SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 08-01-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	24CV433281 Hearing: Order of Examination	Fundamental Capital, LLC. vs Peter Cournoyer et al	Notice appearing proper, all parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 2	24CV430319 Hearing: Demurrer	PAULINE SILVA-RE vs KRISTINE WISECARVER et al	See Tentative Ruling. Court will issue the final order.
LINE 3	20CV368366 Motion: Summary Judgment/Adjudication	Cynthia Perez vs City of San Jose et al	See Tentative Ruling. Court will issue the final order.
LINE 4-6 and 10-12	20CV361307 Motion: Compel	Kristy Bailey et al vs Vintage Towers et al	Matters withdrawn.
LINE 7	19CV342125 Motion: To Approve Proposition 65	Safe Products for Californians, LLC vs Amazon.com, Inc. et al	Good cause appearing, Plaintiff's unopposed motion is GRANTED. Plaintiff shall submit the final order within 10 days of the hearing.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 8	2015-1-CV-286462 Motion to Amend Judgment	M. Verkamp vs MBD Construction, Inc., et al	Good cause appearing, the motion to amend the judgment to correct Defendants' names is GRANTED. Plaintiff shall submit the final order and the amended judgment.
LINE 9	2012-1-CV-236987 Hearing: Claim of Exemption	GCFS, Inc. vs G. Mazlumyan	While the Court has Creditor's objection to the claim of exemption, the Court does not have the claim of exemption. Parties are ordered to appear for the hearing. If Debtor fails to appear, the claim for exemption will be denied.
LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 2
Case Name: *Silva-Re v. Wisecarver, et al.*
Case No.: 24CV430319

This action arises from an alleged breach of a Commercial and Residential Listing Agreement ("Listing Agreement") between Kristine Wisecarver ("Defendant" or "Wisecarver,") an agent of Smith Avenue Properties, LLC ("Smith Properties") (collectively, "Defendants,") and Pauline Silva-Re ("Plaintiff,") a real estate salesperson for Sapphire Properties ("Sapphire").

Defendants now demur to the operative Complaint filed by Plaintiff.

I. Background

A. Factual

According to allegations of the Complaint, Defendants were landlords of real property located at 1801 Smith Avenue, San Jose, California ("Subject Property.") (Complaint, ¶ 1.)

On or about September 25, 2019, Defendant Wisecarver and Plaintiff signed the Listing Agreement, which named Plaintiff as the broker. (Complaint, ¶ 5; Exh. A – Listing Agreement.) Plaintiff alleges she informed Wisecarver that Plaintiff was employed by and "acting on behalf of," Hilary Saunders ("Saunders"), a real estate broker doing business under Sapphire. (Complaint, ¶¶ 3, 5; Exh. A – Listing Agreement.) Plaintiff gave her business card to Defendant Wisecarver indicating she was an agent of Sapphire, not a broker. (Complaint, ¶ 5.) Plaintiff asserts that "section 4. C." of the Listing Agreement provided that: "Wisecarver would pay commissions to Broker of 6% of the first 2 years of a of a procured lease, 5% for years 3 to 5 and 3% for years 6 to 10, and in the event of an action pursuant to the listing agreement, the prevailing party would be entitled to recover attorney's fees." (Complaint, ¶ 5; Exh. A – Listing Agreement.)

Plaintiff subsequently procured a tenant, Luke Joseph Springer, who was doing business as Suburban Miners Technologies LLC ("Tenant") and negotiated "a proposed 3-year lease" with Tenant. (Complaint, ¶ 6.) Defendant then informed Plaintiff she was only willing to lease the Subject Property for one year and that she, Defendant, would prepare the lease. (Complaint, ¶ 7.) Defendant prepared a Commercial Lease Agreement ("Lease Agreement") which designated Sapphire as the selling agent, and Defendant leased the Subject Property to Tenant from January 15, 2020, through February 28, 2021, for a monthly rent of $17,500. (Complaint, ¶ 8.)

On or about January 9, 2020, Plaintiff sent an invoice on behalf of Sapphire to Defendants Wisecarver and Smith Properties for "services and advertising expenses" totaling $15,382.52 for the dates of January 15, 2020, through February 28, 2021. (Complaint, ¶ 10.) This amount was based on the Lease Agreement prepared by Defendant Wisecarver. (*Ibid*.)

On January 24, 2020, Wisecarver contacted Saunders and complained about Plaintiff's services. (Complaint, ¶ 11.) Defendant subsequently offered to pay $12,600 instead, "which is 6% of the one-year rent, in 3 installments of $4,200." (*Ibid.*) Saunders told Defendant that Plaintiff had performed her duties as a lease listing agent, and that Wisecarver should pay by

February 4, 2021. (*Ibid.*) Wisecarver made one payment of $4,200 to Saunders and refused to pay anything further. (*Ibid.*) On July 13, 2023, Saunders assigned her claim under the Listing Agreement to Plaintiff. (*Ibid*.)

Beginning in February 28, 2021, Tenant paid a monthly rent of $17,500 for ten months. (Complaint, ¶ 14.) Plaintiff alleges she earned a 6 percent commission from the total rent amount of $175,000. (*Ibid.*) Plaintiff further alleges that Tenant remained in the Subject Property from approximately January 1, 2022, to May 31, 2022. (Complaint, ¶ 16.) Plaintiff alleges she has demanded payment of her commission, which Defendants have refused to pay. (Complaint, ¶ 16.)

B. Procedural

On February 2, 2024, Plaintiff filed the operative pleading, alleging the following four causes of action against Defendants:

1) breach of written contract
2) breach of contract in second year
3) breach of contract in third year
4) quantum meruit compensation to finder

On May 2, 2024, Defendants demurred to the entirety of the Complaint. Plaintiff filed an opposition on July 17, 2024. A week later, Defendants filed a reply.

II. Meet and Confer Requirements

Before filing a demurrer, a demurring party must "meet and confer in person or by telephone" with the opposing party to determine "whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code Civ. Proc., § 430.41, subd. (a).) When filing the demurrer, the demurring party must include a declaration stating either "the means by which the demurring party met and conferred with [the other party] and that the party did not reach an agreement resolving the objections raised in the demurrer" or "[the other party] failed to respond to the meet and confer request of the demurring party or otherwise failed to meet in good faith." (Code Civ. Proc., § 430.41, subd. (a)(3).) A court's determination that the meet and confer process was insufficient is not a ground to sustain or overrule a demurrer. (Code Civ. Proc., § 430.41, subd. (a)(4).)

Counsel for Defendants has filed a meet and confer declaration regarding the arguments to be raised in the demurrer. (Declaration of Patricia M. Smith Regarding Meet and Confer Prior to Filing a Demurrer (Smith Decl.,") ¶¶ 2-5.) Defense counsel asserts that Plaintiff's counsel engaged in discussions that were "largely non-responsive and inconsistent with the pleadings." (Smith Decl., ¶ 3.) In opposition, Plaintiff's attorney contends that his meet and confer efforts were adequate given that he replied to defense counsel's emails. (See Smith Decl., ¶ 3; Exh. B – Plaintiff's Counsel Email Response; Plaintiff's Opposition to Demurrer (Opp.,) p. 2:4-16.) Plaintiff's counsel further asserts that he responded to defense counsel's meet and confer call on April 22, 2024, and the call lasted thirty minutes. (Smith Decl., ¶ 4; Exh. C – Email Exchanges.) Given counsels' email communications and phone call, it appears that the parties have adequately met and conferred. Any further meet and confer efforts would be fruitless. Alternatively, even if those efforts had been inadequate that would not be a basis

for overruling the demurrer. (See Code Civ. Proc., § 430.41, subd. (a)(4).) Consequently, the Court will consider the merits of Defendants' demurrer.

III. Defendants' Demurrer

A. Legal Standard

"A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

"…The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

B. Breach of Contract – First through Third Causes of Action

Defendants demur to Plaintiff's breach of contract claims on two grounds: uncertainty and statute of limitations. (See Notice of Demurrer and Demurrer ("Dem. MPA,") citing Code Civ. Proc., §§ 337 & 339.)

1. Uncertainty

Defendants argue that Plaintiff's breach of contract claim is uncertain because it is unclear whether the action is based on the "expired" written Listing Agreement or the partially performed oral "Installment Agreement" with Saunders. (Dem. MPA, p. 3:18-24.) Specifically, Defendants argue that as part of an oral agreement, Wisecarver offered to pay $12,600 in three installments and did make a partial payment of $4,200 to Saunders. (*Ibid.*) Defendants conclude it is difficult to ascertain from the Complaint, which agreement, oral or written, is the basis of Plaintiff's breach of contract claims. (*Ibid.*) Although not raised by Defendant, the confusion is all the more so, because the complaint seems to allege that the invoice of January 9, 2020 was not for a commission but was "for services and advertising expenses from January 15, 2020, through February 28, 2021, in the amount of $15,382.52 based on the lease prepared by Wisecarver." See Complaint, paragraph 10.

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

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet,

a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Here, given the contentions raised on general demurrer, Defendants appear to be on notice of the claims against them in this litigation. Additionally, the Court does not find the Complaint to be so incomprehensible or ambiguous to support a demurrer for uncertainty, although it is very poorly drafted. As noted in Plaintiff's opposition, the Complaint specifically references sections of the written Listing Agreement, namely Plaintiff's commissions schedule, which appears to be the basis of Plaintiff's breach of contract claims. (Opp., p. 4:13-22.) And, to the extent there is any such uncertainty – whether the action is based on a written Listing Agreement or oral Installment Agreement - the parties can clarify those ambiguities utilizing civil discovery procedures. (See *Davies v. Super. Ct.* (1984) 36 Cal.3d 291, 299 [purpose of civil discovery is to take the game element out of trial preparation and assist parties in obtaining facts and evidence necessary for expeditious resolution of their dispute].)

Consequently, the demurrer to the Complaint on the ground of uncertainty is OVERRULED.

2. Failure to State a Claim – Statute of Limitations

A statute of limitations prescribes the period "beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 806 (*Fox*).) It "strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

"A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements." (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 509-510, internal citations and quotation marks omitted.)

Although the statute of limitations is a factual issue, it can be raised on demurrer if the pleading discloses that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962 (*Fuller*).) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff's burden "even at the pleading stage" to establish an exception to the limitations period. (*Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197.) When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

Here, Defendants argue Plaintiff's breach of contract claims are time barred *if they are based on the written* Listing Agreement. (Dem. MPA, p. 4:9-14.) Specifically, Defendants claim the events alleged in the Complaint occurred on January 24, 2020, when the demand for a commission was disputed by Defendants in a telephone call to Saunders, and Plaintiff's action was filed more than four years later on February 2, 2024. (*Ibid.*) However, Defendants admit it is unclear whether the basis of Plaintiff's breach of contract claims is the original

Listing Agreement or the partially performed oral agreement with Saunders. (Dem. MPA, p. 4:17-21.) As noted in Plaintiff's opposition, Defendants cannot show that the action is "time barred based on the face of the Complaint" as required under Code of Civil Procedure section 430.30, subdivision (a). (See Opp., p. 3:10-27.) If based on the oral agreement, the Complaint alleges that payment was not due until February 2021, such that the claim would not accrue prior to that date. See Complaint, paragraph 11. If that were the case, the statute would extend until February 2025, rendering the complaint timely. "In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred." (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

In their reply, Defendants argue that based on Plaintiff's Complaint and "documentary" evidence – an email exchange between Defendants and Plaintiff regarding a counteroffer – the dispute that forms the basis for Plaintiff's Complaint arose "by at least January 24, 2020." (Reply Brief in Support of Dem. ("Reply"), p. 4:13-15; Smith Decl., ¶¶ 2-5; Exhs. A, B.) Thus, Defendants conclude the Complaint filed on February 2, 2024, was not timely filed within the four-year statutory period. (Reply, p. 4:15-20; Smith Decl., ¶¶ 2-5; Exhs. A, B.) But, the Court cannot consider extrinsic evidence, namely, the email exchanges regarding Wisecarver's counteroffer, in ruling on a demurrer. This Court can only consider the well-pleaded allegations of the complaint and judicially-noticed materials. (See *Nealy v. County of Orange* (2020) 54 Cal.App.5th 594, 597, fn. 1 [on demurrer, court's focus is limited to the facts alleged on the face of the pleading and its exhibits, and any facts subject to judicial notice].) Nor is it the role of this Court on a demurrer to examine the merits of a case or consider declarations filed by the parties. (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 [demurrer tests only legal sufficiency of a complaint and court cannot consider substance of declarations in addressing demurrer]; see also *SKF Farms v. Super. Ct.* (1984) 153 Cal.App.3d 902, 905 ["A demurrer tests the pleadings alone and not the evidence or other extrinsic matters."].)

Accordingly, because the defect does not affirmatively appear on the face of the Complaint, Defendants' statute of limitations argument is undeveloped and fails on this ground alone. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants."].) Accordingly, Defendants' demurrer to the first through third causes of action on grounds that they are time barred is OVERRULED.

C. Fourth Cause of Action – Quantum Meruit

1. Failure to State a Claim – Statute of Limitations

Defendants argue that the fourth cause of action is time barred because the statute of limitations for quantum meruit claims is two years, and Plaintiff's action was filed on February 2, 2024, more than four years later. (Dem. MPA, p. 3:2-6.; Reply, p. 5:3-12.)

As Defendants note, a cause of action for quantum meruit is governed by the two-year statute of limitations found in Code of Civil Procedure section 339. (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 452 (*Maglica*); see also *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996.) "Generally, the statute of limitation

commences when a party knows or should know the facts essential to the claim." (*Vishva Dev, M.D., Inc. v. Blue Shield of California Life & Health Ins. Co.* (2016) 2 Cal.App.5th 1218, 1223 (*Vishva Dev*).) The requisite elements of quantum meruit are: "1) the plaintiff acted pursuant to 'an explicit or implicit request for the services' by the defendant, and 2) the services conferred a benefit on the defendant." (*Port Medical Wellness, Inc. v. Connecticut General Life Ins. Co.* (2018) 24 Cal.App.5th 153, 180.)

The fourth cause of action alleges Plaintiff procured Tenant to occupy the Subject Property, and "thereby conferr[ed] a benefit to defendants." (Complaint, ¶ 19.) Plaintiff did not include a date in which she procured Tenant, but the Complaint alleges Defendant Wisecarver leased Subject Property to Tenant from January 15, 2020, through February 28, 2021. (Complaint, ¶ 8.) Plaintiff further alleges the following in her Complaint:

> On January 24, 2020, Wisecarver contacted the Broker, Hilary Saunders and complained about Silva-Re's services, and offered to pay $12,600 which is 6% of the one-year rent, in 3 installments of $4.200. Ms. Saunders told Wisecarver that Silva-Re had performed her duties as a lease listing agent, and that Wisecarver should pay by February 4, 2021. *Wisecarver subsequently made one payment of $4,200 to Ms. Saunders and has refused to pay anything further*. *On July 13, 2023, Ms. Saunders assigned her claim under the Listing Agreement to Silva-Re.*

(Complaint, ¶ 11, italics added.)

In opposition, Plaintiff argues that a cause of action for quantum meruit "does not accrue until the repudiation or breach of the oral promise, upon which it is based." (Opp., p. 6:13-23; see also *Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 455 (*Zakk*).) Here, Plaintiff asserts the Complaint alleges "no facts to support an express or implied repudiation" that would trigger the statute of limitations, and that the duration of the lease "is within Defendants' knowledge." (Opp., p. 7:18-20.) Plaintiff concludes Defendants never repudiated their obligations to pay Plaintiff, and discovery "is necessary to develop all the facts." (Opp., p. 7:20-24; see also *Vishva Dev, supra,* at p. 1218 ["the limitations period began to run when the provider had knowledge of the facts giving rise to the claims upon receiving explanation of benefits letters, which unequivocally denied the amounts billed for services rendered to insured patients"].)

Defendants, in their reply, highlight paragraph eleven of Plaintiff's Complaint to demonstrate that the contract was repudiated by Wisecarver on January 24, 2020, which is four years prior to the filing of Plaintiff's Complaint. (Reply, p. 5:3-12.) Thus, Defendants conclude the statute of limitations started to run on January 24, 2020, and Plaintiff's Complaint, which was
filed on February 2, 2024, would be barred by the statute of limitations. (*Ibid*.) The Court disagrees. "Although the statute of limitations on a cause of action for quantum meruit for personal services usually begins to run when those services or the relationship between the parties terminate (see, e.g., [*Maglica, supra,* 66 Cal.App.4th at pp. 452-454]), that is not always the case. Where services are provided with the understanding that payment for those services will be made at some time after the termination of those services or upon some contingency, the statute of limitations does not begin to run until that time arrives or contingency occurs. [Citations omitted.]" (*Zakk, supra,* 33 Cal.App.5th at pp. 455-456.)

In the present case, Plaintiff alleges Defendants agreed to pay her commissions for the duration of the procured Lease Agreement. (Complaint, ¶¶ 5-6, 10.) Plaintiff also alleged that although she believes Tenant remained in Subject Property until May 2022, she "will move to amend this complaint when the exact date that the tenant ended his tenancy is discovered." (Complaint, ¶ 16.) As the Complaint currently reads, Plaintiff contends that she is entitled to commission through May 2022. (*Ibid*.) Therefore, it is unclear when the two-year statute of limitations on her quantum meruit cause of action began to run. (See, e.g., *Thompson v. Oreña* (1901) 134 Cal.26, 28 [the plaintiff provided services for the promisor, and parties agreed he would be paid upon the promisor's sale of certain land; Supreme Court held that "the statute of limitations did not begin to run against plaintiff's claim until it matured and could be enforced, … regardless of whether the time fixed was reasonable or unreasonable"].)

Additionally, as discussed above, Defendants concede it is unclear whether the basis of Plaintiff's Complaint arose from the written Listing Agreement or oral agreement between Saunders and Wisecarver. (Dem MPA, p. 3:16-24.) Thus, the untimeliness of the lawsuit does not affirmatively appear on the face of the Complaint. (Dem MPA, p. 3:16-24; Reply, p. 5; see also *Schmier v. City of Berkeley* (2022) 76 Cal.App.5th 549, 554 ["'…the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint…' [Citation]"].)

Therefore, the demurrer to the fourth cause of action on the grounds that it is barred by the statute of limitations is OVERRULED.

D. Case Reclassification Claim

Defendant claims this Court lacks jurisdiction because Plaintiff's amount in controversy is less than the threshold under Code of Civil Procedure section 85. (Dem. MPA, p. 5:1-4.) Specifically, Defendant argues the amount pled must exceed $35,000 in order to fall within the court's unlimited jurisdiction, and the Complaint "prays for just over $25,000." (*Ibid.*)

Pursuant to Code of Civil Procedure section 85 a proceeding shall be treated as a limited civil case only if all of the following conditions are satisfied:

(a) The amount in controversy does not exceed thirty-five thousand dollars ($35,000). As used in this section, "amount in controversy" means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy in the action, exclusive of attorneys' fees, interest, and costs.

(b) The relief sought is a type that may be granted in a limited civil case.

(c) The relief sought, whether in the complaint, a cross-complaint, or otherwise, is exclusively of a type described in one or more laws that classify an action or special proceeding as a limited civil case or that provide that an action or special proceeding is within the original jurisdiction of the superior court, including, but not limited to, the following provisions…

(Code Civ. Proc., § 85.)

A defendant may move to reclassify an action after the time to respond to an initial pleading where (1) the case is incorrectly classified and (2) it shows good cause for not seeking reclassification earlier. (Code Civ. Proc., § 403.040.) "A transfer must be made only when the lack of jurisdiction is clear on the face of the record before the court." (*Ytuarte v. Superior Court* (2005) 129 Cal.App.4th 266, 278.) "[S]uperior courts have long been cautioned to order transfers sparingly and only in the clearest of circumstances after a thorough review of the facts of the case." (*Ibid*.) Code of Civil Procedure section 403.040 does not contemplate reclassification to the small claims division, but only reclassification between limited and unlimited civil cases. (See Code Civ. Proc., § 403.040.)

Here, as noted in Plaintiff's opposition, Defendants' request to reclassify the instant matter from unlimited jurisdiction to small claims court is not a proper basis for a demurrer. (Opp., p. 2:19-22; Dem. MPA, p. 5; see Code Civ. Proc., § 430.10 [listing grounds for demurrer].) Instead, the remedy is for Defendants to file a motion to reclassify concurrently with the demurrer or prior to filing a demurrer (See Code Civ. Proc., § 403.040.) To the extent Defendants are asking this Court to reclassify the case on its own motion, (Dem. MPA, p. 5:6-21; Reply, p. 7: 4-11; Code Civ. Proc., § 403.040, subd. (a) [a party may move to reclassify a case, or the court may do so on its own motion]), this Court declines. Accordingly, the Court will not order reclassification on its own motion.

IV. Conclusion

Defendants' demurrer to the entirety of the Complaint is OVERRULED.

The Court will prepare the final Order.

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Calendar Line 3
Case Name: *Perez v. City of San Jose, et al*.
Case No.: 20CV368366

I. Background

A. Factual

This is an employment discrimination action. According to allegations of the Complaint, Plaintiff is a Mexican American woman, who is over the age of 40. (Complaint, ¶ 2.) She also has an unnamed physical disability. (*Ibid*.) Plaintiff was hired by Defendant City of San Jose ("City") in or around November 2005 as a Parking and Traffic Control Officer. (*Id*., ¶ 16.) In July 2014, she took on the position of Office Specialist II, reporting to her supervisors, Defendant Eric Newton ("Newton") and, later, Defendant David Murphy ("Murphy"). (*Id*., ¶ 17.) In or around February 2017, Plaintiff began working with two coworkers, Defendants Liana Trejo ("Trejo") and Robert Parker ("Parker"). (*Id*., ¶ 18.)[1]

Beginning in November 2017, Plaintiff s supervisors and coworkers subjected her to "unequal" treatment including, but not limited to, placing her in an office located under the stairs; prohibiting her from using the disabled bathroom and assigning her to respond to work emails during non-work hours, including on weekends. (Complaint, ¶ 19.) The Individual Defendants ridiculed and humiliated Plaintiff, including giving her the middle finger when she walked past her supervisors and making "mocking and rude gestures" behind her back. (*Id.*, ¶ 20.) Plaintiff's supervisors also made disparaging comments about her age including calling her an "old buck," telling her that she should work with "o1d people," and telling her that she should "let the young people" take over her job. (*Id.*, ¶ 21.) Plaintiff complained to Newton and Murphy that she did not feel comfortable with Trejo in her office alone but Newton and Murphy did nothing. (*Id.*, ¶ 22.) Trejo, Newton, and Murphy would jump on the stairs above Plaintiff's office in order to disrupt her work. (*Id.*, ¶ 22.) Plaintiff complained to her supervisors and a City of San Jose Safety Officer but the noise did not stop. (*Ibid.*)

In or around July 2017, Plaintiff applied for the open position of Inspector with the City. (Complaint, ¶ 24.) Newton and Murphy met with Plaintiff about her application and asked her detailed questions about her personal relationships and her health, including medical needs and restrictions. (*Ibid*.) One day after one of these meetings, Newton approached Plaintiff in the parking lot and asked her " 'how can you apply for the Inspector position when you are parking in a handicap parking spot[?]' " (*Id.*, ¶ 25.) Thereafter, Plaintiff received a letter indicating that she did not qualify for an interview for the Inspector position but Murphy told her that she actually did qualify, she just was not given an interview. (*Id.*, ¶ 25.)

The Individual Defendants continued to condescend and humiliate Plaintiff because of her race, gender, and age. (Complaint, ¶ 26.) Plaintiff made a formal complaint to a City Human Resources Representative in November 2017. (*Id.*, ¶ 27.) Following that complaint, Plaintiff's office was moved from under the stairs but she was then subjected to adverse actions, including "sabotage" of her work area, blocked access to her email, and disconnection of the "telephone headset/charger" in her office. (*Id.*, ¶ 28.)

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[1] Defendants Newton, Murphy, Trejo, and Parker will be referred to as the "Individual Defendants".

On May 23, 2018, Plaintiff filed a complaint for discrimination based on race, national origin, sex, age, and disability with the City's Office of Employee Relations. (Complaint, ¶ 29.) She was informed that that office was able to substantiate a violation of City policy and told that appropriate action would be taken. (*Ibid*.) But, the harassment, discrimination, and retaliation did not stop and in fact, Plaintiff suffered further adverse actions, including exclusion from office events and surveillance of Plaintiff. (*Ibid*.) Plaintiff was not invited to an office meet and greet on September 14, 2018. (*Id.*, ¶ 30.) Plaintiff continued to make complaints but the discrimination and retaliation did not stop. (*Id.*, ¶ 31.)

Plaintiff provided Spanish translation services for the City but she was denied additional interpreter pay. (Complaint, ¶ 32.) She also worked in a senior classification for two months but she did not receive additional "acting pay." (*Ibid*.)

B. Procedural

Plaintiff filed a Complaint of Discrimination with the California Department of Fair Employment and Housing ("DFEH") and obtained a right to sue letter, dated July 17, 2019. (Complaint, ¶ 13.)

Plaintiff initiated the instant action on July 15, 2020, with the filing of the still-operative Complaint, which asserts the following claims: (1) Fair Employment and Housing Act ("FEHA") discrimination; (2) harassment, in violation of FEHA; (3) FEHA retaliation; (4) creating and sustaining a hostile work environment under FEHA; (5) failure to prevent discrimination, harassment and retaliation under FEHA; (6) intentional infliction of emotional distress; and (7) negligent infliction of emotional distress.

On May 13, 2024, Defendants[2] filed the instant motion for summary judgment, or in the alternative summary adjudication, which Plaintiff opposed on July 18, 2024. Defendants filed a reply on July 25, 2024.

II. Plaintiff's Request for a Continuance

In opposition to the motion, Plaintiff makes no substantive arguments and, instead, requests a under section 437c, subdivision (h), which provides,

> If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.

When faced with a request for relief under section 437c, subdivision (h), the trial court must determine whether the declaration or affidavit meets the substantive standards of the statute in that it demonstrates "'(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional

[2] "Defendants" refers to the City and Defendants Newton, Trejo, and Parker, collectively. Defendant Murphy does not seem to have appeared in this action.

time is needed to obtain these facts.'" (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633 (*Frazee*), quoting *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623.)

"The reason for this 'exacting requirement' is to prevent 'every unprepared party who simply files a declaration stating that unspecified essential facts may exist' from using the statute 'as a device to get an automatic continuance.' 'The party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented.'" (*Chavez v. 24 Hour Fitness USA, Inc*. (2015) 238 Cal.App.4th 632, 643 (*Chavez*), citing *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715-716 (*Lerma*).) If the party's submission fulfills these requirements, "the court shall deny the [summary judgment] motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." (§ 437c, subd. (h).) "[I]n cases in which the opposing party (usually the plaintiff) has been thwarted in the attempt to obtain evidence that might create an issue of material fact, or discovery is incomplete, the motion for summary judgment should not be granted." (*Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 174.)

If the party does not meet the requirements for a mandatory denial or continuance, the court must still consider whether a party has established "good cause" for a discretionary denial, continuance, or other relief. (*Chavez*, *supra*, 238 Cal.App.4th at p. 643.) The court's discretion must be exercised liberally in favor of granting a continuance: "The interests at stake are too high to sanction the denial of a continuance without good cause." (*Frazee*, *supra*, 95 Cal.App.4th at p. 634; see also *Insalaco v. Hope Lutheran Church of West Contra Costa County* (2020) 49 Cal.App.5th 506, 517-520 [denial of request for continuance to perform site inspection was error]; *Hamilton v. Orange County Sheriff's Dept.* (2017) 8 Cal.App.5th 759, 766 [trial court abused its discretion by denying parties' joint request to continue summary judgment hearing for plaintiff to take necessary depositions]; *Denton v. City & County of San Francisco* (2017) 16 Cal.App.5th 779, 791-794 [oral request at hearing may be sufficient to show good cause for discretionary continuance].)

The Courts of Appeal appear to be split on the question of whether a discretionary request for denial or continuance itself may be denied as a result of a party's failure to show diligence in pursuing discovery. (See *Braganza v. Albertson's LLC* (2021) 67 Cal.App.5th 144, 152-157 (*Braganza*) [discussing cases].) Several courts have held that where the non-moving party has failed to show diligence in pursuing discovery, a denial of any relief under section 437c, subdivision (h) is not an abuse of discretion. (*Braganza*, *supra*, 67 Cal.App.5th at pp. 152-157.)

Nevertheless, in *Chavez*, *supra*, 238 Cal.App.4th at p. 644, the Court of Appeal stated that a discretionary request under section 437c, subdivision (h), should not be denied based on requesting counsel's lack of diligence whenever "the delay" that prompted the request "was not entirely caused by plaintiffs." Also, "[g]ood cause has been found where an attorney's 'dire medical condition' or other special circumstances prevented the completion of discovery." (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 533, citing *Lerma*, *supra*, 120 Cal.App.4th at p. 716 [hospitalization of attorney sufficient good cause for discretionary continuance].)

Plaintiff asserts that Defendants did not properly serve her because they used an incorrect email address for William Gaspe, a paralegal with Plaintiff's counsel's law firm, and,

as a result, Plaintiff was unaware of the filing of the motion until July 17, 2024. (See Declaration of Na'il Benjamin in Support of Opposition to Motion for Summary Judgment or, in the Alternative, Summary Adjudication, ¶¶ 2, 4.) Additionally, her counsel's office staff "who usually monitors all incoming emails did not receive a copy of said filings." (*Id*., ¶ 3.) Further, Defendants have served Gaspe at the correct email address in the past but, this time, they used an old address. (*Id*., ¶ 4.)

Defendants concede that they sent the motion and supporting papers to william@benjaminlawgroup.com, the email address Plaintiff asserts is no longer Mr. Gaspe's.[3] (See Declaration of Elisa Tolentino in Support of Defendants' Reply ("Tolentino Decl."), ¶ 10.) However, they argue that they used the address for Mr. Gaspe that was provided to them and that Mr. Gaspe never informed them that he had changed his address. (*Id.*, ¶¶ 8, 10, 18.) Although Mr. Gaspe had used his new email address in sending items to Defendants' counsel, Defendants' counsel did not notice the change. (*Id.*, ¶ 5.) Defendants also contend that they met and conferred regarding the hearing date for the motion and that they made it clear that they would be filing a motion for summary judgment with an August 1, 2024 hearing date. (*Id*., Exhibit A.)

Plaintiff contends that facts essential to oppose the motion exist but she cannot present them at this time. She maintains that a short continuance would be sufficient to allow her to oppose the motion and it would not prejudice Defendants. However, conspicuously absent from the Plaintiff's papers is any indication of what further *discovery* needs to be conducted and what essential facts she is unable to present.

Defendants contend that they would be prejudiced by the continuance because trial is set to begin on September 9, 2024. They point to Code of Civil Procedrure section 437c, subdivision (a)(3), which provides that a motion for summary judgment "shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise."

Plaintiff's submission is clearly deficient in that it makes no mention of the discovery that remains to be conducted or when it will be conducted and it does not indicate what essential facts Plaintiff has been unable to present. Accordingly, a mandatory continuance under section 437c, subdivision (h) is unavailable. Additionally, as Defendants correctly point out, this case was filed in 2020 and has been pending for four years. Further, although Plaintiff maintains that her counsel was unaware of the summary judgment motion, the discovery cut off is August 9, 2024 and the trial is set to begin on September 9, 2024. Thus, Plaintiff unreasonably delayed in serving deposition notices for six individuals. Plaintiff makes no argument as to any circumstances that would have prevented her from noticing these depositions sooner.

The court does not find that the failure to use Mr. Gaspe's new email renders the notice improper. The motion and supporting documents were served on *Plaintiff's counsel's* correct

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[3] The proof of service attached to the notice of motion indicates that the motion was served electronically on email addresses NBenjamin@benjaminlawgroup.com and william@benjaminlawgroup.com. Notably, nbenjamin@benjaminlawgroup.com is the email address for Na'il Benjamin appearing on his declaration and one of the email addresses on the service list Defendants contend Plaintiff's counsel requested they use. (Tolentino Decl., ¶ 8.)

email address. This is sufficient. Plaintiff makes no attempt to explain why serving Plaintiff's counsel did not result in actual notice of the motion and its hearing date. Further, Defendants have adequately shown that they served the email address for Gaspe that they were provided and that Gaspe never informed them of his updated email address. Further, Defendants correctly point out that counsel for Defendants and counsel for Plaintiff met and conferred regarding an August 1, 2024 hearing date. Notably, Plaintiff's counsel himself responded to the initial email regarding scheduling of the motion.

Under the circumstances, the court finds that a continuance is not warranted. The request for a continuance is DENIED. The court will consider the motion to be unopposed as no Plaintiff provided no substantive opposition.

III. Motion for Summary Judgment

Pursuant to Code of Civil Procedure section 437c, Defendants moves for summary judgment, or, in the alternative, summary adjudication, as to Plaintiff's operative Complaint, and all causes of action therein.

A. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., § 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 Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, at p. 843.) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (§ 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.'" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action…The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72, internal citations omitted; emphasis added.)

When a defendant moves for summary judgment, "its declarations and evidence must either establish a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted." (*Gray* v. *America West Airlines, Inc*. (1989) 209 Cal.App.3d 76, 81.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts 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 party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

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.)

B. Summary Judgment/Adjudication in FEHA Discrimination/Retaliation Cases

Special rules govern the allocation of the burden of proof on motions for summary judgment in wrongful termination and employment discrimination cases, under both federal and state law. " 'Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.' [Citation.]" (*Moore v. Regents of Univ. of Calif.* (2016) 248 Cal.App.4th 216, 233.) Because direct evidence of discrimination is seldom available, courts use a system of shifting burdens as an aid to the presentation and resolution of such cases both at trial and on a motion for summary judgment. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354-355 (*Guz*).) "California has adopted a three-stage burden-shifting test established by the United States Supreme Court for trying employment discrimination claims that are based on the disparate treatment theory. Under this '*McDonnell Douglas*[4] test,' (1) the plaintiff must establish a prima facie case of discrimination; (2) if the plaintiff is successful, the employer must offer a legitimate nondiscriminatory reason for its actions; and (3) if the employer produces evidence on that point, the plaintiff must show that employer's reason was a pretext for discrimination." (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144, citations omitted; see also *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 (*King*).)

When the employer is the moving party, the initial burden rests with the employer to show that no unlawful discrimination occurred. (Code Civ. Proc., § 437c, subd. (p)(2); see *Guz*, *supra*, 24 Cal.4th at pp. 356-357; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1523 [employee has no obligation to produce evidence until defendant "has established either the existence of a complete defense or the absence of an essential element of plaintiff's claim."].) The employer may do this by presenting admissible evidence either negating an essential element of the employee's claim or showing some legitimate, nondiscriminatory reason for the action taken against the employee. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202-203.)

C. Failure to Exhaust Administrative Remedies

Defendants argue that all of Plaintiff's claims are barred due to failure to exhaust her administrative remedies. Defendants recognize that Plaintiff filed a complaint with the DFEH, but they contend that she did not include the conduct she complains of in the Complaint in her DFEH complaint. In order for Plaintiff "to avail herself of state judicial remedies for her

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4 *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.

additional claims [not raised in her original DFEH complaint], it was essential that she undertake by reasonable means to make the additional claims known to the DFEH." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1729-1730.) "It is fundamental that '. . . where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.' [Citation.]" (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1612 (*Okoli)*.)

Defendants assert that the DFEH complaint filed by Plaintiff on September 25, 2018, only named some specific instances of conduct. (See Defendants' Index of Exhibits in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Index of Exhibits"), Ex. D.) Thus, Defendants contend, Plaintiff cannot rely on incidents that were not included in the DFEH complaint to support her claims. Specifically, they assert that the issues of bilingual pay, higher classification pay, the placement of Plaintiff's office under the stairs, and Plaintiff's application for the Inspector position were not included in the DFEH complaint and, therefore, cannot be included in the Complaint filed in court. The court agrees that the claims related to bilingual pay, higher classification pay, and Plaintiff's application for the Inspector position cannot be raised in the Complaint. Claims that were "neither like nor reasonably related" to a DFEH claim and "were not likely to be uncovered in the course of a DFEH investigation" are "barred by the exhaustion of remedies doctrine." (*Okoli*, *supra*, 36 Cal.App.4th at p. 1617.) However, the court finds that the placement of Plaintiff's office under the stairs is sufficiently related to Plaintiff's allegations in the DFEH complaint that her coworkers were jumping on the stairs over her office such that the investigation into the DFEH complaint could have discovered this claim.

The court does not find that the entire Complaint is barred for that reason. Notably, Plaintiff does not specify the bases for her causes of action raised in the Complaint. Instead, the Complaint generally refers to the Defendants' conduct as the basis for each cause of action. Defendants do not assert that any particular cause of action is barred on this ground. Accordingly, the court will go on to discuss the remainder of Defendants' arguments.

Further, to the extent Defendants argue that incidents that occurred outside of the one-year period in which to file a DFEH complaint may not be considered, this argument was rejected by the California Supreme Court in *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1056-1058 (*Yanowitz*). Accordingly, the court rejects that argument as well.

D. Second and Fourth Causes of Action: FEHA Harassment and Hostile Work Environment

Plaintiff's claims stem from harassment allegedly due to her race, age, and an unnamed physical disability. Based on Plaintiff's responses to their form interrogatories and her deposition testimony, Defendants contend that Plaintiff relies on the following conduct to establish her harassment claim:

> 1. On one occasion, Trejo slammed a door and kicked a mail container because she was upset about Plaintiff's refusal to change desks with her (UF No. 19);
> 2. On one occasion, Trejo video recorded Plaintiff as she entered the office, to capture Plaintiff's reaction to the office's holiday decorations (UF No. 20);
> 3. Trejo told Plaintiff not to multitask while performing her job duties (UF No. 21);

4. On one occasion, Trejo refused to allow Plaintiff to charge her headset on Trejo's desk (UF No. 23);
5. Parker assigned Plaintiff difficult emails to respond to (UF No. 26);
6. On one occasion, a wine glass was placed on Plaintiff's desk by an unknown individual (UF No. 28);
7. Parker wrote the word 'ponder' and drew illustrations on an office board to mock Plaintiff's misuse of the word (UF No. 30);
8. On one occasion in 2018, Newton struck one hand with his other fist in front of Plaintiff's face and displayed his middle finger (UF No. 32);
9. On another occasion, Newton gave Plaintiff the middle finger gesture (id);
10. On one occasion, Newton told Plaintiff 'The only time you like it here is when people are kissing your ass' (UF No. 33); and
11. On one occasion, Parker displayed an animated image of a woman with her midsection exposed (UF No. 34).

(Memorandum of Points and Authorities in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Memo."), p. 7:12-28.)

Defendants argue first that, although the Complaint alleges causes of action for harassment and hostile work environment separately, these are two elements required to establish FEHA harassment. Notably, Plaintiff's fourth cause of action (hostile work environment) is based on Government Code section 12940, subdivisions (j)(1) through (j)(4), which deal with harassment. Hostile work environment is a type of harassment. (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461, fn. 6.)

Defendants also assert that Plaintiff cannot establish that the actions listed above occurred because she is a member of a protected class or that it was so pervasive and severe as to create a hostile work environment. The court agrees.

To establish a prima facie case of a hostile work environment, Ortiz must show that (1) she is a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her protected status; (4) the harassment unreasonably interfered with her work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn*. (2019) 37 Cal.App.5th 568, 581.) The plaintiff must show a "concerted pattern of harassment of a repeated, routine or a generalized nature." (*Aguilar v. Avis Rent A Car Sys., Inc.* (1999) 21 Cal.4th 121, 131.) "[C]ourts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial …." (*Lyle v. Warner Bros. Television Prods.* (2006) 38 Cal.4th 264, 283.)

As Defendants note, nothing about the above incidents themselves suggests that they were motivated by Plaintiff's race, age, or disability. Defendants also point to portions of Plaintiff's deposition testimony where she indicates that the Individual Defendants took certain actions, not because of her membership in a protected class but because they simply did not like her. (See Memo., pp. 8:15-9:14, citing Index of Exhibits, Exhibit C (Plaintiff's Deposition Testimony), pp. 114, 118.) Plaintiff's deposition testimony indicates that the incidents above occurred because of the Individual Defendants' dislike of her and not because of her membership in a protected class. (Index of Exhibits, Exhibit C, pp. 99:6-12 [Trejo video recorded Plaintiff "to see my expression of coming out of the elevator and seeing the Christmas

tree all decorated in the office that she did"]; 100:10-17 [Trejo slammed the door and kicked the mail container because Plaintiff did not want to trade seats with her]; 111:23-25 & 114:23-115:19 [Parker wrote the word "ponder" on the white board because Plaintiff misused it and Parker did not like Plaintiff because she knew more than him]; 116 [Plaintiff believes large wine glass was placed on Plaintiff's desk to make fun of her because she drinks wine]; 118:22-119:7 [Trejo and Parker made fun of Plaintiff because they did not like her].)

Further, these incidents consist of mere social slights, which are insufficient to amount of FEHA harassment or a hostile work environment. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 [harassment focuses on situations in which the social environment of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee"].)

Defendants appear to concede that the incident where Parker put up a picture of a woman with her belly hanging out could be considered harassment. (See Index of Exhibits, Exhibit C, p. 107 [Parker put up the picture to make fun of women].)[5] However, they correctly point out that one instance of improper conduct is generally insufficient to constitute a hostile work environment. (See *Lyle v. Warner Bros. Television Prods.*, *supra*, 38 Cal.4th at p. 283.)

Plaintiff has not substantively opposed the motion and the Complaint sheds no light on how this conduct was allegedly motivated by Plaintiff's membership in a protected class. The court finds that Defendants have met their burden at the first step of the summary judgment analysis and Plaintiff has not shown there exists of a triable issue of material fact. Accordingly, the motion is GRANTED as to the second and fourth causes of action.

E. First Cause of Action: FEHA Discrimination

"The specific elements of a prima facie case [of discrimination] may vary depending on the particular facts. [Citations.] Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations.]" (*Guz*, *supra*, 24 Cal.4th at p. 355.)

"In an employment discrimination case, an employer may move for summary judgment against a discrimination cause of action with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. [Citation.] A legitimate, nondiscriminatory reason is one that is unrelated to prohibited bias and that, if true, would preclude a finding of discrimination. [Citation.] The employer's evidence must be sufficient to allow the trier of fact to conclude that it is more likely than not that one or more legitimate, nondiscriminatory reasons were the sole basis for the adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158.)

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[5] As Defendants note, Plaintiff testified that the instances of Newton slamming his fist on the desk and flipping Plaintiff off occurred because Plaintiff reported the Individual Defendants' actions to the Office of Employee Relations ("OER"). (See Index of Exhibits, Exhibit C, pp. 125:13-127:9.) Thus, this evidence would support a claim of retaliation, not harassment and this will be discussed below.

The burden is then on the plaintiff employee to rebut with evidence raising an inference that intentional discrimination occurred. Summary judgment for the employer should be granted where, "given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz*, *supra*, 24 Cal.4th at p. 362.) If the employer meets the initial burden, to avoid summary judgment the employee must produce "substantial responsive evidence that the employer's showing was untrue or pretextual" thereby raising at least an inference of discrimination. (*Hersant v. Cal. Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.)

Again, Plaintiff contends that she suffered discrimination based on age, race, gender, and disability.

i. Age and Gender Discrimination

With respect to age discrimination, the complaint mentions two specific instances of comments. In one instance, Newton stated that it was time for the "old folks" to retire and let the "young bucks" take over. In another, Trejo suggested that Plaintiff should work with "old people". With respect to gender discrimination, in Plaintiff's responses to Defendants' form interrogatories, Plaintiff mentioned that a non-defendant employee told another person "you got to watch that girl; she likes to get into things." (See Index of Exhibits, Exhibit B.)

As Defendants contend, "the determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h)." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054-1055, fn. omitted.)

Defendants meet their burden to show that these instances amount to minor stray comments, reasonably likely to do no more than anger or upset an employee. As such, they are insufficient to state a case for FEHA discrimination.

ii. Disability Discrimination

With respect to disability to discrimination, the complaint alleges that Plaintiff was unable to use the "disabled bathroom." (Complaint, ¶ 9.) Defendants contend that Plaintiff admitted during the course of the OER investigation that she was never told by any employee that she was not allowed to use the Americans With Disabilities Act compliant restroom; instead she did not use that restroom because she would find urine on the toilet and floor. (See Declaration of Allison Suggs in Support of Motion for Summary Judgment or, in the

Alternative, Summary Adjudication ("Suggs Decl."), ¶ 21.) Thus, this conduct does not amount to a discriminatory adverse employment action based on Plaintiff's membership in a protected class.

iii. Adverse Employment Actions

In her responses to Defendants form interrogatories, Plaintiff mentions two incidents of adverse employment actions: (1) denial of higher class pay while performing a higher classification job, and (2) the "questioning" regarding Plaintiff's application for the Inspector position and the fact that she was not interviewed for same. (Index of Exhibits, Exhibit B, pp. 6-7.) With respect to higher classification pay, Defendants contend that Plaintiff received higher classification pay when she performed higher classification work and she otherwise did not receive such pay because she was not performing such work. They provide evidence of the requirements for receiving higher classification pay and that Plaintiff was paid for higher classification work when she performed it during vacancies in the role of Senior Office Specialist. (Suggs Decl., ¶¶ 8-11; Declaration of Carolyn Landon-Ramirez in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Landon-Ramirez Decl."), ¶¶ 6-8.)

With respect to the questioning of Plaintiff for the Inspector position, Plaintiff contends that she was asked about a conflict of interest. Defendants argue that the questioning was warranted as Plaintiff's experience listed on her application to meet the requirements of the position included a position as an intern with a company owned by her significant other. Thus, questioning regarding a potential conflict of interest was reasonable. The evidence Defendants cite in support, portions of Plaintiff's deposition testimony, do not support the claim that the business where Plaintiff interned was owned by a significant other. Accordingly, this argument is rejected. Nonetheless, the court finds that one instance of a supervisor asking Plaintiff questions about a conflict of interest in regards to a job application does not amount to discrimination as an employee's qualifications for a job she has applied for is a legitimate business interest. There is no evidence this questioning occurred because of Plaintiff's membership in a protected class.

Defendants also argue that questioning regarding Plaintiff's physical ability to perform the Inspector job because, at the time of her application, Plaintiff had a health condition that required her to be able to sit and stand as she desires, which is inconsistent with the work of an Inspector. They rely on Plaintiff's own deposition testimony indicating that she was required to be able to sit and stand "when [she] wanted to." (Index of Exhibits, Ex. C., p. 76, lns. 18-23.) They have also provided evidence that an Inspector "is not always able to control how long they must stand, how far they must walk to a site, or when they are able to take a break." (Landon-Ramirez Decl., ¶ 13.) Accordingly, Defendants have met their burden at the first step of the summary judgment analysis as to the questioning regarding the Inspector position.

With respect to the failure to interview Plaintiff for the Inspector position, the concern for whether Plaintiff could perform the duties of the job is sufficient to show a legitimate reason for the failure to interview Plaintiff.

Defendants have met their burden at the first step of the summary judgment analysis as to the first cause of action. Plaintiffs have provided no evidence in opposition to support the

finding of the existence of a triable issue of material fact. The motion is GRANTED as to the first cause of action.

F. Fourth Cause of Action: FEHA Retaliation

It is unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [the FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]." (Gov. Code, § 12940, subd. (h).) "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)

As part of a prima facie claim for retaliation, Plaintiff must prove that she partook in such a protected activity. Plaintiff contends that her coworkers retaliated against her after the she complained to the OER. Defendants do not contend that Plaintiff has not established that she engaged in protected activity.

Defendants contend that Plaintiff was not subjected to adverse employment action due to her complaints to the OER. The following instances of conduct are alleged to support Plaintiff's retaliation claim: (1) denial of higher classification pay, (2) denial of bilingual pay, (3) on one occasion, Trejo would not allow Plaintiff to charge her headset on Trejo's desk, (4) one time, Newton hit his fist on a table and displayed his middle finger toward Plaintiff and, another time, he flipped her off, (5) Plaintiff was excluded from use of her email on one occasion, and (6) Plaintiff was excluded from a meet and greet function on one occasion.

An adverse employment action "consists of discrimination regarding compensation, terms, conditions, or privileges of employment and disparate treatment in employment, specifically requiring people to work in a discriminatorily hostile or abusive environment." (*Malais v. Los Angeles City Fire Dept*. (2007) 150 Cal.App.4th 350, 357 (*Malais*), citing *Yanowitz*, *supra*, 36 Cal.4th at p. 1052.) By contrast, " '[m]inor or relatively trivial adverse actions or conduct by employers o[r] fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable.' " (*Ibid*. quoting *Yanowitz*, *supra*, 36 Cal.4th at pp. 1054-1055.) "Actions that threaten to derail an employee's career are objectively adverse[.]" (*Yanowitz*, *supra*, 36 Cal.4th at pp. 1060.)

"Not every change in the conditions of employment, however, constitutes an adverse employment action." (*Malais*, *supra*, 150 Cal.App.4th at p. 357.) For example, a change that is merely contrary to the employee's interests or not to the employee's liking is insufficient. (*Ibid*.) This is because workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action. (*Ibid*.) A plaintiff claiming he was subjected to an adverse employment action based on discrimination must demonstrate the employer's actions had a detrimental and substantial effect on the plaintiff's employment. (*Id*. at p. 358.)

Other than the denial of higher classification and bilingual pay, none of the above incidents, taken individually or together, are sufficient to constitute adverse employment actions. "[A] mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of [Government Code] section 12940(a) (or give rise to a claim under [Government Code] section 12940(h)) . . . ." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1054.) Here, the complained of behavior, albeit quite unprofessional, consists of what might be termed "commonplace indignities typical of the workplace". (*Id.* at p. 1060.) While the failure to allow Plaintiff to charge her headset may have had an impact on Plaintiff's job duties in the moment, Plaintiff does not allege that there was no other possible place to charge it. Thus, it amounts to a mere inconvenience. With respect to Plaintiff's email access, Defendants have presented evidence that Plaintiff informed the OER that she was unable to access a certain email account for two hours on one specific day and, on an another day, Plaintiff contended that her access to a different email account had been removed. (Suggs Decl., ¶¶ 22, 24.) But, Trejo and Parker, whom Plaintiff blamed for the first incident did not have the ability to modify access to the email accounts and, in response to the second incident, it was confirmed that Plaintiff had access to the account. (*Id.*, ¶¶ 23, 24.)

With respect to the denial of higher classification pay and bilingual pay, Defendants contend that Plaintiff cannot show that these actions were the result of Plaintiff's reports to the OER. With respect to bilingual pay, Plaintiff did not meet the requirements to receive such pay because she was not certified to provide Spanish translations. Defendants provide evidence that the memorandum of agreement between the City and Plaintiff's union requires that an employee be certified, which requires the employee pass a test. (Suggs Decl., ¶ 7.) But, the City's human resources department has no record of Plaintiff taking the test. (Declaration of Gina Pineda in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication, ¶ 4.) Higher classification pay has been discussed above in the context of the discrimination cause of action and any argument that denial of higher classification pay provides a basis for the retaliation cause of action would fail for the same reasons discussed above.

Defendants have met their burden at the first step of the summary judgment analysis as to the fourth cause of action. Plaintiff has provided no evidence raising a triable issue of material fact. Accordingly, the motion is GRANTED as to the fourth cause of action.

G. Fifth Cause of Action: Failure to Prevent Harassment, Discrimination, and Retaliation

Government Code section 12940, subdivision (k) provides that it is an unlawful employment practice "[f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Because Plaintiff's claims of harassment, discrimination, and retaliation fail, the fifth cause of action for failure to prevent same must necessarily also fail. The motion is GRANTED at to the fifth cause of action.

H. Sixth and Seventh Causes of Action: Intentional and Negligent Infliction of Emotional Distress

Defendants argue that the sixth and seventh causes of action (intentional and negligent infliction of emotional distress fail because Plaintiff has not complied with the claims

presentation requirement of the Government Claims Act (Gov. Code § 810, et seq.) "Under [Government Code] section 911.2, '[a] claim relating to a cause of action for death or for injury to person or to personal property … shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than six months after the accrual of the cause of action.' [Government Code s]ection 945.4 then provides that "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity . . . Thus, under these statutes, failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239.)

Further, the claims presentation requirement applies to the Individual Defendants. "Except as provided in Section 950.4, a cause of action against *a public employee or former public employee* for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immune from liability for the injury." (Gov. Code, § 950.2, italics added.) Notably, the Complaint indicates that the Individual Defendants were acting within the scope of their employment when the complained of conduct occurred. (Complaint, ¶ 9.)

Here, as Defendants point out, the Complaint makes no allegations that the claims presentation requirement has been complied with. Defendants present evidence that the City has no record of any claims filed by Plaintiff between January 2017 and August 2020.[6]

Defendants have met their burden at the first step of the summary judgment analysis. As Plaintiff has presented no evidence in opposition, the motion is GRANTED as to the sixth and seventh causes of action.

IV. Conclusion

Plaintiff's request for a continuance is DENIED. Defendants' motion for summary judgment is GRANTED.

The Court will prepare the Final Order.

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[6] Plaintiff alleges that the conduct began in November 2017, (see Complaint, ¶ 19), and the Complaint was filed in July 2020.