SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: October 31, 2023 TIME: 9:00 A.M.

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

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

***New information* (please read)**: To set future motion hearings, you no longer need to file your motion before receiving a hearing date. Phone lines are now open for you to call and reserve a hearing date *before filing and serving* your motion. Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve your date. This will obviate the need to file and serve a separate amended notice at a later time. Please note: if your motion papers are not filed within five business days of reserving the hearing date, the date will be released to other cases.

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

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

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

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung
Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: October 31, 2023 TIME: 9:00 A.M.

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

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV395989	Sisi Xu et al. v. Bethany Liou et al.	Continued order of examination (Monterey Dynasty): parties to appear in person.
LINE 2	22CV395989	Sisi Xu et al. v. Bethany Liou et al.	Continued order of examination (Bethany Liou): parties to appear in person.
LINE 3	22CV395989	Sisi Xu et al. v. Bethany Liou et al.	Continued order of examination (Golden California Regional Center): parties to appear in person.
LINE 4	21CV385230	Formation8 Partners, LLC v. Arch Insurance Company et al.	Click on LINE 4 or scroll down for ruling in lines 4-5.
LINE 5	21CV385230	Formation8 Partners, LLC v. Arch Insurance Company et al.	Click on LINE 4 or scroll down for ruling in lines 4-5.
LINE 6	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 6 or scroll down for ruling in lines 6-10.
LINE 7	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 6 or scroll down for ruling in lines 6-10.
LINE 8	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 6 or scroll down for ruling in lines 6-10.
LINE 9	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 6 or scroll down for ruling in lines 6-10.
LINE 10	19CV358256	Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.	Click on LINE 6 or scroll down for ruling in lines 6-10.
LINE 11	22CV398376	Yuyang Cao v. Aegle Analytica Inc.	OFF CALENDAR
LINE 12	1999-7-CV-386483	Jose Mezzetti v. John Mickey II	Return of civil bench warrant: parties to appear.

- oo0oo -

Calendar Lines 4-5
Case Name: *Formation8 Partners, LLC v. Arch Insurance Company et al.*
Case No.: 21CV385230

This is a third-party insurance coverage dispute between plaintiff Formation8 Partners, LLC ("Formation8") and defendants Arch Insurance Company ("Arch") and Woodruff-Sawyer & Co. ("Woodruff-Sawyer"). Formation8 alleges that Arch had a duty to pay defense costs for an underlying arbitration brought against Formation8 by one of its former employees, Tanguy Chau ("Chau"). Arch has denied coverage, alleging that Formation8 failed to provide timely notice of Chau's claim under the insurance policy. Formation8 and Arch have now filed dispositive motions against each other. For the reasons that follow, the court GRANTS in part and DENIES in part Formation8's motion for summary adjudication, DENIES Arch's motion for summary judgment, and GRANTS in part and DENIES in part Arch's motion for summary adjudication.

I. BACKGROUND

A. The Policies

Formation8 was the named insured under successive insurance policies issued by Arch: Arch Alternative Asset Management Liability Policy Number AAP9300217-03, effective August 16, 2017 to August 16, 2018, and Arch Alternative Asset Management Liability Policy Number AAP9300217-04, effective August 16, 2018 to August 16, 2019 (collectively, the "Arch Policies"). (First Amended Complaint, ¶ 9.) According to the First Amended Complaint ("FAC"), the Arch Policies provided the following coverage:

> A. Insured Person Liability
> Except for Loss paid as indemnification by an Insured Organization, the Insurer shall pay Loss on behalf of any Insured Person resulting from a Claim first made against such Insured Person during the Policy Period or Extended Reporting Period, if applicable, for a Wrongful Act.
>
> B. Organization Reimbursement
> The Insurer shall pay Loss on behalf of an Insured Organization that such Insured Organization is permitted or required to indemnify any Insured Person resulting from a Claim first made against such Insured Person during the Policy Period or Extended Reporting Period, if applicable, for a Wrongful Act.
>
> C. Organization Liability
> The Insurer shall pay Loss on behalf of an Insured Organization resulting from a Claim first made against such Insured Organization during the Policy Period or Extended Reporting Period, if applicable, for a Wrongful Act.

(*Id*. at ¶ 12.) An insurance policy for a "Claim first made" against the insured person or organization is sometimes referred to as a "claims made" policy.

B. The Underlying Action[1]

Chau worked at Formation8, a venture capital firm, starting in May 2013. In 2015 or 2016, Chau began looking for other work, and in April 2017, he received an offer of employment from Mayfield, another venture capital firm. Chau and Formation8's Founder and Managing Member, James Kim, began negotiating the terms of Chau's separation, with a significant amount of back-and-forth between the parties in April, May, and June 2013. Formation8's CFO, Brett Cummings, was also involved in these negotiations. According to Formation8, on June 13, 2017, Chau requested a severance payment "for the first time" as part of his separation. (Formation8's MPA in Support of Summary Adjudication at p. 3:24-27.) On July 13, 2017, Chau wrote to James Kim, stating that he had retained an attorney, Thomas Kim "to help and support me so we can close this." (Declaration of James Kim in Support of Formation8's Motion, Exhibit B.)

On September 9, 2017, Thomas Kim sent an email on behalf of Chau indicating that Chau wanted "to amicably resolve his separation matters without litigation," but that his efforts did "not seem to be reciprocated by Formation 8." Chau's attorney went on to assert, allegedly for the first time: that Chau had been subjected to "a very hostile and toxic work environment while at Formation 8 and the company was aware of it"; that "Formation 8 has retaliated against him and wrongfully terminated him"; that "Mr. Chau has suffered financial damages and this wrongful termination by the company will negatively impact his career"; and that Chau "continues to suffer severe emotional distress." The email indicated that "Mr. Chau has many viable claims against the company such as but not limited to: (1) wrongful termination; (2) retaliation in violation of the [FEHA]; and (3) termination in violation of the implied covenant of good faitth and fair dealing in CA." Finally, the email ended by stating: "If we do not hear from you within 10 days of this email, we will assume Formation 8 prefers the litigation path and Mr. Chau will pursue it accordingly." (Declaration of James Kim, Exhibit C; see also FAC at ¶ 10.)

Shortly after receiving this email, James Kim and Brett Cummings decided to "reach out to Mayfield" to obtain assistance in negotiating with Chau. (June 24, 2020 Decision at p. 5:15-18.) It is undisputed that there were multiple communications between Formation8 and Mayfield, although the exact content of those communications is disputed. It is also undisputed that Mayfield and Chau had further discussions about Chau's employment at Formation8. Later that same month, Mayfield terminated Chau's employment. On September 24, 2017, Chau asked James Kim to join a conference call with Mayfield to try to convince Mayfield to rehire him. According to Chau, Kim refused to join the call unless Chau agreed to release all claims against Formation8; according to Kim, Chau stated that he would sign the separation agreement only if Mayfield actually rehired him. The parties could not agree on any of this, and Kim ultimately did not participate in the call. (*Id.* at p. 7:16-24.)

On November 2, 2018, Chau filed a demand for arbitration (the "Arbitration Demand") against Formation8, claiming: 1) Defamation; 2) Retaliation in Violation of California Fair Employment and Housing Act; 3) Intentional Interference with Contractual Relations; 4)

[1] Because of the distressing lack of clarity in the parties' briefing, the court's summary of the underlying arbitration relies in part on the background section of the arbitrator's "Decision and Rulings on Respondents' Dispositive Motion," dated June 24, 2020, which is attached as Exhibit G to the Declaration of Michael Skoglund in Support of Arch's Motion. None of the material facts in this summary appear to be disputed by the parties here.

Intentional Interference with Prospective Economic Relations; 5) Violation of Labor Code Section 1050; 6) Breach of Contract; 7) Breach of Covenant of Good Faith and Fair Dealing; 8) Intentional Infliction of Emotional Distress; 9) Wrongful Termination in Violation of Public Policy; 10) Violation of Labor Code Section 206.5; and 11) Retaliation in Violation of Labor Code Section 1102.5.

On March 4, 2019, Woodruff-Sawyer tendered the Arbitration Demand to Arch, which denied coverage on the ground that the claim was triggered by the September 9, 2017 email from Chau's attorney and therefore fell under the 2017-2018 policy, rather than the 2018-2019 policy. (FAC at ¶¶ 11, 16.) Under Paragraph 11(A) of the Arch Policies, "[a]s a condition precedent to coverage, the Claim Manager shall give the Insurer written notice of any Claim as soon as practicable, but no later than 60 days after the end of the Policy Period or the Extended Reporting Period, if applicable." (Declaration of Michael Skoglund, Exhibit A at p. ARCH_000030.) Under this provision, Arch contends that notice of the claim was due by October 15, 2018, making the tender on March 4, 2019 four and a half months too late.

C. The Present Lawsuit

Formation8 filed the present lawsuit on July 2, 2021. The operative FAC alleges the following causes of action against the defendants:

1. Breach of Contract – against Arch
2. Breach of the Implied Covenant of Good Faith and Fair Dealing – against Arch; and
3. Negligence – against Woodruff-Sawyer.

Currently before the court are two cross-motions for summary judgment or adjudication by Formation8 and Arch. Formation8's motion for summary adjudication contends that Arch owed a duty to pay defense costs for the arbitration. Arch's motion for summary judgment, or in the alternative, summary adjudication, argues that Formation8 cannot establish the elements of its breach of contract and breach of the implied covenant of good faith and fair dealing causes of action. Arch also seeks a summary adjudication that Formation8 cannot establish the malice, oppression, or fraud required for punitive damages.

II. EVIDENTIARY MATTERS

A. Evidentiary Objections

Both sides have filed evidentiary objections on these motions. The court will not rule on Formation8's objections, as they do not comply with Rule of Court 3.1354. The rule requires the filing of two documents, evidentiary objections and a separate proposed order on the objections, and both must be in one of the two approved formats set forth in the Rule. Both documents must be filed at the same time as the objecting party's opposition or reply papers. (Rule of Court 3.1354(a).) Formation8's objections do not comply with the rule, and the court is not required to decide objections that do not fully comply with the rule. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) As for Arch's objections, which are more limited,

the court agrees that the objected-to items are irrelevant and immaterial, and so the court sustains these objections and has disregarded the four items identified by Arch in the Declaration of James Kim.

In granting or denying a motion for summary judgment or summary adjudication, the court needs to 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 of Civil Procedure, § 437c, subdivision (q).)

B. Formation8's Request for Judicial Notice

Formation8 requests judicial notice of the following exhibits attached to the Declaration of James Kim:

A. Arch Policy AAP9300217-04 from Arch to Formation8 with a policy period of August 16, 2018 to August 16, 2019;

B. Email from Mr. Chau dated July 13, 2017, regarding the negotiation of his separation agreement;

C. Email dated September 9, 2017, from Thomas Kim to Andrew Thornborrow (Formation8's attorney);

D. Arbitration demand filed by Tanguy Chau and served on Formation8 November 2, 2018;

E. Denial letter dated August 21, 2019 from Arch denying a defense to Formation8;

F. Letter dated October 3, 2019 from defense counsel for Formation8 in the underlying arbitration in response to Arch's denial letter;

G. Letter dated December 18, 2019, from Arch to Formation 8 in which Arch maintains its denial; and

H. Portions of Tanguy Chau's deposition from the underlying arbitration.

The court notes that Formation8 does not cite any Evidence Code sections upon which it bases its request. (See Code Civ. Proc., § 1010 ["Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based."].)

Nevertheless, although the court DENIES Formation8's request for judicial notice, the court may consider the exhibits as evidence, to the extent that their authenticity and admissibility are undisputed by Arch.

III. LEGAL STANDARDS

A motion for summary judgment must dispose of the entire action, while a motion for summary adjudication may dispose of a cause of action, affirmative defense, or punitive damages, and it may also determine whether a defendant owed a duty to a plaintiff. (Compare

Code Civ. Proc., § 437c, subd. (a) with Code Civ. Proc., § 437c, subd. (f).) Nonetheless, "[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].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*); see also *Quidel Corp. v. Super. Ct.* (2020) 57 Cal.App.5th 155, 163-164 ["A plaintiff moving for summary adjudication meets its burden if it proves each element of the cause of action. [Citation.]"].) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Aguilar, supra,* 25 Cal.4th at p. 856.)

On a motion for summary judgment or adjudication, the moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (*Johnson v. American Standard, Inc*. (2008) 43 Cal.4th 56, 64, parentheses added.)

IV. FORMATION8'S MOTION FOR SUMMARY ADJUDICATION

Formation8 moves for summary adjudication on an issue of duty: *i.e.*, whether Arch owed Formation8 a duty to defend (or duty to indemnify defense costs incurred in) the underlying arbitration filed by Tanguy Chau against Formation8, James Kim, and Brett Cummings. Arch opposes the motion, arguing that Formation8 failed to present timely notice of the claim, as required by the Arch Policies.

"In general, interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation." (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 194.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.)

Parties to a contract may define their duties toward one another in the event of a third-party claim against one or both arising out of their relationship, and "may also assign one party, pursuant to the contract's language, responsibility for the other's legal defense when a third party claim is made against the latter." (*Crawford v. Weather Shield Mtf. Inc.* (2008) 44 Cal.4th 541, 551 (*Crawford*), italics omitted, citing Civ. Code, § 2772 and *Mel Clayton Ford v. Ford Motor Co.* (2002) 104 Cal.App.4th 46, 49.) The duty to defend generally arises when a claim against the indemnitee is made, and is an issue appropriately resolved on summary adjudication. (*Crawford, supra,* 44 Cal.4th at p. 568; *Transamerica Ins. Co. v. Superior Court* (1994) 29 Cal.App.4th 1705, 1713, citing Code Civ. Proc., § 437c, subd. (f).)

"[W]here plaintiff's complaint alleges facts embraced by the indemnity agreement, the indemnitor has a duty to defend throughout the underlying tort action unless it can conclusively show by undisputed facts that plaintiff's action is not covered by the agreement." (*Centex Homes v. R-Help Construction Co., Inc.* (2019) 32 Cal.App.5th 1230, 1237 (*Centex*).) "On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 655.) Thus, the duty to

defend arises "'if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.'" (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.* (2018) 5 Cal.5th 216, 222 [quoting *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308].)

In this case, Arch points out that the insurance policies are not "traditional duty to defend" policies, because the duty to defend actually rests with the policyholder. (Arch's Opposition to Formation8's Motion at p. 13:2-7.) In Paragraph 10(A) of the Arch Policies, it states: "It shall be the duty of the Insureds to defend any Claim, provided that the Insurer shall have the right to effectively associate with the Insureds in the defense of any Claim and make any investigation it deems appropriate." Paragraph 10(B) further states: "At the written request of the Insureds, the Insurer shall advance on a current basis Defense Costs excess of the applicable Retention, provided the Insureds shall repay such Defense Costs if it is subsequently determined that such Defense Costs are not covered under this Policy." (Kim Decl., Ex. A at F8002032; boldface removed.) Thus, under the policies, Formation8 must defend itself in the arbitration, but it may seek indemnification of defense costs from Arch; in addition, it may request an "advance on a current basis" of those defense costs from Arch. In other words, the "duty to defend" at issue here is more like a "*duty to indemnify defense costs in realtime*." The reason this is significant is that the parties have provided *virtually no information to the court* as to what actually happened in underlying arbitration. All that the court has is the Arbitration Demand, the June 24, 2020 "Decision and Rulings on Respondents' Dispositive Motion" from the arbitrator, which granted in part and denied in part Formation8's dispositive motion, and the bare statement that "[o]n March 19, 2021, the arbitrator issued her final award." (Kim Decl., ¶ 15.) Given that the arbitration has now concluded, this court is being asked simply to address a duty to indemnify fixed, *historical* defense costs. There is no question about any duty to "advance" these costs, because we are already at the point—two and a half years after the arbitration—where it may "subsequently [be] determined that such Defense Costs are not covered under this Policy." (Kim Decl., Ex. A at F8002032.)

Because, as discussed below, the court ultimately concludes that Arch owes *some* of the claimed defense costs to Formation8, but *not all* of them, it would have been helpful if the parties had actually provided more information to the court about the underlying arbitration.

1. Formation8's Showing of Potential Coverage

Formation8 argues that the underlying arbitration falls within the provisions of the 2018-2019 Arch Policy. That policy (Arch Policy AAP9300217-04) defines "claim" as any of the following:

1. written demand or notice for civil monetary damages or other civil non-monetary relief commenced by an Insured's receipt of such demand or notice;

2. civil proceeding, including, without limitation, an arbitration or alternative dispute resolution proceeding, commenced by the service upon an Insured of a complaint, demand for arbitration, request for mediation or similar document, including a foreign equivalent thereof;

3. criminal proceeding commenced by the return of an indictment, information, or similar document, including a foreign equivalent thereof;

4. administrative or regulatory proceeding commenced by the filing of a notice of charges or similar document, including a foreign equivalent thereof;

5. civil, criminal, administrative, or regulatory investigation of an Insured commenced upon such Insured's receipt of a formal order of investigation, or once such Insured is identified by name in a Wells Notice, subpoena or "target" letter (within the meaning of Title 9, 11.151 of the United States Attorney's Manual) by an investigating authority as a person or entity against whom a proceeding described in 2, 3 or 4 above may be commenced; or

6. written request to an Insured to toll or waive a period or statute of limitations regarding a potential Claim as described above commenced by the Insured's receipt of such request.

(Kim Decl., Ex. A at p. F8002019, boldface removed.)

Chau served Formation8, who was the "Insured" under the Arch Policies, with the Arbitration Demand on November 2, 2018, which is within the coverage period of the 2018-2019 Arch Policy AAP9300217-04. (FAC, ¶¶ 9, 11.) This is sufficient to meet Formation8's initial burden of showing a potential for insurance coverage under this "claims made" policy. Arch therefore bears the burden of establishing the absence of potential coverage. (See *Centex, supra,* 32 Cal.App.5th at p. 1237.)

2. Arch's Response

In its opposition, Arch argues that Formation8 is not entitled to coverage because: (1) the September 9, 2017 email is a "claim" under the *first* of the two Arch Policies before the court (the 2017-2018 policy, not the 2018-2019 policy), and Formation8 tendered the claim too late under that earlier policy; and (2) any claim set forth in Chau's November 2, 2018 Arbitration Demand arises out of "Wrongful Acts" that are "interrelated" with the claim set forth in the September 9, 2017 email, which means that it also falls under the coverage period of the earlier policy, not the later one.

a) The September 9, 2017 Email

Arch contends that the September 9, 2017 email from Chau's lawyer was a "claim" under the earlier policy, because it constituted a "written demand or notice for civil monetary damages or other civil non-monetary relief commenced by an Insured's receipt of such demand or notice." (Kim Decl., Ex. A, p. F8002019, boldface removed.) Indeed, the email notifies Formation8 of Chau's potential legal claims and threatens litigation to resolve the "separation matter." (Kim Decl., Ex. C, pp. F8000990-91.) In particular, the email states that with respect to his wrongful termination and retaliation claims, "Mr. Chau remained hopeful that the company would want to amicably resolve the issues with a fair separation benefit rather than pursuing his claims," and that "Mr. Chau's possible claims against the company may carry significant punitive damages and attorney's fees." (*Ibid.*)

Arch points out that for purposes of insurance policy claims, courts have understood a simultaneous request for compensation and threat of litigation as a "demand" in the ordinary sense of the word. (*Westrec Marina Management, Inc. v. Arrowood Indemnity Co.* (2008) 163 Cal.App.4th 1387, 1393 (*Westrec*) [citing *Phoenix Ins. Co. v. Sukut Construction Co.* (1982) 136 Cal.App.3d 673, 677–678 (*Phoenix*)]; see also Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/demand> [defining "demand" as "something claimed as due or owed"].)

In *Westrec*, a company had an insurance policy, and one of the company's employees claimed she was subjected to discrimination. (*Westrec, supra,* 163 Cal.App.4th at p. 1387.) The employee's attorney sent a letter restating the employee's claim and inquired "if [the company] would prefer to resolve or mediate this matter, or if it will be necessary to file a lawsuit and have a jury decide the outcome." (*Id.* at p. 1390.) The Court of Appeal concluded that "the insistence on compensation by way of settlement in lieu of litigation constituted a demand for 'civil damages or other relief' within the ordinary meaning of those words." (*Id*. at p. 1393 ["absent some form of negotiated compensation, [the employee] would commence a lawsuit against [the company]."]

In *Phoenix*, an attorney had an insurance policy and executed a mechanic's lien for a client. (*Phoenix, supra,* 136 Cal.App.3d at p. 673.) When the client discovered the lien may have been inadequate, the client demanded the attorney "to work without pay to correct the problem with the lien." (*Id*. at p. 675.) The Court of Appeal held that the client's demand was a claim because "[a] claim, both in its ordinary meaning, and in the interpretation given to it by other courts in similar circumstances [Citations], is a demand for something as a right, or as due." (*Id*. at p. 677.)

Formation8's reply does not directly address Arch's reliance on *Westrec* and *Phoenix* for these principles. Instead, Formation8 repeats its anticipatory arguments from the opening brief, citing cases that are generally distinguishable.

In Formation8's first case, *Domokos v. Scottsdale Ins. Co.* (N.D. Cal. July 16, 2020, No. 20-cv-00336-SVK) 2020 U.S.Dist.LEXIS 125648 (*Domokos*), plaintiffs were officers of a company, and the defendant was an insurance company that denied coverage for a pending state court action. The *Domokos* defendant contended that an email demanding that the plaintiffs pay for overdue invoices constituted a "claim" under the policy because it was a "'written demand against any Insured for monetary damages or non-monetary or injunctive relief.'" (*Id*. at *12.) While the email was not submitted as evidence before the court, the email (as described) did not constitute a "claim," according to the U.S. District Court, because it did not "indicate a threat of legal action or demand damages from Plaintiffs, as opposed to requesting payment of moneys owed under a contract." (*Id*. at *14.) The *Domokos* court noted that this conclusion was bolstered by the fact that the complaints in the underlying action referred to other communications regarding unpaid invoices.[2] (*Id.* at *15.)

[2] Contrary to Formation8's assertion that the two-year delay was relevant to the District Court's holding, the discussion of delay was an attempt at explaining the insurer's inconsistent positions as to which communications constituted a claim. (*Domokos, supra,* 2020 U.S.Dist.LEXIS 125648, at *15-16 ["Scottsdale's focus on the November 6, 2012 email might be explained by its mistaken belief that the Underlying Action was filed within a few months of that email."])

In *Catlin Specialty Ins. Co. v. Camico Mut. Ins. Co.* (N.D.Cal. 2012) 896 F.Supp.2d 808, 819-820 (*Catlin*), Catlin Specialty Insurance Company issued an insurance policy to CAMICO Mutual Insurance Company that defined a "claim" as "'a written demand received by [CAMICO] for monetary damages . . . for an actual or alleged Wrongful Act.'" (*Catlin, supra,* 896 F.Supp.2d 809 [boldface removed].) Catlin sought a declaration that it had no duty to defend or indemnify CAMICO for a claim made against CAMICO by one of its insureds, because the alleged claim fell outside of the coverage period. (*Ibid*.) The *Catlin* court rejected Catlin's argument that the letters sent by CAMICO's insured to CAMICO urging settlement of a third party lawsuit were "claims," because the insured failed to make a demand for extracontractual monetary damages or assert that CAMICO had a duty above and beyond payment of the policy limits. (*Id.* at p. 819.)

While Formation8 concedes that the email stated Chau's grievances, it maintains that because Chau did not seek damages in connection with the claims, the email was solely a request for payment of a severance. This argument ignores the contents of the September 9, 2017 email, which unlike the communication in *Domokos*, details Chau's wrongful termination and harassment claims, and threatens that if Formation8 does not express interest in discussing the separation matter within 10 days of the email, "we will assume Formation 8 [*sic*] prefers the litigation path and Mr. Chau will pursue it accordingly." (See Kim Decl., Ex. C, p. F8000991.)

The court also rejects Formation8's argument that Chau's repeated demand for a severance payment was not a claim for "monetary damages." Formation8 asserts that "a severance payment is not 'civil monetary damages'" (see, e.g., Formation8's Opposition to Arch's Motion for Summary Judgment at p.7:1-2), but it provides no authority to support this bold proposition, other than its own uniquely constricted interpretation of "monetary damages." In this case, even a cursory review of the September 9, 2017 email makes it clear that Chau's attorney was demanding a severance payment from Formation8 that was based at least in part on his claims of having been subjected to "a very hostile and toxic work environment while at Formation 8," retaliation and wrongful termination, "financial damages [that] will negatively impact Chau's career," and "severe emotional distress." This is the very essence of monetary damages.

For the foregoing reasons, the court concludes that the September 9, 2017 email was a "claim," and because Formation8 failed to tender the claim in time under the 2017-2018 Arch Policy, Arch did not owe a duty to defend the "Wrongful Acts" alleged within the email. Accordingly, the court DENIES Formation8's motion for summary adjudication on this basis.

b) The Arbitration Demand

Arch goes on to argue that the "wrongful acts" set forth in the Arbitration Demand are also subject to the 2017-2018 Arch Policy, because they are interrelated with the "wrongful acts" set forth in the September 9, 2017 email. According to Arch, because both the email and the Arbitration Demand arise from employment disputes between Chau and Formation8, including the terms of his separation, and because both include allegations of retaliation, wrongful termination, failure to pay carried interest, and a breach of the covenant of good faith and fair dealing, they are all part of a "single claim." (See Kim Decl., Ex. C at p. F8000991; see also Ex. D at pp. F8001099, F8001109-19; see also Skoglund Decl., Ex. A.) To support this argument, Arch cites the Interrelated Claims provision of the Arch Policies:

> All Claims arising from, based upon, or attributable to the same Wrongful Act or Interrelated Wrongful Acts shall be deemed to be a single Claim first made on the earliest date that:
>
> > A. any of such Claims was first made, even if such date is before the Policy Period;
> >
> > B. proper notice of such Wrongful Act or any Interrelated Wrongful Act was given to the Insurer pursuant to Section 11.B; or
> >
> > C. notice of such Wrongful Act or any Interrelated Wrongful Act was given under any prior directors and officers, management, or similar insurance liability policy.

(Boldface removed.)

Arch Policy AAP9300217-03 defines a "Wrongful Act" as "any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by an [Insured]" or "Employment Practices Wrongful Act," which, in turn, is defined as "wrongful dismissal, discharge or termination of employment, including constructive dismissal, discharge, or termination" or workplace harassment. "Interrelated Wrongful Acts" is defined as "Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes." (Kim Decl., Ex. A; Skoglund Decl., Ex. A.) Arch argues that even though some of the allegations of the Arbitration Demand arose after Chau's time at Formation8, the defamation and intentional interference causes of action in the Arbitration Demand are interrelated with the hostile work environment and retaliation claims in the September 9, 2017 email and should all be treated as part of a single "claim."

Formation8 counters that because "a wrongful act of maintaining a hostile work environment is of a very different nature than wrongful acts of post-employment retaliation, defamation, and interference with contractual relationships," this court should apply the same analysis that the U.S. District Court's applied in the unreported case of *Opus Bank v. Liberty Ins. Underwriters, Inc.* (C.D.Cal. June 26, 2013, No. SACV 13-00469-CJC(JPRx)) 2013 U.S.Dist.LEXIS 189915 (*Opus*). In *Opus,* a plaintiff bank (insured) sought a declaration that a defendant (insurer) had a duty to defend claims asserted by a former bank employee in a demand letter. (*Id.*, 2013 U.S.Dist. LEXIS 1899155 at * 1.) The insurance policy contained a "Prior Acts Exclusion," which excluded from coverage any "Wrongful Acts" committed in whole or in part before coverage began on September 30, 2010, as well as any "Wrongful Acts" committed *after* September 30, 2010 that had a common nexus to acts committed in whole or in part *before* that date. (*Id*. at *3.) In the demand letter, the former employee alleged three claims: fraudulent misrepresentation, failure to pay wages, and retaliation. (*Id*. at *7.) The federal district court ultimately concluded that the policy covered the retaliation claim, because "[a]ll of the retaliatory conduct alleged in the Demand Letter occurred after September 30, 2010. None of it occurred before that date." (*Id*. at *16-17.) The claim for fraudulent misrepresentation, by contrast, did occur before that date. While the insurer argued the basis for all three claims were part of a larger scheme of fraudulent hiring and therefore should have been considered as part of a single, interrelated claim, the court ultimately concluded that "the underlying facts in the Demand Letter allege a retaliation claim that is

potentially based on conduct completely separate and independent from the alleged fraudulent scheme." (*Id.* at *19.) The court went on to explain that the insurer was required to consider the demand letter "as a whole, not only specific allegations that could possibly exclude the claim from coverage." (*Id*. at *18.) The insurer could not "'construct a formal fortress' based on certain conclusory allegations in the Demand Letter and allow [the former employee] to be the 'arbiter of the policy's coverage' through the precise wording her attorney employed in the Demand Letter." (*Ibid*.) In the end, the insurer was "required to examine the actual underlying *facts* alleged by [plaintiff] to determine whether they raise any issue that would potentially bring the claim within the Policy's coverage." (*Id*. at *19 [emphasis in original] [citing *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 276].) In that case, the court determined

Although *Opus* is not binding authority, the court finds that its analysis is persuasive and directly applicable to the situation here. (See *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6 [although not binding, courts may consider unpublished federal district court opinions as persuasive].) Based on a close review of the September 9, 2017 email and the November 2, 2018 Arbitration Demand, the court finds that there is some obvious overlap between the two—specifically, in the second, sixth, seventh, eighth, and ninth causes of action of the Arbitration Demand—but that there are also some causes of action—the first, third, fourth, fifth, tenth, and eleventh causes of the Arbitration Demand—that do not overlap at all. The court finds that there are basically two distinct sets of "claims" set forth in these documents: one of them relates to the hostile work environment, retaliation, wrongful termination, and emotional distress claim set forth in the email and in the second, sixth, seventh, eighth, and ninth causes of action of the Arbitration Demand; the other relates to all of the alleged "wrongful acts" that occurred *after* September 9, 2017 with respect to Chau's prospective employment at Mayfield: the defamation, intentional interference, Labor Code section 206.5, and Labor Code section 1102.5 violations set forth in the first, third, fourth, fifth, tenth, and eleventh causes of action in the Arbitration Demand. These are two independent sets of "wrongful acts" that do not share a "common nexus," in exactly the same way that the fraud and retaliation "wrongful acts" in *Opus* did not share a common nexus.

The court's conclusion is bolstered by the fact that the Arbitration Demand names additional parties (James Kim and Brett Cummings) who were not identified as potential defendants in the September 9, 2017 email, and it only names them in the *post*-September 9, 2017 causes of action (the first, third, fourth, fifth, tenth, and eleventh). Arch cites *Feldman v. Illinois Union Ins. Co.* (2011) 198 Cal.App.4th 1495 for the proposition that claims are interrelated even if the later claim adds defendants who are related to the insured. This is a misstatement of the Court of Appeal's ruling, which generally held that while the amended cross-complaint "expanded its theories of recovery," the additional claims asserted against an added defendant had a common nexus with the original cross-complaint. (*Id.*, 198 Cal.App.4th at p. 1504.) *Feldman* does not directly address whether the addition of defendants might create a separate "claim" under policy language. Formation8's reliance on *Abifadel v. Cigna Ins. Co.* (1992) 8 Cal.App.4th 145 is more persuasive. In that case, a cease-and-desist order against a bank did not constitute a "claim" against the former directors of the bank (who were not named in the order); in addition, the order related to activities that occurred after the directors resigned and did not propose to hold the former directors personally liable. As a result, the Court of Appeal held that there was no claim against the former directors within the policy period. (*Abifadel, supra*, 8 Cal.App.4th at p. 167.) Here, the September 9, 2017 email did not name Kim or Cummings as potential defendants, nor did it argue that they were personally liable for

anything. Accordingly, any "claim" against Kim and Cummings was first made in the Arbitration Demand.

The court therefore GRANTS Formation8's motion for summary adjudication as to Arch's duty to indemnify Formation8 for the defense costs arising out of defending against the first, third, fourth, fifth, tenth, and eleventh causes of action in the Arbitration Demand.

V. ARCH'S MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

Arch moves for summary judgment on the breach of contract and breach of implied covenant of good faith and fair dealing claims, contending that Formation8 cannot establish the elements of each claim.

A. Breach of Contract

The parties' arguments on the breach of contract claim are essentially the same as those raised in Formation8's motion for summary adjudication. Because Arch contends that the breach of contract claim is without merit on the ground that it had no duty to indemnify any defense costs in the underlying arbitration, and this court has determined that Arch did have a duty to indemnify at least part of those costs, the court DENIES Arch's motion for summary adjudication. (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272 ["A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense."]; see also *Maryland Cas. Co. v. National American Ins. Co. of Calif.* (1996) 48 Cal.App.4th 1822, 1832 [holding on a motion for summary judgment on the insurer's duty to defend, the insurer must be able to negate potential coverage as a matter of law].)

As noted above, the court has no insight into which defense costs arise out of the "original claim" (the September 9, 2017 email), and which costs arise out of the "subsequent claim" (the November 2, 2018 Arbitration Demand), because each of the parties has taken an ill-advised "all or nothing" approach to these motions, and neither party has presented the court with evidence or other information about the manner in which these causes of action were actually addressed in the underlying arbitration. As a result, the court can only provide an abstract ruling regarding the issues of duty presented in these competing motions.

B. Breach of Implied Covenant of Good Faith and Fair Dealing

In moving for summary adjudication as to Formation8's breach of implied covenant of good faith and fair dealing cause of action, Arch argues that it acted in good faith by promptly addressing the Arbitration Demand, based on the "genuine dispute" doctrine.

1. Unreasonable Conduct

An implied covenant of good faith and fair dealing is implicit in an insurance contract. (See *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683.) "Before an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted *unreasonably* or *without proper cause*." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1072 (*Jordan*) [emphasis in original]; see also *Tilbury*

Constructors, Inc. v. State Compensation Ins. Fund (2006) 137 Cal.App.4th 466, 475 [citing *Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151].)

Arch maintains that it acted reasonably in addressing the arbitration demand because it: 1) promptly acknowledged the demand on March 7, 2019 after tender on March 4, 2019; 2) conducted and completed an investigation; and 3) declined coverage on August 21, 2019. (Skoglund Decl., Exhs. C-E, H.) After Formation8's counsel contested Arch's decision on October 3, 2019, Arch again confirmed its coverage position on December 18, 2019. (Skoglund Decl. Exhs. I-J.) Formation8's counsel took over six months to respond to the December 18, 2019 denial of coverage; after receiving a September 1, 2020 letter from Formation8's counsel, Arch retained coverage counsel and confirmed the prior determination with additional details on October 23, 2020. (Skoglund Decl., Exhs. J-L.)

"If the conduct of the insurer in denying coverage was objectively reasonable, its subjective intent is irrelevant." (*CalFarm Ins. Co. v. Krusiewicz* (2005) 131 Cal.App.4th 273, 287; *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973 [triable issues of fact regarding the insurer's subjective intent cannot defeat summary judgment in favor of the insurer in a bad faith action when the insurer's conduct was objectively reasonable as a matter of law].) Here, Arch meets its initial burden of showing that it responded to each of Formation8's inquiries in a reasonably timely manner. The burden therefore shifts to Formation8 to demonstrate the existence of a disputed material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.)

An "insurer's denial of or delay in paying benefits gives rise to tort damages only if the insured shows the denial or delay was unreasonable." (*Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 723.) Formation8 relies on California Code of Regulations section 2695.7, subdivision (b) ("Section 2695.7") for the proposition that Arch failed to act in a timely manner. This regulation provides: "Upon receiving proof of claim, every insurer, except as specified in subsection 2695.7(b)(4) below, shall immediately, but in no event more than forty (40) calendar days later, accept or deny the claim, in whole or in part. The amounts accepted or denied shall be clearly documented in the claim file unless the claim has been denied in its entirety." (Cal. Code Regs., tit. 10, § 2695.7, subd. (b).) This regulation, however, is derivative of Insurance Code section 790.03, which sets for the Unfair Insurance Practices Act ("UIPA") (see Cal. Code. Regs., tit. 10, § 2695.1), and which the California Supreme Court has held can only be enforced by the Insurance Commissioner. Private UIPA actions are "absolutely barred," because "[w]hen the Legislature enacted the UIPA, it contemplated only administrative enforcement by the Insurance Commissioner." (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 384 [citing *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 300].) Accordingly, Formation8 has not established that a denial or delay was unreasonable.

2. The Genuine Dispute Doctrine

"Where there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute." (*Jordan, supra,* 148 Cal.App.4th at p. 1072 [citing *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346–347 (*Chateau*)].) "This is known as the 'genuine dispute' or 'genuine issue' doctrine, and it enables an insurer to obtain summary adjudication of a bad faith cause of action

by establishing that its denial of coverage, even if ultimately erroneous and a breach of contract, was due to a genuine dispute with its insured." (*Bosetti v. United States Life Ins. Co. in New Yorkbosettibosetti* (2009) 175 Cal.App.4th 1208, 1237 (*Bosetti*) [citing *Chateau, supra*, 90 Cal.App.4th 335, 346–347].)

The court concludes that the coverage dispute in this case is a "genuine dispute" and that Arch is therefore entitled to summary adjudication as to the second cause of action. That this matter has been vigorously disputed is clearly evidenced by the parties' extensive briefing on these motions. In addition, these motions have raised a purely legal issue of contract interpretation (the Arch Policies) and the interpretation of documents as to which the contents are undisputed (the September 9, 2017 email and the November 2, 2018 Arbitration Demand); accordingly, nothing is left for a factfinder to determine, and a summary adjudication is appropriate. Finally, the court finds that both sides were partially correct and partially incorrect in the legal positions they took. Both sides took an all-or-nothing approach, with Formation8 arguing that *all* of the underlying arbitration was subject to a duty to indemnify defense costs because the September 9, 2017 email was not a "claim," and Arch arguing that *none* of the underlying arbitration was subject to the duty because it was "interrelated" with the original claim set forth in the September 9, 2017 email. As noted above, the court agrees in part and disagrees in part with both sides.

Again, Formation8 must demonstrate a triable issue of fact under the genuine dispute doctrine, and its sole argument as to the application of the doctrine is that it does not apply to third-party insurance coverage cases, only first-party cases. The court considers this to be a misstatement of the law. At most, courts have held that application of the doctrine was historically "doubtful" and not always applied—not that it could *never* be applied. (See *Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1424, fn. 19 [citing federal and state cases and a treatise that note the unclear or unsettled law on genuine dispute doctrine application to third party cases].) Arch cites at least two published decisions that applied the genuine dispute doctrine to third-party coverage. (Reply in Support of Motion for Summary Judgment at p. 10:18-23.) Accordingly, Formation8 has not established a triable issue of fact as to Arch's assertion of the genuine dispute doctrine.

The court therefore GRANTS Arch's motion for summary adjudication as to the cause of action for breach of the implied covenant of good faith and fair dealing.

C. Punitive Damages

Punitive damages may be awarded if the plaintiff proves by clear and convincing evidence that the defendant is guilty of fraud, oppression or malice. (Civ. Code, § 3294, subd. (a).) "Thus, defendants may seek summary adjudication either that: [1] some element of the tort claim cannot be established; or [2] defendants' conduct does not constitute 'oppression, malice or fraud' ((as defined by Civil Code §3294(c)); or [3] plaintiff's proof is not 'clear and convincing' as required by Civil Code §3294(a)." (Weil & Brown, et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2019) ¶ 10:42.)

Having determined that the coverage dispute here is subject to the "genuine dispute doctrine" and that there is no possibility of a "bad faith" determination, the court concludes that there is no basis for a finding of malice, oppression, or fraud.

The court therefore GRANTS Arch's motion for summary adjudication as to the claim for punitive damages.

- oo0oo -

Calendar Lines 6-10
Case Name: *Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.*
Case No.: 19CV358256 (consolidated with 20CV370523 and 20CV372889)

Defendant Gilroy Garlic Festival Association, Inc. ("GGFA") moves to compel further answers to form interrogatories and special interrogatories from plaintiffs Juan Salazar, Lorena Salazar, Lyann Salazar, Eduardo Lopez Ponce, and Dasha Pimental. In addition, GGFA requests monetary sanctions of $2,500 for each motion. These motions were originally calendared for July 25, 2023 (as to the Salazars) and July 27, 2023 (as to Lopez Ponce and Pimental). Notice was proper for those hearing dates. Shortly before the hearing dates, GGFA requested a continuance to October 31, 2023, and the court granted that request in its tentative rulings, which no party contested. Those tentative rulings were adopted as orders of the court.

The court did not receive any responses to the motions from plaintiffs in advance of the July hearing dates. Despite the passage of three more months, the court did not receive any timely responses from plaintiffs.[3]

Good cause appearing, the court now GRANTS the motions to compel further answers. The court understands that the interrogatories at issue are slightly different for each plaintiff. For Juan Salazar, they are Form Interrogatories Nos. 6.3-6.7, 8.1, 8.8, 9.1, 11.1, 12.1-12.6, 14.1, and 15.1, and Special Interrogatories Nos. 1-47. For Lorena Sanchez, they are Form Interrogatories Nos. 6.2-6.7, 8.1, 8.8, 9.1, 11.1, 12.1-12.6, 14.1, and 15.1, and Special Interrogatories Nos. 1-54. For Lyann Salazar, they are Form Interrogatories Nos. 6.2-6.7, 8.1, 8.8, 9.1, 11.1, 12.1-12.6, 14.1, and 15.1, and Special Interrogatories Nos. 1-16. For Eduardo Lopez Ponce, they are Form Interrogatories Nos. 6.2-6.7, 8.1, 8.8, 9.1, 11.1, 12.1-12.6, 14.1, and 15.1, and Special Interrogatories Nos. 1-16. For Dasha Pimental, they are Form Interrogatories Nos. 6.3-6.7, 8.1, 8.8, 9.1, 11.1, 12.1-12.6, 14.1, and 15.1, and Special Interrogatories Nos. 1-16

As for monetary sanctions, the court finds that $2,500 is too much for each motion, particularly given the significant overlap (and extreme repetition) between each motion and the interrogatories at issue. The court GRANTS IN PART the request for sanctions and orders plaintiffs and their counsel to pay $600 as to each motion (a total of $3,000 for the five motions) by December 1, 2023.

IT IS SO ORDERED.

- oo0oo -

[3] After already preparing this tentative ruling, the court received, on Friday, October 27, 2023 (two court days before the hearing), a declaration from plaintiffs' counsel stating that plaintiffs have now responded to the interrogatories. Timely responses or oppositions to the motions to compel were due on October 18, 2023; timely responses would have given GGFA an opportunity to address the status of these motions in reply briefs, which would have been due on October 25, 2023. For plaintiffs to submit a filing well after these established deadlines is completely unhelpful to the court. As a result, the court disregards the exceedingly tardy declaration from plaintiffs' counsel, which does not change the court's ruling in any event.