may vary depending on the particular facts. Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*) [internal citations omitted].)[1]

[1] Some courts omit or modify the fourth element from *Guz*.

Plaintiff alleges he had a disability, a record of disability, and/or was perceived as or treated as having a disability by the County. (Complaint, ¶ 30.) FEHA contains detailed definitions for various disabilities. (Gov. Code., § 12926.) "'Mental disability' includes . . . having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity." (Gov. Code, § 12926, subd. (j)(1).) A "physical disability" includes "[h]aving any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that" affects one or more body systems and limits a major life activity. (Gov. Code, § 12926, subd. (m)(1)(B).)

Plaintiff fails to allege any facts regarding his alleged disability, thus, the Court is unable to determine whether Plaintiff's alleged disability falls within any of the FEHA protected categories. And, although Plaintiff alleges he was "terminated in material part because of his disability", Plaintiff fails to allege any facts in support of that allegation. (Complaint, ¶ 32.) Plaintiff accordingly fails to allege facts that suggest discriminatory motive for his termination. (*Guz,* 24 Cal.4th at p. 355.)

The County's demurrer to the first cause of action is SUSTAINED with 20 days leave to amend.

C. Second Cause of Action: Failure to Accommodate

It is an unlawful employment practice, "[f]or an employer… to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (Gov. Code, § 12490, subd. (m).) "In addition, to a general prohibition against unlawful employment discrimination based on disability, FEHA provides an independent cause of action for an employer's failure to provide a reasonable accommodation for an applicant's or employee's known disability. (Gov. Code, § 12940, subds. (a) & (m).)

"The elements of a failure to accommodate claim are (1) the plaintiff has a disability under the FEHA; (2) the plaintiff is qualified to perform the essential functions of the position; and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1009-1010 (*Scotch*).) A "reasonable accommodation" is any "modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired. (*Scotch, supra,* 173 Cal.App.4th at p. 1010.)

Reasonable accommodation may include "[j]ob restricting, part-time or modified work

schedules, reassignment to a vacant position…and other similar accommodations for individuals with disabilities. (Gov. Code, § 12926, subd. (p).) "FEHA does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee or applicant seeks. It only requires that the accommodation chosen be 'reasonable.'" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222.) Plaintiff must show he or she suffers from a disability covered by FEHA and that he or she is a qualified individual. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256 (*Jensen*).) To show that a plaintiff is a qualified individual, plaintiff must prove that he or she can perform the essential functions of the position to which reassignment is sought, rather than the essential functions of the existing position. (*Ibid*.)

As stated above, the Complaint does not allege facts sufficient to support a physical or mental disability under the FEHA. Moreover, Plaintiff does not allege he was qualified to perform the essential functions of any of the requested positions. (See *Jensen, supra,* 85 Cal.App.4th at p. 256.) Thus, the demurrer to the second cause of action is SUSTAINED with 20 days leave to amend.

D. Third Cause of Action-Failure to Engage in the Interactive Process

The FEHA imposes a duty on the employer "to engage in a timely, good faith, interactive process with the employee or appliance to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n).) "An employer's failure to engage in this process is a separate FEHA violation." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193.)

"The interactive process imposes burdens on both the employer and employee. The employee must initiate the process unless the disability and resulting limitations are obvious. 'Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, … the initial burden rests primarily upon the employee … to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.'" (*Scotch, supra,*173 Cal.App.4th at p. 1013 [citations omitted].) "'Although it is the employee's burden to initiate the process, no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation.'" (*Ibid*.) "Once the interactive process is

initiated, the employer's obligation to engage in the process in good faith is continuous." (*Ibid*.)

As the Court stated above, the Complaint does not allege facts sufficient to support a physical or mental disability under the FEHA. The Complaint also contains only conclusory allegations regarding the County's failure to engage in the interactive process. Thus, the demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

E. Fourth Cause of Action: Race and Sex Discrimination

To state a claim under this FEHA section, a plaintiff must show that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, denial of an available job, and (4) some other circumstances suggest discriminatory motive. (*Guz, supra,* 24 Cal.4th at p. 355.)

Adverse employment actions must "materially affect the terms, conditions, or privileges of employment to be actionable." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366-367.) An employee's termination can be actual or constructive. "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245.)

Plaintiff is an African American man. (Complaint, ¶ 52.) He alleges he was able to perform the essential functions of his job with reasonable accommodations for his disability. (Complaint, ¶ 52.) He further alleges he was subjected to adverse employment action when he was terminated in material part because of his race and sex. (Complaint, ¶ 54.) Plaintiff alleges he complained to the County about his supervisor, Joel Grabschied's, racial and discriminatory comments, such as telling Plaintiff that his food "smelled ethnic" and that he was "incompetent, illiterate, always late, and not qualified." (Complaint, ¶ 24.) On December 11, 2019, Plaintiff, along with other employees, took a vote of no confidence. (*Ibid*.) It is unclear to the Court whether Grabschied was removed from his position after this or whether he continued to have some role in Plaintiff's alleged treatment. Plaintiff also alleges he was retaliated against and subjected to harassment by the County's manager of probation and internal affairs

supervisor, however, Plaintiff fails to allege any facts in support of this alleged harassment. Therefore, Plaintiff fails to allege circumstances which suggest discriminatory motive. (See *Guz, supra,* 24 Cal.4th at p. 355.) The County's demurrer to the fourth cause of action is therefore SUSTAINED with 20 days leave to amend.

F. Fifth Cause of Action: Retaliation

"In order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) they engaged in a "protected activity"; (2) the employer subjected the employee to an adverse employment action; and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) "Employees need not explicitly and directly inform their employer that they believe the employer's conduct was discriminatory or otherwise forbidden by the FEHA." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046.)

Plaintiff alleges that after he requested reasonable accommodations and opposed the County's unlawfully discriminatory practices, the County retaliated against him by denying his request for accommodations, while other employees' requests were granted, refusing to reassign him to another position, and forcing him to use up all of his leave until he was required to go on unpaid leave, which forced Plaintiff to retire. (Complaint, ¶ 60.) As the Court stated above, it is unclear whether Grabschied had a role in Plaintiff's alleged treatment after the vote of no confidence. The Complaint is also devoid of any facts regarding the alleged harassment from the County's manager of probation and internal affairs supervisor. Plaintiff thus fails to allege facts to support a causal connection between his protected activity and the County's actions. The County's demurrer to the fifth cause of action is therefore SUSTAINED with 20 days leave to amend.

G. Sixth Cause of Action: Wrongful Termination in Violation of Public Policy

Plaintiff agrees to dismiss this cause of action. (Opp., p. 7:5.) Thus, the demurrer to the sixth cause of action is SUSTAINED without leave to amend.

Calendar Line: 2
Case Name: *Santa Clara Valley Transportation Authority v. Nguyen Trong Nguyen et.al*.
Case No.: 23CV414040

Before the Court is Plaintiff, Santa Clara Valley Transportation Authority's ("SCVTA") demurrer to Defendants, Nguyen Trong Nguyen's, Phuong Kim This Nguyen's, Nguyen Family Trust's, and Nguyen's Auto Services' (collectively "Defendants") First Affirmative Defense as raised in their Second Amended Answer. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an eminent domain action. Plaintiff seeks to acquire a subsurface subway easement beneath a 6,723 square foot area of Defendants' real property ("Subject Property") for SCVTA's BART Silicon Valley Extension (BSV) Program ("Project"). The Project will extend BART service from Fremont through Milpitas, San Jose, and into Santa Clara.

After completion of various studies and environmental impact reports, SCVTA notified the Defendants of a Resolution of Necessity Hearing to be held on October 6, 2022 pursuant to Code of Civil Procedure section 1245.235. At the hearing, the SCVTA Board found and determined: (1) the public interest and necessity require the proposed Project; (2) the proposed Project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; (3) the Subject Property is necessary for the proposed Project; (4) the offer required by Section 7267.2 of the Government Code has been made to the owners; (5) environmental review consistent with the California Environmental Quality Act ("CEQA") for the Project has been previously certified by this Board; and (6) all conditions and statutory requirements necessary to exercise the power of eminent domain ("the right to take") to acquire the Subject Property have been complied with by SCVTA.

Accordingly, SCVTA was authorized to acquire the Subject Property, and Plaintiff filed its complaint for eminent domain on April 3, 2023. Defendants filed their amended answer on July 10, 2023. Plaintiff timely demurs to a portion of that answer.

II. Legal Standard

Code of Civil Procedure section 430.20 provides: "A party against whom an answer has been filed may object, by demurrer … to the 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; as used in this subdivision, 'uncertain' includes ambiguous and unintelligible, (c) where the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral." A demurrer may be asserted against "the whole answer, or to any one or more of the several defenses set up in the answer." (Code Civ. Proc., § 430.50, subd. (b).)

A demurrer challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. (*Cundiff v. GTE Cal., Inc.* (2002) 101 Cal.App.4th 1395, 1404-05.) Questions of fact cannot be decided on demurrer. (*Berryman v. Merit Prop. Mgmt., Inc.* (2007) 152 Cal.App.4th 1544, 1556.) The court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law … [and] consider[s] matters which may be judicially noticed." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591, citation omitted.)

III. Analysis

Plaintiff demurs to Defendants' first affirmative defense on the grounds that it is uncertain and fails to state sufficient facts to constitute a defense.

Defendants' first affirmative defense states: "the government isn't taking the property for a proper public use or by proving it hasn't offered the just FMV of the property …." Plaintiff contends this affirmative defense is equivalent to an objection to Plaintiff's "right to take" and fails to state the ground for the objection or the facts upon which the objection is based as required by Code of Civil Procedure section 1250.350. Plaintiff further argues that to be able to assert this affirmative defense, Defendants were required to raise their objections at the Necessity Resolution Hearing, and their answer is devoid of any facts showing their compliance with this requirement.

First, uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "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." (*Ibid.*) "[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations

sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.) Plaintiff appears to have discerned Defendant's affirmative defense, thus Defendant's demurrer will not be sustained on this basis.

Next, a landowner may object, by demurrer or answer, to a plaintiff's "right to take" on any ground authorized by Code of Civil Procedure section 1250.360 or 1250.370 by stating the *specific ground* upon which the objection is taken and setting forth the *specific facts* upon which the objection is based if made by answer. (Code Civ. Pro. § 1250.230 (emphasis added.)) Defendants' allegations that Plaintiff's value assessment is substantially below the market value and that Plaintiff failed to provide an appraisal or other documentation to support its value assessment appears to allege Plaintiff's non-compliance with Government Code section 7267.2, which provides:

> Prior to adopting a resolution of necessity pursuant to Section 1245.230 of the Code of Civil Procedure and initiating negotiations for the acquisition of real property, the public entity shall establish an amount that it believes to be just compensation therefor, and shall make an offer to the owner or owners of record to acquire the property for the full amount so established …. The amount shall not be less than the public entity's approved appraisal of the fair market value of the property…The public entity shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation. The written statement and summary shall contain detail sufficient to indicate clearly the basis for the offer….

The provisions of section 7267.2 are mandatory. (*City of San Jose v. Great Oaks Water Co*. (1987) 192 Cal. App. 3d 1005, 1013 [affirming dismissal of condemnation action where city failed to comply with Gov. Code, 7267.2].) Although non-compliance with this section is not listed as a "right to take" objection, case law indicates a landowner may obtain judicial review of the pre-condemnation offer in the eminent domain action, where the objection was made at the hearing on the resolution of necessity. (See *People ex rel. Dept. of Transp. v. Cole* (1992) 7 Cal.App.4th 1281, 1284-1286.)

Here, Defendants' second amended answer lacks factual allegations showing their attendance at the resolution hearing and/or their objections to the pre-condemnation offer. Therefore, the Court SUSTAINS Plaintiff's demurrer with 20 days LEAVE TO AMEND.

Calendar Line: 3
Case Name: *La Barbera, et.al. v. Good Samaritan Health Systems*
Case No.: 19CV356293

Before the Court is Defendant, Jafar Tay's, motion for summary judgement or, in the alternative, summary adjudication. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

A. Undisputed Factual Background

This is a wrongful death action. William Roy Bonner was husband to Edwina La Barbera, father to Stephanie Bonner, William Bonner Jr., and Brittany Bonner, and grandfather to Willow Bonner. Mr. Bonner had just turned 55 when he fell from his chair while doing physical therapy at home, landed on his right arm, and dislocated his shoulder. Five days later, on October 31, 2018, Mr. Bonner presented to Regional Medical Center of San Jose emergency department. The plan was to admit Mr. Bonner and attempt closed reduction under conscious sedation and, if necessary, open reduction under general anesthesia. (Defendant's Statement of Undisputed Facts ("SUMF"), ¶ 2.)

On November 1, 2018, Mr. Bonner was taken to the operating suite where Dr. Jothi Murali attempted closed reduction. This was unsuccessful, so Dr. Murali proceeded with a routine open reduction surgery. (Plaintiffs' Exhibit 1, Medical Records, p. 26.) After making a standard incision in the shoulder, Dr. Murali attempted to manipulate the humeral head with a blunt Cobb instrument, during which Dr. Schlifke noticed bright arterial blood. Dr. Schlifke instructed Dr. Murali to stop the manipulation and to place pressure on the wound to stop the bleeding. Concerned about a massive bleed, Dr. Schlifke made an order to invoke Massive Transfusion Protocol ("MTP") and started IV and arterial lines. He also instructed the circulating nurse, Robert De Costa, to call for the on-call vascular surgeon consult for help. (Plaintiffs' Exhibit 1, pp. 50-51; Plaintiffs' Exhibit 2, Schlifke deposition, pp. 36-42.)

Dr. Tay responded to the request for an on-call vascular surgeon at approximately 14:30. (Plaintiffs' Exhibit 1, pp. 97-99 operative note; Exhibit 3, De Costa Deposition, p. 21.) At approximately 15:10, Dr. Tay, assisted by Dr. Murali, removed the strap muscles of the shoulder to get better exposure to the humeral head, and encountered brisk and uncontrollable bleeding. (Plaintiffs' Exhibit 1, p. 98.) At 15:30 hours, thoracic surgeon Dr. Dana Forman, came in to perform a right anterior thoracotomy. When she arrived, chest CPR compressions were ongoing. However, there was no blood when she cut

into the skin and there was no blood in the axillary region. Mr. Bonner died on the operating table from loss of blood. (Plaintiffs' Exhibit 1, pp. 51, 94.)

B. Procedural Background

On October 7, 2019, Plaintiffs Edwina La Barbera, Stephanie Bonner, William Bonner Jr., Brittany Bonner, and Willow Bonner (minor) filed their complaint for negligence against Defendants, Good Samaritan Health Systems, dba Regional Medical Center of San Jose, Regional Medical Center of San Jose, Jothi Murali, M.D. and Does 1 through 25.

The complaint was subsequently amended on March 16, 2020, and a second amended complaint for wrongful death ("SAC") was filed on August 15, 2022, alleging negligence against San Jose Healthcare Systems LP, dba Regional Medical Center of San Jose, and doctors Tay, Schlifke, and Murali. On May 5, 2023, Plaintiffs added Regents of the University of California as Doe number 5.

On May 15, 2023, Plaintiffs filed their request for dismissal as to Defendant Murali only. On this day, Defendant, Dr. Tay, filed his motion for summary judgement and, in the alternative, motion for summary adjudication, which Plaintiffs oppose.

II. Legal Standard

Summary judgement is appropriate if there are no triable issues of material fact, and the moving party is entitled to judgement 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.) 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).

A defendant moving for summary judgment has the initial burden to make a prima facie showing that there is no merit to a cause of action and 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 (1) show plaintiff has not established and cannot reasonably establish at least one of the elements of the cause of action or (2) 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, 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.)

"A party may move for summary adjudication as to one or more causes of action within an action … if that party contends that the cause of action has no merit … ." (Code Civ. Proc., § 437c, subd. (f)(1).) "The aim of the procedure is to discover whether the parties possess evidence requiring the weighing procedures of a trial. (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1057 (*Marron*).) "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgement and shall proceed in all procedural respects as a motion for summary judgement." (Code Civ. Proc., § 437c, subd. (f)(2).)

III. Defendant's Evidentiary Objections

Dr. Tay objects to the declaration of Markus Willoughby and the attached Exhibit 1 (Decedent's medical records from Regional Medical Center of San Jose), Exhibit 5 (Regional Medical Center of San Jose Medical Staff Bylaws), and Exhibit 6 (Regional Medical Center of San Jose Medical Staff Rules & Regulations). Dr. Tay also objects to Plaintiff's responses 5, 6, 9, and 11 to his separate statement of undisputed material facts.

The objections do not comply with Rule of Court 3.1354, which requires two documents to be submitted when evidentiary objections are made: the objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule. Plaintiff submitted one document that attempts to be both the objections and the proposed order, in violation of Rule 3.1354.

Consequently, the Court declines to rule on the evidentiary objections. (See *Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) [trial courts only have duty to rule on evidentiary objections presented in the proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co.*

(2012) 211 Cal.App.4th 1 (*Hodjat*) [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) Objections that are not ruled on are preserved for appellate review. (See Code of Civ. Proc., § 437c, subd. (q).)

IV. Analysis

Dr. Tay moves for summary judgement based on section 2396 of the Business and Professions Code, the Good Samaritan law, arguing that he did not have a pre-existing duty of care to the decedent and is therefore immune from civil liability. Plaintiffs oppose his motion, arguing that Dr. Tay had a contractual duty to render aid to the decedent.

To obtain immunity under Business and Professions Code section 2396, the defendant must prove (1) the defendant is a licensed physician, (2) who rendered emergency medical care at the request of another physician "for medical complications arising from" the requesting physician's prior medical care, (3) who acted in "good faith, and (4) who did not have a preexisting duty of professional care to the patient. (See *Street* v. *Superior Court* (1990) 224 Cal.App.3d 1397; *Kearns* v. *Superior Court,* 204 Cal.App.3d 1325 (*Kearns*); *Colby v. Schwartz* (1978) 78 Cal.App.3d 885 (*Colby*); *Reynoso v. Newman* (2005) 126 Cal.app.4th 494; *Burciaga* v. *St. John's Hospital,* (1986) 187 Cal.app.3d 710 (*Burciaga*).) The "Good Samaritan law is applicable to protect a physician who renders emergency assistance in a hospital to the patient of another doctor. The heart of the application of the Good Samaritan statutes is the inquiry whether a duty of professional care pre-existed the emergency." (*Kearns*, 204 Cal.App.3d at 1329 (citations and quotations omitted).)

When a physician renders emergency care as part of the physician's duties and responsibilities in the medical facility, courts have not allowed the physician to claim the protection of the Good Samaritan statutes. In *Colby v. Schwartz*, 78 Cal.App.3d 885, two physicians who provided care in their capacity as members of the hospital's emergency surgical call panel claimed immunity based on Business and Professions Code sections 2144 and 2144.5, the predecessors to sections 2395 and 2396. Noting that the physicians "operated upon the decedent as part of their normal course of practice as members of the hospital emergency [surgical] call panel," the court held the physicians "did not render the type of physician care which constitutes 'emergency care' as it is used in those sections." (*Colby*, 78 Cal.App.3d

at 891.) The court explained the statutes "were directed towards physicians who, by chance and on an irregular basis, come upon or are called to render emergency medical care," often under circumstances where "the medical needs of the individual would not be matched by the expertise of the physician and facilities could be severely limited." (*Id.* at 892) Physicians on emergency surgical call for a hospital, "who treat patients requiring immediate medical care as part of their normal course of practice do not need the added inducement that immunity from civil liability would provide." (*Ibid.*) Such physicians are "practicing within their area of expertise and with all of the benefits of full hospital facilities." (*Ibid.*)

By contrast, where providing emergency care to patients is not part of the physician's regular hospital duties and responsibilities, courts have ruled the Good Samaritan immunity applies. In *Kearns* v. *Superior Court,* 204 Cal.App.3d 1325 "unexpected complications during surgery produce[d] a pressing necessity requiring immediate intraoperative assistance during a crucial stage of the operation …." A physician who "merely happened to be in the hospital treating his own patients and had no duty of professional care to plaintiff pre-existing the request for intraoperative assistance" responded to the emergency, and court held that the physician was entitled to immunity under the Good Samaritan statutes. (*Id.* at 1329.)

McKenna v. Cedars of Lebanon Hospital (1979) 93 Cal.App.3d 282 (*McKenna*) is also instructive. There, a nurse paged the chief resident and took him to a room where the patient was having a seizure. The patient died of cardiac arrest shortly after the resident administered medication to stop the seizure. (*Id.* at 284-285.) The court held the trial court properly instructed the jury on the Good Samaritan statute, explaining that the physician was on duty as a chief resident, and "was, in essence, a medical volunteer called to the scene of an emergency" while treating another patient on another floor of the hospital. (*Id.* at 286.) Under these circumstances, there was "no showing [the physician] had a legal duty to render emergency treatment arising from his contract of employment with the hospital.

Here, Defendant argues that like the physicians in *McKenna* and *Kearns* he had no legal or contractual duty to render emergency treatment to decedent. Dr. Tay declares he was contractually required to provide on call vascular surgery services for the trauma and emergency department, emphasizing that the scope of his on-call coverage and responsibility were limited to the trauma and emergency department. In support of his position, Dr. Tay submits a copy of his referenced contract and

highlights the following:

- "The Agreement is entitled, 'Regarding Vascular Surgery On Call for Trauma and Emergency Department.'"
- Part I, subpart D states: "Call Coverage. Contractor will provide Emergency Department call coverage in accordance with Facilities Bylaws, Rules and Regulations and Policies and Procedures and in accordance with the call schedule maintained by the Facility."
- Part I, subpart E states: "Required Response. Contractor and Contractor's representatives shall respond to all calls requested by the Emergency Department and acknowledge that determination of the need for call is at the discretion of the requesting Emergency Physician."
- Part I. subpart L states: "Coverage for call shall be defined as response to Emergency Department admissions or consults during the call period and shall be provided without regard to the insurance status of the patient."

(Jafar Tay Declaration ¶¶ 1-2.)

Dr. Tay testifies that on November 1, 2018, Dr. Murali requested an emergency vascular surgery consultation when he could not control decedent's bleeding during Mr. Bonner's shoulder surgery. He had no obligation to respond to Dr. Murali since this request did not come from and was not related to the emergency department or trauma service. Nevertheless, Dr. Tay responded to the request in good faith and as a Good Samaritan who had no pre-existing patient-physician relationship with the decedent. (Jafar Tay Decl. ¶¶ 2-3.) Dr. Tay also submits the Regional Medical Center of San Jose's medical record of decedent, William Bonner; in which the operating procedure and events are memorialized. (Declaration of Carol Strahan, Exhibit D.)

Dr. Tay's professional service agreement had a separately executed addendum, titled "Professional Services Agreement Addendum." Analysis of that addendum illustrates that it is not limited to vascular surgery on call for trauma and emergency department:

- Section 3(A) of the addendum states: "Contractor shall provide Vascular Surgery on-call *for all patients*, including but not limited to patients who may be indigent in accordance with the Facility's Medical Staff Charity policy, for twenty-four (24) hours per day on those days to which Contractor is assigned to be on-call for Trauma and for the Emergency Department *and as*

part of the Facility's Vascular Surgery call panel. (Emphasis added.)

- Section 3(B) states: "Contractor shall be responsible for maintaining the Vascular Surgery on-call panel schedule."
- Section 3(H) addressing panel participation provides: "When taking calls from for Facility's call panel, Facility will be the only hospital and the designated specialty will be the only specialty for which Contractor should be on call…."
- Section 3(L) provides: "Coverage for calls shall be defined as response to Emergency Department admissions *or consults during the call period* and shall be provided without regard to the insurance status of the patient. (Emphasis added.)

It is evident from his submitted contract that Dr. Tay was required to provide on-call services as part of the facility's vascular surgery call panel as well as for the trauma and emergency department.

Pursuant to the facility's Medical Staff Rules and Regulations, Dr. Tay also agreed to be called for consultation within his specialty. (Plaintiffs' Exhibit 6, Medical Staff Rules and Regulations, Section 2, 2.1.1, 2.2.1 (d), 23.) A "consultation" is what Dr. Tay provided during the operation as indicated by the operative reports dictated by Dr. Murali and Dr. Tay: "as soon as the arterial bleeding was encountered, a vascular surgery consult was called. The vascular surgeon on-call, Dr. Tay, entered the OR within 5 minutes of initial consultation, at approximately 2:21 p.m." (Plaintiff's Exhibit 1, Decedent's medical record from Regional Medical Center of San Jose pp. 97-98.) Dr. Tay's operative report provides that he responded to a vascular surgery consultation. (Plaintiff's Exhibit 1, Decedent's medical record from Regional Medical Center of San Jose p. 99.) And Dr. Tay is listed as the on-call vascular surgeon on the vascular surgery on-call schedule for November 1, 2018. (Plaintiffs' Exhibit 27, Regional Medical Senter of San Jose's Verified Response to Request for Production of Vascular Surgery Schedule).

At a minimum, on this record, there are contradictory inferences regarding the existence of a pre-existing duty to the decedent, which creates a triable issue of material fact regarding whether the Good Samaritan defense applies. (*AmerUs Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 638 ["Summary judgement shall not be granted … based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence, which raise a triable issue

as to any material fact."]

Accordingly, Defendant's motion for summary judgement or in alternative for summary adjudication is DENIED.

Calendar Line 4
Case Name: *Bhupinder Dhillon vs Amritsar Times, Inc., et. al.*
Case No.: 19CV358400

Before the Court is Non-Party Sikh Gurdwara's Motion to Quash and for Sanctions. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

This is a defamation and false light/invasion of privacy case. According to the Complaint, Plaintiff Bhupinder S. Dhillon (aka Bob Dhillon) is the President of Sikh Gurdwara-San Jose ("Temple"). (Complaint, ¶ 1.) Plaintiff alleges Defendant Jasjeet Singh (aka Jasjeet Singh Chala) and Defendant Balwinder Singh are the owners of the publication *Quamantry Amritsar Times*. (Complaint, ¶ 2.) According to Plaintiff, *Quamantry Amritsar Times* Volume 9, Issue 37, dated September 18, 2019 to September 24, 2019, contained statements about Plaintiff Defendants knew were false. (Complaint, ¶¶ 9- 10.) Defendants contend the statements were true and seek production of the Temple's Bank of America account statements from January 1, 2018 to December 31, 2020 and front and back images of all checks drawn on the Temple's Bank of America accounts during that period. (Temple's Reply, p. 1.) The Temple seeks to quash the bank records subpoena, primarily citing privacy issues.

The Court reviewed the document requests and the alleged false statements and finds the document requests to be tailored to address specific allegedly false statements. The Temple does not deny that these records might be relevant to certain of the allegedly false statements but argues an independent audit report should be sufficient to demonstrate that the statements are false. The Court disagrees; Defendants are entitled to gather evidence for their affirmative defenses, and the documents sought by the subpoena are likely to lead to the discovery of admissible evidence. (Code Civ. Pro. § 2017.010 (Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.").) The documents can be produced under a confidential designation pursuant to a protective order to address any third party concerns identified by the Temple.

The Temple's motion to quash is accordingly DENIED.

Calendar Line 5
Case Name: *Delia Ruvalcaba et. al. vs Raul Ortega, et. al.*
Case No.: 21CV391443

Before the Court is Defendant Raul Ortega's Motion to Compel Further Responses to Requests For Admission Nos. 1, 36, 37, 46, 47 and 48 and for $2,540 in sanctions. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

According to the Complaint, Defendants Martina and Raul Ortega were the owners of vacant real property in Gilroy ("Subject Property"). (Complaint, ¶ 16.) Plaintiffs Delia and Isaias Ruvalcaba and Noe and Elizabeth Perez purchased the Subject Property for $325,000 by paying the Ortegas $200,000 in cash and borrowing $125,000 from the Ortegas on a seller carryback note secured by a deed of trust that was recorded against the Subject Property. (Complaint, ¶ 18.)

Plaintiff alleges the Ortegas failed to disclose an easement that permits Defendant Recology Pacheco Pass to install drainage, pumps, tanks, and similar systems on the Subject Property and that these systems render half of the Subject Property unusable. (Complaint, ¶ 20.) Not only did the Ortegas fail to disclose this easement, but they also told Plaintiffs the visible pipes and other systems were their personal property and promised to remove them. (Complaint, ¶ 23.)

After the Ortegas failed to remove the pipes and other systems, Plaintiffs began to remove the materials themselves. (Complaint, ¶ 26.) Recology then informed Plaintiffs of the easement. (Complaint, ¶27.) Plaintiffs confronted the Ortegas, who admitted the pipes and other systems could not be removed from the Subject Property. (Complaint, ¶ 28.) Plaintiffs allege the parties then entered an agreement whereby the Ortegas would forgive the $125,000 debt in consideration for their failure to disclose the easement. (Complaint, ¶ 29.)

The Ortegas did not ask for a loan payment for over six years. (Complaint, ¶ 30.) Then, on August 24, 2021, the Ortegas recorded a notice of default on the property. Plaintiffs brought this lawsuit on December 7, 2021, asserting fraud and deceit, breach of contract, injunctive relief, quiet title, cancellation of instrument, promissory estoppel, and declaratory relief. Defendants assert no affirmative claims against Plaintiffs.

Raul Ortega now seeks an order compelling Delia Ruvalcaba to produce supplemental responses to certain requests for admission.

II. Legal Standard

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or ***intrusiveness*** of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020 (a) (emphasis added); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.)

Requests for admissions are different than other discovery devices; they are designed to compel admission as to all matters that cannot reasonably be controverted to expedite trial by reducing the number of triable issues that must be adjudicated. (*City of Glendale v. Marcus Cable Assoc., LLC* (2015) 235 Cal.App.4th 344, 352; *Doe v. Los Angeles County Dep't of Children & family Servs.* (2019) 37 Cal.App.5th 675, 690; *Orange County Water Dist. v. The Arnold Eng'g Co.* (2018) 31 Cal.App.5th 96, 119.) Requests for admission are not restricted to just facts and documents. They are also applicable to conclusions, opinions, and legal questions. (*City of Glendale v. Marcus Cable Assoc., LLC* (2015) 235 Cal.App.4th 344.)

III. Analysis

Plaintiff objects to responding to Requests For Admission Nos. 1, 36, 37, 46, 47 and 48 on privacy and relevance grounds. Plaintiff argues that the narrow issue raised by this case is whether the note is enforceable, and, if the note is enforceable, Defendants are limited to recovery through foreclosure, thus Plaintiff's ability to pay the note is irrelevant. Defendant argues this information is relevant to whether there was an agreement to forgive the loan, which agreement would make the loan enforceable.

The Court finds that Requests For Admission Nos. 1, 36, 37, 46, 47 and 48 are not narrowly tailored to lead to the discovery of admissible evidence regarding the oral agreement to forgive the debt. None of the requests are directed to the specific time when that agreement was allegedly reached. And it makes no difference if Plaintiffs can pay $125,000 now or believe the Subject Property has increased in value. Accordingly, the Court finds Plaintiffs' objections well taken and DENIES Defendant's motion to compel.

The parties' cross motions for sanctions are denied.

Calendar Lines 6-8
Case Name: *Illinois National Insurance Co. vs Accellion, Inc.*
Case No.: 22CV393712

Before the Court is (1) Plaintiff Illinois National Insurance Co.'s Motion to Compel Further Responses to Special Interrogatories (Set One); (2) Plaintiff's Motion to File Discovery Documents Under Seal; and (3) Plaintiff's Motion to Seal Accellion Inc.'s Motion to Amend Its Cross-Complaint and Philip L. Gregory Declaration, including exhibits. Pursuant to California Rule of Court 3.1308, the Court issues its tentative rulings.

I. Background

This action arises out of a data breach. Plaintiff is an insurance company that issued a series of insurance policies to corporate insureds for coverage against cyber-related insurance risks. (Amended Complaint ("AC"), ¶ 2.) Defendant is a technology and software company that provides software for secure electronic file sharing and services to customers. (*Id*., ¶ 5.) Defendant developed and sold licenses for a software called File Transfer Appliance ("FTA"), which it marketed as a secure method of transferring files. (*Id*., ¶ 7.) Plaintiff insured Insured A which was also one of Defendant's FTA customers in December 2020 and January 2021. (*Id*., ¶ 31.)

Beginning on December 16, 2020, and again on January 16, 2021 threat actors targeted the FTA as a means of committing an unauthorized access and threat of release of confidential information. (AC, ¶ 8.) Plaintiff alleges Insured A suffered damages, including paying a significant ransom to the threat actors, for which Plaintiff reimbursed Insured A. Plaintiff brought this action against Defendant to recover those payouts.

Plaintiff now seeks to (1) compel defendant to produce further responses to special interrogatories and (2) to maintain the confidentiality of the true identity of Insured A, who is now a cross-defendant in this action. Defendant opposes the motions.

II. Motion to Compel Further Responses to Special Interrogatories

In its motion to compel, Plaintiff seeks (1) unredacted versions of Defendant's supplemental interrogatory responses wherein either (a) Insured A is referred to using a pseudonym, or (b) the

supplemental responses are marked confidential and (2) a further response to special interrogatory 15. Plaintiff's first request is wrapped up in its two related motions to seal and will be addressed below.

Regarding special interrogatory 15, discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

A party responding to interrogatories must respond in writing, under oath separately to each interrogatory with an answer that contains the information sought, an exercise of the party's option to produce writings from which the answer can be determined, or an objection to the interrogatory. (Code Civ. Pro. §2030.210(a).) The responding party must make a reasonable, good faith effort to obtain information to provide a response and generally may not respond to the interrogatory by simply stating it cannot respond. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406; Code Civ. Pro. §2030.210(c).)

Special interrogatory 15 asks: "Did Accellion advise any of its licensees to 'reimage' the FTA instance they used in December 2020 or January 2021? If so, why did Accellion advise its licensees to do so?" (Courtney Nichol Declaration ("Nichol Decl."), Ex. 1.) After meet and confer, the essence of Accellion's response is that it "will only disclose information pertaining to [Insured A]." (Nichol Decl.

Ex. 7.) In opposition to this motion, Accellion states that it "stands on its objection", but further states: "To put this issue to rest, Accellion will agree to respond generally to SROG 15." (Opp., p. 2.)

The Court finds the information sought by this interrogatory is likely to lead to the discovery of admissible evidence. No third party has come forward making an objection to production of this material, and the material may be produced pursuant to protective order. However, these steps are not even necessary, as the interrogatory does not seek the identity of other Accellion licensees, but rather, information concerning whether Accellion advised those other licensees to "reimage" FTA in December 2020 or January 2021, and, if so, why—a point Plaintiff repeatedly made to Accellion during meet and confer.

Plaintiff's motion to compel a further response to special interrogatory 15 is GRANTED. Accellion is ordered to produce a supplemental response to this interrogatory within 20 days of service of this final order.

III. Motions to Seal

The balance of Plaintiff's motion to compel and two other pending motions relate to maintaining anonymity of Insured A.

"Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, Rule 2.550(c).) "[A] trial court is a public governmental institution. Litigants certainly anticipate, upon submitting their disputes for resolution in a public court, before a state-appointed or publicly elected judge, that the proceedings in their case will be adjudicated in public. As observed in *State v. Cottman Transmission Systems, Inc., supra*, 75 Md. App. 647, 542 A.2d 859, 864, '[a]n individual or corporate entity involved as a party to a civil case is entitled to a fair trial, not a private one.'" (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, 1211.)

In keeping with the open door policy of the courts, California Rules of Court, Rule 2.550 provides:

> The court may order that a record be filed under seal only if it expressly finds facts that establish:
>
> (1) There exists an overriding interest that overcomes the right of public access to the record;
>
> (2) The overriding interest supports sealing the record;
>
> (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and
(5) No less restrictive means exist to achieve the overriding interest.

(Cal Rules of Court, Rule 2.550(d); see also *H.B. Fuller Co. v. Doe* (2007) 151 Cal. App. 4th 879 (explaining the adoption of this rule was intended to provide guidance for implementing *NBC Subsidiary*, discussed below.)

The only argument Plaintiff makes in support of its motion to seal is that the EULA requires that Accellion keep Insured A's information confidential. Relying on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, Plaintiff asserts this contractual obligation is all that is necessary to demonstrate an overriding interest; there is no need for further evidence. The Court disagrees.

First, the portion of *NBC Subsidiary* that references a contractual obligation is in footnote 46 of the opinion where that court states:

> As observed, *ante*, at page 1207, the court in *Press-Enterprise II, supra*, 478 U.S. 1, 14 [106 S. Ct. 2735, 2743], implied that an accused's interest in a fair trial constitutes an "overriding interest" supporting closure. We assume that the high court similarly would find that a civil litigant's right to a fair trial also constitutes an overriding interest supporting closure.
>
> Courts have acknowledged various other overriding interests. (*Globe, supra*, 457 U.S. 596, 607 [102 S. Ct. 2613, 2620] [protection of minor victims of sex crimes from further trauma and embarrassment]; accord, *Press-Enterprise II, supra*, 478 U.S. 1, 9, fn. 2 [106 S. Ct. 2735, 2741]; *Press-Enterprise I, supra*, 464 U.S. 501, 512 [104 S. Ct. 819, 825] [privacy interests of a prospective juror during individual voir dire]; *Rovinsky, supra*, 722 F.2d 197, 200 [protection of witnesses from embarrassment or intimidation so extreme that it would traumatize them or render them unable to testify]; ***Publicker, supra*, 733 F.2d 1059, 1073 [protection of trade secrets, protection of information within the attorney-client privilege, and enforcement of binding contractual obligations not to disclose]**; Comment, *The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court*, *supra*, 51 U. Chi. L.Rev. at pp. 299-310 [safeguarding national security, ensuring the anonymity of juvenile offenders in juvenile court]; Fenner & Koley, *supra*, 16 Harv. C.R.-C.L. L.Rev. at pp. 440-444 [ensuring the fair administration of justice, and preservation of confidential investigative information].)

(*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, 1222 (emphasis added).)

In each of these cases, including *Publicker*, there was an additional compelling reason, such as revealing trade secrets, the identity of a sperm donor, or the identity of a sexual assault victim. Plaintiff cites to no California case holding that a contractual obligation to file under seal is sufficient *on its own* to support filing presumptively public documents under seal, much less to support completely shielding the identity of a party or witness. This is not surprising; California courts are not permitted to allow documents to be filed under seal merely based on a stipulation between the parties. (*Huffy Corp. v. Superior Court* (2003) 112 Cal. App. 4th 97 (stipulation and contractual agreement insufficient to justify trial court's sealing order.) It thus follows that this Court must have more than the EULA upon which to base a sealing request.

Next, Plaintiff cites **no** evidence from Insured A – Plaintiff fails even to provide evidence to support its argument that the information Plaintiff claims is confidential under the terms of the EULA is, in fact, confidential **according to Insured A** — and only Insured A would have personal knowledge about that issue. Importantly, on this motion, it was Plaintiff's burden to produce such evidence; attorney argument is not evidence. As the *H.B. Fuller* court explains:

> [A] reasoned decision about sealing or unsealing records cannot be made without identifying and weighing the competing interests and concerns. Such a process is impossible without (1) identifying the specific information claimed to be entitled to such treatment; (2) identifying the nature of the harm threatened by disclosure; and (3) identifying and accounting for countervailing considerations. The burden of presenting information sufficient to accomplish the first two steps is logically placed upon the party seeking the sealing of the documents, who is presumptively in the best position to know what disclosures will harm him and how. This means at a minimum that the party seeking to seal documents, or maintain them under seal, must come forward with a specific enumeration of the facts sought to be withheld and specific reasons for withholding them.

(*H.B. Fuller Co. v. Doe* (2007) 151 Cal. App. 4th 879, 894.)

Accordingly, Plaintiff's motions to file under seal are DENIED.