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


**Department 20, Honorable Socrates Peter Manoukian, Presiding**

**Courtroom Clerk: Hien-Trang Tran-Thien**

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2320

Department20@scscourt.org


**"Every case is important" . . . . . "No case is more important than any other."— United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)**

**"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.**

**As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)**

**Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)**

**By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/**

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## DATE: Thursday, 22 February 2024
## TIME: 9:00 A.M.

**This Department uses Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.**

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

**You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.**

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

## APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in-court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building. If the doors to the Old Courthouse are locked, please see the deputies at the metal detector next door at 191 North First Street.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

**All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.**

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

**CIVILITY.**

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

**COURT REPORTERS.**

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit

photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

**PROTOCOLS DURING THE HEARINGS.**

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

**TROUBLESHOOTING TENTATIVE RULINGS.**

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

**This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.**

| LINE # | CASE # | CASE TITLE | TENTATIVE RULING |
|---|---|---|---|
| LINE 1 | 17CV313599 | Jeffrey Hutchins vs Safyre Solutions, Inc.; EBO, Inc,; Alan N. Slater; George Spillos. | **Order of Examination of George Spillos.**<br>There does not appear to be a proof of service in the file**.**<br>Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM via the Zoom virtual platform. The appropriate oath will be administered by the Court and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely.<br>NO FORMAL TENTATIVE RULING. |
| LINE 2 | 17CV313599 | Jeffrey Hutchins vs Safyre Solutions, Inc.; EBO, Inc,; Alan N. Slater; George Spillos. | **Order of Examination of Alan Slater.**<br>There does not appear to be a proof of service in the file**.**<br>Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM via the Zoom virtual platform. The appropriate oath will be administered by the Court and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely.<br>NO FORMAL TENTATIVE RULING. |

| LINE # | CASE # | CASE TITLE | TENTATIVE RULING |
|---|---|---|---|
| LINE 3 | 22CV409362 | Lion Manufacturing vs Aemetis Advanced Fuels Keyes, Inc. | **Demurrer of Defendant to Plaintiff's Complaint.**<br>Defendant Aemetis's demurrer to the second cause of action of plaintiff Lion's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for declaratory relief is SUSTAINED with 10 days' leave to amend.<br>SEE ATTACHED TENTATIVE RULING. |
| LINE 4 | 22CV409362 | Lion Manufacturing vs Aemetis Advanced Fuels Keyes, Inc. | **Case Management Conference.**<br>This Court will set the matter for a Trial Setting Conference on 13 August 2024 at 11:00 AM in Department 20. The parties can expect a trial date 6 to 8 months after the TSC.<br>NO FORMAL TENTATIVE RULING. |
| LINE 5 | 19CV346678 | Premise Data Corporation, a Delaware corporation vs Moorea Brega; Kyle Dawkins; Ar Rang Jo; David Mendelson. | **Motion of Defendants Moorea Brega and David Mendelson for Summary Judgment.**<br>Plaintiff dismissed these parties on 02 February 2024 and 29 January 2024, respectively. Is this motion MOOT?<br>NO FORMAL TENTATIVE RULING. The parties should use the tentative ruling protocol to advise this Court of the status of the matter. |
| LINE 6 | 19CV346678 | Premise Data Corporation, a Delaware corporation vs Moorea Brega; Kyle Dawkins; Ar Rang Jo; David Mendelson. | **Motion of Defendant Alex Pompe for Summary Judgment.**<br>Plaintiff conditionally dismissed this party on 05 January 2024, with a dismissal to be filed no later than 31 October 2024. Is this motion MOOT?<br>NO FORMAL TENTATIVE RULING. The parties should use the tentative ruling protocol to advise this Court of the status of the matter. |
| LINE 7 | 20CV367863 | Charles E. Thompson, Trustee etc. vs Bruce C. Williams; Virginia Zapitz, Trustee, etc.; Jack Nichols; Samantha Nichols-Fetveit; Jill Matheson; Penelope Tash; Renata Marie Godfrey-Ryerson; Lindseth Godfrey; All Persons Unknown etc. | **Motion of Plaintiff for Order Compelling Continued Deposition of Bruce C. Williams, Interrogatory Answers, Ford Dismissal of 2023 Williams Action; for Indirect Contempt, and for Monetary Sanctions.**<br>Continued from 11 January 2024.<br>No opposition has been filed to this motion. Is Mr. Wagner representing Mr. Williams?<br>The motion is GRANTED in its entirety. Counsel for plaintiff is to prepare a notice of entry of order and serve it upon all parties.<br>NO FORMAL TENTATIVE RULING. |

| LINE # | CASE # | CASE TITLE | TENTATIVE RULING |
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| LINE 8 | 20CV369138 | Charles E. Thompson, Trustee etc. vs Bruce C. Williams; Virginia Zapitz, Trustee, etc.; Jack Nichols; Samantha Nichols-Fetveit; Jill Matheson; Penelope Tash; Renata Marie Godfrey-Ryerson; Lindseth Godfrey; All Persons Unknown etc. | **Motion of Plaintiff to Consolidate/Deemed Cases to Be Related.**<br>No opposition has been filed to this motion.<br>This case is calendared on the motion of plaintiff to deem this case to be related to Case Number 23CV418537 entitled to Bruce Williams v. Charles Thompson et al. This Court further notes that in an order filed in Case Number 23CV418537 on 22 January 2024, Judge Rosen declared Bruce Williams to be a vexatious litigant and dismissed that case with prejudice.<br>Is this motion MOOT?<br>NO FORMAL TENTATIVE RULING. |
| LINE 9 | 20CV367863 | Chicago Title Company, a California corporation vs 28th St., Villa Apartments LLC, a California LLC; Green Villa Apartments, LP, a California Limited Partnership Nobel Holmes LLC, a California LLC.<br>And related cross-complaint | **Motion Of Loida Kirkley And RoygbivReal Estate Development LLC to Compel Deposition Subpoenas for Personal Appearance and Production of Documents of Things of City Team Ministries and John Scott, and for Monetary Sanctions.**<br>NO TENTATIVE RULING. The parties are to appear and advise the court of the status of the matter. |
| LINE 10 | 20CV367863 | Chicago Title Company, a California corporation vs 28th St., Villa Apartments LLC, a California LLC; Green Villa Apartments, LP, a California Limited Partnership Nobel Holmes LLC, a California LLC.<br>And related cross-complaint | **Motion Of Green Villa Apartments To Compel Continued Deposition Of Loida Kirkley and for Monetary Sanctions.**<br>NO TENTATIVE RULING. The parties are to appear and advise the court of the status of the matter. |
| LINE 11 | 20CV367863 | Chicago Title Company, a California corporation vs 28th St., Villa Apartments LLC, a California LLC; Green Villa Apartments, LP, a California Limited Partnership Nobel Holmes LLC, a California LLC.<br>And related cross-complaint | **Motion of Cross-Defendant Lloyd Kirkley to Compel Deposition Attendance of Green Villa Apartments, LLC.**<br>NO TENTATIVE RULING. The parties are to appear and advise the court of the status of the matter. |

| LINE # | CASE # | CASE TITLE | TENTATIVE RULING |
|---|---|---|---|
| LINE 12 | 22CV395429 | Melissa Pocek vs Apple, Inc. | **Motion of Plaintiff to Compel the Deposition of Defendants Person Most Qualified and Production of Documents Without Redaction and Request for Monetary Sanctions in the Amount of $8,686.00.**<br><br>Continued from 25 January 2024. Trial of this matter is set for 29 April 2024. Defendant has calendared a summary judgment motion for 28 March 2024.<br><br>This Court is satisfied with the "Meet & Confer" that took place prior to the filing of this motion.<br><br>According to the declaration of Scott Jang, Esq., defendant has agreed to produce unredacted versions of the 476 produced documents in question that will allow Plaintiff to obtain the names of any purported percipient witnesses while still protecting third party privacy rights.<br><br>This Court wonders how privacy rights affect the identity and location of persons having knowledge of any discoverable matter in this case.<br><br>This Court concludes that the boilerplate objections raised by defendant in its responses to the discovery requests are not well taken. Notwithstanding the boilerplate nuisance objections, defendant responded that it would produce all non-privileged, responsive documents in its possession, custody or control.<br><br>The motion is GRANTED. Defendant is to produce all responsive documents within 10 days of the filing and service of this Order. Any claim of privilege previously asserted must be supported by an appropriate privilege log.<br><br>The request of plaintiff for monetary sanctions is GRANTED IN PART. Defendant is to pay the sum of $4,000.00 to counsel for plaintiff within 10 days of the filing and service of this Order.<br><br>Counsel for plaintiff is to provide notice of entry of this order.<br><br>NO FORMAL TENTATIVE RULING. |
| LINE 13 | 23CV411590 | Mark Porter vs County of Santa Clara | **Plaintiff's Discovery Motion.**<br><br>On 16 January 2024, this Court sustained the demurrer of defendant to all causes of action in plaintiff's Second Amended Complaint without leave to amend. Execution of the judgment is pending. Plaintiff has filed a notice of appeal. Therefore there is no grounds to order discovery. The motion is DENIED.<br><br>NO FORMAL TENTATIVE RULING. |

| LINE # | CASE # | CASE TITLE | TENTATIVE RULING |
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| LINE 14 | 23CV415836 | Jin Zhang vs Zichao Lu; Reliance Memory Inc.;Hefei Reliance Memory Limited; Heifei Ruibo Enterprises Consulting Management, LLP. | **Motion of Plaintiff for Leave to File First Amended Complaint.**<br><br>The complaint in this wrongful termination case, plaintiff sought damages claiming that defendants induced her to leave her prior employment and work for them under false pretenses with a claim that they promised to transfer to plaintiff a portion of equity in the defendant companies.<br><br>Plaintiff now seeks leave to amend the complaint to plead additional claims relating to discharge from the company, alleging retaliation for her complaints of sexual harassment and failure to pay wages owed etc.<br><br>Defendant claims that the proposed causes of action fail as a matter of law because they can only be asserted against an employer, not an individual acting on behalf of an employer. Plaintiff does not allege that she was ever employed by defendant Lu. Further, defendants claim that the retaliation-based claims proposed against Reliance Memory US is barred by the statute of limitations.<br><br>This Court also notes that defendants are disputing the assertion of personal jurisdiction in this matter.<br><br>It is the policy of this state to grant leave to amend pleadings although this Court is entitled to deny such a motion with the proposed pleading does not state a viable causes of action.<br><br>Under the circumstances of this case, this Court believes it prudent to GRANT the motion WITHOUT PREJUDICE to the right of the defendants to file a dispositive motion challenging the allegations of the first amended complaint.<br><br>Plaintiff is directed to file a copy of the proposed pleading to the court via the e-filing queue and serve it upon defendants, who will then have 20 days leave following service within which to RESPOND.<br><br>NO FORMAL TENTATIVE RULING. |
| LINE 15 | 23CV415836 | Jin Zhang vs Zichao Lu; Reliance Memory Inc.;Hefei Reliance Memory Limited; Heifei Ruibo Enterprises Consulting Management, LLP. | **Motion of Defendant to Dismiss/Stay for Forum Non Conveniens.**<br><br>SEE ATTACHED TENTATIVE RULING. |
| LINE 16 | 23CV416108 | Travelers Property Casualty Co. of America vs Liberty Insurance Corporation; National Union fire insurance Company of Pittsburgh PA; Navigators Specialty Ins. Co.; DPR Construction.<br><br>And Related Cross-Complaint. | **Application of Ellen McGraw, Esq. for Admission Pro Hac Vice for Plaintiff.**<br><br>The application is GRANTED. Counsel should submit a proper order to this Department via the e-filing queue for execution.<br><br>NO FORMAL TENTATIVE RULING. |

| LINE # | CASE # | CASE TITLE | TENTATIVE RULING |
|---|---|---|---|
| LINE 17 | 23CV416108 | Travelers Property Casualty Co. of America vs Liberty Insurance Corporation; National Union fire insurance Company of Pittsburgh PA; Navigators Specialty Ins. Co.; DPR Construction.<br><br>And Related Cross-Complaint. | **Application of Thomas Lether, Esq. for Admission Pro Hac Vice for Plaintiff.**<br><br>The application is GRANTED. Counsel should submit a proper order to this Department via the e-filing queue for execution.<br><br>NO FORMAL TENTATIVE RULING. |
| LINE 18 | 23CV421827 | Ma Azucena Vargas Rivera vs Flagship Facility Services, Inc. | Referred to the Complex Division and rescheduled to 20 June 2024 at 1:30 PM in Department 7. |
| LINE 19 | 23CV421827 | Ma Azucena Vargas Rivera vs Flagship Facility Services, Inc. | Referred to the Complex Division and rescheduled to 20 June 2024 at 1:30 PM in Department 7. |
| LINE 20 | 2015-1-CV-285753 | Occipital Center, LLC; Citronella Cadre Corporation; Durness Corporation; Rudy Martin vs Bank of America; JPMorgan Chase Bank, N. A; Guang Yue Chen; Guang Yue Chen Revocable Trust; Richard Newton | **Motion of Robert Felthoven And Megan Felthoven to Amend or Terminate Order and for Order Directing Kari Rawlings To Distribute Funds to Movants.**<br><br>No party has filed opposition to this motion.<br><br>The motion is GRANTED. This Court will issue an Order terminating or amending that Order of the Honorable Maureen Folan dated 19 October 2016 and ordering that all funds currently being held in Kari Rawlings' trust account as a result of that Order, together with accrued interest thereon, be released to movants Robert Felthoven and Megan Felthoven.<br><br>Counsel for moving parties is to prepare an appropriate order and notice of entry of order and submitted to this Department via the e-filing cue for execution.<br><br>NO FORMAL TENTATIVE RULING. |
| LINE 21 | 19CV354096 | Nancy Elizondo vs California Casualty Indemnity Exchange | **Motion of California Casualty Indemnity Exchange to Confirm Arbitration Award for Award of Statutory Costs and for Entry of Judgment.**<br><br>NO TENTATIVE RULING. The parties should use the tentative ruling protocol to advise the court if they wish to appear and argue the matter on the merits or submit on the papers presented. |
| LINE 22 | 19CV354096 | Nancy Elizondo vs California Casualty Indemnity Exchange | **Motion of Plaintiff to Confirm Arbitration Award.**<br><br>NO TENTATIVE RULING. The parties should use the tentative ruling protocol to advise the court if they wish to appear and argue the matter on the merits or submit on the papers presented. |
| LINE 23 | 19CV354096 | Nancy Elizondo vs California Casualty Indemnity Exchange | **Dismissal After Settlement** Check back at 3:30 PM today |

| LINE # | CASE # | CASE TITLE | TENTATIVE RULING |
|---|---|---|---|
| LINE 24 | 21CV384601 | Mark Rubin; Sarah Weaver vs Douglas Hohbach; Hobach-Lewin LLC; Erica Underwood; Marcus Wood; Hohbachn Realty Company Ltd; Kylix Enterprises, Inc.; The Mayfield Building Company<br>And Related Cross-Complaint | **Motion of Defendants Mayfield, Kylix, and Hohbach for Summary Judgment/Summary Adjudication to the First Amended Complaint of Mark Rubin.**<br>**TO BE HEARD AT 2:30 PM THURSDAY 22 FEBRUARY 2024.**<br>Defendant HRCLP's motion for summary judgment of plaintiffs Rubin and Weaver's FAC is GRANTED.<br>Defendant Mayfield's motion for summary adjudication of the first and third causes of action of the FAC against plaintiff Weaver is GRANTED. Defendants Mayfield and Kylix's motion for summary judgment, or in the alternative, summary adjudication against Sarah Weaver is otherwise DENIED.<br>Defendant Mayfield's motion for summary adjudication of the first and third causes of action of the FAC against plaintiff Rubin is GRANTED. Defendants Mayfield and Kylix's motion for summary judgment, or in the alternative, summary adjudication against Mark Rubin is otherwise DENIED.<br>SEE ATTACHED TENTATIVE RULING. |
| LINE 25 | 21CV384601 | Mark Rubin; Sarah Weaver vs Douglas Hohbach; Hobach-Lewin LLC; Erica Underwood; Marcus Wood; Hohbachn Realty Company Ltd; Kylix Enterprises, Inc.; The Mayfield Building Company<br>And Related Cross-Complaint | **Motion of Defendants Mayfield, Kylix, and Hohbach for Summary Judgment/Summary Adjudication On the Cross-Complaint of Mark Rubin and Sarah Weaver.**<br>**TO BE HEARD AT 2:30 PM THURSDAY 22 FEBRUARY 2024.**<br>SEE LINE #24. |
| LINE 26 | 21CV384601 | Mark Rubin; Sarah Weaver vs Douglas Hohbach; Hobach-Lewin LLC; Erica Underwood; Marcus Wood; Hohbachn Realty Company Ltd; Kylix Enterprises, Inc.; The Mayfield Building Company<br>And Related Cross-Complaint | **Motion of Defendants Kylix, and Hohbach Realty for Summary Judgment/Summary Adjudication Against Mark Rubin.**<br>**TO BE HEARD AT 2:30 PM THURSDAY 22 FEBRUARY 2024.**<br>SEE LINE #24. |
| LINE 27 | 21CV384601 | Mark Rubin; Sarah Weaver vs Douglas Hohbach; Hobach-Lewin LLC; Erica Underwood; Marcus Wood; Hohbachn Realty Company Ltd; Kylix Enterprises, Inc.; The Mayfield Building Company<br>And Related Cross-Complaint | **Motion of Defendants Mayfield, Kylix, and Hohbach for Summary Judgment/Summary Adjudication against Mark Rubin and Sarah Weaver.**<br>**TO BE HEARD AT 2:30 PM THURSDAY 22 FEBRUARY 2024.**<br>SEE LINE #24. |
| LINE 28 | | | SEE ATTACHED TENTATIVE RULING. |
| LINE 29 | | | SEE ATTACHED TENTATIVE RULING. |
| LINE 30 | | | SEE ATTACHED TENTATIVE RULING. |

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**Calendar Line 1**

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**Calendar Line 2**

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**Calendar Line 3**


**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**
**DEPARTMENT 20**

**161 North First Street, San Jose, CA 95113**
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*(For Clerk's Use Only)*

**CASE NO.: 22CV409362** **Lion Manufacturing v. Aemetis Advanced Fuels Keyes, Inc., et al.**
**DATE: 22 February 2024** **TIME: 9:00 am** **LINE NUMBER: 4**

**This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 21 February 2024. Please specify the issue to be contested when calling the Court and Counsel.**

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**Order On Defendant Aemetis Advanced Fuels Keyes, Inc.'s Demurrer To Plaintiff's Complaint.**

**I. Statement of Facts.**

Plaintiff Lion Manufacturing ("Lion") is engaged in the business of consulting with and identifying needs of companies and customers in the chemical industry, and has knowledge of quantities and production capability of various companies in the industry. (Complaint, ¶5.) When the COVID-19 pandemic occurred and the need for hand sanitizer grew exponentially, plaintiff Lion kept abreast of various companies that require the basic ingredients for hand sanitizer and plaintiff Lion also sourced various manufacturers based on their production capability to satisfy such demand. (*Id.*)

Defendant Aemetis Advanced Fuels Keyes, Inc. ("Aemetis") is engaged in the business of manufacturing and selling chemicals, specifically denatured alcohol which is used in for manufacturing hand sanitizers. (Complaint, ¶6.) Because of plaintiff Lion's connections in the industry (Aemetis reached out to Lion or Lion identified opportunities for future business for Aemetis), plaintiff Lion and defendant Aemetis began discussions on 15 March 2021 to determine whether a business opportunity existed for them. (Complaint, ¶7.)

On or about 23 March 2020, plaintiff Lion entered into a written agreement ("Agreement") with defendant Aemetis for consulting services to be provided by plaintiff Lion in exchange for promise of payment by defendant Aemetis. (Complaint, ¶8 and Exh. A.) Pursuant to the Agreement, defendant Aemetis was to pay plaintiff Lion a commission or consulting fee of 50% of the net sales with an additional 10% if net sales exceeded a certain threshold amount, for customers that plaintiff Lion identified and introduced to defendant Aemetis. (Complaint, ¶9.)

On or about 23 March 2020, plaintiff Lion performed by identifying and introducing RPP Products, Inc. ("RPP") to defendant Aemetis to source denatured ethanol from defendant Aemetis. (Complaint, ¶10.) Following the identification and introduction of RPP by plaintiff Lion, RPP began ordering large quantities of denatured ethanol from defendant Aemetis such that by June 2020, RPP had ordered such product in the amount of $1,175,836. (Complaint, ¶11.) Between March and July 2020, defendant Aemetis delivered product and RPP paid defendant Aemetis for such product in the total amount of at least $2 million. (Complaint, ¶12.)

On or about 24 March 2020, defendant Aemetis paid plaintiff Lion $5,000 representing the consulting fee/ commission for the first batch of product. (Complaint, ¶13.) However, defendant Aemetis has failed to pay the remaining balance of $295,000 for the balance of products ordered by RPP and paid to defendant Aemetis to date.

(Complaint, ¶14.) On or about 6 May 2021, plaintiff Lion made a demand on defendant Aemetis to comply with the terms of the Agreement and pay the balance due, but defendant Aemetis has refused to do so. (Complaint, ¶15.)

On or about 12 January 2022[1], plaintiff Lion filed the instant complaint against defendant Aemetis in Los Angeles County Superior Court asserting causes of action for:

(1) Breach of Contract

(2) Declaratory Relief

On or about 11 April 2022, defendant Aemetis filed a motion to transfer venue to Santa Clara County.

On or about 15 September 2022, the Los Angeles County Superior Court (Hon. Kevin Brazile) issued and adopted a tentative ruling which granted defendant Aemetis's motion to transfer venue to Santa Clara County.

Santa Clara County Superior Court assumed jurisdiction on or about 31 October 2022.

On 28 April 2022, defendant Aemetis filed a motion to compel arbitration. On 21 September 2023, the court denied defendant Aemetis's motion to compel arbitration.

On 13 November 2023, defendant Aemetis filed the motion now presently before the court, a demurrer to the second cause of action [declaratory relief] of plaintiff Lion's complaint.

## II. Analysis.

### A. Defendant Aemetis's demurrer to the second cause of action [declaratory relief] of plaintiff Lion's complaint is SUSTAINED.

"A complaint for declaratory relief should show the following: (a) A proper subject of declaratory relief within the scope of C.C.P. 1060; (b) An actual controversy involving justiciable questions relating to the rights or obligations of a party." (5 Witkin, California Procedure (4th ed. 1997) §809, pp. 264 – 265; emphasis omitted.) Code of Civil Procedure section 1060 specifically provides for a declaration of rights and duties between two persons. "Any person claiming rights under a contract (oral or written) … may bring an action for a declaration of his or her rights or duties with respect to another. [Citations.] The action may be brought before any breach of the obligation regarding which the declaration is sought." (Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Group 2020) ¶6:186, p. 6-65 citing Code Civ. Proc., §1060; *Market Lofts Community Ass'n v. 9th St. Market Lofts, LLC* (2014) 222 Cal.App.4th 924, 931; *Columbia Pictures Corp. v. De Toth* (19450 26 Cal.2d 753, 760.)

The court in *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403 wrote, "declaratory relief operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them." Defendant Aemetis points out the specific allegation by plaintiff Lion that defendant Aemetis has already breached the Agreement by failing to pay. (See Complaint, ¶19.) Hence, where there is an accrued cause of action for an actual breach of contract or other wrongful act, declaratory relief may be denied. (5 Witkin, California Procedure (4th ed. 1997) Pleading, §823, p. 279.) Since the complaint already asserts breach of the Agreement in the first cause of action, defendant Aemetis contends declaratory relief is unnecessary.

It is statutorily recognized that declaratory relief is within the discretion of the trial court. "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc. §1061.) "The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C).)

action. The object of the statute is to afford a new form of relief where needed and not furnish a litigant with a second cause of action for the determination of identical issues." (*California Ins. Guarantee Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617.)

Plaintiff Lion argues, in opposition, that the declaratory relief second cause of action "does not concern the breach of contract that has already occurred. Instead, it concerns the determination of rights under the contract including Plaintiff's commission as to referred clients and the amount as it relates to the net sales earned by Defendant for each client."[2] Yet, plaintiff does not identify any "referred clients" other than RPP.

Instead, plaintiff Lion suggests there remains an ongoing contractual relationship with defendant Aemetis. However, a mere continuing contractual relationship is not enough. In *Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 371, the court noted that the pleadings alleged both a "continuing contractual relationship and future consequences for the conduct of the relationship that depended on the court's interpretation of the contracts at issue." Plaintiff Lion points to allegations that a contract existed, but do not point to allegations that the contract remains "ongoing."

If anything, plaintiff Lion's belief that the Agreement remains ongoing is belied by the actual terms of the Agreement which is attached as an exhibit to the complaint.[3] Section 7 of the Agreement specifically states, "The term of this Agreement shall commence on the Effective Date and shall continue for a period of one (1) year unless extended by written agreement of the parties hereto." The Effective Date is identified earlier in the Agreement as "March ___, 2020." Thus, by its own terms, the Agreement expired by the end of March 2021. The complaint contains no allegation that the parties extended the Agreement in writing.

Absent an ongoing contractual relationship, there are no allegations (as *Osseous* requires) which would support "future consequences for the conduct of the relationship that depend[] on the court's interpretation of the contract[] at issue."

Accordingly, defendant Aemetis's demurrer to the second cause of action of plaintiff Lion's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for declaratory relief is SUSTAINED with 10 days' leave to amend.

**III. Order.**

Defendant Aemetis's demurrer to the second cause of action of plaintiff Lion's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for declaratory relief is SUSTAINED with 10 days' leave to amend.

_____ _____

**DATED:** **HON. SOCRATES PETER MANOUKIAN**
***Judge of the Superior Court***
***County of Santa Clara***

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[2] See page 4, lines 16 – 19 of Plaintiff Lion Manufacturing's Opposition to Demurrer to Complaint.

[3] Facts appearing in exhibits attached to the complaint (part of the "face of the pleading") are given precedence over inconsistent allegations in the complaint. See *Holland v. Morse Diesel Int'l, Inc.* (2001) 86 Cal. App. 4th 1443, 1447. See also *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal. App. 4th 500, 505 ("[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits.")

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**Calendar Line 15**


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

**DEPARTMENT 20**

**161 North First Street, San Jose, CA 95113**
**408.882.2320 · 408.882.2296 (fax)**
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***http://www.scscourt.org***


*(For Clerk's Use Only)*

**CASE NO.: 23 CV 415836** **Jin Zhang v. Zhi Chao Lu et al.**
**DATE: 22 February 2024** **TIME: 9:00 am** **LINE NUMBER: 15**

**This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 21 February 2024. Please specify the issue to be contested when calling the Court and Counsel.**

**---oooOooo---**

**Order On Defendant Zhichao Lu's Motion To Dismiss**
**Or, in the Alternative, Stay Proceedings.**

## I. Statement of Facts.

Plaintiff Jin Zhang ("Zhang") started working for defendants Hefei Reliance Memory Ltd.; Reliance Memory, Inc. ("Reliance US"); Hefei Ruibo Enterprise Consulting Management LLP (collectively, "Company") on 28 December 2017 and employed as defendant Company's General Counsel from 3 May 2018 to 30 May 2021, and continued to provide services until 2 June 2021. (Complaint, ¶1.) Defendant Company has steadfastly refused to pay plaintiff Zhang her equity grant promised as part of her compensation in direct violation of the parties' employment agreement and equity incentive agreement. (*Id.*)

Pursuant to an employment agreement executed by plaintiff Zhang and defendant Hefei Reliance Memory Ltd. ("Reliance China") in early September 2018 ("PRC Employment Agreement"), plaintiff Zhang was to be compensated at $100,000 in base salary per annum and bonuses up to 20% of her base salary, among other benefits. (Complaint, ¶3.) Plaintiff Zhang was also granted a 10% equity interest in defendant Hefei Ruibo Enterprise Consulting Management LLP ("Limited Partnership"), which is equivalent to 3.4229% of defendant Reliance China's equity after Series A-1 financing or 3% after Series A-2 financing. (*Id.*)

After multiple requests by plaintiff, defendant Zhichao Lu ("Lu"), CEO of defendant Company, signed an equity incentive agreement ("Equity Agreement") with plaintiff Zhang on behalf of defendant Company on 8 November 2018 which stated that, subject to a stipulated discount for early departure, defendant Lu is to transfer 10% of his equity in defendant Limited Partnership within five days after plaintiff Zhang's separation from defendant Company. (Complaint, ¶¶4 and 20.)

Plaintiff Zhang performed her job duties admirably, leading efforts to incorporate defendant Hefei PRC and RMI, recruiting core founding members and other outstanding employees, and playing an instrumental role in securing initial funding for defendant Company through her legal advice on term sheet negotiations. (Complaint, ¶5.) Despite continued promises and representations, defendant Lu refused to transfer the promised equity interest to plaintiff Zhang. (Complaint, ¶6.)

On 2 May 2023[4], plaintiff Zhang filed a complaint against defendants Reliance China, Reliance US, Limited Partnership, and Lu asserting causes of action for:

(1) Breach of Contract

(2) Breach of the Covenant of Good Faith and Fair Dealing

(3) Promissory Estoppel

(4) Unjust Enrichment/ Quantum Meruit

(5) Nonpayment of Wages Owed Upon Separation from Employment

(6) Unfair Competition

(7) Fraudulent Inducement

(8) Intentional Misrepresentation

(9) Negligent Misrepresentation

(10) Concealment

(11) Intentional Interference with Contractual Relations

On 17 July 2023, defendant Lu filed an answer to plaintiff Zhang's complaint.

On 24 August 2023, defendant Lu filed the motion now presently before the court, a motion to dismiss or alternatively stay for forum non conveniens.

## II. Analysis.

### B. Defendant Lu's motion to dismiss or alternatively stay for forum non conveniens is DENIED.

"A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion … [t]o stay or dismiss the action on the ground of inconvenient forum." (Code Civ. Proc., §418.10, subd. (a)(2).) "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." (Code Civ. Proc., §410.30, subd. (a).)

As a preliminary matter, the court considers where the burden of proof lies. The court notes that, "[o]n a motion for forum non conveniens, the defendant, as the moving party, bears the burden of proof." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751; see also *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1675 (*Ricoh*)—"The defendant bears the burden of proof in attempting to override the plaintiff's choice of forum.") Once the defendant meets that initial burden, "the party opposing the enforcement of a forum-

[4] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C).)

selection clause (generally the plaintiff) bears the burden of proof. [Citation.]" (*Ricoh*, *supra*, 12 Cal.App.4th at p. 1680.)

"Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.)

> In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a "suitable" place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation.

(*Stangvik*, *supra*, 54 Cal.3d at p. 751.)

"The lynchpin of any order granting a motion based on forum non conveniens is a determination that a suitable alternative forum exists. It is only after the trial court reaches that conclusion that it would even consider whether the benefits of the proposed alternative forum outweigh the reasons for keeping the litigation in California." (*Investors Equity Life Holding Co. v. Schmidt* (2015) 233 Cal.App.4th 1363, 1368.)

> Because the threshold inquiry regarding the suitability of alternative forum is so critical to how a forum non conveniens motion to dismiss will be resolved, a number of cases following Stangvik have dealt with the question regarding what exactly makes an alternative forum suitable or unsuitable." (Comment, Stangvik v. Shiley and Forum Non Conveniens Analysis : Does a Fear of Too Much Justice Really Close California Courtrooms to Foreign Plaintiffs? (2000) 13 Transnat'l Law. 175, 217 (hereafter Forum Non Conveniens Analysis).) As a general matter, a forum is suitable "if there is jurisdiction and no statute of limitations bar to hearing the case on the merits. [Citation.] '[A] forum is suitable where an action "can be brought," although not necessarily won.' [Citation.]" (*Chong*, *supra*, 58 Cal. App. 4th at pp. 1036-1037.)
>
> The narrow question here, not answered by these settled principles, is whether the moving defendant must show that there is an alternative forum that has jurisdiction over *all* of the defendants.
>
> …
>
> Even if the major, or "primary," defendants can be sued in the proposed alternative forum, the *Watson* court held, ***the moving party must show that all other defendants, whether or not as central to the litigation, are subject to its jurisdiction as well***. (*Watson*, at p. 357.)
>
> This rule makes sense. The court's discretion to decline to exercise its authorized jurisdiction over an action for considerations of convenience is limited by the proviso that another forum must be available for the plaintiff's action. A rule permitting a stay or dismissal of an action over which no single alternative court could exercise jurisdiction would force the plaintiff to pursue separate actions in multiple states or countries to obtain complete relief. Such a rule, by encouraging piecemeal litigation and blossoming numbers of actions in multiple jurisdictions, would threaten precisely those considerations of convenience, economy and justice the doctrine was designed to bolster. (See Forum Non Conveniens Analysis, supra, 13 Transnat'l Law. at pp. 180, 182-184; *Koster v. Lumbermens Mutual Co.* (1947) 330 U.S. 518, 527 [67 S. Ct. 828, 833, 91 L. Ed. 1067].) It would also encourage the tactical use of forum non conveniens motions, not for valid reasons of public and private convenience, but to overburden plaintiffs with the difficulty and expense of litigating on multiple fronts.

> … we hold that [the party moving to stay or dismiss based on forum non conveniens's] failure to demonstrate that all defendants are subject to jurisdiction in [the alternative forum] precludes application of forum non conveniens.

(*Am. Cemwood Corp. v. Am. Home Assurance Co.* (2001) 87 Cal.App.4th 431, 436-440 (*American Cemwood*); emphasis added.)

As noted earlier, the moving defendant bears the initial burden. Here, defendant Lu has not met his initial burden of showing that all other co-defendants are subject to jurisdiction in the proposed alternative forum, the People's Republic of China. Plaintiffs make note of this in their opposition, specifically with regard to defendant Reliance US who they contend, as a California corporation, is not subject to jurisdiction in the People's Republic of China.

In reply, defendant Lu relies upon *David v. Medtronic, Inc.* (2015) 237 Cal.App.4th 734 (*David*). The *David* court affirmed the rule in *American Cemwood* stating:

> The moving defendant has the burden of proof on a motion for forum non conveniens. (*Stangvik*, *supra*, 54 Cal.3d at p. 751.) Thus, a moving defendant seeking to establish an alternative forum is suitable must show that all defendants are subject to jurisdiction in the proposed alternative forum. (*American Cemwood*, *supra*, 87 Cal.App.4th at p. 433.) There is some limited flexibility. In a case with 200 defendants, the moving defendants were not required to establish that the alternative forum had jurisdiction over all 200. Instead, the court stayed the action in California (rather than dismissing it) and allowed the case to proceed in the alternative forum, with the understanding that the stay would be lifted if the alternative forum did not, in fact, have jurisdiction over all defendants. (*Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753, 758 [59 Cal. Rptr. 2d 229].) That, however, is a unique situation. ***When the moving defendant seeks dismissal of an action for forum non conveniens, and there is a reasonable number of defendants, the moving defendant must establish jurisdiction exists in the alternative forum over all defendants***.

(*David*, *supra*, 237 Cal.App.4th at p. 743.)

Here, there are but four named defendants, a reasonable number. Defendant Lu suggests, nevertheless, that defendant Reliance US is but a nominal defendant, i.e., a defendant who "is of no real importance to the outcome of the case" or "is at best only peripherally liable," and that a different rule applies in cases involving nominal defendants. (*David*, *supra,* 237 Cal.App.4th at pp. 744-745.)

> Only two options are available in California; state courts cannot transfer the action to the alternative forum, but must either dismiss the entire action for forum non conveniens or sever the nominal defendant and allow the action to continue to proceed against him in California. We believe the latter course is the only reasonable option. Were it otherwise, the nominal defendant—who may, in fact, be liable—would escape liability on nothing more than the moving defendant's showing that he is at best only peripherally liable, but is not subject to suit in a more convenient forum for pursuit of the main action. As explained by the Sixth Circuit, "If in fact plaintiffs' claims … against [the nominal defendants] do not have a valid legal foundation, then plaintiffs' causes of action against said defendants are proper subjects for dismissal pursuant to summary judgment or directed verdict. However, these defendants cannot be dismissed from the instant litigation simply because the trial judge sua sponte determined that they are not as important as the 'primary' defendant."

(*Ibid*.)

However, for this apparent nominal defendant exception to overcome the general rule, this court again notes that it is the moving defendant Lu's initial burden to demonstrate that co-defendant Reliance US is, in fact, a nominal defendant. Defendant Lu has not made such a showing and, consequently, this court will instead apply the general rule from *American Cemwood* that a moving defendant seeking to establish an alternative forum is suitable must show that ***all*** defendants are subject to jurisdiction in the proposed alternative forum. (*American Cemwood*, *supra*, 87 Cal.App.4th at p. 433.) Defendant Lu has not done so here.

Accordingly, defendant Lu's motion to dismiss or alternatively stay for forum non conveniens is DENIED.

**III. Case Management.**

This Court will hear the motion to quash service of summons of the Heifei defendants on 23 May 2024 at 9:00 AM in this Department.

Good cause appearing, IT IS ORDERED that the current Case Management Conference currently set on 12 March 2024 is VACATED and RESET to 23 May 2024 at 9:00 AM in Department 20.

**IV. Order.**

Defendant Lu's motion to dismiss or alternatively stay for forum non conveniens is DENIED.

_____ _____

**DATED:**

**HON. SOCRATES PETER MANOUKIAN**
***Judge of the Superior Court***
***County of Santa Clara***

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**Calendar Line 24**


**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**
**DEPARTMENT 20**

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*(For Clerk's Use Only)*

**CASE NO.: 21CV384601** **Mark Rubin, et al. v. The Mayfield Building Company, et al.**
**DATE: 22 February 2024** **TIME: 9:00 am** **LINE NUMBER: 24-27**

**This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 21 February 2024. Please specify the issue to be contested when calling the Court and Counsel.**

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**Orders on:**
**(1) Motion Of Defendants/ Cross-Complainants For Summary Judgment,**
**Or In The Alternative, Summary Adjudication, On Cross-Complaint;**
**(2) Motion Of Defendants For Summary Judgment,**
**Or In The Alternative, Summary Adjudication Against Sarah Weaver;**
**(3) Motion Of Defendants For Summary Judgment,**
**Or In The Alternative, Summary Adjudication Against Mark Rubin;**
**(4) Motion Of Hohbach Realty Company For Summary Judgment,**
**Or In The Alternative, Summary Adjudication,**
**Against Plaintiffs Mark Rubin And Sarah Weaver.**

## I. Statement of Facts.

**First Amended Complaint**

On or about 1 June 1990, plaintiff Mark Rubin ("Rubin") moved into residential real property located at 345 Sheridan Avenue, Apartment 307, in Palo Alto ("Premises") pursuant to a written lease with defendant Mayfield Building Company ("Mayfield"), the owner and/or manager of the Premises. (First Amended Complaint ("FAC"), ¶¶1, 5, and 9.) The initial monthly rent for the Premises was $1,600. (FAC, ¶11.)

At various times, defendants increased monthly rent for the Premises without providing any written notice. (FAC, ¶11.)

On or about 1 June 2019, plaintiff Sarah Weaver ("Weaver") moved into the Premises. (FAC, ¶10.) Plaintiff Rubin informed defendants that plaintiff Weaver would be moving into the Premises and defendants consented. (*Id.*) Defendants never requested a security deposit of plaintiff Weaver and plaintiff Weaver never paid one. (*Id.*)

Subsequently, on or about 17 July 2019, plaintiff Rubin signed a lease ("Lease") [for the Premises] with defendant Hohbach Realty Company Limited Partnership ("HRCLP") establishing a tenancy from 1

November 2019 to 31 October 2020 and continuing month-to-month thereafter. (FAC, ¶9 and Exh. A.) The Lease required plaintiff Rubin pay $2,568 per month and a security deposit of $2,568 which plaintiff Rubin paid. (*Id.*) The Lease includes an attorney's fee provision. (*Id.*)

On or about 1 November 2019, defendants increased monthly rent for the Premises to $2,768, the amount plaintiffs paid at the time they vacated the Premises. (FAC, ¶11.)

Throughout plaintiffs' tenancy, there were numerous and substantial habitability defects and dangerous conditions at the Premises which, individually and collectively, constituted violations of the Lease as well as applicable housing and residential tenancy laws. (FAC, ¶12.) The defective and dangerous conditions at the Premises reflected decay, neglect, and a lack of adequate maintenance/ management of the property for a prolonged period, some of which directly affected health and safety. (*Id.*) The defective and dangerous conditions included, but were not limited to, ineffective waterproofing and weather protection of roof and exterior walls; building, grounds, and appurtenances not kept clean and sanitary, and/or free from accumulations of debris, filth, rubbish, garbage, rodents and/or vermin; an inadequate number of appropriate receptacles for garbage/ rubbish; floors, stairways, and railings not maintained in good repair; general dilapidation or improper maintenance; broken, rotted, split, or buckled exterior wall coverings or roof coverings; accumulation of material or conditions constituting fire, health, and/or safety hazards; inadequate maintenance; and inadequate exit facilities. (FAC, ¶12.)

Tenants observed water leaks that intruded into the Premises throughout the duration of their tenancy, particularly through the door jamb which did not provide adequate weather protection. (FAC, ¶13.) Defendants neglected to perform necessary maintenance such as repairs to keep the buildings' elevators in operation. (*Id.*) Damage from break-ins was never repaired and no efforts were made to improve/ restore security measures damaged by a major burglary. (*Id.*)

Throughout their tenancy, plaintiffs repeatedly notified defendants and/or their agents of the defective and dangerous conditions requesting defendants address them. (FAC, ¶¶14 – 15.) Defendants failed and refused to repair the conditions and/or have done so in a negligent, unprofessional, and shoddy fashion. (*Id.*)

On 21 June 2021[5], plaintiffs Rubin and Weaver filed a complaint against Douglas Hohbach, Marcus Wood, Erica Underwood, Kylix Enterprises, Inc. ("Kylix"), HRCLP, and Hohbach-Lewin, Inc.

On 30 November 2021, the defendants named in the complaint filed a demurrer to the complaint.

On 14 December 2021, plaintiffs Rubin and Weaver filed the operative FAC against defendants Mayfield, Kylix, and HRCLP asserting causes of action for:

(1) Breach of Implied Warranty of Habitability [against defendants Mayfield and HRCLP]

(2) Breach of the Covenant of Quiet Enjoyment [against defendants Mayfield and HRCLP]

(3) Nuisance

(4) Negligence

(5) Constructive Eviction [against defendants Mayfield and HRCLP]

(6) Violation of California Civil Code Section 1940.2[6] [against defendants Mayfield and HRCLP]

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[5] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C).)

(7) Violation of California Civil Code Section 1942.5[7] [against defendants Mayfield and HRCLP]

On 18 January 2022, defendants Kylix and HRCLP filed a demurrer to plaintiffs Rubin and Weaver's FAC. On 3 May 2022, the court issued an order overruling defendants Kylix and HRCLP's demurrer.

**Cross-Complaint**

On 15 July 2022, Mayfield, Kylix, and HRCLP filed a cross-complaint against Rubin and Weaver. The cross-complaint alleges on or about 1 June 1990, Rubin moved into the Premises where he remained until 10 May 2020. (Cross-Complaint, ¶8.) On or about 5 April 2018, Mayfield and Rubin entered into a residential lease for Rubin to reside at the Premises from 1 May 2018 until 30 April 2019 and month-to-month thereafter until terminated by either party after giving 30-day written notice. (Cross-Complaint, ¶¶9 and 17.) Rubin was required to pay $2,400 per month for rent plus an additional $200 each month for a parking space. (*Id.*) Kylix and HRCLP never entered into a residential lease with Rubin. (Cross-Complaint, ¶10.)

Pursuant to the terms of the lease, Rubin identified no other occupants at the Premises. (Cross-Complaint, ¶11.) Pursuant to the terms of the lease, no portion of the Premises was to be sublet or assigned any attempt to sublet or assign without the written permission of the landlords shall, at landlord's election, be an irremediable breach of the lease agreement. (Cross-Complaint, ¶12.) Guests that remained more than 30 days were considered additional occupants for which the tenant, Rubin, agreed to pay $40 per day per additional occupant. (Cross-Complaint, ¶13.) Unknown to Mayfield, Kylix, and HRCLP, Rubin alleged in his FAC that Weaver moved into the Premises. (Cross-Complaint, ¶14.) It is unknown what date Weaver moved into the Premises. (Cross-Complaint, ¶15.) Mayfield, Kylix, and HRCLP never entered into a residential lease with Weaver. (Cross-Complaint, ¶16.)

Rubin acknowledged the Premises, equipment, and personal property subject to the lease had been examined and were in good, safe, and clean condition and repair. (Cross-Complaint, ¶18.) Pursuant to the terms of the lease, Rubin was required to promptly notify the landlord of any damage, defect, or destruction of the Premises or in the event of the failure of any of the appliances or equipment. (Cross-Complaint, ¶19.)

On or around 14 January 2020, Marcus Wood ("Wood") offered to pay Rubin $5,000 if he vacated the Premises on or before 10 April 2020 and offered to return, in full, other deposits held by the landlord. (Cross-Complaint, ¶21.)

On or around 18 January 2020, Rubin responded alleging various violations and demanded $17,000 for relocation; $12,000 for future loss of rental unit; $5,000 for alleged harassment and retaliation;

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[6] In relevant part, Civil Code section 1940.2, subdivision (a) states: "It is unlawful for a landlord to do any of the following for the purpose of influencing a tenant to vacate a dwelling: … (3) Use, or threaten to use, force, willful threats, or menacing conduct constituting a course of conduct that interferes with the tenant's quiet enjoyment of the premises in violation of Section 1927 that would create an apprehension of harm in a reasonable person. Nothing in this paragraph requires a tenant to be actually or constructively evicted in order to obtain relief. (4) Commit a significant and intentional violation of Section 1954."

[7] In relevant part, Civil Code section 1942.5, subdivision (a) states: "If the lessor retaliates against the lessee because of the exercise by the lessee of the lessee's rights under this chapter or because of the lessee's complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following:

(1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, has provided notice of a suspected bed bug infestation, or has made an oral complaint to the lessor regarding tenantability."

$1,800 for the return of his security deposit; a move out date of 10 April 2020, and a positive housing reference moving forward. (Cross-Complaint, ¶22.)

On or around 19 January 2020, Wood rejected Rubin's demand, refuted Rubin's allegations, and advised that his previous offer of $5,000 would be withdrawn and a three-day notice would be issued. (Cross-Complaint, ¶23.)

On or around 27 January 2020, Rubin responded stating he wanted to "restore civility and open the door to a peaceful resolution." (Cross-Complaint, ¶24.) Rubin confirmed he would be leaving the Premises on or before 10 April 2020. (*Id.*)

That same date, Wood responded confirming Rubin's 10 April 202 move-out date and inquired if there was agreement on his initial offer of 14 January 2020. (Cross-Complaint, ¶25.)

On or around 29 January 2020, Rubin countered with $15,000 and advised he could move out on 6 April 2020. (Cross-Complaint, ¶27.)

On or around 3 February 2020, Wood offered Rubin $8,600 (including $1,600 return of security deposit) if Rubin moved out on 10 April 2020. (Cross-Complaint, ¶28.) Rubin accepted three hours later. (Cross-Complaint, ¶29.)

On or around 1 March 2020, Rubin asked if he could stay at the Premises one additional month until 10 May 2020 and his request was granted. (Cross-Complaint, ¶31.)

On or around 10 May 2020, Rubin moved out of the Premises and a settlement check for $7,000 was sent to Rubin which he cashed. (Cross-Complaint, ¶32.) Thereafter, Wood discovered Rubin was not provided the $1,600 security deposit at the time he moved out of the Premises and immediately sent Rubin the agreed upon security deposit amount with 10% interest. (Cross-Complaint, ¶33.) Rubin cashed the security deposit check. (*Id.*)

The cross-complaint asserts the following causes of action:

(1) Breach of Contract – 2018 Lease Agreement [Mayfield versus Rubin]

(2) Breach of Contract – Settlement Agreement [All defendants/ cross-complainants against Rubin and Weaver]

On 20 July 2022, Rubin and Weaver filed an answer to the cross-complaint.

On 25 October 2022, Mayfield, Kylix, and HRCLP filed an answer to plaintiffs Rubin and Weaver's FAC.

On 29 November 2023, defendants/ cross-complainants Mayfield, Kylix, and HRCLP filed the four motions now before the court: (1) cross-complainants Mayfield, Kylix, and HRCLP move for summary judgment/ adjudication of their cross-complaint; (2) defendants Mayfield, Kylix, and HRCLP move for summary judgment/ adjudication of the FAC insofar as it is asserted by Weaver; (3) defendants Mayfield, Kylix, and HRCLP move for summary judgment/ adjudication of the FAC insofar as it is asserted by Rubin; (4) defendant HRCLP moves for summary judgment/ adjudication of the FAC insofar as it is asserted against it.

## II. Summary Judgment in General.

Any party may move for summary judgment. (*Code of Civil Procedure*, § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Code of Civil Procedure*, § 437c, subd. (c); *Aguilar, supra,* at p. 843.) The object of the summary judgment

procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see *Evidence Code*, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar, supra,* at p. 851.) A defendant moving for summary judgment may satisfy its initial burden either by producing evidence of a complete defense or by showing the plaintiff's inability to establish a required element of the case. (*Code of Civil Procedure*, § 437c, subd. (p)(2); *Aguilar, supra,* at p. 853.) *supra,* at p. 853.) Allegations in the complaint alone are not enough to defeat a motion for summary judgment. (*Coyme v. Krempels* (1950) 36 Cal.2d 257.)

If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civil Procedure, § 437c, subd. (p)(2); see *Aguilar, supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "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.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

"An issue of fact can only be created by a conflict of evidence. It is not created by speculation, conjecture, imagination or guess work. Further, an issue of fact is not raised by cryptic, broadly phrased, and conclusory assertions, or mere possibilities that or by allegations in the complaint." (*Lyons v. Security Pacific National Bank* (1995) 40 Cal.App.4th 1001, 1014) (internal citations omitted, punctuation modified.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id.* at p. 843.)

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

In addition to the facts provided by a moving defendant, the burden of production on summary judgment can shift to the plaintiff upon a showing that the plaintiff cannot factually support his claim. (See, e.g., *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283.) Indeed, a defendant can satisfy its initial burden to show an absence of evidence through discovery responses that are factually devoid. (Id. at 1302.)

Thereafter, the plaintiff must present evidence supporting the challenged claim.

**III. Analysis.**

**C. Cross-complainants Mayfield, Kylix, and HRCLP's motion for summary judgment/ adjudication of its cross-complaint.**

**1. Cross-complainant Mayfield's motion for summary adjudication of the first cause of action [Breach of Contract – 2018 Lease Agreement] of the cross-complaint against cross-defendant Rubin is DENIED.**

In relevant part, cross-complainant Mayfield alleges it entered into a residential lease agreement with cross-defendant Rubin on or about 5 April 2018 ("Lease Agreement") and cross-defendant Rubin breached the Lease Agreement by "subleasing the Premises, occupying the Premises with another person who was not included on the [Lease Agreement], and not promptly notifying the landlord of any damages, defects, or destruction of the Premises." (Cross-Complaint, ¶¶35 – 36 and Exh. A.)

"A … cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).) "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

To meet its initial burden, cross-complainant Mayfield proffers the following facts: For over thirty years, from June 1990 until May 2020, cross-defendant Rubin resided at the Premises.[8] Per the terms of the operative lease between cross-complainant Mayfield and cross-defendant Rubin, "No portion of said premises shall be sublet nor this agreement assigned. Any attempted subletting or assignment by the Tenant without written permission of the Landlord shall, at the election of the Landlord, be an irremediable breach of this agreement."[9] Cross-defendant Rubin was obligated to identify any and all occupants of the Premises.[10] The Lease Agreement specifically provided that "the premises shall be occupied only by the following named person(s)."[11] Cross-defendant Rubin did not identify any co-occupants and did not notify property management of any occupants that resided in his unit after the execution of this lease agreement in April 2018.[12] Cross-defendant Rubin admits that he sublet the unit and that he "entered into several verbal lease agreements."[13] Pursuant to the Lease Agreement, "the number of occupants is limited by your rental agreement. Guests remaining more than 30 days shall be considered additional occupants. Tenant agrees to pay the sum of $40 per day for each additional occupant."[14] Since executing the Lease Agreement, cross-defendant Rubin admitted that at least two occupants moved into his unit for approximately 22 months' worth of days in May 2019 through April 2020."[15] This did not include cross-defendant Weaver as an additional occupant in the unit, who resided there for ten months.[16] Cross-defendant Rubin never paid any amounts to the landlord above the monthly rent for these occupants.[17] Cross-complainant Mayfield upheld the terms in the lease agreement by providing a habitable premise, to which cross-defendant Rubin admits.[18]

In opposition, cross-defendant Rubin argues initially that cross-complainant Mayfield has waived its right to enforce the provision in the Lease Agreement which prohibits subleasing and/or the provision in the Lease Agreement concerning payment for additional occupants.

> Case law is clear that waiver is the intentional relinquishment of a known right after knowledge of the facts. The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver. [Citations.] The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation.]

(*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31; internal punctuation omitted.)

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[8] See Defendants/ Cross-Complainants' Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment, or in the Alternative, Summary Adjudication ("Cross-Complainants' SSUF"), Issue No. 1, Fact No. 1.

[9] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 2.

[10] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 3.

[11] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 4.

[12] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 5.

[13] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 6.

[14] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 7.

[15] See Cross-Complainants' SSUF, Issue No. 1, Fact Nos. 8 and 15 – 18.

[16] See Cross-Complainants' SSUF, Issue No. 1, Fact Nos. 9 and 19.

[17] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 10.

[18] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 22.

> Whether there has been a waiver is usually regarded as a question of fact to be determined by the jury, or by the trial court if there is no jury. Although some authorities say waiver is a mixed question of law and fact, each case depending on its own circumstances, the only question of law that can be involved must relate to the legal definition of waiver. For example, the jury might be instructed that, as a matter of law, a waiver must be voluntary, and that it implies a knowledge of the right claimed or thing waived. Whether it actually was voluntary, and whether the party had knowledge of the right or thing waived, are questions of fact to be submitted to the jury, unless but one inference can be drawn from the evidence.

(*Kay v. Kay* (1961) 188 Cal.App.2d 214, 217 – 218.)

To support his waiver argument, cross-defendant Rubin proffers the following evidence: During his deposition, cross-defendant Rubin testified, in relevant part, "I had roommates, and management was well aware of that over a period of 30 years. That's – the Alesses were aware of that. Harold Hohbach specifically requested that I function as lead roommate. … Franco Caruba was well aware for years that I had roommates at the time of the initial request for – for leases in 2018. … no issue had ever been raised about this. And as I said, Harold Hohbach was aware for decades that I had roommates, and he asked me to function as the lead roommate and give him one – one rent."[19] Further, cross-defendant Rubin testified, "At no time during my tenancy of 30 years has management ever raised an issue about roommates somehow being improper or a violation of my tenancy."[20]

Cross-defendant Rubin's testimony presents a triable issue of material fact with regard to whether cross-complainant Mayfield waived its right to enforce the provision in the Lease Agreement which prohibits subleasing and/or the provision in the Lease Agreement concerning payment for additional occupants.

Accordingly, cross-complainant Mayfield's motion for summary adjudication of the first cause of action [Breach of Contract – 2018 Lease Agreement] of the cross-complaint against cross-defendant Rubin is DENIED.

**2. Breach of Contract – Settlement Agreement.**

The second cause of action of the cross-complaint alleges, in relevant part, that on or about 3 February 2020 (prior to Rubin and Weaver filing their complaint in the instant action on 21 June 2021), "Mr. Rubin and Mr. Wood entered into a written settlement agreement resolving all of the issues raised in Mr. Rubin's First Amended Complaint. (See Exhibit B)." (Cross-Complaint, ¶48.) Weaver "was a third party beneficiary of that settlement agreement." (Cross-Complaint, ¶49.) Rubin and Weaver "breached the settlement agreement by bringing a lawsuit against MAYFIELD, KYLIX ENTERPRISES, and HOHBACH REALTY for issues that were fully negotiated and resolved per the terms of the settlement agreement." (Cross-Complaint, ¶50.)

As set forth above, "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.) In moving for summary adjudication of this second cause of action, cross-complainants themselves cite *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1585-1586 for the following general principles:

> "A settlement agreement is a contract, and the legal principles [that] apply to contracts generally apply to settlement contracts." (*Weddington Productions, Inc. v. Flick*, *supra*, 60 Cal.App.4th 793, 810.) Its validity is thus "judged by the same legal principles applicable to contracts generally." (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1128 [131 Cal. Rptr. 2d 387]; see also *Nicholson v. Barab* (1991) 233 Cal. App. 3d 1671, 1681 [285 Cal. Rptr. 441].) [The party moving for summary adjudication in reliance on a contract] therefore had the burden of establishing each contractual element—parties who are capable of entering into contract, their mutual consent, a lawful object, and sufficient cause or consideration (Civ. Code, § 1550; *Shaw v. Regents of*

[19] See ¶3 and Exh. B to the Declaration of Ari Rief in Support of Opposition, etc. [Rubin Deposition, Vol. II, page 279, line 7 – page 279, line 25.]

[20] See ¶3 and Exh. B to the Declaration of Ari Rief in Support of Opposition, etc. [Rubin Deposition, Vol. II, page 275, lines 18 – 20.]

*University of California* (1997) 58 Cal.App.4th 44, 53 [67 Cal. Rptr. 2d 850])—in support of their motion.

"Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage', controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608; internal citations omitted.)

In order for cross-complainants to meet their initial burden, they would have to demonstrate that they entered into a settlement agreement with cross-defendants Rubin and Weaver and the terms of the settlement agreement (e.g., covenant not to sue or a release of claims) precluded Rubin and Weaver from bringing the claims asserted in their FAC.

Initially, the court observes that cross-complainants make some effort to establish that Weaver, although not a party to the settlement agreement, is an intended beneficiary of the settlement agreement.[21] However, cross-complainants do not take the same care to show that they (Mayfield, Kylix, and HRCLP) are the parties on the other side of the settlement agreement. Cross-complainants contend Rubin engaged in settlement discussions with Wood but do not identify who Wood is or Wood's relationship to the cross-complainants or Wood's authority to act on behalf of the cross-complainants.

Even if the court were to assume Wood properly acted on behalf of all cross-complainants, the court is not persuaded cross-complainants have met their initial burden to show that the settlement agreement precluded cross-defendants Rubin and Weaver from bringing a lawsuit (the underlying FAC) against cross-complainants. The written settlement agreement purportedly attached as exhibit B to the cross-complaint is actually a series of e-mail exchanges between Wood and Rubin occurring between 14 January 2020 and 3 February 2020 culminating in Rubin's statement to Wood: "Your offer of $7,000 is acceptable and we will move out on April 10, 2020. The amount of $1,600 for the security deposit is fine." Cross-complainants are unable to point to an express covenant by cross-defendants Rubin and Weaver not to sue the cross-complainants or a release of cross-complainants from any claims cross-defendants Rubin and Weaver held.

Instead, cross-complainants apparently contend such a release of cross-defendants Rubin and Weaver's claims can be implied from language found in the e-mail exchanges and, in particular, language authored by cross-defendant Rubin. Cross-complainants begin with a "Settlement Proposal" prepared by cross-defendant Rubin on 10 January 2020 in which he states, in relevant part, "in order to resolve this matter before I have to retain counsel and exercise my legal rights, I am willing to terminate my tenancy as requested, and surrender the premises on April 10, 2020 with the following stipulations: with an agreement of a payment from owners/ management of $17,000, equal to the no-fault relocation required by the City of Palo Alto. In addition to a payment from owners of $10,000 in compensation for the demeaning and belittling attitude to which I have been subjected."[22] There is no clear definition of the "matter" or what "legal rights" cross-defendant Rubin contemplated.

In a 14 January 2020 response to cross-defendant Rubin's "Settlement Proposal," Wood e-mailed the following relevant statement: "Without addressing the issues raised in your letter I would like to find an amicable solution. Toward this end, I am willing to offer you $5,000, once you vacate on April 10, 2020. This, of course, is in addition to any other deposits held by the Mayfield Building Company."[23] When read as a whole, the prefatory language, "without addressing the issues raised," suggests the exchange of consideration is limited to money/ security deposit and possession of the premises.

Cross-complainants place great emphasis on cross-defendant Rubin's response thereafter on 18 January 2020 which included an outlining of numerous causes of action that cross-defendant Rubin believed he could assert

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[21] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 25.

[22] See Cross-Complainants' SSUF, Issue No. 2, Fact Nos. 28 and 30.

[23] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 31.

against cross-complainants and then specifically wrote, "in lieu of civil action," before demanding $34,000.[24] Wood responded to Rubin's monetary demand, and reiterated his $5,000 counteroffer.[25] Cross-complainants' own evidence shows that Wood kept reiterating his $5,000 counteroffer of 14 January 2020.[26] Then, finally on 3 February 2020, Wood addressed cross-defendant Rubin's reduced demand for $17,000 concluding cross-defendant Rubin is not entitled to that amount because termination was with cause (for subleasing) and then stating, "You are entitled to one months rent. We gave you two. To simplify life I am willing to go to $7000. We discovered a handwritten note from Harold Hohbach regarding the security deposit, so you will also receive $1600 for a total of $8600.00 once you have moved out on April 10, 2020."[27] Cross-defendant responded within three hours stating, in relevant part, "Your offer of $7000 is acceptable and we will be moved out on April 10, 2020. The amount of $1600 for the security deposit is fine."

Cross-complainants' evidence does not affirmatively demonstrate an agreement by cross-defendants Rubin and Weaver releasing any claims they may have had against cross-complainants. Even if cross-complainants' evidence could be viewed as implicitly including such a release, cross-defendants Rubin and Weaver argue in opposition that the settlement agreement is ambiguous.

> "Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39–40 [69 Cal. Rptr. 561, 442 P.2d 641]; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1140–1141 [234 Cal. Rptr. 630].) Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 40 & fn. 8; *Pacific Gas & Electric Co. v. Zuckerman*, *supra*, 189 Cal. App. 3d at pp. 1140–1141.)" [Footnote omitted.]
>
> The interpretation of a contract involves "a two-step process: 'First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]' (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 [6 Cal. Rptr. 2d 554].) The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. (*Ibid.*) ***The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.*** (*Id.* at p. 1166.) ***Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made … parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.'*** (*Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal. App. 3d 149, 158 [241 Cal. Rptr. 677].)" [Footnote omitted.]

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[24] See Cross-Complainants' SSUF, Issue No. 2, Fact Nos. 32 – 36.

[25] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 37.

[26] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 41. [Exhibit M—"Please let me know, if you are in agreement with that which I proposed on January 14; Exhibit N—"Mark-Please let me know, if you are in agreement with my email proposal of January 14…"]

[27] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 45.

(*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350-1351 and 1356-1357; emphasis added.)

In opposition, cross-defendant Rubin proffers his deposition testimony with regard to his own understanding of the settlement agreement.[28] In particular, cross-defendant Rubin understood his proposal(s) to have been rejected which supports an interpretation that the offer by Wood was limited to monetary consideration and return of security deposit in exchange for possession of the premises, and did not include a covenant not to sue or a release of claims by cross-defendants Rubin and Weaver. At the very least, this presents a triable issue of material fact.

Accordingly, cross-complainants Mayfield, Kylix, and HRCLP's motion for summary adjudication of the second cause of action [Breach of Contract – Settlement Agreement] of the cross-complaint against cross-defendants Rubin and Weaver is DENIED.

**D. Defendant HRCLP's motion for summary judgment/ adjudication of plaintiffs' FAC.**

Defendant HRCLP moves for summary judgment/ adjudication of the seven causes of action asserted in plaintiffs' FAC by asserting that it is neither the owner or property manager of the Premises. Instead, defendant Mayfield has owned the Premises since the land was purchased and developed in 1986.[29] Defendant Kylix is the current property manager for the Premises.[30] HRCLP is not the property manager for the Premises.[31] Prior to being named Kylix, the Premises was previously managed by Hohbach Enterprises, Inc.[32] Harold Hohbach was owner and President of Hohbach Enterprises, Inc. until his passing in December 2017.[33] Harold Hohbach's son, Doug Hohbach, took over as President of Hohbach Enterprises, Inc. in early 2018.[34] In February 2019, Hohbach Enterprises, Inc. was renamed to Kylix.[35] Defendant HRCLP is an entity created by Harold Hohbach to hold property.[36] Defendant HRCLP currently owns a number of commercial and residential properties, but has never owned the Premises.[37] Defendant HRCLP does not provide any services to the Premises.[38]

Plaintiffs acknowledge that all causes of action in the FAC except the fourth cause of action [negligence] require an ownership interest or control of the property. As such, plaintiffs concede defendant HRCLP is "free of liability due to their lack of contractual relationship to the subject property."[39] Based on this concession, defendant HRCLP is entitled to summary adjudication of the first through third and fifth through seventh causes of action of plaintiffs Rubin and Weaver's FAC.

Plaintiffs, however, do not concede defendant HRCLP's non-liability with regard to their fourth cause of action for negligence. Instead, plaintiffs assert in opposition that HRCLP failed to exercise proper oversight over defendant Kylix and allowed its employees to represent themselves as employees of defendant HRCLP. This reflects a change in theory from what was alleged in plaintiffs' FAC. In relevant part, the fourth cause of action of plaintiffs'

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[28] See Plaintiffs/ Cross-Defendants Mark Rubin and Sarah Weaver's Response to Defendant/ Cross-Complainant's Separate Statement of Undisputed Facts, Issue No. 2, Fact Nos. 24 – 27 and 31.

[29] See Defendant HRCLP's Separate Statement of Undisputed Facts in Support of Summary Judgment, or in the Alternative, Adjudication Against Plaintiffs Mark Rubin and Sarah Weaver ("HRCLP SSUF"), Issue No. 1, Fact Nos. 1 – 2.

[30] See HRCLP SSUF, Issue No. 1, Fact No. 3.

[31] *Id.*

[32] See HRCLP SSUF, Issue No. 1, Fact No. 5.

[33] *Id.*

[34] See HRCLP SSUF, Issue No. 1, Fact No. 6.

[35] *Id.*

[36] See HRCLP SSUF, Issue No. 1, Fact No. 11.

[37] See HRCLP SSUF, Issue No. 1, Fact Nos. 11 – 12.

[38] See HRCLP SSUF, Issue No. 1, Fact No. 13.

[39] See page 7, lines 3 – 5 of Plaintiffs' Opposition to Defendant Hohbach Realty Company's Motion for Summary Judgment, or in the Alternative Summary Adjudication.

FAC alleges, "***Because of the landlord-tenant relationship between DEFENDANTS and PLAINTIFFS***, DEFENDANTS owed PLAINTIFFS the duty to exercise reasonable care in the management and control of the PREMISES, owed a duty to provide PLAINTIFFS with a residential rental property meeting minimum standards of habitability, and were required to allow PLAINTIFFS the peaceful and quiet enjoyment of the PREMISES." (FAC, ¶34; emphasis added.)

The pleadings serve as the "outer measure of materiality" in a summary judgment/ adjudication motion, and the motion may not be granted or denied on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Sup. Ct.* (2000) 79 Cal App 4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal App 4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal App 4th 60, 73—"the pleadings determine the scope of relevant issues on a summary judgment motion.")

Since plaintiffs' fourth cause of action is premised specifically upon the existence of a landlord-tenant relationship between defendants and plaintiffs and since plaintiffs concede defendant HRCLP is not the landlord or property manager of the subject Premises, the court will not consider this change of theory/ factual allegation raised in opposition to be a basis for denying summary adjudication of the fourth cause of action. Even if, as plaintiffs assert, defendant HRCLP's negligence caused plaintiffs to hold a belief that HRCLP may be their landlord or property manager, plaintiffs do not now dispute that defendant HRCLP is neither landlord nor property manager of the subject Premises. As such, there is no basis to hold defendant HRCLP liable on the fourth cause of action, as alleged.

Consequently, defendant HRCLP's motion for summary judgment of plaintiffs Rubin and Weaver's FAC is GRANTED.

[In opposition, plaintiffs Rubin and Weaver filed an Objection to Evidence Submitted by Defendant Hohbach Realty Company in Support of Summary Judgment, etc. The court declines to rule on said objections since the court did not consider the material objected to in rendering its ruling. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)]

**E. Defendants Mayfield and Kylix's motion for summary judgment/ adjudication of the FAC against plaintiff Weaver.**

**1. Settlement Agreement.**

Initially, defendants Mayfield and Kylix contend the Settlement Agreement (discussed above in section II(A)(2)) bars plaintiff Weaver's FAC. Presumably, defendants Mayfield and Kylix assert the Settlement Agreement includes an implied release by Weaver of any claims now being asserted in the instant FAC. "In general, a written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence." (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366.) However, as the court observed above, a triable issue of material fact exists with regard to whether the Settlement Agreement includes such a release.

**2. Tenancy.**

Defendants move for summary adjudication on all but the fourth cause of action (negligence) asserted by plaintiff Weaver on the ground that each of the causes of action (except the fourth) requires the existence of a landlord-tenant relationship and plaintiff Weaver was not a tenant. Defendants proffer the following evidence in support: Weaver never signed a lease while she resided at the Premises.[40] "A tenancy may be created by consent and acceptance of rent, despite the absence of a lease." (*Cobb v. San Francisco Residential Rent Stabilization &*

[40] See Defendants' Separate Statement of Undisputed Facts in Support of Summary Judgment, or in the Alternative, Summary Adjudication Against Sarah Weaver ("SSUF re Weaver"), Issue No. 1, Fact No. 7; Issue No. 2, Fact No. 68, Issue No. 3, Fact No. 129; Issue No. 5, Fact No. 252; Issue No. 6, Fact No. 314; and Issue No. 7, Fact No. 375.

*Arbitration Bd.* (2002) 98 Cal.App.4th 345, 352.)[41] However, Rubin did not obtain approval from property management or owners for Weaver to move in.[42] Weaver did not inform property management that she was going to be moving in to Rubin's apartment.[43] For these last two proffered facts, defendants cite to page 72:25 – 73:6 of Rubin's deposition and page 163:22 – 24 of Weaver's deposition, respectively. Purportedly, the relevant pages of deposition testimony can be found in defendants' counsel's accompanying declaration. However, in reviewing the declaration, the court was unable to locate the relevant pages of deposition testimony. Consequently, defendants have not met their initial burden to show that Weaver did not create a tenancy at the subject Premises.

**3. Breach of Implied Warranty of Habitability.**

"Case law supports an independent action by a tenant or former tenant for damages for breach of a landlord's implied warranty of habitability." (*Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1169.)

In *Green v. Superior Court* (1974) 10 Cal.3d 616 (*Green*), our Supreme Court enunciated the implied warranty of habitability in its current form, which is founded on modern legal decisions that have protected the reasonable expectations of consumers by "impl[ying] a warranty of fitness and merchantability in the case of the sale of goods." (*Id.* at p. 626.) Reasoning that "the modern urban tenant is in the same position as any other normal consumer of goods," and thus "reasonably expect[s] that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit," the court held that leases contain an implied warranty that protects these expectations. (*Id.* at p. 627.)

> ***The elements of a cause of action for breach of the implied warranty of habitability "are the existence of a material defective condition affecting the premises' habitability, notice to the landlord of the condition within a reasonable time after the tenant's discovery of the condition, the landlord was given a reasonable time to correct the deficiency, and resulting damages."*** (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1297 [173 Cal. Rptr. 3d 159].) The alleged defective condition must "affect the tenant's apartment or the common areas which he uses." (*Hinson v. Delis* (1972) 26 Cal.App.3d 62, 70 [102 Cal. Rptr. 661], disapproved on another point in *Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 55, fn. 7 [171 Cal. Rptr. 707, 623 P.2d 268].) When the alleged defect is in a common area, the landlord's duty to inspect and maintain the common area removes any excuse by the landlord regarding a lack of knowledge. (*Muro v. Superior Court* (1986) 184 Cal.App.3d 1089, 1092, fn. 1 [229 Cal. Rptr. 383].)
>
> A violation of a statutory housing standard that affects health and safety is a strong indication of a materially defective condition. (See *Knight v. Hallsthammar*, *supra*, 29 Cal.3d at p. 59, fn. 10.) By statute, a dwelling will be considered untenantable if (1) the "[b]uilding, grounds, and appurtenances" are not "clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin" (Civ. Code, § 1941.1, subd. (a)(6)); or (2) the dwelling substantially lacks "[a]n adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair" (Civ. Code, § 1941.1, subd. (a)(7)).

(*Peviani v. Arbors at California Oaks Property Owner, LLC* (2021) 62 Cal.App.5th 874, 891; emphasis added.)

Defendants move for summary adjudication of this first cause of action by Weaver on the ground that Weaver has not identified the existence of a material defective condition affecting the premises' habitability. Defendants proffer the fact that during the course of ten months [that Weaver resided at the Premises], Weaver alleges that she experienced habitability issues, yet in her deposition, testified that she did not have any concerns about the habitability of the property.[44] In opposition, Weaver cites to her deposition testimony describing a security

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[41] See also *Mosser Companies v. San Francisco Rent Stabilization & Arbitration Bd.* (2015) 233 Cal.App.4th 505, 516— "Tenancies in property need not be created by written leases. (*Parkmerced Co. v. San Francisco Rent Stabilization & Arbitration Bd.*, *supra*, 215 Cal.App.3d at p. 495.) One may become a tenant by occupancy with consent. (*Ibid.*)"

[42] See SSUF re Weaver, Issue No. 1, Fact No. 8.

[43] See SSUF re Weaver, Issue No. 1, Fact No. 9.

[44] See SSUF re Weaver, Issue No. 1, Fact No. 49.

door within fifty feet of the Premises which had been forced open and not repaired sufficiently to prevent further forced entry.[45]

Defendants anticipated Weaver would assert a lack of security as the factual basis for her breach of implied warranty of habitability cause of action and contends the lack of security is not a material defective condition. Defendants rely upon *Penner v. Falk* (1984) 153 Cal.App.3d 858 (*Penner*) where the plaintiff-tenant sued defendant apartment owner after being assaulted on premises by two non-tenant intruders waiting in the common hallway. The plaintiff tenant asserted, among others, a claim for breach of warranty of habitability. The trial court sustained a demurrer to that cause of action without leave to amend and the *Penner* court affirmed. In explaining, the *Penner* court wrote: "There is here neither the allegation of a written lease nor the allegation of an agreement with respondents concerning security of the premises." (*Penner*, *supra*, 153 Cal.App.3d at p. 869.) "[Plaintiff] here has not alleged that there existed a level of security of the premises which was relied upon by him in entering into the landlord-tenant relationship. [Plaintiff] has not alleged that [defendants] permitted or effected a reduction in that level of security which existed at the time he entered into the lease." (*Id.* at p. 870.) Defendants invite this court to follow *Penner* in rejecting Weaver's assertion that a lack of security does not amount to a breach of the implied warranty of habitability. Just as in *Penner*, there is no allegation nor any assertion by Weaver that she had an agreement with defendants concerning security. There is also no allegation nor any assertion by Weaver that she relied upon the existence of a certain level of security or that defendants permitted or effected a reduction in that level of security. Weaver does not address *Penner* in opposition.

Accordingly, defendant Mayfield's[46] motion for summary adjudication of the first cause of action of the FAC against plaintiff Weaver is GRANTED.

**4. Breach of the Covenant of Quiet Enjoyment.**

> "In every lease the landlord impliedly covenants that the tenant shall have quiet enjoyment and possession of the premises. In California this covenant is partially expressed in Civil Code section 1927, which guarantees the tenant against rightful assertion of a paramount title." (*Guntert v. City of Stockton*, *supra*, 55 Cal.App.3d at p. 138.) The statute provides: "An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same." (Civ. Code, § 1927.) "Beyond the statutory covenant, the landlord is bound to refrain from action which interrupts the tenant's beneficial enjoyment." (*Guntert v. City of Stockton*, at p. 138.)[47]
>
> …
>
> ***Determining whether there has been a breach of the covenant of quiet possession generally "depends upon the facts in a proper case."*** (*Stockton Dry Goods Co. v. Girsh* (1951) 36 Cal.2d 677, 682 [227 P.2d 1]; see also, e.g., *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 593 [22 Cal. Rptr. 3d 832].)
>
> ***Breach can take many forms, including actual or constructive eviction.*** (See, e.g., *LaFrance v. Kashishian* (1928) 204 Cal. 643, 644 [269 P. 655] [covenant breached where "plaintiff was evicted from the leased premises by one who had established paramount title to the property"]; *Guntert v. City of Stockton*, *supra*, 55 Cal.App.3d at p. 139 ["arbitrary and unreasonable notice of termination violated the lessor's implied obligation to abstain from interference with the tenant's use and enjoyment of the premises"]; *Goldman v. House* (1949) 93 Cal.App.2d 572, 576

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[45] See Plaintiff Sarah Weaver's Response to Defendants The Mayfield Building Company and Kylix Enterprises, Inc.'s Separate Statement of Undisputed Facts, Issue No. 1, Fact No. 49.

[46] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[47] Defendants apparently argue that the covenant of quiet enjoyment is implied from a lease and since plaintiff Weaver did not enter into a lease agreement, the covenant does not run to her. However, as this authority states, the covenant is only partially expressed by Civil Code section 1927 and the landlord has an obligation beyond the statutory covenant.

> [209 P.2d 639] [under the covenant of quiet enjoyment, "attempt to evict by the use of wrongful and malicious means with knowledge of probable injury is actionable"]; see *id.* at p. 574 ["defendants wilfully and maliciously shut off the electric current" and the tenant "fell down the darkened stairway and sustained injuries"].) Pursuant to another provision of division 3, part 4, title 5, chapter 2, the hirer or tenant need not even "be actually or constructively evicted in order to obtain relief." (Civ. Code, § 1940.2, subd. (a)(3).)

(*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1034-1035 (emphasis added).)

"The claim [for breach of implied covenant of quiet enjoyment] has often been inextricably tied to breach of the covenant by eviction, which disturbs the tenant's right to undisturbed possession of the leased premises. … If the landlord's acts or omissions affect the tenant's use of the property and compel the tenant to vacate, there is a constructive eviction." (*Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873, 897.)

In moving for summary adjudication of this cause of action, defendants apparently rely again on Weaver's deposition testimony that she did not have any concerns about the habitability of the property.[48] Issue concerning habitability are distinct from issues concerning quiet enjoyment. The court is not persuaded that the cited evidence is sufficient for defendant to meet its initial burden.

Defendants argue additionally that, to the extent Weaver's tenancy at the Premises ended, it was attributable to ***Rubin's*** violation of the Lease Agreement's prohibition against subletting and not based on anything that defendants did or did not do.[49] However, as argued previously, Weaver argues in opposition that Rubin's subletting was not a valid reason for the termination of his and Weaver's tenancy since defendants had waived enforcement of the subletting provision or, rather, at least a triable issue of material fact exists with regard to whether defendants had waived enforcement of the subletting provision.

For the same reason discussed above, defendant Mayfield's[50] motion for summary adjudication of the second cause of action of the FAC against plaintiff Weaver is DENIED.

**5. Nuisance.**

In the third cause of action, plaintiff Weaver generically alleges, "DEFENDANTS' acts and failures to act created an obstruction to the free use of the property and therefore constitute a nuisance." (FAC, ¶29.) The third cause of action incorporates by reference all the general allegations. Taken together and reasonably construed, the only acts and failures attributed to defendants in those general allegations is defendants' "refus[al] and fail[ure] to correct the defective and dangerous conditions [relating to habitability], perform[ance of] inadequate, shoddy repairs, and/or deliberate[] delay[ in] making repairs and remedying the conditions for an unreasonable amount of time." (FAC, ¶15.)

Nuisance is broadly defined by Civil Code section 3479 to mean, in relevant part, "Anything which is injurious to health, … or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." "[I]n order for a defendant's conduct to constitute a nuisance, the interference with use and enjoyment of land must be both substantial and unreasonable." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1178.)

In moving for summary adjudication of this third cause of action, defendants argue, essentially, that Weaver's nuisance cause of action is premised on the same alleged conduct which forms the basis for Weaver's first cause of action for breach of implied warranty of habitability and since plaintiff Weaver cannot maintain that first cause of action, plaintiff Weaver cannot maintain the nuisance cause of action.

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[48] See SSUF re Weaver, Issue No. 2, Fact No. 110.

[49] See SSUF re Weaver, Issue No. 2, Fact Nos. 66 and 71.

[50] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

In opposition, plaintiff Weaver now asserts her claim of nuisance is premised upon defendants' "exercising inconsistent application of policies and fail[ure] to effectively communicate the rules under which tenancies would be governed," presumably in reference to plaintiffs' assertion that defendants improperly sought to evict plaintiffs for the purportedly pretextual reason that Rubin violated the lease agreement's prohibition against subletting. Plaintiff Weaver's argument is not consistent with the allegations of the FAC. The pleadings serve as the "outer measure of materiality" in a summary judgment/ adjudication motion, and the motion may not be granted or denied on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Sup. Ct.* (2000) 79 Cal App 4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal App 4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal App 4th 60, 73—"the pleadings determine the scope of relevant issues on a summary judgment motion.") Having made the allegations noted above, the court will not consider this change of theory raised in opposition to defendants' motion for summary adjudication.

Accordingly, defendants Mayfield and Kylix's[51] motion for summary adjudication of the third cause of action of the FAC against plaintiff Weaver is GRANTED.

**6. Negligence.**

Defendant Kylix moves for summary adjudication of plaintiff Weaver's fourth cause of action for negligence by relying on CACI 1000 to suggest that only an "owner" of property may be liable for negligence/ premises liability and Kylix is not the owner of the subject Premises. CACI 1000, however, does not limit liability to only "owners" of property. As plaintiff Weaver points out in opposition, "rental agents owed a duty of ordinary care towards the tenant because the transaction between the rental agent and the landowner was clearly intended to affect the tenants, and because harm would be foreseeable to the tenants if the rental agent did not properly perform his duty." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 930-931.)

Defendants seek summary adjudication of plaintiff Weaver's negligence cause of action by again relying on their earlier argument that they have not breached any standards regarding habitability. However, the decision defendants themselves relied on earlier, *Penner*, *supra*, 153 Cal.App.3d at pp. 864 – 866, makes clear that a claim for negligence is broader than a claim for breach of implied warranty of habitability and can, under certain circumstances be based upon inadequate security. Thus, this court finds defendants have not met their initial burden by simply referring to the same argument and facts presented with regard to breach of the implied warranty of habitability. Likewise, and also for the reasons discussed earlier, the court is also unpersuaded by defendants' assertion that since there has been no breach of plaintiff Weaver's quiet enjoyment of the Premises, defendants are not liable for negligence.

Accordingly, defendants Mayfield and Kylix's[52] motion for summary adjudication of the fourth cause of action of the FAC against plaintiff Weaver is DENIED.

**7. Constructive Eviction.**

> "A constructive eviction occurs when the acts or omissions . . . of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises, or a substantial portion thereof, unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises."

(*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 925-926 (*Stoiber*).)

Defendants argue, essentially, that since there has been no breach of the warranty of habitability and there has been no breach of the covenant of quiet enjoyment, the subject premises were not unfit nor has there been any disturbance/ interference with plaintiffs' possession of the subject premises. However, as discussed above, there

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[51] The third cause of action of the FAC is directed against all defendants. In light of the court's ruling with regard to defendant HRCLP, only defendants Mayfield and Kylix remain as defendants to the third cause of action.

[52] The fourth cause of action of the FAC is directed against all defendants. In light of the court's ruling with regard to defendant HRCLP, only defendants Mayfield and Kylix remain as defendants to the fourth cause of action.

remains a triable issue of material fact with regard to whether there has been a breach of the covenant of quiet enjoyment.

Alternatively, defendants note that, "Abandonment of premises by the tenant within a reasonable time after the wrongful act of the landlord is essential to enable the tenant to claim a constructive eviction." (*Stoiber*, *supra*, 101 Cal.App.3d at p. 926.) Defendants omit from *Stoiber* the statement, "Whether [plaintiff] abandoned within a reasonable time would constitute a jury question." (*Ibid.*) Instead, defendants cite *Bakersfield Laundry Asso. v. Rubin* (1955) 131 Cal.App.2d Supp. 862, 865 (*Bakersfield*) where the court noted, "Many cases hold as a matter of law one month is a reasonable time." Defendants proffer evidence that Rubin was issued a Notice of Non-Renewal for Cause on 12 December 2019, but did not vacate or abandon the subject Premises until 10 May 2020, a span of five months. Defendants seemingly suggest that anything more than one month is unreasonable. That is not the holding from Bakersfield. *Bakersfield* does not address what amount of time is unreasonable, as a matter of law, instead finding that more than six months "should be held to be beyond a reasonable time" under the circumstances presented there. Since it is clear the *Bakersfield* holding considered other circumstances ("retaining possession for at least one half of the term of the lease") in reaching its determination, *Bakersfield* is not support for defendants' assertion that five months is, as a matter of law, unreasonable.

Accordingly, defendant Mayfield's[53] motion for summary adjudication of the fifth cause of action of the FAC against plaintiff Weaver is DENIED.

**8. Violation of California Civil Code Section 1940.2.**

Plaintiff Weaver's sixth cause of action asserts a violation of Civil Code Section 1940.2, subdivision (a) which states, in relevant part:

> (a) It is unlawful for a landlord to do any of the following for the purpose of influencing a tenant to vacate a dwelling: …
>
> (3) Use, or threaten to use, force, willful threats, or menacing conduct constituting a course of conduct that interferes with the tenant's quiet enjoyment of the premises in violation of Section 1927 that would create an apprehension of harm in a reasonable person. Nothing in this paragraph requires a tenant to be actually or constructively evicted in order to obtain relief.
>
> (4) Commit a significant and intentional violation of Section 1954.

Civil Code Section 1954, in turn, states, in relevant part:

> (a) A landlord may enter the dwelling unit only in the following cases:
>
> (1) In case of emergency.
>
> (2) To make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors or to make an inspection pursuant to subdivision (f) of Section 1950.5.
>
> (3) When the tenant has abandoned or surrendered the premises.
>
> (4) Pursuant to court order.
>
> (5) For the purposes set forth in Chapter 2.5 (commencing with Section 1954.201).
>
> (6) To comply with the provisions of Article 2.2 (commencing with Section 17973) of Chapter 5 of Part 1.5 of Division 13 of the Health and Safety Code.

[53] The fifth cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

> (b) Except in cases of emergency or when the tenant has abandoned or surrendered the premises, entry may not be made during other than normal business hours unless the tenant consents to an entry during other than normal business hours at the time of entry.

In moving for summary adjudication of plaintiff Weaver's sixth cause of action, defendant Mayfield asserts it has not entered the dwelling without permission and plaintiff Weaver has not provided any fact to support such an allegation. However, defendant Mayfield does not direct the court to any particular evidence to support this assertion.

> Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. … For the defendant must "support[]" the "motion" with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." (Code Civ. Proc., § 437c, subd. (b).) The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence-as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing.

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854–855.)

Defendant Mayfield has not met its initial burden simply by making a naked assertion that plaintiff lacks evidence. Accordingly, defendant Mayfield's[54] motion for summary adjudication of the sixth cause of action of the FAC against plaintiff Weaver is DENIED.

**9. Violation of California Civil Code Section 1942.5.**

Plaintiff Weaver's seventh cause of action alleges retaliatory eviction pursuant to Civil Code Section 1942.5.[55] In addition to arguing that plaintiff Weaver is not a tenant and that this cause of action has been released (already discussed above), defendant Mayfield argues plaintiff Weaver cannot establish that defendant Mayfield retaliated against Weaver and Rubin (i.e., issued plaintiffs a Notice of Non-Renewal) because plaintiffs complained of tenantability/ habitability concerns. Just as it did in the second cause of action, defendant Mayfield asserts its issuance of a Notice of Non-Renewal was entirely attributable to ***Rubin's*** violation of the Lease Agreement's prohibition against subletting.[56] From this, the court should infer that the issuance of the Notice of Non-Renewal was not in retaliation for plaintiffs' complaints regarding tenantability/ habitability. However, as argued previously, Weaver argues in opposition that Rubin's subletting was not a valid reason for the issuance of the Notice of Non-Renewal (and thus pretextual) since defendants had waived enforcement of the subletting provision or, rather, at least a triable issue of material fact exists with regard to whether defendants had waived enforcement of the subletting provision.

For the same reason discussed above, defendant Mayfield's[57] motion for summary adjudication of the seventh cause of action of the FAC against plaintiff Weaver is DENIED.

**10. Evidentiary objection.**

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[54] The sixth cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[55] Civil Code Section 1942.5, subdivision (a)(1) states: "If the lessor retaliates against the lessee because of the exercise by the lessee of the lessee's rights under this chapter or because of the lessee's complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following: (1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, has provided notice of a suspected bed bug infestation, or has made an oral complaint to the lessor regarding tenantability."

[56] See SSUF re Weaver, Issue No. 7, Fact Nos. 373, 378, and 380.

[57] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

In opposition, plaintiff Weaver filed an Objection to Evidence Submitted by Defendants Mayfield and Kylix in Support of Summary Judgment, etc. The court declines to rule on said objection since the court did not consider the material objected to in rendering its ruling. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

**F. Defendants Mayfield, Kylix, and HRCLP's motion for summary judgment/ adjudication of the FAC against plaintiff Rubin.**

**1. Settlement Agreement.**

Initially, defendants Mayfield and Kylix contend the Settlement Agreement (discussed above in section II(A)(2)) bars plaintiff Weaver's FAC. Presumably, defendants Mayfield and Kylix assert the Settlement Agreement includes an implied release by Weaver of any claims now being asserted in the instant FAC. "In general, a written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence." (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366.) However, as the court observed above, a triable issue of material fact exists with regard to whether the Settlement Agreement includes such a release.

**2. Breach of Implied Warranty of Habitability.**

Substantively, the argument in support of and in opposition to summary adjudication of the first cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver. The only observable difference is that plaintiff Rubin raised an objection to evidence cited by defendants in support. Specifically, plaintiff Rubin objects to his own deposition testimony on the ground that he is not qualified to render an expert opinion or legal conclusion as to habitability. Plaintiff Rubin's objection is OVERRULED. The court declines to rule on the balance of plaintiff Rubin's evidentiary objections since the court did not consider the material objected to in rendering its ruling. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

For the same reasons discussed above in connection with plaintiff Weaver, defendant Mayfield's[58] motion for summary adjudication of the first cause of action of the FAC against plaintiff Rubin is GRANTED.

**3. Breach of the Covenant of Quiet Enjoyment.**

Substantively, the argument in support of and in opposition to summary adjudication of the second cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendant Mayfield's[59] motion for summary adjudication of the second cause of action of the FAC against plaintiff Rubin is DENIED.

**4. Nuisance.**

Substantively, the argument in support of and in opposition to summary adjudication of the third cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendants Mayfield and Kylix's[60] motion for summary adjudication of the third cause of action of the FAC against plaintiff Rubin is GRANTED.

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[58] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[59] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[60] The third cause of action of the FAC is directed against all defendants. In light of the court's ruling with regard to defendant HRCLP, only defendants Mayfield and Kylix remain as defendants to the third cause of action.

**5. Negligence.**

Substantively, the argument in support of and in opposition to summary adjudication of the fourth cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendants Mayfield and Kylix's[61] motion for summary adjudication of the fourth cause of action of the FAC against plaintiff Rubin is DENIED.

**6. Constructive Eviction.**

Substantively, the argument in support of and in opposition to summary adjudication of the fifth cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendant Mayfield's[62] motion for summary adjudication of the fifth cause of action of the FAC against plaintiff Rubin is DENIED.

**7. Violation of California Civil Code Section 1940.2.**

Substantively, the argument in support of and in opposition to summary adjudication of the sixth cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver. The only observable difference is that defendant Mayfield directs the court's attention to its separate statement of undisputed facts, numbers 261 – 312. However, in reviewing those facts, the court did not find any facts or evidence which affirmatively demonstrates that defendant Mayfield did not enter the dwelling without permission or that plaintiff Rubin has no facts to support an allegation that defendant Mayfield entered the dwelling without permission. As such, defendant Mayfield has not met its initial burden.

Accordingly, defendant Mayfield's[63] motion for summary adjudication of the sixth cause of action of the FAC against plaintiff Rubin is DENIED.

**8. Violation of California Civil Code Section 1942.5.**

Substantively, the argument in support of and in opposition to summary adjudication of the seventh cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendant Mayfield's[64] motion for summary adjudication of the seventh cause of action of the FAC against plaintiff Rubin is DENIED.

## IV. Tentative Ruling.

The tentative ruling was duly posted.

## V. Case Management.

All remaining settlement conference, readiness conference and trial dates REMAIN AS SET.

## VI. Order.

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[61] The fourth cause of action of the FAC is directed against all defendants. In light of the court's ruling with regard to defendant HRCLP, only defendants Mayfield and Kylix remain as defendants to the fourth cause of action.

[62] The fifth cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[63] The sixth cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[64] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

Cross-complainant Mayfield's motion for summary adjudication of the first cause of action [Breach of Contract – 2018 Lease Agreement] of the cross-complaint against cross-defendant Rubin is DENIED. Cross-complainants Mayfield, Kylix, and HRCLP's motion for summary adjudication of the second cause of action [Breach of Contract – Settlement Agreement] of the cross-complaint against cross-defendants Rubin and Weaver is DENIED.

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Defendant HRCLP's motion for summary judgment of plaintiffs Rubin and Weaver's FAC is GRANTED.

----oOo----

Defendant Mayfield's motion for summary adjudication of the first and third causes of action of the FAC against plaintiff Weaver is GRANTED. Defendants Mayfield and Kylix's motion for summary judgment, or in the alternative, summary adjudication against Sarah Weaver is otherwise DENIED.

----oOo----

Defendant Mayfield's motion for summary adjudication of the first and third causes of action of the FAC against plaintiff Rubin is GRANTED. Defendants Mayfield and Kylix's motion for summary judgment, or in the alternative, summary adjudication against Mark Rubin is otherwise DENIED.

_____ _____

**DATED:** **HON. SOCRATES PETER MANOUKIAN**
*Judge of the Superior Court*
*County of Santa Clara*

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## Calendar Line 25

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