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: April 9, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: **Before 4:00 PM today you must notify the:**

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

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

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

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

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

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	22CV401560	Mezzetti Financial Services, Inc. vs Network remedy, Inc.	The parties are ordered to appear for the debtor's examination.
2	23CV412192	Ralph Jackson vs County of Santa Clara	Defendant's demurrer is SUSTAINED with 20 days leave to amend. Scroll to line 2 for complete ruling. Court to prepare formal order.
3-4	23CV425457	Mohammad Monsef vs Elite Realty Services	Defendant's Motion to Quash is DENIED. While Defendant is correct that service of process appears not to have been perfected because there is no showing of diligent attempts to serve the agent for service of process or mailing after substitute service, the Court finds Defendant's motion to compel arbitration and stay the case to be a general appearance under the facts of this case. (See, e.g., *General Ins. Co. v. Superior Court of Alameda County* (1975) 15 Cal. 3d 449, 453.) "Whether a particular act of the defendant reflects an intent to submit to the jurisdiction of the court, constituting a general appearance, depends upon the circumstances." (*Id.*, citing *Davenport* v. *Superior Court* (1920 183 Cal. 506, 511; *Smith* v. *Moore Mill & Lumber Co.*(1929) 101 Cal.App. 492, 494;1 Witkin, Cal. Procedure (2d ed. 1970) pp. 646-647.) Here, Defendant seeks to employ the jurisdiction of the court to compel Plaintiff to act in accordance with the parties' agreement to arbitrate, thus acquiescing to the court's jurisdiction. Defendant's motion to compel arbitration is GRANTED. A notice of motion with this hearing date and time was served on Plaintiff by U.S. and electronic mail on February 16, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. Plaintiff's suit is for failure to pay real estate sales commissions. (Complaint.) Plaintiff references the parties' Independent Contractor Agreement ("ICA") in his Complaint. (Complaint, ¶ 8.) Defendant submits a copy of the ICA which includes an agreement to arbitrate at paragraph 12B. (Declaration of William C. Tran, Ex. A.) This is prima facie evidence of the existence of an arbitration agreement, which evidence Plaintiff fails to refute. (*Condee v. Longwood Management Corp.* (2001) 88 Cal. App. 4th 215, 218; *Gamboa v. Northeast Community Clinic* (2021) 72 Cal. App. 5th 158, 165 (once moving party produces prima facie evidence of a written arbitration agreement by attaching the agreement or summarizing the terms in a motion to compel, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement.); California Rules of Court, Rule 371.) On this record, the Court is required to send this matter to arbitration. (Code Civ. Pro. § 1281.2 ("the court shall order a matter to arbitration if it determines that there is an agreement to arbitrate and (1) the agreement has not been waived or (2) the agreement has not been revoked."); *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) Accordingly, this case is ordered to arbitration. The April 16, 2024 case management conference is VACATED. A status conference regarding arbitration is set for December 19, 2024 at 10:00 a.m. in Department 6.
5	23CV415930	Payroll Express LLC dba Payroll Express et al vs HOP Capital et al	Vacated per stipulation.

6	23CV427271	Weiting Zhan vs Jianing Tang	Weiting Zhan's Motion to Compel Responses to Special Interrogatories (Set One) and Requests for Production of Documents (Set One) is GRANTED. A notice of motion with this hearing date and time was served by U.S. Mail on March 4, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiff also served these discovery requests on January 28, 2024 and wrote to Defendant after receiving no responses. Defendant has served no responses as of the date of this motion. Where, as here, a responding party fails to timely respond to interrogatories, the responding party waives all objections to the interrogatories, including objections based on privilege or on the protection for work product. (Code of Civ. Proc. §2030.290(a).) So too for requests for production. (Code of Civ. Proc. §2031.300.) Defendant is accordingly ordered to serve verified, Code compliant responses without objections within 20 days of service of this formal order. Defendant is further ordered to pay $60 to Plaintiff within 60 days of service of this formal order. Court to prepare formal order.
7, 13	21CV380291	CITY OF CUPERTINO vs JENNIFER CHANG	Plaintiff's Motion for summary adjudication is DENIED; its motion to amend is CONDITIONALLY GRANTED. Scroll to lines 7, 13 for complete ruling. Court to prepare formal order.
8	21CV384685	Jeremy Witt vs Sherry Ross et al	Dylan Hackett's Motion to Withdraw as Counsel for Jeremy Witt is DENIED WITHOUT PREJUDICE. There is plainly good cause for Mr. Hackett and his firm to withdraw, however, the motion is not fully compliant with California Rules of Court Rule 3.1362. Most importantly, the Court could not locate a proof of service of the notice of motion and motion on Mr. Witt, which is plainly required. The proof of service in the court file only shows service on defense counsel. This order will be reflected in the minutes.
9	20CV371800	Rahel STEPHAN et al vs BRIDGEMAN FAMILY MOBILE, LLC et al	Joseph S. Tobener's motion to withdraw as counsel for Rahel Stephan is GRANTED. Court to use form of order on file, which will become effective upon filing the proof of service of the signed order on Rahel Stephan.
10	23CV414203	TD Bank USA, N.A. vs Romeojunior Damian	The parties are ordered to appear. Defendant claims the levied funds are needed for rent. The attached notice indicates the deadline for paying the rent has passed. The Court therefore seeks clarification and documentation as to whether this rent is still due.
11	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Specially appearing defendant Paul Brown's motion for an order finding Plaintiff Mark Christopher Tracy to be a vexatious litigant and entry of a prefiling order is GRANTED. The Courts finds the judicially noticeable materials submitted with Mr. Brown's motion establish that Mr. Tracy is a vexatious litigant under at least Code of Civil Procedure section 391(b)(1)&(4). Moving party is ordered to prepare a form of pre-filing order pursuant to Code of Civil Procedure section 391.7 that includes a provision for posting a security as outlined in Code of Civil Procedure section 391(c). Court to prepare formal order.
12	23CV423612	John Le et al vs Thomas Vo	Off calendar per stipulation.

Calendar Line 2
Case Name: *Ralph Jackson v. County of Santa Clara, et al.*
Case No.: 23CV412192

Before the Court is Defendant County of Santa Clara's (the "County") demurrer to plaintiff Ralph Jackson's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for workplace discrimination. According to the FAC, Plaintiff is an African American who suffers from a disability within the meaning of the Fair Employment and Housing Act ("FEHA"). (FAC, ¶ 9.) Plaintiff worked for the County's Probation Department at James Ranch. (FAC, ¶ 10.) In March 2020, he requested accommodations to work from home or to be transferred to a position that would allow him to work from home as an accommodation for his disability and being in the high-risk category for COVID-19. (FAC, ¶ 12.) Plaintiff alleges Defendants initially offered to compensate him with paid administrative leave, but by April 2020, Defendants reneged and offered him an ultimatum to return working onsite without accommodations or to use his leave banks and benefits. (FAC, ¶ 15.) According to Plaintiff, on September 28, 2020, Defendants changed Plaintiff's status to "Health Leave" so they would no longer have to pay for his insurance benefits. (FAC, ¶ 17.) Defendants refused to accommodate him, forced him to go on leave with no benefits, until he had no option but to retire in October 2021. (FAC, ¶ 18.)

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 October 27, 2023, the Court issued an order (the "Order") sustaining the County's demurrer with leave to amend all claims except the wrongful termination claim, which Plaintiff agreed to dismiss. On November 27, 2023, Plaintiff filed his FAC, asserting: (1) disability discrimination; (2) failure to accommodate; (3) failure to engage in interactive process; (4) race and sex discrimination; and (5) retaliation. On January 5, 2024, the County filed the instant motion, which Plaintiff opposes.

II. 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.[1] (*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. First Cause of Action-Disability Discrimination

Under FEHA, 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 varies 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

[1] On its own motion, the Court takes judicial notice of the Complaint. (Evid. Code, § 452 (d).)

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 v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*) [internal citations omitted].)[2]

A "physical disability" includes but is not limited to "having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic, and lymphatic, skin, and endocrine. (B) limits a major life activity." (Gov. Code., § 12926 (m)(1)(A) & (B).) "Under this statute, working is a major life activity." (Gov. Code, § 12926.1 (c).)

Plaintiff alleges he had a disability, a record of disability, and/or was perceived as or treated as having a physical disability by the County. (FAC, ¶ 29.) He alleges he suffers from underlying health conditions that make him highly susceptible to infections and related complications, which places him in the high-risk category for COVID-19. (FAC, ¶ 13.) He further alleges his underlying conditions affect one or more of his body systems and limit major life activities, including work. (*Ibid*.)

The County contends Plaintiff's allegations that he is "highly susceptible to infections and related complications" do not constitute a disability as a matter of law. In support, the County relies on multiple federal district court opinions interpreting the Americans with Disabilities Act ("ADA").

"Where…the particular provision in question in the FEHA is similar to the one in the ADA, the courts have looked to decisions and regulations interpreting the ADA to guide construction and application of the FEHA." (*Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 973, fn. 12.) However, "California law and federal law differ with respect to the standard for establishing a disability, in that federal law requires a showing of a '*substantial limitation*,' while FEHA requires only that the condition 'limits' a major life activity." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 312 [emphasis added]; see also Gov. Code, § 12926.1(c) ["[the distinction between the FEHA and ADA] is intended to result in broader coverage under the law of this state than under the federal act"].)

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

The County's reliance on cases involving the standard for establishing a disability under the ADA is unhelpful.[3]

However, Plaintiff's recitation of the statutory language fails to allege facts to permit the Court to determine whether Plaintiff's disability falls under the FEHA definition and thus, whether he is a member of a protected class who suffered a disability. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795 [the general rule is that statutory causes of action must be pleaded with particularity]; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 [same] (*Covenant Care*).) Plaintiff asserts he can amend the pleading to add facts regarding his condition. (See Opp., p. 7:20-24.) Thus, the demurrer is sustained with 20 days leave to amend.

B. 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 (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 (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 (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

[3] The County also relies on the DFEH Employment Information on COVID-19 as a persuasive authority, however, the document is dated February 16, 2022, which is after the relevant events in this matter and it states, "this guidance is based on current public health information and may be updated from time to time, and replaces previous guidance issued on March 20, 2020, and July 24, 2020. This guidance is for informational purposes only and does not create any rights or obligations separate from those imposed by the FEHA and other laws." (DFEH Employment Information on COVID-19, p. 1.)

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 FAC does not allege facts sufficient to support a physical disability under FEHA. Plaintiff also fails to allege facts to support he was qualified for the positions he sought. (See *Covenant Care, supra,* 32 Cal.4th at p. 790; see also *Ali v. Robert Half Int'l, Inc.* (2019) 2019 U.S. Dist. LEXIS 173970 [dismissed plaintiff's ADA and FEHA claims for failure to plead sufficient facts regarding his disability and conclusory allegations regarding whether he was a qualified individual under FEHA].)[4] Thus, the demurrer to the second cause of action is SUSTAINED with 20 days leave to amend.

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

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(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.'"

[4] The FEHA and ADA contain virtually identical language governing interactive process and reasonable accommodation claims. (Compare § 12940, subd. (m)(1) [requiring employers "to make reasonable accommodation for the known physical or mental disability of an applicant or employee"] with 42 U.S.C. § 12112, subd. (b)(5)(A) [requiring employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee"].)

(*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 FAC does not allege facts sufficient to support a physical disability under FEHA. Thus, the demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

D. Fourth Cause of Action: Race and Sex Discrimination

The 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.) "The 'materiality' test encompasses not only ultimate employment decisions, but 'also the entire spectrum of employment actions that are reasonably likely to be adversely and materially affect an employee's job performance or opportunity for advancement in his or her career.'" (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 (*Patten*).)

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. (FAC, ¶ 62.) He alleges Defendants discriminated against him in the terms and conditions of his employment on the basis of his race and sex because they assigned contract tracing positions which would have been a reasonable accommodation for him to non-African American female employees. (FAC, ¶ 63.)

The County contends Plaintiff cannot claim his retirement was a constructive discharge. (See MPA, p. 12, fn. 2.) But the County relies on extrinsic evidence in support of its argument. The exhibit is not before the Court at this time because it was not attached to the pleading nor has it been judicially noticed. Therefore, the County's argument goes beyond the instant motion.

The County contends Plaintiff cannot sufficiently allege discriminatory motivation because the FAC's allegations regarding Plaintiff's supervisor Joel Grabschied constitute a sham pleading as Plaintiff has removed all the relevant dates.

Generally, after an amended pleading is filed, the original pleading is superseded. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.) Courts will assume the truth of the factual allegations in the amended pleading for purposes of demurrer. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383 (*Owens*).) However, under the sham pleading doctrine, "admissions in an original complaint… remain within the court's cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff's case will not be accepted.'" (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061.) The purpose of the doctrine is to "enable the courts to prevent an abuse of process." (*Hanh v. Mirda* (2007) 147 Cal.App.4th 740, 751.) "[W]here a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings," the court may examine the prior complaint to ascertain whether the amended pleading is merely a sham. (*Owen, supra,* 198 Cal.App.3d at p. 383.)

"In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so, the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint." (*Ibid*.) A pleading cannot be summarily dismissed if the sham pleading doctrine applies as the pleader must be given the opportunity to provide an explanation for the incompatible pleadings. (See *Owens*, *supra*, 198 Cal.App.3d at 384 [pleader must be given opportunity to explain inconsistency]; see also *Deveny v. Entropin, Inc*. (2006) 139 Cal.App.4th 425-426 [sham pleading doctrine is inapplicable where pleader offers plausible explanation for amendment].)

In the Complaint, Plaintiff alleged Grabschied made racial and discriminatory comments, such as telling Plaintiff his food "smelled ethnic" and that he was "incompetent, illiterate, always late, and not qualified." (See Complaint, ¶ 24.) Plaintiff further alleged he, along with other employees, took a vote of no confidence on December 11, 2019. (*Ibid*.) In the Order, the Court stated, "it is unclear to the Court whether Grabschied was removed from his position after the vote or whether he continued to have some role in Plaintiff's alleged treatment." (Order, p. 8:17-19.) In the FAC, Plaintiff again alleges the same racial and discriminatory comments by Grabschied to him along with additional comments toward other people. (FAC, ¶ 21.) Without providing any dates, Plaintiff alleges his participation in the no confidence vote, his complaints to the County regarding Grabschied's behavior, and Grabschied's "inconsistent disciplinary actions based on favoritism and discrimination, made up personnel policies and use of profane language in the workplace." (FAC, ¶ 22,)

Plaintiff states the dates "are not relevant to the overall gravamen of the Complaint. Grabschied engaged in a historical pattern and practice of racism and sexism. His leadership led to practices that permitted only white women to receive contact tracing positions, and his conduct is both circumstantial and direct evidence of discriminatory motive." (Opp., p. 13:26-14:3.) He further states the intent was to show Plaintiff complained to his supervisors at the County about Grabschied's conduct and white employees in remote positions. (Opp., p. 14:5-7.) The Court is not persuaded by Plaintiff's explanation because paragraph 22 states, "Plaintiff also complained to Defendants about Grabschied based on discriminatory, sexist, and inappropriate behavior, *including* allowing white employees to remain in remote positions during COVID-19 such as contact tracing positions, while demanding that African American employees who suffered from a qualified disability and/or are high-risk for COVID to return to work onsite." (FAC, ¶ 22.) Plaintiff's allegation implies Grabschied was involved in making the decisions regarding the alternate positions. Thus, the sham pleading doctrine applies here and the Court reads in the dates of the events concerning Grabschied into the FAC, i.e., that the no confidence vote took place in December 2019, Plaintiff had an interview with Internal Affairs in January 2020 regarding Grabschied, and Grabschied eventually was placed on administrative leave. (See Complaint, ¶¶ 24-25.) Nevertheless, the Court's inquiry as to whether Grabschied continued to have a role in Plaintiff's treatment remains unanswered based on the allegations and judicially noticed materials, thus, Plaintiff

fails to allege sufficient fact to support discriminatory motive. But Plaintiff asserts he can amend to allege those facts. (See Opp., p. 14:20-21.)

Plaintiff argues the County can be liable for another supervisor's adverse employment action if such action was influenced or intended by Grabschied's animus, however, he fails to state any facts in support. His allegations regarding *Grabschied's* alleged discriminatory practices and conduct does not itself support the purported influence over another supervisor's or the County's subsequent decisions. Plaintiff asserts he can amend to add facts to show the purported influence over the County's management personnel's decisions. (See Opp., p. 14:16-19.)

The County also argues Plaintiff cannot allege an adverse employment action because he voluntarily retired. However, Plaintiff alleges he was *forced* to retire early after his request for accommodations was denied, he was forced to take unpaid leave, his insurance benefits were stripped, and the continued threat of exposure to COVID-19 in the workplace. (FAC, ¶¶ 19, 23.) Whether these things materially affected Plaintiff's employment and therefore constitute adverse employment actions is a question of fact that cannot be resolved on demurrer. Thus, the demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend.

E. Fifth Cause of Action: Retaliation

Government Code section 12940, subdivision (h) provides:

> For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(Gov. Code, § 12940 (h).)

"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 he protested and opposed discriminatory conduct and thereafter the County retaliated against him by denying his request for reasonable accommodations, pressuring him to return to work onsite without accommodations, refusing to grant him options regarding alternate positions, terminating his health benefits, placing him on an involuntary leave of absence, and terminating his employment. (FAC, ¶¶ 72-73.) For reasons stated above, Plaintiff fails to allege facts to support the causal connection between the protected activity and the County's action. However, Plaintiff asserts he can amend to add such facts. (Opp., p. 15:22-27.) Thus, the demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend.

Calendar Lines 7, 13
Case Name: *City of Cupertino v. Jennifer Chang et.al.*
Case No.: 21CV380291

Before the Court is Plaintiff City of Cupertino's ("Cupertino") motion for summary adjudication of its third cause of action for conversion against Defendant, Jennifer Chang. Pursuant to the California Rule of Court, Rule 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from the alleged embezzlement of Cupertino's funds. Defendant was employed as an accountant in Cupertino's Finance Department between August 25, 1997, and July 7, 2015. (Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Adjudication ("SSUMF"), ¶1.) She was promoted to senior accountant on June 30, 2014, and remained in that position until her retirement. (*Id.*, ¶2.) As both an accountant and senior accountant, Defendant's responsibilities included maintaining Cupertino's general ledger accounts and performing bank reconciliations and quarterly reconciliation in preparation for external audits. (*Id.*, ¶6.) In conjunction with her responsibilities, Defendant had access to, and was authorized to issue and cut Cupertino checks. (*Id.*, ¶7.)

At all times during Defendant's employment with Cupertino, the Finance Department maintained a deposit liability account that tracked customer deposits and construction bonds related to a variety of Cupertino activities, including issuing building permits and processing applications for development ("Customer Deposit Liability Account"). (SSUMF, ¶8.) When Cupertino contracted with third-party vendors for activities or services associated with customer deposits, Cupertino payments to these vendors were debited out of the Customer Deposit Liability Account. During the time of Defendant's employment, she was responsible to enter debits on the Account Spreadsheet. (*Id.*, ¶14.)

Near the end of 2014, Cupertino began working with its IT department to implement a new financial system. The new system went "live" in or around January 2015. (*Id.*, ¶15.) Implementation of the new financial system involved the migration of data from Cupertino's old system to the new system. (*Id.*, ¶16.) A significant amount of manual data clean-up was necessary following migration and implementation. As part of this multi-year clean-up process, Richard Wong, an accountant in Cupertino's Finance Department, was responsible for the review of the Customer Deposit Liability

Account, which began on or around January 2018, and involved manual review of thousands of transactions. (*Id.*, ¶17.)

Over the course of his review, Mr. Wong identified a number of outgoing payments to third-party vendors for which he could not locate any associated customer deposit or supporting documentation for the payments themselves. (SSUMF, ¶21.) Over the course of several months, Mr. Wong realized the payments were issued to only four entities: Pacific Bay Investment ("Pacific Bay"), MFS Network Technology ("MFS"), Pacific West Development ("Pacific West"), and Greater Bay Properties ("Greater Bay"). (*Id.*, ¶22.) On April 16 or 17, 2018, Mr. Wong learned that all four entities were registered to Yuen-Cheng Chang. (*Id.*, ¶24.) On April 17, 2018, Mr. Wong brought this information to the attention of Cupertino's Finance Manager, Zach Korach. (*Id.*, ¶25.) On April 18, 2018, the former City Manager, David Brandt, contacted the Santa Clara County Sheriff's Office to report Mr. Wong's discovery and Defendant's possible involvement. (*Id.*, ¶6.)

In all, Cupertino identified twenty-three payments, totaling $791,494, issued from Cupertino to Pacific Bay, MFS, Pacific West, or Greater Bay, summarized below:

Check Date	**Check No.**	**Amount**	**Payee**
9/28/2000	580115	$24,500	Pacific Bay
9/28/2001	588337	$28,708	MFS
10/3/2003	604126	$24,952	Pacific Bay
5/20/2005	618042	$26,050	MFS
8/26/2005	620010	$21,998	MFS
4/20/2007	631061	$28,850	MFS
8/10/2007	633114	$24,150	MFS
7/22/2011	659393	$23,425	Pacific West
8/19/2011	659874	$23,425	Pacific West
10/21/2011	660936	$24,450	Pacific West
10/28/2011	661153	$23,850	Pacific West
3/16/2012	663263	$18,635	Pacific West
8/16/2013	671962	$39,627	Pacific West
8/16/2013	671963	$46,332	Pacific West
8/16/2013	672043	$46,829	Pacific West
8/16/2013	672044	$39,248	Pacific West
3/14/2014	675184	$68,800	Greater Bay
3/14/2014	675185	$48,925	Pacific West
3/14/2014	675236	$62,780	Greater Bay
3/14/2014	675268	$49,415	Pacific West

9/5/2014	678209	$29,715	Pacific West
9/5/2014	678251	$37,480	Greater Bay
9/5/2014	678283	$29,350	Pacific West

(*Id.*, ¶27)

Cupertino obtained deposited copies of the 2011-2014 Checks, which established that each of those checks was transacted out of Cupertino's bank account. (SSUMF, ¶45.) However, Cupertino could not then obtain copies of the 2000-2007 checks because Cupertino's bank only retained records for seven years. (*Id.*, ¶62.)

On September 4, 2018, a criminal complaint was filed against Ms. Chang in Santa Clara Superior Court charging her with embezzlement (Penal Code Section 504), grand theft (Penal Code Section 487(b)(3)), and computer crimes (Penal Code Section 502(c)(1)(A)) relating to 23 transactions. (Disputed Separate Statement of Material Facts ("DSSMF"), ¶1.) Cupertino calculated that the 23 transactions to the entities totaled $791,494. (SAC, ¶22.)

On December 19, 2019, the criminal court held there was insufficient evidence for Ms. Chang to answer for charges prior to 2011. (DSSMF, ¶16.) Thereafter, Ms. Chang pled no contest to embezzlement, grand theft, and computer crimes for 16 transactions that took place between 2011 and 2014. (*Id.*, ¶17.) On January 31, 2022, Ms. Chang paid $612,000 in restitution for which Cupertino stated, "no further restitution to Cupertino of Cupertino is due." (*Id.*, ¶18.)

Cupertino filed this suit on April 13, 2021, against Ms. Chang and subsequently amended its complaint on October 1, 2021, and again on November 12, 2021. Cupertino's operative second amended complaint ("SAC") alleges causes of action for fraud, breach of contract, and conversion.

II. Legal Standard

A. Summary Adjudication

A party may seek summary adjudication of select causes of action, affirmative defenses, claims for damages, or issues of duty, which proceeds in all procedural respects like a motion for summary judgment. (Code Civ. Proc., § 437c(f)(1)-(2), (t).) The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) Code Civil Procedure section 437c(c)

requires "the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

"The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67, citing *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 381-382.) As to each claim framed by the complaint, the defendant moving for summary judgment must satisfy the initial burden of proof by presenting facts to negate an essential element, or to establish a defense. (Code Civ. Proc. § 437c(p)(2); *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520.) Defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Defendant must present evidence and not simply point out that plaintiff does not possess and cannot reasonably obtain needed evidence. (*Aguilar, supra*, 25 Cal.4th at 865-66.) Thus, a moving defendant has two means by which to shift the burden of proof under the summary judgment statute: "The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. [Citation.] [Or a]lternatively, the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1103.)

Until the moving defendant has discharged its burden of proof, the opposing plaintiff has no burden to come forward with any evidence. Once the moving defendant has discharged its burden as to a particular cause of action, however, the plaintiff may defeat the motion by producing evidence showing that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc. §437c(p)(2).) Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389.)

B. Leave to Amend

Code of Civil Procedure section 473, subdivision (a)(1) provides: "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code." (Code Civ. Proc., § 473(a)(1).) "This discretion should be exercised liberally in favor of amendments, for judicial policy favors resolution of all disputed matters in the same lawsuit." (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1047.)

Under Rule 3.1324, subdivision (a) of the California Rules of Court, a motion to amend a pleading shall (1) include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments; (2) state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph and line number, the deleted allegations are located; and (3) state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. (Cal. Rules of Court, Rule 3.1324 (a).)

Under Rule 3.1324, subdivision (b) of the California Rules of Court, a separate declaration must accompany the motion and must specify (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier. (Cal. Rules of Court, Rule 3.1324, subd. (b).)

III. Evidentiary Objections

The Court rules on Defendant objections to Plaintiff's evidence, as follows:

- Alfaro's Declaration, p.2, lines 17-21, 22-24: OVERRULED.
- Alfaro's Declaration, p. 3, lines 1-3: SUSTAINED

- Wong's Declaration, p.2, lines 21-26, p.3 lines 22-24: SUSTAINED for lack of personal knowledge as to Defendant's duties and authority prior to September 2006; OVERRULED as to knowledge of Defendant's duties and authority between September 2006 and July 7, 2015.
- Wong's Declaration, p. 2 line 27, p. 3 line 3: SUSTAINED for lack of personal knowledge as to Plaintiff's accounting procedures and/or its Finance Department's handling of Customer Deposit Liability Account, preceding Mr. Wong's employment; OVERRULED as to Mr. Wong's knowledge during his employment.
- Wong's Declaration p. 3 lines 24-27: OVERRULED.
- Wong's Declaration p. 5 lines 8-10: SUSTAINED.
- Wong's Declaration p. 8 lines 3-7: OVERRULED.
- Wong's Declaration p. 8 lines 7-9: SUSTAINED for lack of personal knowledge as to Defendant's responsibility for reconciliation of accounts preceding Mr. Wong's employment; OVERRULED as to Mr. Wong's knowledge during his employment.
- Exhibit 30, Copies of checks HERITAGE00004, and HERITAGE00045: OVERRULED.
- Exhibit 57, Defendant's notice of motion and motion to dismiss counts 1 to 7 of the Information filed in the *People v. Jennifer Yuencheng Chang*, case No. C1899743: OVERRULED as to existence of this filing; SUSTAINED as to its hearsay content.
- Exhibit 60, Stipulated Surrender of License and Order, In the Matter of the Accusation against *Jennifer Yuencheng Chang*, Case No. AC-2023-1: OVERRULED. This exhibit reflects a stipulation and proposed order that was submitted for consideration and confirmation by the California Board of Accountancy of the Department of Consumer Affairs. As such this is not a final administrative order excluding the admissibility of Defendant's admissions in subsequent civil proceedings. Furthermore, Defendant's admission is limited to the allegations and transactions addressed in the criminal proceeding, which are undisputed in this proceeding.

The Court rules on Plaintiff's objections to Defendant's evidence as follows:

- Chang's Declaration p. 1, lines 8: OVERRULED pursuant to Evid. Code § 800.
- Chang's Declaration p. 1, lines 14-16: OVERRULED. The statement is admissible to show Plaintiff's notice and knowledge and not for the truth that the internal controls were weak.
- Chang's Declaration p. 1, line 16: OVERRULED.
- Chang's Declaration p. 1, lines 17-18: OVERRULED.
- Exhibit B, email communications from the Attorney General's Office to City Counsel: SUSTAINED.
- City Exhibit 56, transcript of Preliminary Hearing Examination at 82:10-83:15: OVERRULED. Plaintiff is objecting to excerpts of its own evidence.

IV. Analysis

A. Summary Adjudication of the Cause of Action for Conversion

"'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. [Citation.]'" (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451-452.) Conversion is a strict liability tort. It does not require bad faith, knowledge, or even negligence; it requires only that the defendant has intentionally done the act depriving the plaintiff of his or her rightful possession. (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1150.)

"Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment. [Citations.] A 'generalized claim for money [is] not actionable as conversion.' [Citation.]." (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.) According to the California Supreme Court: "While it is true that money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved

[citation], it is not necessary that each coin or bill be earmarked." (*Id*. at 396 (internal citations and quotations omitted.)

Here Plaintiff contends its conversion cause of action must be adjudicated in his favor as a matter of law because (1) Defendant admitted her fraudulent transfer of $612,286.00 from Plaintiff's account to various accounts by checks issued for her own use during 2011-2014; (2) deposited copies of check numbers 618402, 620010, and 633114 were discovered in 2023 showing Defendant's fraudulent transfer of $76,898.00 of Plaintiff's funds into an account held by "Yeuncheng Chang DBA MFS Network Technology"; (3) a deposit of $28,850 into the account held by Yeuncheng Chang DBA MFS Network Technology was discovered in 2023, which corresponds with the amount of the check number 631061; (4) Defendant created check numbers 580115, 588337, and 604126 respectively in 2000, 2001, and 2003, totaling $78,160.00 to payee companies Defendant owned and controlled.

In support of its position Plaintiff submits the following evidence:

- Exhibit 1 - City's Copy of Check 6593931
- Exhibit 2 - City's Copy of Check 659874
- Exhibit 3 - City's Copy of Check 660936
- Exhibit 4 - City's Copy of Check 661153
- Exhibit 5 - City's Copy of Check 663263
- Exhibit 6 - City's Copy of Check 671962
- Exhibit 7 - City's Copy of Check 671963
- Exhibit 8 - City's Copy of Check 672043
- Exhibit 9 - City's Copy of Check 672044
- Exhibit 10 - City's Copy of Check 675184
- Exhibit 11 - City's Copy of Check 675185
- Exhibit 12 - City's Copy of Check 675236
- Exhibit 13 - City's Copy of Check 675268
- Exhibit 14 - City's Copy of Check 678209
- Exhibit 15 - City's Copy of Check 678251
- Exhibit 16 - City's Copy of Check 678283

- Exhibit 17 - City of Cupertino's Request for Admissions to Jennifer Chang, and Declaration of Additional Discovery, Set One, May 4, 2022
- Exhibit 18 - Defendant Jennifer Chang's Responses to Plaintiff City of Cupertino's Request for Admission (Set One), June 21, 2022
- Exhibit 19 - Defendant Jennifer Chang's [Amended] Responses to Plaintiff City of Cupertino's Request for Admission (Set One), August 29, 2022
- Exhibit 20 - Defendant Jennifer Chang's Third Amended Responses to Plaintiff City of Cupertino's Request for Admission (Set One), October 18, 2022
- Exhibit 21 - Defendant Jennifer Chang's Responses to Plaintiff's Form Interrogatories (Set One), June 21, 2022
- Exhibit 22 - Defendant Jennifer Chang's Amended Responses to Plaintiff's Form Interrogatories (Set One), July 25, 2022
- Exhibit 23 - Defendant Jennifer Chang's Amended Responses to Plaintiff's Form Interrogatories (Set One), August 29, 2022
- Exhibit 24 - Defendant Jennifer Chang's Amended Responses to Plaintiff City of Cupertino's Special Interrogatories (Set One), July 25, 2022
- Exhibit 25 - Defendant Jennifer Chang's Amended Responses to Plaintiff City of Cupertino's Special Interrogatories (Set One), August 29, 2022
- Exhibit 26 - Defendant Jennifer Chang's Responses to Plaintiff City of Cupertino's Request for Production of Documents (Set One), June 21, 2022
- Exhibit 27 - Defendant Jennifer Chang's Amended Responses to Plaintiff City of Cupertino's Request for Production of Documents (Set One), August 29, 2022
- Exhibit 28 - Reporter's Transcript of the Deposition of Jennifer Chang, July 10, 2023
- Exhibit 29 February 23, 2023, Deposition Subpoena for Production of Business Records served by Cupertino on the Custodian of Records for Heritage Bank of Commerce dated January 4, 2024
- Exhibit 30 - Heritage Bank of Commerce Records
- Exhibit 31 - Defendant's Copy of Check 6593932

- Exhibit 32 - Defendant's Copy of Check 659874
- Exhibit 33 - Defendant's Copy of Check 660936
- Exhibit 34 - Defendant's Copy of Check 661153
- Exhibit 35 - Defendant's Copy of Check 663263
- Exhibit 36 - Defendant's Copy of Check 671962
- Exhibit 37 - Defendant's Copy of Check 671963
- Exhibit 38 - Defendant's Copy of Check 672043
- Exhibit 39 - Defendant's Copy of Check 672044
- Exhibit 40 - Defendant's Copy of Check 675184
- Exhibit 41 - Defendant's Copy of Check 675185
- Exhibit 42 - Defendant's Copy of Check 675236
- Exhibit 43 - Defendant's Copy of Check 675268
- Exhibit 44 - Defendant's Copy of Check 678209
- Exhibit 45 - Defendant's Copy of Check 678251
- Exhibit 46 - Defendant's Copy of Check 678283
- Exhibit 47 - Wells Fargo Bank, N.A. Business Records Declaration and Attorney General Subpoena
- Exhibit 48 - Wells Fargo Subpoena Copy of Check 675184
- Exhibit 49 - Wells Fargo Subpoena Copy of Check 675185
- Exhibit 50 - Wells Fargo Subpoena Copy of Check 675236
- Exhibit 51 - Wells Fargo Subpoena Copy of Check 675268
- Exhibit 52 - Wells Fargo Subpoena Copy of Check 678209
- Exhibit 53 - Wells Fargo Subpoena Copy of Check 678251
- Exhibit 54 - Wells Fargo Subpoena Copy of Check 678283
- Exhibit 55 - Criminal Information Summary in People v. Jennifer Yuencheng Chang, Case No. C18997434
- Exhibit 56 - Reporter's Transcript of Preliminary Examination Hearing in People v. Jennifer Yuencheng Chang, Case No. C1899743, December 10, 2019 (file-stamped); Exhibit 56(a) -

Reporter's Transcript of Preliminary Examination Hearing in People v. Jennifer Yuencheng Chang, Case No. C1899743, December 10, 2019 (certified)

- Exhibit 57 - Defendant's Notice of Motion and Motion to Dismiss Counts 1 to 7 of the Information Pursuant to Penal Code § 995, filed in in People v. Jennifer Yuencheng Chang, Case No. C1899743, September 27, 2020
- Exhibit 58 - Sentencing Memorandum in in People v. Jennifer Yuencheng Chang, Case No. C1899743, February 1, 2022
- Exhibit 59 - Restitution Payment Stipulation And Order in People v. Jennifer Yuencheng Chang, Case No. C1899743, April 28, 2022
- Exhibit 60 - Stipulated Surrender of License and Order, In the Matter of the Accusation Against Jennifer Yuen-Cheng Chang, Case No. AC-2023-1, December 15, 2022
- Declaration of Kristina Alfaro
- Declaration of Richard Wong
- Declaration of Rene Ortega

In its SAC, Plaintiff's single count for conversion pertains to the combined collection of 23 checks Defendant allegedly issued to fraudulently transfer $791,494.00 from Plaintiff's account to the account of various companies she owned and operated for her own use. (SAC ¶¶ 27, 53-58) The function of Plaintiff's SAC is to define the issues and its scope. Therefore, for the purpose of this motion, Plaintiff has the burden of showing some actual control or ownership by Defendant over *all* the funds allegedly converted. (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451.)

There is no dispute that at the relevant times Defendant owned and operated Pacific Bay and MFS Network Technology. (Plaintiff's Ex. 18, Defendant's verified Responses to Request for Admissions.) There is also no dispute that 16 of the 23 checks, issued from July 22, 2011, to September 5, 2014, were fraudulently issued and the associated funds were illegally transferred to accounts of various other companies for Defendant's use.

Plaintiff submits copies of checks numbered 633114, 620010, and 618402, deposited in the Heritage Bank account number 543000046, which was held by Yeuncheng Chang DBA MFS Network Technology. Plaintiff also submits a May 2007 bank statement for account number 543000046 showing

a deposit of $28,850.00 on May 25, 2007. Although there is no evidence as to the source of the deposited $28,850.00, Plaintiff asks the Court to deduce it was transferred from its account since the amount coincides with Plaintiff's check number 631061. However, Plaintiff provides no evidence showing the source of this deposited sum or a copy of its check number 631061. The only evidence as to the existence of this check and its amount is Mr. Wong's testimony.

Defendant testifies she has no recollection about this deposit and disputes Plaintiff's inference. While the Court is authorized to make inferences reasonably deducible from the evidence uncontradicted by other inferences or evidence, the Court must consider all evidence in the light most favorable to the nonmoving party, which in this case is the Defendant. (Code Civ. Proc., § 437c(c); *Marez v. Lyft, Inc.* (2020) 48 Cal.App.5th 569, 576–577.) On this record, there appears to be an issue of fact for the jury.

Plaintiff also provides no evidence showing check numbers 580115, 588337, and 604126, totaling $78,160.00 were debited from its bank account and/or transferred to Defendant. Plaintiff contends a reasonable trier of fact will deduce Defendant's conversion of this sum from her statement to the arresting officer about cutting checks for MFS, Pacific West Development, and greater Bay Properties without Plaintiff's permission. (Plaintiff's Ex. 56, transcript of criminal preliminary hearing.) Plaintiff argues that simply creating the checks is tantamount to Defendant exercising dominion and control over its funds and no reasonable trier of fact could find otherwise. Perhaps the jury will agree with Plaintiff. However, the Court cannot adjudicate that Defendant converted this sum as a matter of law when there is no evidence showing these checks were debited from Plaintiff's account and where there is no evidence that Defendant had actual control or ownership of these funds. While it is not necessary that there be a manual taking of the money, it is necessary for Plaintiff to show Defendant's assumption of control or ownership over the funds, or that she applied the funds to her own use. (*Oakdale Village Group v. Fong* (1996) 43 Cal. App. 4th 539, 543-544.)

Based on the foregoing, the Court finds that Plaintiff has failed to meet its burden of proof and there are triable issues as to whether the deposited sum of $28,850.00 and the sum of $78,160.00 were withdrawn from Plaintiff's account, whether Defendant had control over the $78,160.00 sum, or whether

Defendant had utilized the $78,160.00 sum for her own use. Accordingly, Plaintiff's motion for summary adjudication of its cause of action for conversion is DENIED.

2. Timeliness of Action

Given the Court's denial of Plaintiff's motion, there is no reason for further analysis of issues and arguments pertaining to the timeliness of Plaintiff's conversion claim.

B. Motion for Leave to Amend

Plaintiff seeks the Court's leave to amend its SAC to add a prayer for punitive damages. Plaintiff argues the leave should be granted because (1) punitive damages are based on and are entirely derivative of its fraud claim, (2) no additional discovery is required since trying punitive damages will not introduce any element beyond those already contained in the fraud claim, (3) addition of punitive damages, for Defendant's perjured testimony and discovery responses, facilitate the interest of justice.

In opposition, Defendant contends (1) Plaintiff is unjustifiably late in seeking this amendment since the original complaint, containing fraud allegations, was filed in 2021, (2) the alleged perjured deposition testimony occurred on July 10, 2023, and Plaintiff is unjustifiably tardy in seeking this amendment, (3) Defendant will be unable to gather needed evidence to defend against the new allegations of perjury by the discovery cut-off date of April 22, 2024, (4) Defendant will be prejudiced by addition of punitive damages since it changes the tenor of the existing allegations by increasing damages based on the new perjury claims, and (5) addition of punitive damages for unfounded perjury allegations do not serve the interests of justice.

Here, Plaintiff has satisfied the California Rules of Court, Rule 3.1324, subdivision (a) by submitting its Proposed TAC and identifying where the changes would take place. (Ms. Lucey's Decl. Exhibits A, B.) Even if a good amendment is proposed in proper form, a long, unwarranted and unexcused delay in presenting it may be a good reason for denial. In most cases, the factors for timeliness are: (1) lack of diligence in discovering the facts or in offering the amendment after knowledge of them; and (2) the effect of the delay on the adverse party. If the party seeking the amendment has been dilatory, and the delay has prejudiced the opposing party, the court has discretion to deny leave to amend. (See, *Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490.) Prejudice exists where the amendment would require delaying the trial, resulting in loss of critical evidence,

or added costs of preparation such as an increased burden of discovery. (See, *Magpali v. Farmers Group, Inc*. (1996) 48 Cal.App.4th 471, 486-488.)

Plaintiff repeatedly asserts that its prayer for punitive damages is "wholly derivative" of its long-standing fraud claim and based on facts "currently [pleaded] in the operative complaint." (Motion p. 5, lines 13-15; Declaration of Ms. Lucey ¶¶ 3, 4.) The original complaint, alleging fraud cause of action, was filed on April 13, 2021. The complaint was amended on October 1, 2021, and again on November 12, 2021. Plaintiff has not provided any explanation for exclusion of its prayer for punitive damages when the complaint and the subsequent amendments all contained a fraud claim based on the same set of facts. Evidently, Plaintiff's ground for this motion is Defendant's alleged perjured deposition testimony, which took place on July 10, 2023. Yet again, Plaintiff has failed to provide any justifiable reason for filing this motion after lapse of approximately 8 months.

However, given the policy of great liberality in allowing amendments, it is a rare case in which a court will be justified in refusing a party leave to amend his/her pleading absent a showing of prejudice to the adverse party. (*Bd. of Trustees v. Superior Ct*. (2007) 149 Cal. App. 4th 1154, 1163.) Trial of this matter is currently scheduled for May 20, 2024. Defendant will not have sufficient time to gather evidence and/or prepare its defense against allegations of perjury. The Court will CONDITIONALLY GRANT Plaintiff's motion upon its willingness to continue trial and permit Defendant additional time to conduct discovery on this issue. The parties are ordered to meet and confer and agree to a new trial date from which the discovery deadlines will be recalculated.