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: 10-10-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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.)

IN PERSON HEARINGS: **Courtrooms are again open and all litigants may appear in person** at the Downtown Superior Courthouse located at 191 N. First Street, San Jose.

VIRTUAL HEARINGS: You should **appear by video**, unless it is not possible.

To **Join Teams Meeting** -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

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

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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.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV412780 Hearing: Demurrer	Scott Landstrom vs Komodo Fire Systems, Inc. et al	See Tentative Ruling. The Court will prepare the final order.
LINE 2	22CV394699 Motion: Compel	TRINET HR III INC. vs AMBIENT SCIENTIFIC INC.	See Tentative Ruling. Defendant shall submit the final order.
LINE 3	23CV410157 Motion: Compel	Jane Doe vs Support Systems Homes, Inc. et al	See Tentative Ruling. Defendants shall submit the final order.
LINE 4	19CV359631 Hearing: Motion Determination good faith settlement	Carla Cremers vs Best Overnite Express, Inc. et al	See Tentative Ruling. Settling Defendants shall submit the final order.
LINE 5	20CV361267 Hearing: Pro Hac Vice Counsel	SRS Distribution, Inc. et al vs Bill Shevlin et al	Notice appearing proper and good cause appearing, the unopposed motion of Patrick Sneed to appear Pro Hac Vice is GRANTED. Moving party shall submit the final order.

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LINE 6	20CV364697 Hearing: Motion Determination good faith settlement	RECYCLING SPECIALISTS, LLC et al vs AUSTIN KYLES et al	See Tentative Ruling. Settling Defendants shall submit the final order.
LINE 7	22CV394432 Motion: Leave to File	City of San Jose vs Maria Garcia	Service appears proper, as an amended notice was filed and served on counsel on July 17, 2023. On July 20, 2023, Defendant's counsel was relieved. On July 25, 2023, Defendant appeared in Court and was advised of the pending motion. Good cause appearing, the unopposed motion for leave to file the FAC and for joinder is GRANTED. Plaintiff shall submit the final order.
LINE 8	22CV398755 Hearing: Petition Compel Arbitration	Mindy Ni vs Urban Compass, Inc. et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 9	22CV398755 Hearing: Motion Lift Stay & Compel	Mindy Ni vs Urban Compass, Inc. et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 10	22CV399032 Motion: Leave to Amend	MARY SCHUTTEN vs CALIFORNIA STATE UNIVERSITY et al	Defendant moves for leave to file an amended answer to correct the name of Defendant. Plaintiff objects but provides no evidence to suggest that Defendant is wrong as to its own correct name for legal purposes. The Court does not find the motion untimely and notes that leave to amend is to be liberally construed. The motion is GRANTED. Defendant shall submit the final order and shall file the amended answer within 10 days of the final order.

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

LINE 11			
LINE 12			

- oo0oo -

Calendar Line 1
Case Name: *Landstrom v. Komodo Fire Systems Inc., et al.*
Case No.: 23CV412780

According to the allegations of the complaint, plaintiff Scott Landstrom ("Plaintiff") was employed by defendants Komodo Fire Systems, Inc. ("Komodo") and Shawn Sahbari ("Sahbari") (collectively, "Defendants") from March 11, 2019 to March 13, 2020 pursuant to a written employment contract in which Plaintiff was to receive $2,500 per week. (See complaint, ¶ 8.) Plaintiff was never paid the $2,500 per week in wages that he was owed. (*Id*.) Plaintiff filed a claim with the Labor Commissioner on July 1, 2020; however, this claim was dismissed by the Labor Commissioner on June 30, 2021. (See complaint, ¶ 10.) Plaintiff filed a second claim with the Labor Commissioner on March 10, 2022, but this claim was closed after the Labor Commissioner declined jurisdiction on February 7, 2023. (*Id*.)

On March 16, 2023, Plaintiff filed a complaint against Defendants, asserting causes of action for:

1) Breach of written contract (against all defendants);
2) Failure to pay minimum wages and overtime wages (against all defendants);
3) Liquidated damages under Labor Code § 1194.2 (against all defendants);
4) Failure to provide proper itemized wage statements (against all defendants);
5) Waiting time penalties (against all defendants); and,
6) Unlawful business practices.

Defendants demur to the complaint, arguing that "Plaintiff does not attach a copy of the written agreement he alleges he entered with both Defendants… [and b]ecause Plaintiff does not describe the terms of the written agreement, his obligations under that agreement, or provide a copy of that agreement, Plaintiff's pleading, as to a written breach of contract is vague and cannot constitute a proper cause of action against Defendants." (Defs.' memorandum of points and authorities in support of demurrer, p.4: 8-22.) In support of their argument, they cite to the 1985 case, *Otworth v. Southern Pac. Transportation Co*. (1985) 166 Cal.App.3d 452, in which the court states that "[i]f the action is based on an alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." (*Id*. at p.459, citing *Wise v. Southern Pacific* (1963) 223 Cal.App.2d 50, 59.) However, that is no longer the law. In *Construction Protective Services, Inc. v. TIG Specialty Ins. Co*. (2002) 29 Cal.4th 189, the California Supreme Court stated that "[i]n an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Id*. at pp. 198-199.) In *Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, the Fourth District noted that "[t]he *Otworth* court did not offer any analysis to support that proposition… [but i]nstead, it simply cited *Wise v. Southern Pacific* (1963) 223 Cal.App.2d 50, 59." (*Miles, supra,* 236 Cal.App.4th at pp.401-402.) However, "[t]he *Wise* court stated, 'where a written instrument is the foundation of a cause of action, it may be pleaded in *haec verba* by attaching a copy as an exhibit and incorporating it by proper reference.'" (*Miles, supra*, 236 Cal.App.4th at p. 402, quoting *Wise, supra*, 223 Cal.App.2d at p.59.) "It is readily apparent that the *Otworth* court read more into that statement than is actually there." (*Miles, supra*, 236 Cal.App.4th at p. 402.) "The *Wise* court was simply stating one available method of pleading the contract—it was not specifying the exclusive means of pleading a contract." (*Id*.) The correct rule is that 'a plaintiff may plead the legal effect of the contract rather than its precise

language.'" (*Id*., quoting *Construction Protective Services, Inc.*, *supra*, 29 Cal.4th at pp.198-199.) "Because it is apparent that the *Otworth* court misread *Wise*, and because, in any event, we are bound by our Supreme Court, we decline to follow *Otworth*." (*Miles*, *supra*, 236 Cal.App.4th at p. 402.)

Here, the complaint alleges the existence of the employment contract, Plaintiff's performance of that contract through working from March 11, 2019 to March 13, 2020, Defendants' breach by not paying Plaintiff wages owed and damages to Plaintiff in the amount of the wages. (See FAC, ¶¶ 8-10.) This is sufficient to state facts constituting a cause of action for breach of contract and is not vague. (See *Acoustics, Inc. v. Trepte Constr. Co*. (1971) 14 Cal.App.3d 887, 913 (stating that "[a] statement of a cause of action for breach of contract requires a pleading of (1) the contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damage to plaintiff therefrom").) The demurrer to the complaint is OVERRULED in its entirety.

The Court will prepare the Order.

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Calendar Line 2
Case Name: Trinet HR III, Inc. v. Ambient Scientific, Inc.
Case No.: 22CV394699

Defendant/Cross-Complainant Ambient Scientific, Inc. moves to compel responses to its demand for inspection and copying of documents (set one) numbers 1 and 2. In these requests, Defendant seeks "any and all DOCUMENTS related to telephone calls between YOU and the PROPOUNDING PARTY" and "any and all DOCUMENTS related to written communication between YOU and the PROPOUNDING PARTY. This includes, but is not limited to, e-mail messages and text messages." See Defendant's Separate Statement. Plaintiff objected to the request for information regarding telephone calls on the basis that it was "unreasonably burdensome - if not impossible - for the company to retrieve telephonic recordings without information from the asker regarding when it spoke to the company." *Id*. In response to the request for written communications, Plaintiff objected "that it is unreasonably burdensome to retrieve all electronic communications between the company and the asker. In the alternative, such a request is outside the scope of the incident. In the alternative, such documents are already in the possession of the asker." *Id*. Now in its opposition to the motion to compel, Plaintiff objects only on the basis that the requests are not limited in time. Opp. p3.

Defendant claims they were not required to raise the defense of time frame earlier, citing *Gray v. Carlin*, 2014 U.S. Dist. LEXIS 8571. This case does not stand for that proposition, nor is it binding on this Court, given that it is a federal case. Because Plaintiff failed to raise this objection, it is now waived. See CCP §§ 2031.240 (response shall "set forth clearly the extent of, and the specific ground for, the objection"); *City of Fresno v. Superior Court* (1988) 205 Cal. App. 3d 1459, 1473 (failure to serve a timely objection will generally waive the objection, including those based on privilege). As such, Plaintiff shall provide code-compliant responses without objection within 20 days of the final order. Plaintiff, having failed to raise any objection based on overbreadth with respect to time prior to filing its opposition, having failed to provide any response to Plaintiff's requests, and having failed to adequately meet and confer (see exhibits attached to Decl. of Rubin) is ordered to pay Plaintiff $1,000 in sanctions (4 hours x $250/hour) within 20 days of the final order. Defendant shall submit the final order.

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Calendar Line 3
Case Name: *Doe v. Support Systems Homes, Inc., et al.*
Case No.: 23CV410157

On January 19, 2023, plaintiff Jane Doe filed a complaint against defendants Support Systems Homes, Inc. ("SSH") and Filipos Markolefas ("Markolefas") (collectively, "Defendants"), asserting causes of action for declaratory relief, negligence, improper hiring, retention, supervision and employment, and intentional infliction of emotional distress. On April 25, 2023, SSH moved to strike Plaintiff's usage of Jane Doe as a pseudonym from the complaint, arguing that Plaintiff failed to allege facts demonstrating that she was permitted the use of a pseudonym given the presumption that judicial proceedings in civil cases are to be open.

After SSH filed the motion, counsel for Plaintiff emailed counsel for Defendants, indicating that he found an additional case supporting the use of a pseudonym and that he believed that Defendants knew the identity of Plaintiff because "[i]f the Defendants did not know the identity of Plaintiff then we would have been asked who she is." (Hooshmand decl. in support of motion to compel further responses to discovery ("Hooshmand decl."), exh. A.) Plaintiff also then served form interrogatories ("FIs"), special interrogatories ("SIs"), requests for admissions ("RFAs") and requests for production of documents ("RPDs") on SSH. (See Hoshmand decl., ¶ 12, exhs. D-G.) On May 26, 2023, SSH provided responses to the discovery requests, consisting wholly of objections based on the ground that Plaintiff failed to identify the name of the propounding party. (See Hooshmand decl., exhs. H-K.) Upon receipt of SSH's responses, Plaintiff's counsel reached out to SSH's counsel to meet and confer, apparently disagreeing with SSH's position that the plaintiff needed to identify herself, and SSH's counsel noted that it provided argument in support of its position in connection with the motion to strike, and suggested that responses to discovery be postponed until after the hearing on the motion to strike since it was directly related to the merit of its objections. (See Hooshmand decl., exhs. L-N.) Plaintiff's counsel disagreed and filed the instant motion to compel further responses to FIs 1.1, 2.1-2.13, 3.1-3.7, 4.1-4.2, 6.1-6.6, 7.1-7.3, 8.1-8.8, 9.1-9.2, 10.1-10.3, 11.1-11.2, 12.1-12.7, 13.1-13.2, 14.1-14.2, 15.1, 16.1-16.9, 17.1, 50.1-50.6, SIs 1-35, RFAs 1-20, and RPDs 1-29. Plaintiff also seeks $9,052 in monetary sanctions in connection with her motion against SSH and its counsel.

On August 8, 2023, the Court issued a tentative ruling granting the motion to strike, noting that the complaint indeed failed to allege or otherwise demonstrate judicially noticeable facts permitting Plaintiff to use a pseudonym. (See Bradley decl. in opposition to motion to compel ("Bradley decl."), ¶ 5, exh. 1.) Counsel for Plaintiff contested the tentative ruling, and at the August 9, 2023 hearing, argued that his client would be entering the Safe at Home Program and therefore would be entitled to the use of a pseudonym pursuant to the Code. (See Bradley decl., ¶ 5.) The Court continued the hearing on the motion to allow the parties to review the new arguments. On August 14, 2023, Plaintiff's counsel for the first time served a Confidential Information Form on SSH's counsel. (See Bradley decl., ¶ 6, exh. 2.) After the conclusion of a jury trial in San Joaquin County with which SSH's counsel was engaged, SSH's counsel reviewed Plaintiff's form, agreed to withdraw the motion to strike, asked Plaintiff's counsel to withdraw its motion to compel and offered to produce amended responses without objections by October 13, 2023. Plaintiff's counsel refused, stating that "given the history of this case we cannot have comfort that we will receive actual substantive code compliant responses to the discovery…. I believe that a formal order requiring code compliant

responses without boilerplate objections and without continued delay is the only way that my client will receive full and complete discovery responses."

Plaintiff's requests for judicial notice

In support of her motion, Plaintiff requests judicial notice of the complaint. The request for judicial notice is GRANTED. (Evid. Code § 452, subd. (d).)

In support of her reply to the opposition, Plaintiff requests judicial notice of the August 15, 2023 minute order, continuing the hearing on the motion to strike to September 15, 2023 with any reply due on September 8, 2023. The request for judicial notice is GRANTED. (Evid. Code § 452, subd. (d).)

Analysis

Here, at the time Plaintiff filed her motion, Plaintiff's counsel was incorrect as to whether Plaintiff had adequately stated facts indicating that she was permitted to use a pseudonym in connection with her complaint. Plaintiff's counsel refused to acknowledge this deficiency until the August 9, 2023 hearing on the motion to strike and the subsequent August 14, 2023 service of the Confidential Information Form.

The Santa Clara County Bar Association Code of Professionalism instructs that "[a] lawyer should engage in a meaningful and good faith effort to resolve discovery disputes and should only bring discovery issues to the court for resolution after these efforts have been unsuccessful." (Santa Clara County Bar Association Code of Professionalism, § 10 ("Discovery").) Further, "[a] lawyer should agree to reasonable requests for extensions of time or continuances without requiring motions or other formalities." (Santa Clara County Bar Association Code of Professionalism, § 4 ("Continuances and Extensions of Time").)

After being mistaken about the primary issue of the motion to strike and SSH's objections, it does not seem that Plaintiff engaged in a meaningful and good faith effort to resolve the discovery disputes, only bringing the discovery issues to the court for resolution after those efforts were unsuccessful. Plaintiff's counsel could—and should—have offered to accept the amended responses that counsel for SSH agreed to provide by October 13 (a few days from now), and stipulate to a continuance on the hearing of the motion to compel to allow for the provision of those responses. Had Plaintiff received those amended responses, the motion to compel would be moot. Instead, Plaintiff's counsel stated that an order for such responses was "the only way his client will receive full and complete discovery responses." Considering Plaintiff's counsel's prior erroneous position, and Plaintiff's counsel's reliance on that erroneous position as the basis for the motion to compel, Plaintiff's counsel could not reasonably conclude that, "given the history of this case," a formal order was the only way that Plaintiff would receive full and complete discovery responses. Plaintiff's counsel is admonished for bringing discovery issues to the court for resolution before fully engaging in a meaningful and good faith effort to resolve discovery disputes.

The motion to compel further responses is continued to October 26, 2023 at 9:00 a.m. in Department 16. Plaintiff shall notify Defendants and the Court as soon as possible if the matter can come off calendar. Defendants shall prepare the final order.

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Calendar line 4
Case Name: Carla Cremers v. Best Overnite Express, Inc., et al.
Case No.: 19CV359631

This is personal injury case that arises from a collision between Plaintiff Carla Cremers and Defendants Best Overnite Express, Inc., Sam Hysaj, and Applebee Leasing Inc. (the "Settling Defendants"). The Settling Defendants are the owners (Best Overnite and Applebee Leasing) and driver (Sam Hysaj) of the semi-truck tractor that hit Plaintiff when she was on her bicycle. The Settling Defendants bring a motion for good faith settlement determination pursuant to Code of Civil Procedure §877.6. The City of Santa Clara ("City"), who was a co-defendant but has been granted summary judgment, opposes the motion on the basis that the settlement relies on inadmissible evidence, ignores the applicable insurance policy limits, and is not in the ballpark for what the case is potentially worth.

EVIDENTIARY OBJECTIONS

City objects to paragraphs 2-11, 26, and 31 of the declaration of Jeffrey Choi and objects to exhibits 1 and 6 attached to the declaration. City objects on the basis of hearsay, incompetency of Choi to testify to such matters, and objects that the exhibits are without foundation. The Settling Defendants offer no argument in opposition to the objections. Counsel's statements as to the facts of the case are hearsay. Counsel is not a competent witness to lay the foundation for admission of either exhibits 1 or 6. The objections are SUSTAINED.

Despite the objections, however, the Court has evidence on which to base its decision, consisting of ¶¶ 12-25, 27-30 of and Exhibits 2-5 attached to the Choi declaration, as well as the declaration and exhibits in support of City's opposition.

REQUEST FOR JUDICIAL NOTICE

City requests judicial notice of four different court filings, exhibits D-G attached to its request. These exhibits are subject to judicial notice as records of the superior court under Evidence Code section 452, subdivision (d). See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 (the court may take judicial notice of its own file). But, "while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files." *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 658. The request for judicial notice is GRANTED.

GOOD FAITH

Code of Civil Procedure § 877.6 states in relevant part that "any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors . . ." Where the settlement is contested, the settling defendant must first make a sufficient showing that the settlement is in good faith. *City of Gran Terrace v. Sup. Ct.* (1987) 192 Cal.App.3d 1251, 1261. In determining good faith the court considers a number of factors as laid out in *Tech-Bilt, Inc. v. Woodward-Clyde Assocs*. (1985) 38 Cal.3d 488. As explained in *Tech-Bilt,* the court should consider the plaintiff's likely total recovery, the settlor's proportionate

liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, the financial condition of settling defendants, as well as the existence of collusion, fraud or tortious conduct aimed to injure the interests of nonsettling defendants. *Tech-Bilt*, 38 Cal.3d at 499. The evaluation should be made on the basis of information available at the time of settlement. *Id*. The party asserting the lack of good faith has the burden of proof on that issue (§ 877.6, subd. (d)). One consideration in assessing good faith is whether the settlement is so far out of the ballpark as to be inconsistent with the equitable objectives of the statute. *Id.* at 499-500. A settlement is in good faith if it is not grossly disproportionate to what a reasonable person would estimate the settling defendant's liability to be based upon the information available at the time the settlement is reached. *Id*. In order to bear the burden of proof, a non-settling party is required to demonstrate that the settlement is so far out of the ballpark of reasonableness that it is "inconsistent with the equitable objectives of the statute." *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 960.

1. Likely Total Recovery

City claims that Plaintiff's likely total recovery is almost $10 million and that Plaintiff would be found 50% at fault, for a likely recovery of $5 million. The Settling Defendants agree that Plaintiff likely would be apportioned a significant percentage of fault for failing to use due care. See Exh. 2 to Choi Declaration. City's estimate assumes the highest possible figure for each category of loss and assumes that Plaintiff would in fact obtain that amount. The fact that Plaintiff during the course of litigation may have made claims of around $10 million (and it should be noted that City simply assumes Plaintiff would request $7 million in non-economic damages) does not mean that she would be able to establish that or obtain it. A more reasonable assessment of likely recovery is closer to $3 million.

2. Settling Defendants' Proportionate Liability

The Court agrees with City that the Settling Defendants likely would assume 50% of the loss, as things stand today, given that City is out of the case. However, if City were to lose Plaintiff's appeal and were to be found liable, City would likely assume a large if not full proportion of fault for creating a dangerous condition. City most likely has no liability at all. But in the unlikely event the appeal were granted and they were found liable, their liability would likely be very high, as it would mean the jury found that Plaintiff and perhaps even the Settling Defendants used due care. See *Chowdhwy v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196 ("A public entity is only required to provide roads that are safe for reasonably foreseeable careful use. If it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of [Section] 830...." (internal citations and quotations omitted).) Thus, regardless of the likely recovery, whether $3 million or $5 million, the settlement is fair, as City is either not liable at all or primarily liable.

3. Financial Condition

While the settlement is the maximum of the first layer of insurance, City is correct that the Settling Defendants are in a strong financial condition and could pay as much as $6 million.

4. Collusion, Fraud, or Tortious Conduct

City does not claim any collusion or fraud and the Court finds none.

Overall, the Court finds that the Settling Defendants have established that the settlement is in good faith. One should expect the Settling Defendants to pay less in settlement than they would after a trial. *Tech-Bilt*, 38 Cal.3d at 499-500. The $1 million settlement is within the ballpark given that the recovery after trial would likely be around $3 million, given that Plaintiff would likely be found partially responsible, and given that City currently has no liability and is likely not to be found liable, even if the appeal is successful.

The Court does not find the settlement outside the ballpark or grossly disproportionate. Accordingly, the Motion for Good Faith Settlement Determination is GRANTED. Settling Defendants shall submit the final order.

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Calendar Line 6
Case Name: Recycyling Specialists, LLC et al v. Austin Kyles et al
Case No.: 20CV364697

The Non-Settling Defendants Austin and Jeannette Kyles through their revocable trust, the Austin J. Kyles and Jeanette E. Kyles Revocable Trust dated February 17, 1988 ("Non-Settling Defendants" or "Kyles") owned Recycling Specialists, Inc. (RSI). Johanson & Yau Accountancy Corp. ("J&Y" or "Settling Defendant") were the long-time tax return preparers for RSI. Recycling Specialists, LLC (SRL) purchased RSI from the Kyles on August 1, 2016. The business was purchased in part with a personal loan guaranteed by the RSL's managing member, Howard Misle. Following the sale, Recycling Specialists, LLC remained in debt to the Kyles in the amount of approximately $1.3 million.

In early 2016, J&Y became aware that the Kyles were selling Recycling Specialists, Inc. and it received a copy of the written purchase and sale agreement around July of 2016. (Decl. of Davis). The sale closed on August 1, 2016. On July 1, 2016, Gary Giannini, the lawyer for the Kyles, asked J&Y to prepare the final 2015 tax returns for RSI, telling J&Y that Austin Kyles had "met with the Buyer and you are going to prepare the final income tax return for the period ended in July 31, 2016, and Butch [Kyles] is going to pay for your services to do the final return. . . . In addition, we have an Agreement that any refund will go to Butch directly, so be sure to put Butch's home address in the tax return or make whatever note you have to so that when the check comes, it will go directly to Butch." See Ex. 6 to RFJN –Davis Decl. ¶ 10. The return was filed in October 2016. The returns reported a Net Operating Loss ("NOL") of $1,552,582.

A few months later, J&Y believed the returns needed to be corrected and prepared amended returns for RSI for 2015. The amended return reclassified the service expense to capital distribution which reduced the previously reported NOL from $1,552,582 to $615,122. The amended return carried back the remaining NOL to the prior fiscal year ending July 31, 2015 (the 2014 tax year) which absorbed $359,730 of the available NOL and generated a refund in favor of the Kyles in the amount of $117,701. (See Ex. 6 to RFJN – Davis Decl. ¶¶ 11-21.)

J&Y suggests that it amended the return on behalf of RSI, despite knowing that the Kyles were no longer the owners of RSI and knowing that it had not been retained by RSL, based on the July 2016 email from the Kyles' lawyer, in which he had stated that J&Y should prepare the 2015 returns. In support of its belief, J&Y includes an email it sent to Mr. Giannini in February 17, 2017 in which J&Y seeks confirmation that any refund caused from the filing of the amended return should go to Butch Kyles. See Ex. 9 attached to Ex. 6 to RFJN – Davis Decl. ¶22.

On March 4, 2020, the Plaintiffs, RSI, RSL and Howard Misle ("Plaintiffs) filed a complaint alleging in essence breach of contract and misrepresentation by the Kyles and breach of fiduciary duty and professional negligence by J&Y, asserting that they bought RSI with the understanding that the NOL was approximately $1.5 million and that they would be able to use that NOL against future earnings, such that the actions of the Defendants in amending the returns, greatly reduce the NOL, and taking the refund caused them damages.

REQUESTS FOR JUDICIAL NOTICE

Each side has requested the Court take judicial notice of various court filings. These exhibits are subject to judicial notice as records of the superior court under Evidence Code

section 452, subdivision (d). See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 (the court may take judicial notice of its own file). But, "while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files." *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 658. The requests for judicial notice are GRANTED.

GOOD FAITH

Code of Civil Procedure § 877.6 states in relevant part that "any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors . . ." Where the settlement is contested, the settling defendant must first make a sufficient showing that the settlement is in good faith. *City of Gran Terrace v. Sup. Ct.* (1987) 192 Cal.App.3d 1251, 1261. In determining good faith the court considers a number of factors as laid out in *Tech-Bilt, Inc. v. Woodward-Clyde Assocs*. (1985) 38 Cal.3d 488. As explained in *Tech-Bilt,* the court should consider the plaintiff's likely total recovery, the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, the financial condition of settling defendants, as well as the existence of collusion, fraud or tortious conduct aimed to injure the interests of nonsettling defendants. *Tech-Bilt*, 38 Cal.3d at 499. The evaluation be made on the basis of information available at the time of settlement. *Id*. The party asserting the lack of good faith has the burden of proof on that issue (§ 877.6, subd. (d)). One consideration in assessing good faith is whether the settlement is so far out of the ballpark as to be inconsistent with the equitable objectives of the statute. *Id.* at 499-500. A settlement is in good faith if it is not grossly disproportionate to what a reasonable person would estimate the settling defendant's liability to be based upon the information available at the time the settlement is reached. *Id*. In order to bear the burden of proof, a non-settling party is required to demonstrate that the settlement is so far out of the ballpark of reasonableness that it is "inconsistent with the equitable objectives of the statute." *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 960.

1. Likely Total Recovery and Settling Defendants' Proportionate Liability

J&Y assert that the total likely recovery is zero, since Plaintiffs have filed no tax returns since 2016 and have had no income to write off against the NOL. Alternatively, they argue that the loss is $117,701, the amount of the tax refund returned to Austin Kyles. Memo, pp8-9. The Non-Settling Defendants claim that the loss is likely much higher, but do not present evidence of what it would be. Primarily, their argument is that regardless of the amount of the recovery, the proportionate liability among the defendants would be inequitable based on this settlement. The Non-Settling Defendants claim that J&Y are wholly liable as they were the tax experts, they were the ones that suggested the tax returns needed to be amended, they were the ones that asked the Kyles to sign the returns, and because they knew that the Kyles were no longer the owners of RSI. See Opp. pp14-15. They argue that unless the proposed settlement agreement includes the dismissal of claims against them, it should be denied or else it "would deny the Kyles the benefit of the substantive loss allocation principles embodied in the implied contractual indemnity doctrine." Opp. p15.

The Court is not persuaded. The Settling Defendants and the Non-Settling Defendants are likely to be found equally liable. While J&Y knew that the Kyles no longer owned RSI, the Kyles' attorney told RSI that he and the Kyles had spoken with the buyer and wanted J&Y to prepare the returns and had agreed to have Butch Kyles receive the refund. When J&Y wrote the lawyer to confirm this was still the case in February 2017, Mr. Giannini failed to correct him. It was the Kyles who benefitted from the tax refund received as a result of the amended returns. Given this, the Court does not find that settlement to be out of the ballpark or to be unfair to the Non-Settling Defendants.

2. Financial Condition

The Settling Defendants are in a strong financial position and could pay more.

3. Collusion, Fraud, or Tortious Conduct

There is no claim of any collusion or fraud and the Court finds none. The allocation of settlement among the plaintiffs is also not an issue in this case.

Overall, the Court finds that the Settling Defendants have established that the settlement is in good faith. One should expect the Settling Defendants to pay less in settlement than they would after a trial. *Tech-Bilt*, 38 Cal.3d at 499-500. The settlement is a fair amount and not grossly disproportionate given the amount of the refund paid the Kyles and given the uncertainty of the amount of damages from the change in NOL.

Accordingly, the Motion for Good Faith Settlement Determination is GRANTED. Settling Defendants shall submit the final order.

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Calendar Lines 8 and 9
Case Name: Mindy Ni v. Urban Compass, Inc. et al.
Case No.: 22CV398755

Background

This action arises from an independent contractor agreement entered between plaintiff Mindy Ni ("Plaintiff") and defendants Urban Compass, Inc., and Compass California II, Inc. (collectively, "Compass"). Compass filed a motion to compel arbitration and stay proceedings, which the court granted in its order filed on March 8, 2023.

On May 16, 2023, Plaintiff filed the first motion now before the court, a motion to lift the stay and for related sanctions, contending Compass waived the right to arbitration by failing to timely pay its share of the arbitration fee. (Plaintiff's memorandum of points and authorities, pp. 1, 4.)

On September 7, 2023, Compass filed the second motion now before the court, a motion to compel arbitration, contending it did not knowingly waive the right to arbitration because the attorney of record did not receive timely notice for the payment of the arbitration fee. (Compass' memorandum of points and authorities, pp. 11-15.)

Legal Standard

"Code of Civil Procedure sections 1281.97 and 1281.98[1] provide that a company or business pursuing arbitration of a dispute under a predispute arbitration agreement is in material breach and default of that agreement—thereby waiving its right to arbitrate—if it fails to timely pay its share of arbitration fees." (*Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054, 1061-1062 (*Williams*).)

"In the event the drafting party does not pay the invoice within the 30 days, thus materially breaching the arbitration agreement under section 1281.97, subdivision (a)(1), the employee or consumer may '[w]ithdraw the claim from arbitration and proceed in a court of appropriate jurisdiction,' or '[c]ompel arbitration in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration' (§ 1281.97, subd. (b).)" (*Espinoza v. Superior Court* (2022) 83 Cal.App.5th 761, 774 (*Espinoza*).)

"Should the employee or consumer choose to proceed in court, 'the court shall impose sanctions on the drafting party in accordance with Section 1281.99.' (§ 1281.97, subd. (d).) Section 1281.99, in turn, states that the court 'shall impose a monetary sanction against a drafting party' in the form of 'the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer as a result of the material breach.' (§ 1281.99, subd. (a).)" (*Espinoza, supra,* 83 Cal.App.5th at pp. 774-775.) "The court 'may' impose additional specified sanctions 'unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanctions unjust.' (§ 1281.99, subd. (b).)" (*Id.* at p. 775.)

[1] Undesignated statutory references are to the Code of Civil Procedure.

"In enacting sections 1281.97 and 1281.98, the Legislature intended to prevent drafting parties from abusing their obligation to pay arbitration fees as a means of severely prejudicing employees and consumers in the vindication of their rights by hindering the efficient resolution of disputes." (*Williams, supra,* 86 Cal.App.5th at p. 1067 [internal quotation marks and citations omitted]; *Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621, 634 (*Gallo*) [stating same]; *Cvejic v. Skyview Capital, LLC* (2023) 92 Cal.App.5th 1073, 1076 (*Cvejic*) [stating same].) "The Legislature stated its intention … that a company's failure to pay arbitration fees pursuant to a mandatory arbitration provision constitutes a breach of the arbitration agreement and allows the non-breaching party to bring a claim in court." (*Id.* at p. 1070 [internal quotation marks and citations omitted].)

Evidence Issues

Compass requests the court take judicial notice ("RJN") of various documents filed in this matter (RJNs 1-12) and two trial court orders filed in other matters (RJNs 13-14). RJNs 1-12 are already part of the record in this matter and taking judicial notice of them is not necessary. (*Duarte v. Pacific Specialty Insurance Company* (2017) 13 Cal.App.5th 45, 51, fn. 6—denying request where judicial notice is not necessary, helpful, or relevant.) The request for judicial notice as to RJNs 1-12 is DENIED.

Plaintiff objects to RJNs 13 and 14 because they are unpublished trial court orders. Unpublished California opinions "must be not be cited or relied on by a court or party in any other action." (Cal. Rules of Court, rule 8.115(a); see also *Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 831 ["a written trial court order has no precedential value"]; *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 448, fn. 4 ["in the absence of some additional showing—such as the conditions for claim or issue preclusion—the actions of other judges are simply irrelevant"].) The objections to RJNs 13 and 14 are SUSTAINED, and thus the request for judicial notice as to RJNs 13 and 14 is DENIED.

Analysis

Plaintiff's Motion to Lift the Stay is GRANTED

As set forth above, a drafting party of an arbitration agreement is in material breach of that agreement if it does not pay its share of the arbitration initiation fee within 30 days after the due date. (§ 1297, subd. (a)(1).) Here, Plaintiff proffers evidence that Compass is in material breach.

First, Plaintiff presents a letter from the American Arbitration Association ("AAA") dated April 8, 2023, and addressed via email to Patricio T. Barrera and Rene I. Gamboa. (See declaration of Patricio Barrera in support of Plaintiff's motion, filed on May 16, 2023 ("Barrera Decl."), ¶ 4, Ex. A.) The letter states: "The outcome of our preliminary administrative review, which is subject to review by the arbitrator, is to apply the Employment Arbitration Rules and Employment/Workplace Fee Schedule to this dispute." (*Ibid*.) The letter states that a non-fundable filing fee of $350.00 must be paid by the individual, and a non-refundable filing fee of $2,100.00 must be paid by the company. (*Ibid.*) It further indicates Plaintiff's share of the fee had already been paid, and states the following in boldface:

"**Accordingly, we request that the company pays its share of fee in the amount of $2,100,00 on or before May 8, 2023.**" (*Ibid.* [emphasis original].)

Plaintiff also presents an invoice from AAA she asserts was emailed to Mr. Gamboa on April 8, 2023, stating substantially the same information as the letter. (Barrera Decl. at ¶ 5, Ex. B.) Emails provided by Plaintiff demonstrate that the April 8, 2023, correspondence was emailed to Mr. Gamboa on that date, and Rachel Olague followed up on April 28, 2023 by replying to all, i.e. including Mr. Gamboa, to the April 8 email, requesting confirmation when respondent (i.e., Compass) had paid their share of the fees. (*Id.* at ¶ 7, Ex. C.) AAA replied to all on May 8, stating that it still had not received Compass's share of the fees. (*Ibid.*)

Finally, Plaintiff presents a letter from AAA dated May 12, 2023, stating: "**The Respondent has failed to submit the previously requested filing fee; accordingly, we have administratively closed our file in this matter.** Any filing fees received from Claimant will be refunded under separate cover." (Barrera Decl., ¶ 9, Ex. D [emphasis added].) The letter goes on to state that AAA "will decline to administer any future employment matter involving Respondent. We ask that Respondent remove our name from its arbitration agreements so there is no confusion to the public." (*Ibid*.)

Here, according to the letter and invoice from the arbitrator itself, the deadline for the arbitration fees was May 8, 2023, 30 days after the date they were due, April 8, 2023. Thus, by clear evidence presented by Plaintiff and the plain language of section 1281.97, Compass is in material breach of the arbitration agreement because it failed to pay its share of fees to initiate the arbitration proceeding within 30 days after the due date. (Section 1281.97, subd. (a)(1).) Consequently, Plaintiff had the option to "withdraw the claim from arbitration and proceed" with the matter in this court, a court of appropriate jurisdiction (section 1281.97, subd. (b)(1)), and she has elected to do so by her instant motion. All the evidence and authority weighs in favor lifting the stay.

Compass' arguments to the contrary are unavailing. While Compass asserts the court should deny Plaintiff's motion due to Plaintiff's alleged lack of good faith (see Opp., pp. 13-15,18-19), appellate decisions interpreting the statutory scheme make clear that the material breach and sanction provisions are to be strictly enforced. (See, *e.g.*, *Cvejic*, *supra*, 92 Cal.App.5th at p. 1078 ["As the legislative history and case law direct, we strictly enforce this statute"]; *Williams*, *supra*, 86 Cal.App.5th at pp. 1074-1075 [citing legislative history of statute "acknowledging that material breach and sanction provisions are 'strict' and 'unforgiving'].) Thus, the court is without discretion to rule on the ground of lack of good faith as urged by Compass.

More specifically, Compass contends the court has authority to deny Plaintiff's motion because, it claims, it never received notice regarding payment of the arbitration fees due to "Plaintiff's counsel's subterfuge." (Opp., p. 13, 4-7.) However, Compass fails to support this claim with any legal authority. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [court need not consider points unsupported by legal authority; *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153 [court may disregard conclusory arguments that are not support by pertinent legal authority or fail to disclose reasoning].) Even if Compass had presented pertinent authority showing the court may disregard the strict language of section 1281.97, the court is not persuaded that Plaintiff's counsel engaged in any subterfuge. Compass does not dispute that the notice emails from AAA were received by Mr. Gamboa, or

that he is a partner at the firm representing Compass and has been listed as counsel for Compass on filed pleadings.[2]

Next, Compass argues section 1281.97 does not apply here because the arbitration agreement signed by the parties refers to "Commercial Arbitration Rules" rather than "Employment Arbitration Rules." (Opp., pp. 13-20.) However, the April 8, 2023 letter from AAA to the parties appears to resolve this issue with the following language:

> As of October 1, 2017, the American Arbitration Association ("AAA") applies the Employment/Workplace Fee Schedule to employment disputes as well as any dispute between an individual independent contractor (who has provided service as an individual and is not incorporated) and a business or organization. The outcome of our preliminary administrative review, which is subject to review by the arbitrator, is to apply the Employment Arbitration Rules and Employment/Workplace Fee Schedule to this dispute. This change is noted in both the Employment Arbitration Rules and the Commercial Arbitration Rules, available on the AAA's website, www.adr.org.

(Barrera Decl., Ex. A.) Thus, the arbitration organization agreed upon by the parties according to the agreement drafted by Compass reviewed the case and found its Employment Arbitration Rules to be applicable.

Moreover, section 1281.97 applies here simply because the statute itself states it applies: "[i]n an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration provider, the drafting party to pay certain fees and costs before the arbitration can proceed…" (Section 1281.97, subd. (a)(1).) Compass is urging a limitation on section 1281.97 based on technical language in the arbitration agreement. The defendant in *Williams* urged a similar limitation, contending the statute should not apply to "voluntary" as opposed to "mandatory" predispute agreements. (*Williams*, *supra*, 86 Cal.App.5th at p. 1073.) The *Williams* court rejected this distinction, using the ordinary meaning of the words of the statute and relying upon the "Leistlature's clear and overriding purpose in enacting the statutory scheme—to ensure the timely dispute resolution by (1) deterring untimely payment of arbitration fees and (2) providing consumers and employees with a procedural mechanism to secure dispute resolution should the drafting party fail to timely pay arbitration fees." (*Ibid.*)

Lastly, Compass argues the court should provide discretionary relief on the grounds of excusable neglect, citing section 473, subdivision (b). (Opp., pp. 18-19.) The courts find the authority presented by Compass in support to be improper (as unpublished trial court orders, discussed above) and/or otherwise distinguishable. Compass has not put a noticed motion under section 473 before the court, nor is it clear from what "judgment, dismissal, order, or other proceeding" it is seeking relief. (§ 473, subd. (b); see also *Hu v. Silgan Containers Corp.*

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[2] A similar scenario occurred in *Gallo*, *supra*, 81 Cal.App.5th 621, and the appellate court strictly enforced the statute. The *Gallo* court affirmed the trial court's order vacating its earlier order compelling arbitration, where notice letters from the arbitrator regarding unpaid fees "were sent to a partner of the law firm representing [defendant], but the partner—for reasons unknown—never forwarded any of this correspondence to the law firm associate handling the case on a day-to-day basis or to the assigned law firm secretary." (*Id.* at p. 632.)

(1999) 70 Cal.App.4th 1261, 1264 ["the court's powers under section 473 cannot be invoked without an adequately supported noticed motion"].)

Furthermore, to allow such ongoing ancillary litigation and further delay a resolution of Plaintiff's underlying claims would undermine the very purpose of section 1281.97. (*De Leon v. Juanita's Foods* (2022) 85 Cal.App.5th 740, 757 [applying material breach provisions "in a straightforward fashion, as the trial court did here, is therefore consistent with the statute's legislative purpose"]; *Espinoza, supra*, 83 Cal.App.5th at p. 877 ["Although strict application may in some cases impose costs on drafting parties for innocent mistakes, the Legislature could have concluded a bright-line rule is preferrable to requiring the nondrafting party to incur further delay and expense establishing the nonpayment was intentional and prejudicial"].) "It is within the Legislature's purview to make a civil remedy available, as a matter of policy, without regard to fault. [Citation.]" (*Williams, supra*, 86 Cal.App.5th at p. 1075.) Thus, Compass' argument seeking relief on grounds of excusable neglect or mistake is without merit.

Accordingly, for the reasons set forth above, Plaintiff's request to lift the stay on the proceedings is GRANTED.

Plaintiff's Request for Sanctions is GRANTED

As the court has found Compass is in material breach of the arbitration agreement under section 1281.97, subdivision (a), and Plaintiff has requested to proceed with the matter in court, as is her right under subdivision (b) of the statute, the court is required to impose a reasonable monetary sanction. (§ 1281.99, subd. (a) [the court "shall impose a monetary sanction against a drafting party" in the form of "the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer as a result of the material breach"]; *Espinoza, supra*, 83 Cal.App.5th at pp. 774-775.)

Plaintiff is requesting fees and costs in the amount of $5,900.00. (Mot., p. 2.) This is based on the claim that attorney Barrera spent 5 hours on the matter at his rate of $850 per hour, and attorney Davenport spent 2 hours on the matter at her rate of $650 per hour, plus $350 in costs. (Barrera Decl., ¶ 11.) The court finds the hourly rates to be excessive and will substitute a rate of $400 per hour. Also, Plaintiff's evidence suggests that AAA would be refunding the initial $350.00 filing fee paid by her. (Barrera Decl., Ex. D.) She need not be reimbursed this amount twice. Thus, the court finds the reasonable amount owed Plaintiff is $2,800.00 (7 hours at $400.00 per hour).

Plaintiff's request for sanctions pursuant to section 1281.99 is GRANTED. Compass shall pay to Plaintiff's counsel the amount of $2,800.00 within 30 days of the filing of this order.

Compass' Motion to Compel Arbitration is DENIED

Compass' instant motion to compel arbitration is functionally equivalent to its opposition to Plaintiff's motion to lift the stay on these proceedings. Indeed, the outcomes sought by the parties on the two motions are functionally identical, and the arguments and authority presented are substantially similar. Accordingly, as the court has granted Plaintiff's motion to lift the stay of these proceedings for reasons set forth above, Compass' motion to compel arbitration is DENIED.

Conclusion

Plaintiff Mindy Li's motion to lift the stay on these proceedings is GRANTED.

Plaintiff Mindy Li's request for sanctions is GRANTED. Defendants Urban Compass, Inc. and Compass California II, Inc. shall pay the sum of $2,800.00 to plaintiff Mindy Li within 30 days of the filing of this order.

The motion by defendants Urban Compass, Inc. and Compass California II, Inc. to compel arbitration is DENIED.

Plaintiff shall submit the final order.

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