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: 06-18-24 TIME: 9 A.M.

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

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

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

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

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

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1 and 14	23CV426528 Hearing: Demurrers	MFA Construction Inc. et al vs Anchor Loans LP et al	See Tentative Ruling. Court will prepare the final order.
LINE 2	23CV426528 Hearing: Motion hearings	MFA Construction Inc. et al vs Anchor Loans LP et al	See Tentative Ruling. Court will prepare the final order.
LINE 3	24CV430326 Hearing: Demurrer	ABRAHAM GACAD vs INNOVA PRODUCTS, INC. et al	See Tentative Ruling. Court will prepare the final order.
LINE 4	24CV430326 Motion: Strike	ABRAHAM GACAD vs INNOVA PRODUCTS, INC. et al	See Tentative Ruling. Court will prepare the final order.
LINE 5	24CV428512 Motion: Quash	First National Bank Of Omaha vs Kaled Morsey	See Tentative Ruling. Plaintiff shall submit the final order within 10 calendar days.
LINE 6	21CV385112 Motion: Summary Judgment/Adjudication	Quintara Biosciences, Inc. vs Gangyou Wang et al	See Tentative Ruling. Court will prepare 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 7	23CV413592 Hearing: Motion Summary Judgment	Wells Fargo Bank, N.A. vs Armando Quant	Plaintiff has moved for summary judgment. Notice appears proper. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar*, *supra*, at p. 843.) If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar*, *supra*, at p. 850.) Here, Plaintiff has met its initial burden. Defendant has failed to file an opposition, and has failed to show, therefore, any triable issue of material fact. Accordingly, the motion is GRANTED. Plaintiff shall submit the final order and judgment.

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

LINE 8	21CV381983 Motion: Discovery	MARY BENITEZ vs Marshalls of MA, Inc. et al	The proof of service has the wrong zip code for Plaintiff. Defendant shall come to the hearing to prove that the motion was in fact sent to the correct address, despite the proof of service. If service was not proper, the motion will be continued to allow for proper service. If service was proper, the unopposed motion will be granted and Plaintiff will be ordered to appear for a noticed deposition within 60 days of the hearing.

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

LINE 9	23CV423613 Motion: Discovery	DIANA OCHOA et al vs FORD MOTOR COMPANY et al	Plaintiff's motion to compel is DENIED. In lemon law cases, the primary focus for discovery is on the vehicle at issue in a particular case—not sweeping discovery. Plaintiffs' citations to cases such as *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138 and *Doppes v. Bently Motors, Inc.* (2009) 174 Cal.App.4th 967 do not change this analysis. Neither of those cases directly addressed a trial court's discovery orders in a lemon law case. Issues of overbreadth plague all of the requests. Many of the requests are not limited in time, not limited to cars of similar make, model, or year, and/or not limited to the defect at issue in the case. Plaintiff simply asserts the relevance of the requests without any specification of particular things needed or how such things might be relevant to the claims made. That documents relate to the Vehicle, regardless of issue, or to a Ford Engine, regardless of make, model or year, is not enough. The Court has denied almost identical motions brought by counsel for Plaintiff in several other lemon law cases. The Court's ruling is not going to change simply because Plaintiff brings the motion again. The motion is DENIED. Ford shall submit the final order.

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LINE 10	20CV371549 Hearing: Claim of Exemption	American Express National Bank et al vs Jennifer Mihojevich	Granted in part and denied in part. Judgment Debtor shall pay $150 per pay period to creditor. Judgment Creditor shall submit the final order.

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LINE 11	22CV409340	Sergey Armishev vs American Honda Motor Co., Inc.	Defendant argues that it can compel arbitration, even though it is a nonsignatory to the sales contract, as a third-party beneficiary or under the doctrine of equitable estoppel, citing *Felisada v. FCA US LLC* (2020) 53 Cal.App.5th 486. Since *Felisada*, every district to consider the questions raised here has gone the other way. See *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324 (*Ochoa*)); *Montemayor et al. v. Ford Motor Company*, 92 Cal.App.5th 958 (Cal. Ct. App. June 26, 2023) ("Montemayor"), *Kielar v. The Superior Court of Placer County*, 94 Cal. App. 5th 614 (Cal. Ct. App. August 16, 2023) ("Kielar"); *Yeh v. Superior Ct. of Contra Costa Cnty.*, 95 Cal.App.5th 264 (Cal. Ct. App. Sept. 6, 2023) ("Yeh"); and *Davis et al. v. Nissan North America, Inc., et al.* ("Davis") (Cal. Ct. App. March 15, 2024) 100 Cal.App.5th 825. Having reviewed these decisions, the court finds that these are better reasoned than *Felisilda*. The motion to compel arbitration is DENIED. Plaintiff shall submit 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 12	23CV410594 Hearing: Other	Cahalan Properties LLC et al vs Pacific Construction & Management et al	The hearing on this petition is continued to August 13, 2024, as the petition depends on the dismissal of the action in 22CV409137 and Defendant has moved to reinstate that complaint with a hearing date on that motion set for July 23, 2024.
LINE 13	23CV423304 Hearing: Motion hearings	Davesh Bhambey et al vs Larry Lacomba	Motion has been withdrawn.
LINE 15			
LINE 16			
LINE 17			

- oo0oo -

Calendar Lines 1, 2, and 14
Case Name: *MFA Construction Inc., et al. v. Anchor Loans LP, et al.*
Case No.: 23CV426528

Now before the Court is: 1) Residential Investment Trust IV's ("RIT" or "Defendant RIT") demurrer to MFA Construction Inc.'s ("MFA" or "Plaintiff") Complaint to enforce a mechanic's lien for labor and materials incorporated into a work of improvement; 2) Defendant RIT's motion to expunge the lis pendens and mechanic's lien; and 3) Anchor Loans, LP's ("Anchor" or "Defendant Anchor") demurrer to Plaintiff's Complaint.

I. Background

A. Factual

This is an action for foreclosure on a mechanic's lien. According to the Complaint, Plaintiff is a licensed general contractor and California corporation with its principal place of business in Santa Clara County. (Complaint, ¶ 1.) On April 6, 2018, Defendant Anchor, a California construction lender, "originated a construction loan" to a business entity known as Overlook Road Los Gatos LLC ("Overlook"). (Complaint, ¶ 3.) Defendant RIT, also a business entity, was "beneficially interested" in Anchor's construction loan, which was secured by a deed of trust against the real property located at 19042 Overlook Road in Los Gatos, California ("Subject Property"). (Complaint, ¶¶ 2-3, Exhs. 1-2, Exh. A.) On October 6, 2023, Anchor conducted a "private foreclosure sale" of the Subject Property. (Complaint, ¶ 3.) Subsequent to the foreclosure sale, on October 6, 2023, Defendant RIT acquired title to the Subject Property per a trustee's deed. (*Ibid*.) On October 19, 2023, Plaintiff recorded a mechanic's lien for "all uncompensated work, labor, and building materials, supplies and equipment, as performed, installed and furnished by Plaintiff to the construction project at the Subject Property" in the amount of $1,641,400. (Complaint, ¶¶ 5-6, 9, Exh. 2.) That same day, Plaintiff provided notice of its mechanic's lien to Defendant RIT by certified mail.[1] (Complaint, ¶ 7.) Plaintiff alleges it was never compensated for the "work done within the scope of the lien" by any "prior nor successor owner" of the Subject Property. (Complaint, ¶ 9.)

Plaintiff now seeks to enforce a mechanic's lien for labor and materials incorporated into a work of improvement in the amount of $1,641,400. (Complaint, ¶¶ 5, 9.)

B. Procedural

On November 21, 2023, Plaintiff MFA and Saul Flores ("Flores",) managing officer of MFA, filed a verified Complaint against RIT and Anchor (collectively, "Defendants") alleging a single claim for foreclosure on a mechanic's lien.

On March 14, 2024, Defendant RIT filed a demurrer to the Complaint on the ground of failure to allege facts sufficient to constitute a cause of action. RIT also filed a motion to expunge the lis pendens and the mechanic's lien itself asserting that Plaintiff cannot prove the probable validity of its cause of action. That same day, Anchor filed a demurrer to Plaintiff's

[1] Notably, Plaintiff's Proof of Service of the recorded claim of mechanic's lien indicates only Anchor was served, not Defendant RIT. (See Complaint, Exh. 2 - Plaintiff's Proof of Service, executed on October 19, 2023.)

Complaint on two grounds: 1) failure to state facts sufficient to constitute a claim against Anchor, and 2) uncertainty. Plaintiff has filed a single opposition to all three motions. Both Defendants filed replies on June 11, 2024.

II. Defendant RIT's Demurrer

Defendant RIT demurs to Plaintiff's single cause of action to foreclose on its mechanic's lien.

A. Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Kirwan*).) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television, Inc.*).)

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

B. Merits of the Demurrer

"A mechanic's lien is a claim against real property, which may be filed if a claimant has provided labor or furnished materials for the property and has not been paid. [Citation.]" (*Brewer Corp. v. Point Center Financial, Inc.* (2014) 223 Cal.App.4th 831, 839 (*Brewer*).) Thus, " '[it] is a procedural device for obtaining payment of a debt [owed] by a property owner for the performance of labor or the furnishing of materials used in construction.' [Citation.]" (*North Bay Construction, Inc. v. City of Petaluma* (2006) 143 Cal.App.4th 552, 555.)

Plaintiff's verified Complaint alleges a single claim for foreclosure on a mechanic's lien. Plaintiff alleges Defendant RIT failed to provide compensation "for the work done within the scope of the lien". (Complaint, ¶ 9.) It further contends that:

> All work, labor, installation of materials, fixtures, or other improvements done by MFA was duly performed in a workmanlike manner, conforming to the building code and plans and specifications provided, and the same is so for all other work, labor, installation of materials, fixtures, or other improvements done by MFA, or as requested by change orders or modifications of the plans and specifications, called for by the original owners and developer.

> No compensation for the work done within the scope of the lien enforced hereby has been paid by any prior nor successor owner of the OLR Parcel and is all due and owing in the total sum of $1,161,400.00.

(Complaint, ¶¶ 8-9.)

As noted above, Plaintiff recorded a verified Mechanic's Lien Claim describing the Subject Property and the labor, services, equipment, and materials to be furnished on the work of improvement, at the Subject Property. (Complaint, ¶ 6.) The balance allegedly due and owed to Plaintiff is currently $1,161,400, plus costs and interests on the outstanding principal. (Complaint, ¶ 7, Exh. 2 – Plaintiff's Proof of Service.)

Proper notice is a prerequisite to perfecting a mechanic's lien and thus, the failure to provide such notice renders the lien void. (*Industrial Asphalt v. Garrett Corporation* (1986) 180 Cal.App.3d 1001 (*Industrial Asphalt*).)

To establish and enforce a valid mechanic's lien, the claimant must meet a variety of substantive and timing requirements set forth in Civil Code section 8200, et seq. Under Civil Code section 8200, "[s]ervice of a preliminary 20-day notice is required to enforce a mechanic's lien…A preliminary notice must be served within 20 days after the claimant has begun providing labor, services, equipment, or material for which a mechanic's lien…claim will be made. The Legislature imposed the notice requirement to alert property owners and lenders to the fact that the property or funds involved might be subject to claims arising from contracts to which they were not parties and would otherwise have no knowledge. The Legislature *intended to exact strict compliance with the preliminary notice requirement*." (*Brewer, supra*, 223 Cal.App.4th at 847, internal citations and quotations omitted, italics added.) More specifically, preliminary notice must be given to the following parties: (1) the owner or reputed owner; (2) the direct contractor or reputed direct contractor to which the claimant provides work, either directly or through one or more subcontractors; and (3) the construction lender or reputed construction lender, if any. (Civ. Code, § 8200, subd. (a).)

Defendant RIT argues that Plaintiff does not allege in its Complaint that Defendant is an owner of the Subject Property with whom Plaintiff "ever had a direct contractual relationship, as required by Civil Code Section 8200(e)(2)," and therefore, the exceptions to the preliminary notice requirement do not apply to Plaintiff. (See Memorandum of Points and Authorities in Support of Defendant's Demurrer to Complaint ("RIT MPA,") p. 4:8-11; see also RIT Reply Brief in Support of Motion to Expunge and Demurrer ("RIT Reply,") p. 4.) As a result, Defendant concludes Plaintiff's Complaint fails to allege that it gave both the statutorily required preliminary notice of its mechanic's lien claim and "proof of notice" to Defendant RIT, the owner of the Subject Property, as required by Civil Code section 8200, subdivision (a). (RIT MPA, pp. 4:8-11; 7:3-15; RIT Reply, p. 5.)

In opposition, Plaintiff insists the service of a preliminary notice on RIT is not required or is excused in this matter because Plaintiff "had a direct contract with the owner of the property," is "asserting a lien claim against the owner of the property, not a construction lender, and RIT "became the current owner and successor-in-interest to the [Subject Property] upon Anchor Loans' foreclosure on the property." (Plaintiff's Opposition to Demurrer and Motion to Expunge Lis Pendens ("Opp.,") p. 4:20-25.) Plaintiff concludes "the only notice

required to be sent to Defendants is the notice that an owner with a direct contract is due." (*Ibid.*) This Court disagrees.

Here, Plaintiff has not pled facts establishing that notice to RIT was excused under either of the two exceptions outlined in Civil Code section 8200, subdivision (e). The Complaint alleges that RIT is an owner of the property. Specifically, the Complaint pleads: "[o]n or about October 6, 2023, [Anchor] caused a private foreclosure sale of the OLR Parcel, and as a result of said sale and a credit bid, defendant RIT IV, took title pursuant to a trustee's deed. [RIT] is now the title holder and a successor in interest to Overlook Road Los Gatos LLC." (Complaint, ¶ 3, Exh. 1 – Trustee's Deed Upon Sale.) But, the Complaint is completely devoid of facts alleging Plaintiff entered into a direct contract with Defendant RIT, the owner of the Subject Property. (See Complaint, ¶ 3.) Accordingly, preliminary notice is a prerequisite to enforcing the mechanic's lien.

Plaintiff also argues that Civil Code section 8200 does not extend the preliminary notice requirement to prior construction lenders. (Opp., pp. 3:23-28-4:1-7.) Specifically, Plaintiff states it did not have a construction lender at the time construction work began at the Subject Property. (*Ibid.*) Rather, Plaintiff had a direct contract with, and a mechanic's lien claim against, the original owner of the Subject Property. (Opp., p. 4:20-25.) It further asserts that Defendant RIT became the current owner and successor-in-interest to Overlook upon Anchor's foreclosure on the Subject Property. (*Ibid.*) Plaintiff cites *Industrial Asphalt, supra*, 180 Cal.App.3d at p. 1008, for the proposition that a preliminary 20-day notice is not required to be served by a direct contractor on an owner. (Opp., p. 4:8-25.)

In *Industrial Asphalt*, defendant Garrett leased real property and hired a general contractor to improve it. (*Industrial Asphalt, supra,* 180 Cal.App.3d at p. 1006.) The general contractor in turn hired Industrial as a subcontractor. (*Ibid.*) Industrial Asphalt provided a preliminary 20-day notice to Garrett as the "owner" under the applicable statutes but not to the general contractor, who filed for bankruptcy and failed to pay Industrial. (*Ibid.*) Industrial recorded a mechanic's lien and filed suit against Garrett to foreclose on the lien. (*Id.* at p. 1008.) The trial court held that the applicable statute, Civil Code section 8200 (then Civil Code section 3097, subdivision (a)), required Industrial to provide written notice to *both* the contractor and the owner. (*Ibid.*) Consequently, even though Industrial provided notice to the owner, Garrett, its claim to foreclose was defeated by its failure to notify the contractor. (*Id.,* at p. 1006.) The appellate court reversed, explaining that the "strict statutory construction would allow a party who received the required notice to be insulated from liability because another party did not receive notice." (*Ibid*.) Refusing to accept "this aridly formulistic result" and proclaiming that this was not the notice statute's purpose, the Court of Appeals held that Industrial's notice to Garrett satisfied the applicable notice requirement. (*Ibid.*) It continued that strict notice requirements "apply only to parties a lien will affect," and contrasted that to the case before it, where the defective notice concerned a party *not* affected by the lien, about whom the statute "d[id] not specifically manifest a legislative intent [to strictly construe the notice requirements.]" (*Industrial Asphalt, supra,* 180 Cal.App.3d at p. 1008.) Plaintiff maintains that the same "aridly formulistic result" would occur should this Court determine that it was required to serve Defendant RIT and that the failure to do so defeats its claim to foreclose on the lien. (Opp., p. 4:2-17.)

In support of its reply, Defendant RIT argues that Plaintiff's reliance on *Industrial*, is misplaced because the mechanic's lien claimant was a subcontractor in that case, not a general

contractor, and the facts are distinguishable. (RIT's Reply in Support of Motion to Expunge and Demurrer ("RIT Reply,") p. 4:14-23.) In *Industrial*, as discussed above, the Court held that the Legislature did not intend that the notice requirements be strictly construed to extend to a party *not affected* by the lien. As correctly pointed out by the Defendant, here, this is simply not a case where Plaintiff is a general contractor attempting to enforce a lien that directly impacts the rights of Defendant RIT. Thus, *Industrial* is neither helpful nor instructive on this matter.

Finally, Plaintiff sets forth an estoppel theory in an attempt to bypass the statutory requirements outlined in Civil Code section 8200, subdivision (a). (Opp., p. 5:1-12.) Under estoppel principles, a general contractor *may* enforce a mechanic's lien, notwithstanding the lack of a preliminary 20-day notice, when a *noncontracting* owner has *actual* knowledge of the construction and does not post and record a notice of nonresponsibility. (*Kim, supra,* 42 Cal.App.4th at p. 856.) In that circumstance, the claimant, who may not be aware of the owner's identity, is deemed to have a direct contract with the owner for purposes of Civil Code section 8200, subdivision (a). (*Id.*, p. 856.) Plaintiff MFA insists, under the estoppel theory, that it was not required to serve Defendant with a preliminary notice because Defendant had *actual* knowledge of both: 1) the work being performed by Plaintiff; and 2) a contract between Plaintiff and the previous owner of the property "[a]t least as early as August 30, 2022." (Opp., p. 5:8-13.)

But, the Complaint is devoid of facts demonstrating that: 1) Defendant RIT had *actual knowledge* of the work performed by Plaintiff on the Subject Property; and 2) RIT did not "post and record a notice of "nonresponsibility." (See *Scott, Blake & Wynee v. Summit Ridge Estates, Inc.* (1967) 251 Cal.App.2d 347, 354 ["The knowledge of the owner…is knowledge of *actual* construction…"]; see also *Kim, supra,* 42 Cal.App.4th at p. 856.) The Complaint alleges RIT purchased the Subject Property at a foreclosure sale in 2023. (Complaint, ¶ 3.) Thus, Plaintiff's estoppel theory is insufficient to bypass the preliminary notice requirements under Civil Code section 8200, subdivision (a).

Relying on Exhibit 2 of Defendant RIT's request for judicial notice in support of the motion to expunge lis pendens, a bankruptcy schedule, Plaintiff contends that RIT had actual notice of the contract between Plaintiff and the previous owner of the contract. At the outset, the Court notes that it will grant judicial notice of this item in relation to RIT's motion to expunge the lis pendens and mechanic's lien, *not* its demurrer. Plaintiff has not asked the Court to take judicial notice of this exhibit in the context of the demurrer and the Court cannot take judicial notice of the truth of the statements made in Exhibit 2. Even assuming the Court could take judicial notice, Plaintiff does not explain how this notice is an adequate substitute for the notice required by Civil Code section 8200, subdivision (a).

In both Plaintiff's opposition and RIT's reply, the parties argue over whether RIT is a construction lender. (See Opp., p. 3:24-27; see also RIT Reply, p. 7.) But, there are no allegations to that effect in the Complaint. Accordingly, any argument based on RIT's status as a construction lender must be rejected.

Defendant's demurrer to the single cause of action of foreclosure on a mechanic's lien on the ground of failure to state facts is SUSTAINED WITHOUT LEAVE TO AMEND. "'Generally[,] it is an abuse of discretion to sustain a demurrer without leave to amend if there is *any reasonable possibility* that the defect can be cured by amendment. [Citation.] . . .

Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]'" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*), italics added.) Here, Plaintiff does not explain how it could amend its Complaint to cure the defects discussed above. Although Plaintiff argues it had a *direct* contractual relationship with RIT, and that RIT had actual knowledge of Plaintiff's work on the Subject Property, Plaintiff fails to provide any support or explanation on how this is so.

III. Defendant Anchor's Demurrer

Defendant Anchor also demurs to Plaintiff's Complaint to enforce the mechanic's lien on grounds that the Complaint: 1) fails to state facts sufficient to constitute a cause of action; and 2) is uncertain.

A. Legal Standard

The applicable legal background is outlined, *supra*. (See Defendant RIT's Demurrer, Subsection II. A.) Thus, the Court need not repeat it here.

B. Anchor's Evidentiary Objection

As a preliminary matter, Anchor objects, within its reply, to the Declaration of Flores, the managing officer of RIT on grounds that it is impermissible extrinsic evidence. (Anchor Reply, p. 1:23-28.) The Court declines to rule on this objection as it is not relying on Flores' declaration and the evidence is not material to the outcome of the demurrer.

C. Merits of the Demurrer

1) Failure to State a Claim

Anchor primarily asserts Plaintiff failed to serve Anchor, a construction lender, with a preliminary notice, which is a prerequisite to foreclosing on a mechanic's lien. (Anchor Demurrer to Plaintiff's Complaint to Enforce Mechanic's Lien ("Anchor MPA,") p. 3:13-18.) This Court agrees with Anchor.

As set forth above, one of the parties to whom preliminary notice must be given is the "construction lender or reputed lender, if any." (Civ. Code, § 8200, subd. (a)(3).) "A claimant with a direct contractual relationship with an owner or reputed owner is required to give preliminary notice only to the construction lender or reputed construction lender, if any." (Civ. Code, § 8200, subd. (e)(2).) Thus, even if Plaintiff was in a direct contractual relationship with the owner, it was still required to give preliminary notice to a construction lender.

According to the Complaint, Anchor is "doing business in California as a construction lender" and "originated a construction loan to Overlook." (Complaint, ¶ 3.) These allegations are accepted as true on demurrer. (See *Committee on Children's Television, Inc., supra,* 35 Cal.3d 197, 213-214.) Plaintiff admits "[Anchor] was the construction lender for the project." (See Opp., p. 1:23-25.) As such, given Anchor's status as a construction lender, Plaintiff is statutorily required to provide preliminary notice to Anchor, to perfect its mechanic's lien. As discussed above, in the context of RIT's demurrer, the Complaint fails to plead facts indicating that notice was excused.

Accordingly, Anchor's demurrer to the single cause of action of foreclosure on a mechanic's lien on the ground of failure to state facts is SUSTAINED WITHOUT LEAVE TO AMEND. (See *Goodman, supra*,18 Cal.3d 335 at p. 349.) Here, Plaintiff does not explain how it could amend its Complaint to cure the defects discussed above.

2) Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616.) "[T]he failure to specify the uncertain aspects of a complaint will defeat a demurrer based on the grounds of uncertainty." (*Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 809, overruled on other grounds by *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 328, fn. 30.)

In both its demurrer and reply, Anchor argues that the Complaint contains no allegations that it is the owner of the Subject Property, and instead, "affirmatively alleges" that Defendant RIT is the owner of the Subject Property based on the Trustee's Deed Upon Sale (attached as Exhibit 1) indicating that title to the Subject Property is held by RIT. (Anchor Demurrer to Plaintiff's Complaint to Enforce Mechanic's Lien ("Anchor MPA,"), p. 4:26-30; Anchor Reply to Opp., p. 2.) Additionally, Anchor argues that the Complaint contains no allegations that Anchor, as the construction lender, ever contracted with Plaintiff to undertake any of the work on the Subject Property, and that the claim of mechanic's lien, attached to the Complaint as Exhibit 2, is belied by the Trustee's Deed Upon Sale and Plaintiff's own allegation that RIT took title at the foreclosure sale. (Anchor MPA, pp. 4:29-30-5:1-4.)

In opposition, Plaintiff argues Anchor identifies itself as "an affiliate" of RIT and Anchor assigned its interest to RIT before the foreclosure which led to RIT taking title to the Property. (Opp., p. 3:16-22.) It further argues, the two Defendants are not distinct and operate as alter egos of one another. (*Ibid.*) Thus, it concludes, Anchor "has a beneficial or equitable interest" in the Subject Property and therefore a proper party defendant. (*Ibid.*)

It is clear from Anchor's arguments that Anchor understands the nature of Plaintiff's claim. Notably, Anchor misapplies Code of Civil Procedure section 430.10, subdivision (f) to contend that it has no interest in the Subject Property and is not a proper party. This argument is more akin to a failure to state a claim under Code of Civil Procedure section 430.10, subdivision (e), rather than an uncertainty argument. In any event, Plaintiff's claim is alleged clearly enough to enable a response. (*Lickiss v. Financial Industry Reg. Authority* (2012) 208 Cal.App.4th 1125, 1135 ["demurrers for uncertainty are disfavored and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond."]; *Khoury, supra,* 14 Cal.App.4th at p. 616 ["A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures."].)

Accordingly, the Court finds that the Complaint is not subject to a demurrer for uncertainty under Code of Civil Procedure section 430.10, subdivision (f).

IV. Defendant RIT's Motion to Expunge the Lis Pendens & Mechanic's Lien

Defendant RIT seeks to expunge the lis pendens and mechanic's lien on the ground that Plaintiff cannot meet its burden to establish the probable viability of its claim to enforce a mechanic's lien within the meaning of Code of Civil Procedure section 405.30.

A. Defendant's Evidentiary Objections

Defendant RIT objects to the following:

1) Declaration of Saul Flores, paragraph 9, on multiple grounds: 1) the statement by Mr. Flores regarding his "unsubstantiated understanding and expectation as to what the source of payments would be" is not probative of the facts that are relevant to any issue on this motion (Evid. Code § 350; *California Correctional Peace Officers Ass'n v. State of Calif.* (2006) 142 Cal.App.4th 1); 2) Mr. Flores' statement lacks foundation; 3) is based on the speculation of the declarant; and 4) has not been shown to be based on facts that are within his personal knowledge. (Evid. Code § 702.) The court declines to rule on this objection because it is not material to the outcome of the motion.

2) Declaration of Saul Flores, paragraph 11, on relevancy grounds. This Court agrees that this paragraph is not probative of any facts that are relevant to any issue on this motion. Accordingly, the Court declines to rule on this objection because it is not material to the outcome of the motion.

B. Defendant's Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citations and quotation mark omitted.)

Defendant asks this Court to take judicial notice of the following items:

1) United States Bankruptcy Court, for the Northern District of California, Case No 22-50557, *entitled,* The Voluntary Petition for Non-Individuals Filing for Bankruptcy, filed by debtor, Overlook Road Los Gatos Development, LLC, filed on June 29, 2022. (Exhibit 1)

2) The Amended Schedule A/B: Assets — Real and Personal Property that Overlook filed in the Bankruptcy Case on August 30, 2022. (Exhibit 2)

3) The Fourth Amended Combined Plan of Reorganization and Tentatively Approved Fourth Amended Disclosure Statement Dated June 9, 2023 that Overlook filed in the Bankruptcy Case on June 9, 2023. (Exhibit 3).

There is no opposition to Defendant's requests. The Court may take judicial notice of item numbers one through three, as records of the Bankruptcy Court under Evidence Code

section 452, subdivision (d). In addition, the items appear relevant to issues raised in the motion. (See *Gbur, supra,* 93 Cal.App.3d at p. 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Accordingly, Defendants' request for judicial notice of item numbers one through three, are GRANTED. (Evid. Code, § 452, subd. (d).) This Court takes judicial notice of the fact that the court records were entered by the court and for the date on which they were entered. The Court does not judicial notice of the truth of hearsay statements contained in a court document. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.)

C. Legal Standard

An owner may file both a motion to remove the mechanic's lien and a motion to expunge the lis pendens and have them heard at the same time. (*Howard S. Wright Constr. Co v Superior Court* (2003) 106 Cal.App.4th 314, 319-320) (*Howard*) [discussing the standard of review of a trial court's determination of the probable validity of a mechanic's lien].)

A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice." (*Urez Corp. v. Super. Ct. (Keefer)* (1987) 190 Cal.App.3d 1141, 1144.) Code of Civil Procedure "[s]ection 405.30 allows the property owner to remove an improperly recorded lis pendens by bringing a motion to expunge." (*Kirkeby v. Super. Ct. (Fascenelli)* (2004) 33 Cal.4th 642, 647 (*Kirkeby*); see also Code Civ. Proc., § 405.31.) When such a motion is filed, "the court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." (Code Civ. Proc., § 405.32.)[2] " 'Probable validity,' with respect to a real property claim, means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim." (Code Civ. Proc., § 405.3.)

In opposing the motion, the claimant bears the burden by a preponderance of the evidence to show the probable validity of the underlying claim. (Code Civ. Proc. §§ 405.30, 405.32)

"Unlike other motions, the burden is on the party opposing the motion to expunge--i.e., the claimant-plaintiff--to establish the probable validity of the underlying claim. (Code Civ. Proc., § 405.30.) The claimant-plaintiff must establish the probable validity of the claim by a preponderance of the evidence. (Code Civ. Proc., § 405.32.)" (*Howard S. Wright Construction Co. v. Superior Court, supra,* 106 Cal.App.4th at p. 319, fn. omitted.) "[A] claimant must prove more than that he recorded the lis pendens in good faith and without ulterior motives… [rather, h]e must make a showing that he is likely to prevail on the merits, in much the same fashion as one seeking an attachment must show the probable merit of the underlying lawsuit." (*Amalgamated Bank v. Super. Ct. (Corinthian Homes)* (2007) 149 Cal.App.4th 1003, 1011-1012.)

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[2] Here, Defendant RIT does not argue that Plaintiff's Complaint does not raise a real property claim.

D. Merits of Motion to Expunge

Defendant RIT asserts that Plaintiff's Complaint to enforce a mechanic's lien is without merit and Plaintiff cannot meet its burden in opposing this motion in proving the probable viability of that claim because it failed to serve the statutorily mandated preliminary notice that Civil Code section 8200 requires it to provide. (See RIT's Motion to Expunge Lis Pendens and Mechanic's Lien ("Mot. Expunge,") pp. 2:10-11-3:1-3, 10:3-5.) Next, RIT argues, the evidence establishes the amount of the lien claim "grossly exceeds by more than six times the amount of money that the principle of both MFA and the debtor, Overlook, represented to the Bankruptcy Court under penalty of perjury." (Mot. Expunge, p. 4:18-23.) Defendant also seeks "reasonable attorneys' fees and costs" in connection with the motion. (Mot. Expunge, p. 10:16-21.)

In opposition, Plaintiff MFA asserts "[Defendant] does not provide any evidence or argument that its claim is invalid for any reason other than the amount of the claim. (Opp., p. 5:14-18.) Plaintiff further argues that even if its claim is monetarily overstated, it does not render the claim invalid. (*Ibid*.) It concludes that Defendant's argument is primarily based on misconstrued timelines, "estimated figures" and "misinterpretations" of contract terms, and that the discrepancies alleged by Defendant simply do not exist. (Opp., pp. 5: 22-25-6:15-22.) Plaintiff seeks reasonable attorney's fees in connection with opposing this motion.

In reply, Defendant RIT argues Plaintiff fails to meet its burden in opposing the motion to expunge because it fails to provide admissible evidence that its mechanic's lien claim has probable viability. (RIT Reply, p. 3:19-23.)

As previously analyzed, Plaintiff's enforcement of a mechanic's lien claim is without merit and RIT's demurrer is sustained without leave to amend. Additionally, Plaintiff has provided no evidence from which the court could conclude that either notice was properly given or that notice was excused. As a result, Plaintiff fails to make a showing that it is likely to prevail on the merits and the motion to expunge is GRANTED on this ground.

In light of the above ruling on the motion to expunge, this Court need not address Defendant's argument regarding the overstatement of Plaintiff's mechanic's lien claim.

E. The Request for Attorney's Fees

"Under section 405.38, a prevailing party on a motion to expunge a lis pendens is entitled to recover attorney fees." (See *Castro v. Super. Ct. (Cal. Savings)* (2004) 116 Cal.App.4th 1010, 1018.) Section 405.38 states that "[t]he court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." (Code Civ. Proc., § 405.38.)

Although Defendant is the prevailing party in bringing this motion, the Court DENIES its request for attorneys' fees because Plaintiff acted with substantial justification in opposing the motion. Additionally, Plaintiff's request for attorney's fees is DENIED because an amount has not been specified and supporting documentation has not been provided.

V. Conclusion

Defendant RIT's demurrer to the single cause of action of foreclosure on a mechanic's lien on the ground of failure to state a claim is SUSTAINED WITHOUT LEAVE TO AMEND.

Defendant Anchor's demurrer to the single cause of action of foreclosure on a mechanic's lien on the ground of failure to state a claim is SUSTAINED WITHOUT LEAVE TO AMEND.

Defendant RIT's motion to expunge the lis pendens and mechanic's lien is GRANTED. Both parties' requests for attorney's fees are DENIED.

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Calendar lines 3 and 4
Case Name: *Abraham Gacad v. Innova Products, Inc. et al.*
Case No.: 24CV430326

I. Factual and Procedural Background

Plaintiff Abraham Gacad ("Plaintiff") brings this personal injury/products liability action against defendant Innova Products, Inc. ("Defendant").

According to the allegations of the complaint, Defendant engaged in the business of manufacturing, fabricating, designing, assembling, distributing, buying, selling, inspecting, servicing, repairing, marketing, warranting, modifying, leasing, and/or advertising the Innova Fitness ITM5900 Inversion Table ("Inversion Table"). (Complaint ("Compl."), ¶ 3.)

On January 22, 2022, Plaintiff purchased the Inversion Table through Amazon.com. (Compl., ¶ 12.) On February 5, 2022, Plaintiff meticulously assembled the Inversion Table according to the provided instructions. (*Id*. at ¶ 13.) Following the assembly, Plaintiff confirmed that the Inversion Table was situated on a stable surface, adhering to the recommended clearance in all directions. (*Id*. at ¶ 14.) Additionally, Plaintiff was under the maximum weight capacity. (*Ibid*.) Upon using the Inversion Table, a part of the machine dislodged and slid off, compromising the security of Plaintiff's right ankle, and exposing Plaintiff to immediate risk and harm. (*Id.* at ¶ 15.)

On February 2, 2024, Plaintiff filed his complaint against Defendant alleging the following causes of action:

1) Negligence;
2) Strict Products Liability;
3) Breach of Express Warranty;
4) Breach of Implied Warranty; and
5) Deceit by Concealment in Violation of Civil Code §§ 1709, 1710.

On March 25, 2024, Defendant filed a demurrer and motion to strike portions of the complaint. Plaintiff opposes both motions. Defendant has filed replies.

II. Demurrer

Defendant demurs to the complaint on the grounds the first, third, and fifth causes of action are uncertain and fail to state facts sufficient to constitute a cause of action.

a. Legal Standard

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

b. Uncertainty

Defendant specially demurs to the first, third, and fifth causes of action on the ground they are uncertain and ambiguous because they fail to state specific factual allegations against Defendant and fail to name Defendant or its conduct in any way. (Demurrer, p. 4:15-19.)

Demurrers for uncertainty are disfavored and sustained "only if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135; see also *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616 ["A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures."].)

In this case, the Court is not persuaded that the complaint is so uncertain or ambiguous that Defendant is unable to respond. Moreover, Defendant is the only named defendant in this case and therefore, the allegations in the causes of action at issue are directed at Defendant. Finally, any ambiguities in the pleading can be clarified further during discovery, which Plaintiff notes has not happened yet. (See Opposition, p. 5:25-27.)

Thus, the demurrer on the ground that the three causes of action are uncertain is OVERRULED.

c. Failure to State Sufficient Facts

i. First Cause of Action – Negligence

"The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252.) "Negligence may be alleged in general terms; that is, it is sufficient to allege an act was negligently done without stating the particular omission which rendered it negligent." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.)

Defendant asserts that the first cause of action fails because "Innova is a distributor of the product in question and Plaintiff has not established Innova owes a general duty of care to Plaintiff. Furthermore, there is no legal duty to warn as Innova is not legally considered a manufacturer of a product." (Demurrer, p. 5:3-5.)[3] Defendant does not cite to any authority and has not requested the Court take judicial notice of any documents to support the contention that it is not "legally considered a manufacturer."[4]

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[3] Defendant states that Plaintiff must prove the elements of each of the causes of action at issue. However, a court reviewing the propriety of a ruling on demurrer is not concerned with the "plaintiff's ability to prove . . . allegations, or the possible difficulty in making such proof." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.)

[4] Defendant includes a footnote on p. 3 of its demurrer regarding exhibits and requests for judicial notice. (See Demurrer, p. 3, fn. 3.) The Court finds no exhibits attached to the complaint and Defendant has not submitted any code-compliant request for judicial notice. Thus, any implication that the Court may take as true Defendant's assertion that it is only the distributor of the Inversion Table is not well taken.

In opposition, Plaintiff contends that he never alleges that Defendant is only a distributor and instead alleges Defendant negligently designed, manufactured, constructed, assembled, inspected, and/or sold the Inversion Table. (See Opposition, p. 9:10-14, Compl., ¶¶ 3, 17, 18.) Plaintiff further asserts that even if Defendant was only a distributor, it would still owe him a duty of care. (Opposition, p. 9:16-23, citing *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 151 (*Williams*), *Defries v. Yamaha Motor Corp.* (2022) 84 Cal.App.5th 846, 857 (*Defries*).)

In *Williams*, the Second District Court of Appeal stated that "[a] manufacturer/seller of a product is under a duty to exercise reasonable care in its design so that it can be safely used as intended by its buyer/consumer." (*Williams, supra*, 185 Cal.App.3d at p. 141.) In *Defries*, the Fourth District Court of Appeal stated: "the nondelegable duty of a product manufacturer (here, a distributor) to deliver to the consumer a defect-free product means it cannot 'escape liability on the ground that the defect . . . may be have been caused by something one of its authorized dealers did or failed to do.'" (*Defries, supra*, 84 Cal.App.5th at p. 857.) The Court does not find these two cases entirely persuasive to Plaintiff's "even if" argument, given that the manufacturer and seller/distributor in those cases were the same parties. However, the California Supreme Court has held that "[i]n general, a manufacturer or distributor has a duty to warn about all known or knowable risks of harm from the use of its product. This duty applies to all entities in a product's supply chain." (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 185 [internal citations omitted]; see also *Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 575.) As such, as the distributor, Defendant does owe a duty of care.

Plaintiff additionally argues that a seller may be negligent in marketing a product and would owe a duty to warn the consumer. (Opposition, p. 9:23-26, citing *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1305 (*Chavez*).). In *Chavez*, the Second District Court of Appeal explained that "'[a] manufacturer or other seller can be negligent in marketing a product because of the way it was designed. In short, even if a seller had done all that he could reasonably have done to warn about a risk or hazard related to the way a product was designed, it could be that a reasonable person would conclude that the magnitude of the reasonably foreseeable harm as designed outweighed the utility of the product as so designed.'" (*Chavez, supra*, at p. 1305, quoting *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 479.)

In this case, the Court finds that Plaintiff alleges Defendant was the designer, manufacturer, and seller of the Inversion Table. (See Compl., ¶¶ 3, 17, 18.) As the manufacturer/designer/seller, Defendant owed a duty of care to Plaintiff. Thus, Plaintiff sufficiently alleges Defendant owed him a duty.

Accordingly, the demurrer to the first cause of action on the ground Plaintiff fails to sufficiently allege a duty is OVERRULED.

ii. Third Cause of Action – Breach of Express Warranty

"The principal elements of an express warranty are an affirmation of fact or promise by the seller and reliance thereon by the buyer." (*Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 696, citing Civ. Code, § 1732; see also *Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 928.)

As to the third cause of action, Defendant again argues that it is the distributor of the Inversion Table and that Plaintiff has not established that it owes him a duty of care. (Demurrer, p. 5:25-26.) Additionally, Defendant asserts there is no legal duty to warn because it is not legally considered the manufacturer of a product. (*Id.* at p. 5:26-27.) This argument does not address the elements of a breach of express warranty. Further, as the Court noted above, Plaintiff alleges Defendant is the designer, manufacturer, and seller of the Inversion Table and Defendant presents nothing to support its argument that it is legally not the manufacturer.

Moreover, as Plaintiff quotes in opposition, "[i]f express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer under this chapter." (Cal. Civ. Code, § 1795; see also Opposition, p. 10:19-23.) Here, the third cause of action alleges that Defendant expressly warranted the Inversion Table to be free from defects in material and workmanship and that it was safe for consumers to use for its intended purpose, it was of merchantable quality, it did not produce dangerous side effects, and was adequately tested. (Compl., ¶¶ 32, 33.) Defendant's argument is not well taken and therefore, the demurrer to the third cause of action is OVERRULED.

iii. Fifth Cause of Action – Deceit by Concealment

"The common law tort of fraud (deceit) is embodied in Civil Code section 1709, and Civil Code section 1710 defines four kinds of actionable deceit, which parallel the provisions of Civil Code section 1572: (1) intentional misrepresentation; . . . (2) negligent misrepresentation; . . . (3) concealment ('The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.') (Civ. Code, § 1710, subd. 3); and (4) failure to perform a promise[.]" (*Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 41-42.)

Defendant merely asserts the same argument it asserted as to the first and third causes of action: Defendant is the distributor and Plaintiff has not established what facts, if any, Defendant was aware of that should have been disclosed to Plaintiff by it, rather than by the manufacturer of the Inversion Table. (Demurrer, p. 6:21-25.)

As both the Court and Plaintiff have noted, the Complaint alleges that Defendant was the designer, manufacturer, and seller of the Inversion Table. (Compl., ¶¶ 3, 17, 18.) Further, Plaintiff alleges Defendant had knowledge that the Inversion Table created an unreasonable risk of seriously injury and intentionally concealed this information while promoting the Inversion Table as safe. (*Id.* at ¶¶ 50, 51, 53.) Based on the foregoing, the Court is not persuaded by Defendant's argument. (See e.g., *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 859 [stating in part, "'a duty to disclose may arise from the relationship between seller and buyer'"].)

Accordingly, the demurrer to the fifth cause of action is OVERRULED. Based on the foregoing, the demurrer is OVERRULED in its entirety.

III. Motion to Strike

Defendant moves to strike the following portions from the complaint:

1. **Page 5, Paragraph 22, Lines 1-5:** "The above-described conduct of Defendants by and through their officers, directors, employees and/or managing agents, was carried out with a conscious disregard of Plaintiff's rights, and of the safety of consumers and, therefore, Plaintiff is entitled to an award of punitive damages in an amount sufficient to punish Defendants, in light of their financial condition, and to make an example of them"

2. **Page 5-6, Paragraph 29, Lines 27-3:** "The above-described conduct of Defendants by and through their officers, directors, employees and/or managing agents, was carried out with a conscious disregard of Plaintiff's rights and of the safety of consumers and, therefore, Plaintiff is entitled to an award of punitive damages in an amount sufficient to punish Defendants, in light of their financial condition, and to make an example of them."

3. **Page 7, Paragraph 39, Lines 7-11:** "The above-described conduct of Defendants by and through their officers, directors, employees and/or managing agents, was carried out with a conscious disregard of Plaintiff's rights and of the safety of consumers and, therefore, Plaintiff is entitled to an award of punitive damages in an amount sufficient to punish Defendants, in light of their financial condition, and to make an example of them."

4. **Page 8, Paragraph 48, Lines 16-20:** "The above-described conduct of Defendants by and through their officers, employees and/or managing agents, was carried out with a conscious disregard of Plaintiff's rights and of the safety of consumers and, therefore, Plaintiff is entitled to an award of punitive damages in an amount sufficient to punish Defendants, in light of their financial condition, and to make an example of them."

5. **Page 9, Paragraph 57, Lines 24-28:** "The above-described conduct of Defendants by and through their officers, employees and/or managing agents, was carried out with a conscious disregard of Plaintiff's rights and of the safety of consumers and, therefore, Plaintiff is entitled to an award of punitive damages in an amount sufficient to punish Defendant and DOES 1 through 20, inclusive, in light of their financial condition, and to make an example of them."

6. **Page 10, Paragraph 4, Lines 7-10:** "As to Defendant, Innova Products, Inc., and DOES 1 through 20, for an award of exemplary damages, in an amount properly calculated to punish said Defendants for their despicable conduct and conscious disregard for the safety of others, and to deter any such despicable conduct and conscious disregard for the safety of others in the future."

a. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code of Civil Procedure, § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) Courts do not read allegations in isolation. (*Ibid.*)

b. Punitive Damages

"[T]o state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294." (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63.) The statutory elements include allegations defendant has been guilty of oppression, fraud, or malice. (*Ibid*.) Malice is conduct intended by defendant to cause injury to plaintiff or despicable conduct which is carried on by defendant with a willful and conscious disregard of the rights or safety of others. (*Ibid*.; Cal. Civ. Code, § 3294, subd. (c).) Oppression is despicable conduct that subjects plaintiff to cruel and unjust hardship in conscious disregard of plaintiff's rights. (Cal. Civ. Code, § 3294, subd. (c)(2).) Fraud is an intentional misrepresentation, deceit, or concealment of a material fact known to defendant with the intention of depriving plaintiff of property or legal rights or otherwise causing injury." (*Id.* at subd. (c)(3).) Simply pleading the terms malice, oppression or fraud by themselves is insufficient to support a claim for punitive damages; a plaintiff must allege sufficient facts supporting that existence of malice, oppression, or fraud. (*Blegen v. Superior Court* (1981) 125 Cal.App.3d 959, 963.)

Defendant seeks to strike all punitive damage allegations from the complaint on the ground the allegations do not meet the requisite specificity required under Civil Code section 3294. To support its motion, Defendant argues Plaintiff fails to allege any facts showing malice, oppression, or fraud by clear and convincing evidence. (Motion, p. 3:16-17.) Specifically, Plaintiff provides no specific facts as to how Defendant failed to act, how its acts constituted a conscious disregard of Plaintiff's rights, or how Defendant's actions endangered the safety of consumers. (*Id.* at p. 3:21-24.)

In opposition, Plaintiff argues each cause of action has made factual allegations that would warrant punitive damages. Plaintiff asserts that he alleges Defendant "knowingly designed, manufactured, constructed, assembled, inspected, and sold a dangerous product that they either did know, or should have known was dangerous to consumers" and that "Defendant knew that the Product created an unreasonable risk of serious bodily injury, or should have known such information, and intentionally suppressed this information to avoid financial losses." (Opposition, p. 8:12-16.) To support his argument, Plaintiff refers the Court to a separate Superior Court case wherein another party sued Defendant after allegedly being injured by the same product. (See Opposition, p. 8:18-19, citing *Frederick v. Innova Products, Inc. et al.*, Case No. 23CV422172.) Plaintiff has not requested the Court take judicial notice of the Superior Court case and even if he had, the Court could not rely on the ruling or the truth of the factual findings. (See *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [a written trial court ruling has no precedential value].) Moreover, the Court declines to turn a motion to strike into an evidentiary hearing. (See e.g., *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-114.)

The Court finds that the allegations in the complaint related to the first four causes of action are insufficient to support a claim for punitive damages. While the complaint contains general and conclusory allegations, it does not allege how Defendant knew the Inversion Table created an unreasonable risk of serious bodily injury, or how it should have known this information. (See e.g., *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1042 [basis for punitive damages must be pled with specificity; conclusory allegations devoid of any factual assertions are insufficient].)

As for the fifth cause of action for concealment, Plaintiff specifically alleges how Defendants knew the true safety information about the product and how they concealed it. The complaint states "[u]pon information and belief, Defendants had actual knowledge based upon studies, published reports, and user experience, that the Product created an unreasonable risk of serious bodily injury or should have known such information," and that "Defendants engaged in deception and intentionally omitted, concealed, and suppressed this information." Complaint paras. 50 and 51. Given this fraud allegation, that fraud is a basis for punitive damages, and that concealment has a lower pleading standard, the motion to strike Item Nos. 5 and 6 is DENIED. (See *Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1199 [requiring a relaxed pleading standard for fraudulent concealment causes of action].)

Accordingly, the motion to strike Item Nos. 1-4 is GRANTED with 15 days leave to amend. The motion to strike Item Nos. 5-6 is DENIED.

IV. Conclusion and Order

The demurrer is OVERRULED in its entirety. The motion to strike is GRANTED with 15 days leave to amend as to Item Nos. 1-4 and DENIED as to Item Nos. 5-6. The Court shall prepare the final order.

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Calendar Line 5
Case Name: *First National Bank of Omaha v. Morsey*
Case No.: 24CV428512

I. Background

A. Facts

This is an action for breach of contract and collection. According to the operative Complaint, Kaled Morsey ("Defendant") became indebted to First National Bank of Omaha ("Plaintiff,") in the amount of $21,301.76 on an open book account for credit extended by Plaintiff. (Complaint, ¶¶ 5-6.)

B. Procedural

The Complaint, filed on January 2, 2024, asserts two causes of action: (1) open book account; and (2) account stated. (Complaint, ¶¶ 8-12.)

On January 16, 2024, a proof of service was filed indicating that on January 13, 2024, at 3:38 p.m., Defendant was served by substituted service of the Summons and Complaint ("S&C") to a "brown-haired" individual ("John Doe") that identified himself as a "co-resident" at 10287 Vista Knoll Blvd., Cupertino, CA 95014-1033." (See Plaintiff's Proof of Service of Summons, ¶ 5, filed January 16, 2024) John Doe refused to give his name, but accepted service with direct delivery. (*Ibid.*)

On March 1, 2024, Defendant, a self-represented litigant, filed a motion to quash service asserting that Plaintiff's service on January 13, 2024, was defective because no "brown-haired man" lives as a "co-resident" at Plaintiff's residence to receive service, and the service attempts were made for an unrelated case pertaining to Defendant's wife. (Defendant's Motion to Quash Service of Summons "MPA MTQ," p. 1; Exh. 2.)[5] Plaintiff opposed the motion on May 24, 2024. Defendant did not file a reply.

II. Defendant's Motion to Quash Service of Summons

A. Legal Standard

Where a "defendant claims that he has not been served or that the service is legally insufficient, he may seek relief *by making a special appearance* and moving the court for an order quashing the service." (*Riskin v. Towers* (1944) 24 Cal.2d 274, 277, emphasis added.)

Code of Civil Procedure section 418.10, subdivision (a)(1) authorizes a defendant to file a motion to quash service of summons "on the ground of lack of jurisdiction of the court over him or her." (Code Civ. Proc. § 418.10, subd. (a)(1).) "[A] motion to quash under section 418.10, subdivision (a)(1) is a limited procedural tool to contest personal jurisdiction over the defendant where the statutory requirements for service of process are not fulfilled." (*Stancil v. Superior Court* (2021) 11 Cal.5th 381, 390.)

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[5] Defendant's wife, Yula Morsey, is a defendant in *Citibank N.A.* v. *Yula Morsey* in docket number 23CV428263. (See MPA MTQ, Exh. 2 – Amended Proof of Service of Summons.)

"When a defendant argues that service of summons did not bring him or her within the trial court's jurisdiction, the plaintiff has 'the burden of proving the facts that did give the court jurisdiction, that is the facts requisite to an effective service.'" (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 387 (*Zara*), citing *Coulston v. Cooper* (1966) 245 Cal.App.2d 866, 868; see also *HealthMarkets, Inc. v. Superior Court* (2009) 171 Cal.App.4th 1160, 1167 ["A plaintiff opposing a motion to quash service of process for lack of personal jurisdiction has the initial burden to demonstrate facts establishing a basis for personal jurisdiction"].) Personal jurisdiction will be deemed lacking where service of the summons and complaint fails to comply with the statutory procedures regarding the manner of service of process. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444.) However, minor deficiencies do not defeat service of process. (*Trackman v. Kenney*, 187 Cal.App.4th 175 (2010).)

The plaintiff must demonstrate by a preponderance of the evidence that proper service of the summons and complaint was effectuated. (*Boliah v. Superior Court* (1999) 74 Cal.App.4th 984, 991.) The filing of a proof of service that complies with applicable statutory requirements by itself creates a rebuttable presumption that service was proper. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441.) Additionally, a declaration of service by a registered process server establishes a presumption that the facts stated in the declaration are true. (Evid. Code, § 647; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.)

B. Analysis

Defendant asserts service of the S&C was improper on the following grounds: (1) Plaintiff failed to meet the requirements for personal service; (2) service was attempted for an unrelated case, and; (3) even if Plaintiff was entitled to serve Defendant by substitute service, that service was also improper.

1. Attempt at Personal Service

Defendant insists Plaintiff's personal service attempt was improper because the process server attempted to serve the wrong person at his residence because no "co-resident" with brown hair resides there. (MPA MTQ, p. 1.) Specifically, Defendant asserts that he has "completely black hair," and that he only lives with his wife. (*Ibid.*)

"[A] summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served." (Code Civ. Proc., § 415.10.) In lieu of personal service, Code of Civil Procedure section 415.20, subdivision (b) permits substitute service when "a copy of the summons and complaint *cannot with reasonable diligence* be personally delivered to the person to be served." For individual defendants, substitute service is available only after a *good faith attempt* at personal service. (Code Civ. Proc., § 415.20, subd. (b); see also *Evartt v. Super. Ct. (Kellet)* (1979) 89 Cal.App.3d 795, 797-801 (*Evartt*) ["[A]s a prerequisite to substitute service reasonable diligence must be exercised to effect personal service.") Requiring "[s]trict compliance with the provision requiring reasonable diligence to accomplish personal service before a secondary means of service is permitted." (*Evartt, supra,* at p. 801.)

Here, the process server completed a declaration of reasonable diligence, which indicates:

> 1/7/2024 6:27 PM: There was no answer at the address.
> 1/09/2024 5:10 PM: There was no answer at the address. Car here, dogs barking, called out for defendant but no answer. Left messages at contact numbers[.]
> 1/13/2024 3:36 PM: There was no answer at the address.

(Declaration of Reasonable Diligence, filed January 16, 2024.)

Defendant disputes the declaration and contends he was never personally served with the S&C by Plaintiff's process server. In support, Defendant submits his declaration, signed under penalty of perjury, stating the following:

1) I am Kaled Morsey, Defendant, in his [sic] matter reside at 10287 Vista Knoll Blvd. Cupertino, Ca 95014
2) I am the only defendant in this case
3) I have never been served in this case in any shape way or form

…

5) I was out of the country during this period and only arrived back home on February 18th, 2024
6) I do not have any co-resident living with me, nor aware of any brown haired person associated with my residence.

(See Defendant's Affidavit in Support of MPA MTQ. (Morsey Decl.,) ¶¶ 2, 5-6.)

However, Defendant does not declare that he did not receive the papers left with the "brown-haired" individual at Plaintiff's residence. Defendant's declaration does not establish that Plaintiff failed to make sufficient attempts at personal service.

Here, as Plaintiff notes, in opposition, Plaintiff's process server (Tasia Stone) attempted to personally serve Defendant at his residence on three separate occasions. The process server declared that on her second attempt, she called out for Defendant, but to no avail, and on her third attempt, there was no answer at the address. (See Plaintiff's Opposition to MPA MTQ, pp. 3:23-24-4:12-16.) Thus, the process server's declarations establish that Defendant could not be personally served despite reasonable diligence, and substituted service was proper. (See *Bein v. Brechtel-Jochim Group, Inc*. (1992) 6 Cal.App.4th 1387, 1391-1392 [holding that attempts to effectuate personal service are reasonably diligent where a process server attempts personal service on at least three separate occasions]; see also *American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 389.)

Finally, Defendant's contention that the process server attempted to serve Defendant with documents pertaining to his wife's case is irrelevant. Although the amended proof of service attached as exhibit 2 to Defendant's MPA MTQ pertains specifically to his wife's case, the second proof of service attached as exhibit 1 refers to Defendant's matter and explicitly refers to Defendant's name and case number. Thus, it appears the process server attempted to serve both the Defendant and his wife on the dates reflected in the Declaration of Reasonable

Diligence. As a result, the process server completed two separate proofs of service – one for the Defendant and one for his wife.

A declaration of service by a registered process server establishes a presumption that the facts stated in the declaration are true. (Evid. Code, § 647; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.) Accordingly, Plaintiff is entitled to serve Defendant by substitute service.

2. Attempt at Substitute Service

Substitute service is permitted when personal service cannot be completed despite reasonable diligence. (Code Civ. Proc., § 415.20, subd. (b) [permits substitute service when "a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served"]; see also *Evartt, supra,* 89 Cal.App.3d at p. 797-801 ["[A]s a prerequisite to substitute service reasonable diligence must be exercised to effect personal service"].) A three-step process is required for substituted service: (1) leave a copy of the summons and complaint at either the individual's dwelling house, usual place of business, or usual mailing address (other than a post office box); (2) in the presence of a "competent member of the household" or person "apparently in charge of his office or place of business" at least 18 years old, who must be told what the papers are; and (3) thereafter, mail other copies of the complaint and summons to the defendant at the place where the copies were left. (Code Civ. Proc., § 415.20, subd. (b).)

As noted above, on January 16, 2024, Plaintiff filed a proof of service with the Court to demonstrate service of process was accomplished by substituted service. (*Floveyor Internat., Ltd. v. Super. Ct.* (1997) 59 Cal.App.4th 789, 795 ["The filing of a proof of service creates a rebuttable presumption that the service was proper."].) As discussed in Plaintiff's opposition, the proof of service indicates that Defendant was served by substituted service on January 13, 2024, at approximately 3:38 p.m. At that time, the process server handed the S&C to John Doe, and she noted the following in the proof of service:

> John Doe, I delivered the documents to an individual who refused to give their name who identified themselves as the co-resident. The individual accepted service with direct delivery. The individual appeared to be a brown-haired male contact over 65 years of age, 5'6"-5'8" tall and weighing 160-180 lbs with an accent and glasses.

(See Plaintiff's Proof of Service of Summons, ¶ 5; see also Opp., p. 3:11-24-4:12-16.)

As required by Code of Civil Procedure section 415.20, subdivision (b), Plaintiff's proof of service indicates the documents were left with someone 18 years of age or older, who appeared to be a competent member of the household, namely, someone who indicated they were a "co-resident." (See Plaintiff's Proof of Service of Summons, ¶ 5.) Consequently, Plaintiff meets the second step of the three-step process for substituted service.

Defendant tries to rebut this proof by stating that he does not have "any co-resident" and that he is not "aware of any brown haired [sic] person associated with my residence." Affidavit of Kaled Morsey in support of his Motion to Quash. This is insufficient because Defendant's affidavit does not state it is true under penalty of perjury, as required by Code of Civil Procedure (CCP) § 2015.5. Nor does it state the place where the affidavit was executed as also required by the statute. Rather, Defendant had his affidavit notarized which simply shows that he is the one who signed the affidavit. As such, Defendant has provided no admissible facts to rebut the presumption that the process server's proof of service is true.

As for the third step, although Plaintiff filed a declaration of mailing indicating that copies of the summons and complaint were mailed to Defendant at his address on January 15, 2024 (see Plaintiff's Declaration of Mailing, filed January 16, 2024), Defendant declares that he never received a copy of the summons and complaint in the mail (see Morsey Decl., ¶ 4). However, Code of Civil Procedure section 415.20 does not require that a defendant actually receive the mailed copies of the summons and complaint. Rather, service is deemed completed on the 10th day after mailing. (See Code. Civ. Proc., § 415.20, subd. (b).) Here, the box labeled "5b(4)," on the proof of service, which states "I thereafter caused to be mailed … copies of the documents to the person to be served at the place where the copies were left (Code Civ. Proc., § 415.20)[,]" is checked. (See Plaintiff's Proof of Summons; see also Defendant's Exh 1.) Consequently, Plaintiff's filed proof of service indicates that the S&C documents were mailed after being served. In sum, the proof of service demonstrates Plaintiff complied with the statutory requirements for substitute service.

Furthermore, statutes governing substitute service shall be "liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant." (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.) Here, Defendant has actual notice of the lawsuit as he has filed a motion to quash.

Accordingly, Defendant's motion to quash is DENIED.

III. Conclusion

Defendant's motion to quash service of summons and complaint is DENIED. Plaintiff shall prepare the final order and submit it within 10 days of the hearing.

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Calendar Line 6
Case Name: *Quintara Biosciences, Inc. v. Ruifeng Biztech Inc., et al.*
Case No.: 21CV385112

According to the allegations of the complaint, plaintiff Quintara Biosciences, Inc. ("Plaintiff") is a corporation that specializes in DNA sequence analysis. (See complaint, ¶ 12.) Defendant Ruifeng Biztech Inc. ("Ruifeng") is a vehicle for defendant Gangyou Wang's ("Gangyou") visa and green card. (See complaint, ¶ 13.) In early 2015, Gangyou talked with Plaintiff cofounder Richard Shan ("Shan") about a service contract to submit to the U.S. Citizenship and Immigration Services ("USCIS") that set forth the business model that Ruifeng promised and Quintara accepted, but was ultimately poorly performed by Ruifeng. (See complaint, ¶¶ 24-25.) The 2015 service contract expressly stated that there was no partnership under the contract; however, the relationship between Ruifeng and Plaintiff changed when USCIS conducted an administrative site visit of Ruifeng's purported office at Plaintiff's former Richmond address and issued a notice of intent to revoke Gangyou's L-1 visa on January 27, 2017. (See complaint, ¶¶ 26-35.) Gangyou first attempted to manufacture evidence that Ruifeng was a legitimate business operation so as to rescue his L-1 visa; however, after USCIS officially notified Gangyou on September 12, 2017 that his L-1 visa was revoked, Plaintiff's employees that were placed on Ruifeng's payroll were transferred back to Plaintiff's payroll, including defendants Alex Wong ("Wong"), and Alan Li ("Li"). (See complaint, ¶¶ 36-52.) By January 2020, defendants Li and Yi Qing Chen, aka Christine Chen ("Chen") conspired with Gangyou to take Plaintiff's equipment, intellectual property, and employees to enable Ruifeng to operate a DNA sequencing business on its own. (See complaint, ¶ 53.) On February 4, 2020, Gangyou stated to Plaintiff that he would run Ruifeng independently and would retain "Ruifeng's machines." (See complaint, ¶ 54.) Li and Chen recruited defendants Dehua Zhao ("Zhao") and Wong to join the effort to set up Ruifeng as an independent business using Plaintiff's resources. (See complaint, ¶ 55.) Zhao was a part of the conspiracy to advise defendants Gangyou, Wong, Li, Rui Shao ("Shao") to convert Plaintiff's Bay Area operations to Ruifeng's, and how to poach Plaintiff's customers. (See complaint, ¶ 59.)

On July 2, 2021, Plaintiff filed the complaint against defendants Ruifeng, Gangyou, Wong, Li, Shao, Chen, Hailong Jiao, Zhao, and RF Biotech LLC (collectively, "Defendants"), asserting causes of action for:

1) Breach of fiduciary duty;
2) Breach of duty of loyalty;
3) Conversion;
4) False advertisement in violation of Business and Professions Code § 17500;
5) Unfair competition—passing off;
6) Intentional interference with contractual relations and prospective economic advantage;
7) Account stated; and,
8) Unfair competition in violation of Business and Professions Code § 17200.

Chen moves for summary judgment, or, in the alternative, for summary adjudication of each cause of action.

DEFENDANT CHEN'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION

The notice of Chen's motion for summary judgment, states that the grounds for the motion are: all causes of action lack merit because Plaintiff cannot establish a duty owed by Chen to it, Plaintiff cannot produce evidence of ownership of any intellectual property and the allegations against Chen fail to state facts sufficient to constitute a cause of action; the first and second causes of action are without merit because Chen does not owe a duty to Plaintiff and did not sign any employment contract, confidentiality agreement or non-disclosure agreement; the third cause of action for conversion is without merit because the allegations of the complaint show that Chen did not commit any of the elements of conversion; and, the fourth through eighth causes of action lack merit because Plaintiff cannot produce evidence of any independent actionable tort committed by Chen as solicitation of employees is not actionable pursuant to Business and Professions Code section 16600.

Defendant's burden on summary judgment

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

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Chen's request for judicial notice

In support of her motion, Chen requests judicial notice of the following documents:

1) The Federal Complaint in *Quintara Biosciences, Inc. v. Ruifeng Biztech Inc*., *et al*. (N.D. Cal. 2020) Case No. 3:20-CV-04808-WHA ("Federal case") (attached as Exhibit 1;
2) The jury verdict in the Federal case (attached as Exhibit 2);
3) The jury instruction in the federal case (attached as Exhibit 3);
4) Judgment (attached as Exhibit 4);

5) Plaintiff's responses to Chen's special interrogatories (attached as Exhibit 5); and,
6) Plaintiff's responses to Chen's request for production of documents (attached as Exhibit 6).

Here, Chen's request for judicial notice is GRANTED as to the Federal Complaint, the jury verdict form in the Federal Case, the jury instruction, and the judgment. (Evid. Code § 452, subd. (d).)

As to Plaintiff's discovery responses, Chen's request for judicial notice is DENIED.

Motion for summary judgment on the ground that Chen owes no duty to Plaintiff

Chen argues that all of the causes of action lack merit because "[t]he absence of employment agreement, non-disclosure agreement or confidentiality agreement demonstrates that Defendant Chen is not a fiduciary of Plaintiff and does not owe a duty of loyalty or any form of duty to it." (Def.'s memorandum of points and authorities in support of motion for summary judgment ("Def.'s memo"), p.5:9-26, 6:1-15, citing *Mattel, Inc. v. MGA Entertainment, Inc.* (C.D.Cal. Mar. 28, 2011, No. CV 04-9049 DOC (RNBx)) 2011 U.S.Dist.LEXIS 55756, at *1-*17 (hereinafter, "*Mattel*").) Chen principally relies on *Mattel, supra*, in which the Central District stated that "[n]o good reason exists to extend these principles… [of] the common law['s] impos[ition of] a duty upon fiduciaries… to all aspects of the employment relationship." (*Mattel, supra*, 2011 U.S.Dist.LEXIS 55756, at *15-*17 (also stating that "[s]ome employees may owe an extra-contractual duty to their employer, but only because they have been entrusted with meaningful authority or property and therefore stand as fiduciaries… [b]ut even as to these employees, the scope of the common law duty is narrowly construed to the specific obligations they 'owe as a fiduciary'").) However, decisions of federal courts are not binding. (See *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 175 (California Supreme Court stating that "[a]lthough the decisions of our sister states and the lower federal courts may be instructive to the extent we find their analysis persuasive, they are neither binding nor controlling on matters of state law"); see also *Rubin v. Ross* (2021) 65 Cal.App.5th 153, 163 (stating that "decisions of lower federal courts are not binding on us, even on questions of federal law").)

As Plaintiff argues, California courts have found that "an employer has the right to expect the undivided loyalty of its employees." (*Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 295-296 (also stating that "a person cannot serve two masters simultaneously"); see also *Fowler v. Varian Assocs.* (1987) 196 Cal.App.3d 34, 41 (stating that "[d]uring the term of employment, an employer is entitled to its employees' 'undivided loyalty'"); see also *Techno Lite, Inc. v. Emcod, LLC* (2020) 44 Cal.App.5th 462, 471 (stating same); see also *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 414 (Sixth District stating that "an employee, while employed, owes undivided loyalty to his employer").) "California law does not authorize an employee to transfer his loyalty to a competitor." (*Fowler, supra*, 196 Cal.App.3d at p.41; see also *Huong Que, Inc., supra*, 150 Cal.App.4th at p.414 (stating same); see also *Techno Lite, Inc., supra*, 44 Cal.App.5th at p.471 (stating same).) "The duty of loyalty is breached, and the breach 'may give rise to a cause of action in the employer, when the employee takes action which is inimical to the best interests of the employer.'" (*Huong Que, Inc., supra*, 150 Cal.App.4th at p.414, quoting *Stokes, supra*, 41 Cal.App.4th at p.295.)

Chen then argues that "the broad allegation that she is conspiring with Defendant Li in recruiting other people to join a rival company is not actionable." (Def.'s memo, p.6:15-18.)

However, the argument that a cause of action's allegations are insufficient is not a proper basis for a motion for summary judgment. (See *Murphy v. Allstate Ins. Co*. (1978) 83 Cal.App.3d 38, 46 (stating that "it is not the function of a motion for summary judgment to test the sufficiency of the pleadings"); see also *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596 (stating that "[i]t is not the purpose of the procedure under section 437c to test the sufficiency of the pleadings"); see also *Coyne v. Krempels* (1950) 36 Cal.2d 257, 262 (California Supreme Court stating same); see also *Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 560 (stating same); see also *C. L. Smith Co. v. Roger Ducharme, Inc*. (1977) 65 Cal.App.3d 735, 744 (stating same).) Chen's separate statement and memorandum do not cite to any evidence demonstrating that Plaintiff's allegations regarding a conspiracy or a breach of fiduciary duty are without merit. Chen thus fails to meet her initial burden on the ground that she owes no duty to Plaintiff.

Motion for summary judgment on the ground that the complaint is barred by collateral estoppel

Chen argues that "as all the claims of plaintiff against Defendant Chen necessitates ownership of an intellectual property such as the customer profile database and that damage is an element in all those claims, the Court must grant summary judgment as to Plaintiff's complaint against Defendant Chen." (Def.'s memo, p.9:17-21.) Chen's separate statement relies solely on the Federal Complaint and the complaint in this action. (See Chen's separate statement of undisputed material facts in support of motion for summary judgment, nos. 1-5.)

As a preliminary matter, Chen fails to establish the application of the doctrine of collateral estoppel. As Chen notes, for the doctrine of collateral estoppel to apply, "the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding… this issue must have been actually litigated in the former proceeding… it must have been necessarily decided in the former proceeding… the decision in the former proceeding must be final and on the merits… [and], the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849.) Again, Chen's separate statement in support of its motion for summary judgment only cites to the Federal Complaint and the complaint in the instant action. These documents do not demonstrate that the issues were actually litigated, necessarily decided in the former proceeding and that the decision in the former proceeding was final and on the merits. As such, Chen fails to meet her initial burden on the motion for summary judgment on this ground.

Moreover, in this action, it is alleged that Chen conspired with Gangyou "to take Quintara's equipment… and even employees to enable Ruifeng to operate a DNA sequencing business on its own," conspired with Gangyou "to misappropriate Plaintiff's Bay Area business operation, including both **tangible and intangible** assets, to launch Ruifeng and RF Biotech" and "routinely made false representations about Ruifeng's relationship with Quintara to customers and potential customers of Ruifen," in furtherance of a conspiracy to "deliberately mislead Quintara's customers into believing that Ruifeng's DNA sequencing services were Quintara's, with the same quality and deserving the same established business reputation." (Complaint, ¶¶ 53, 55, 59, 75, 87, 92-93, 100.) There are a number of issues outside of ownership of intellectual property alleged in the complaint. Chen even acknowledges in her alternative motion for summary adjudication to the conversion cause of action that "Plaintiff alleges that Defendants took possession of all [of] Quintara's equipment in the 3563 Office and

refused to allow Quintara to remove the equipment." (Def.'s memo, p.12:1-3.) Thus, even if Chen had established application of the doctrine of collateral estoppel—which she did not, the application of the doctrine does not demonstrate that the action has no merit as there are many claims that do not involve ownership of intellectual property. Chen additionally fails to meet her initial burden on this ground for summary judgment.

Motion for summary judgment on the ground that no civil wrong is committed by Defendant Chen resulting in injury

Chen lastly moves for summary judgment on the ground that "there is no independent actionable tort committed by Defendant Chen… [a]s discussed in the preceding sections, all the causes of action fail against her… [t]hus, the perfunctory resort to conspiracy as a theory of liability instantly fails as well. (Def.'s memo, pp.9:22-27, 10:1-27, 11:1-25.)

However, for the reasons previously stated, Chen's prior arguments are unsupported and without merit. Accordingly, Chen likewise fails to meet her initial burden on this ground for summary judgment.

As Chen has failed to meet her initial burden with respect to each of her grounds for summary judgment, Chen's motion for summary judgment is DENIED.

Chen's motion in the alternative for summary adjudication of the first and second causes of action

Chen's notice of motion indicates that Chen intends to move, in the alternative, for summary adjudication of the first and second causes of action on the ground that they are without merit because Chen does not owe a duty to Plaintiff and did not sign any employment contract, confidentiality agreement or non-disclosure agreement. While Chen's memorandum in support of the motion does not separately argue that the first and second causes of action lack merit, it does contain the argument regarding the motion for summary judgment that Chen does not owe a fiduciary duty to Plaintiff and does not owe a duty of loyalty to Plaintiff. (See Def.'s memo, pp.4:1-26, 5:1-26, 6:1-27, 7:1-11.) These arguments were considered in the Court's analysis of the motion for summary judgment and Chen relies on identical evidence. (See Def.'s separate statement of undisputed material facts, issues one through three.) For identical reasons as previously stated in the Court's prior analysis of the motion for summary judgment, Chen fails to meet her initial burden with respect to the alternative motion for summary adjudication of the first and second causes of action, and the alternative motion for summary adjudication of the first and second causes of action is DENIED.

Chen's motion in the alternative for summary adjudication of the third cause of action for conversion

Chen moves for summary adjudication of the third cause of action for conversion arguing that "Plaintiff… cannot adduce evidence that Defendant Chen has the key to the office and has the capacity to rekey it to achieve a lockout… [and t]here is, therefore, no way that Plaintiff can prove the element in conversion that Defendant Chen substantially interfered with its property by knowingly or intentionally taking possession of the equipment or prevented Plaintiff from gaining access to it." (Def.'s memo, p.12:15-20.) "Plaintiff cannot also prove the element that Defendant Chen's conduct was a substantial factor in causing Quintara's

harm." (*Id*. at p.12:21-22.) Chen relies on the allegation of paragraph 58 of the complaint which alleges that Gangyou "had the lock of the 3563 Office rekeyed, locking out all Quintara's employees from that office space… [and] refused to allow Quintara to remove its equipment out of the office, which included computers, sequencers, thermocyclers, nanodrop, 80-degree centigrade freezer, and other laboratory equipment." (Def,'s memo, p.12:1-15, quoting complaint, ¶ 58.) However, this allegation neither precludes the possibility of Chen also converting the equipment, nor is evidence that demonstrates that Plaintiff cannot prove that Chen substantially interfered with Plaintiff's property or was a substantial factor in causing Quintara's harm. (See Code Civ. Proc. § 437c, subd. (b)(1) (stating that "[t]he motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken").) To the extent that Chen is arguing that the allegations are insufficient to state facts constituting a cause of action for conversion against Chen, as previously stated, the argument that a cause of action's allegations are insufficient is not a proper basis for a motion for summary judgment. (See *Murphy v. Allstate Ins. Co*. (1978) 83 Cal.App.3d 38, 46 (stating that "it is not the function of a motion for summary judgment to test the sufficiency of the pleadings"); see also *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596 (stating that "[i]t is not the purpose of the procedure under section 437c to test the sufficiency of the pleadings"); see also *Coyne v. Krempels* (1950) 36 Cal.2d 257, 262 (California Supreme Court stating same); see also *Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 560 (stating same); see also *C. L. Smith Co. v. Roger Ducharme, Inc*. (1977) 65 Cal.App.3d 735, 744 (stating same).)

Chen fails to meet her initial burden as to the alternative motion for summary adjudication of the third cause of action, and the alternative motion for summary adjudication of the third cause of action is DENIED.

Chen's motion in the alternative for summary adjudication of the fourth cause of action for false advertising

Chen moves for summary adjudication of the fourth cause of action, asserting that "Plaintiff cannot adduce evidence demonstrating elements for false advertising… [because t]he Complaint did not allege any of these acts to be committed by her." (Def.'s memo, pp.13:1-26, 14:1-7.) Chen believes that because the complaint alleges that Li sent emails containing a confidential marketing presentation for Quintara customers, those allegations somehow precludes the possibility of Chen committing false advertising. (See Def.'s memo, pp.13:24-26, 14:1-5; see also Chen's separate statement of undisputed material facts, issue five, number 1 (stating as the material fact that "[t]he allegation in the Complaint was that it was Defendant Li who sent the mass email," citing Paragraph 92 of its Complaint).) However, the fourth cause of action also alleges that "Defendants conspired to misappropriate Quintara's Bay Area operation for Ruifeng and then masqueraded Ruifeng as the company who had been behind Quintara's established services in the DNA sequencing and related areas… [and] Chen… routinely made false representations about Ruifeng's relationship with Quintara to customers and potential customers of Ruifeng." (Complaint, ¶¶ 86-87.) Here, it is immaterial that the fourth cause of action failed to allege that Chen sent emails as that neither precludes the possibility that she sent other emails or made other communications that constituted false advertising, nor addresses the allegation that Chen conspired to have certain statements that constituted false advertising be made. The allegation is also not evidence supporting Chen's assertion. Again, to the extent that Chen is arguing that the allegations are insufficient to state facts constituting a cause of action for false advertising against Chen, as previously stated, the

argument that a cause of action's allegations are insufficient is not a proper basis for a motion for summary judgment. (See *Murphy v. Allstate Ins. Co*. (1978) 83 Cal.App.3d 38, 46 (stating that "it is not the function of a motion for summary judgment to test the sufficiency of the pleadings"); see also *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596 (stating that "[i]t is not the purpose of the procedure under section 437c to test the sufficiency of the pleadings"); see also *Coyne v. Krempels* (1950) 36 Cal.2d 257, 262 (California Supreme Court stating same); see also *Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 560 (stating same); see also *C. L. Smith Co. v. Roger Ducharme, Inc*. (1977) 65 Cal.App.3d 735, 744 (stating same).)

Chen fails to meet her initial burden as to the alternative motion for summary adjudication of the fourth cause of action, and the alternative motion for summary adjudication of the fourth cause of action is DENIED.

Chen's motion in the alternative for summary adjudication of the fifth and eighth causes of action for passing off and unfair competition

Chen moves for summary adjudication of the fifth and eighth causes of action, asserting that "[a]s abundantly discussed above, the alleged sending of 'mass email' was done by Defendant Li and no allegation, other than bare invocation of conspiracy, in the Complaint that Defendant Chen ever participated in the sending of any email to any customer." (Def.'s memo, p.14:8-25.) Chen again largely relies on paragraph 92 of the complaint as her separate statement addresses the fourth cause of action in combination with the fifth and eighth causes of action. Again, however, it is immaterial that the fifth cause of action failed to allege that Chen sent emails as that neither precludes the possibility that she sent other emails or made other communications that constituted passing off or unfair competition, nor addresses the allegation that Chen conspired to have certain statements that constituted passing off or unfair competition be made. (See complaint, ¶¶ 92-93, 109.) The allegation of paragraph 92 is also not evidence supporting Chen's assertion. Again, to the extent that Chen is arguing that the allegations are insufficient to state facts constituting a cause of action for passing off or unfair competition against Chen, as previously stated, the argument that a cause of action's allegations are insufficient is not a proper basis for a motion for summary judgment. (See *Murphy v. Allstate Ins. Co*. (1978) 83 Cal.App.3d 38, 46 (stating that "it is not the function of a motion for summary judgment to test the sufficiency of the pleadings"); see also *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596 (stating that "[i]t is not the purpose of the procedure under section 437c to test the sufficiency of the pleadings"); see also *Coyne v. Krempels* (1950) 36 Cal.2d 257, 262 (California Supreme Court stating same); see also *Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 560 (stating same); see also *C. L. Smith Co. v. Roger Ducharme, Inc*. (1977) 65 Cal.App.3d 735, 744 (stating same).)

Chen fails to meet her initial burden as to the alternative motion for summary adjudication of the fifth and eighth causes of action, and the alternative motion for summary adjudication of the fifth and eighth causes of action is DENIED.

Chen's motion in the alternative for summary adjudication of the sixth cause of action for intentional interference with contractual relations and prospective economic advantage

Chen moves for summary adjudication of the sixth cause of action for intentional interference with contractual relations and prospective economic advantage, arguing that "Plaintiff again employed the magical incantation of conspiracy liability to lump all defendants with a collective action without specifying what actions were made by individual defendants." (Def.'s memo, p.15:1-11, citing complaint, ¶ 100.) However, this argument that a cause of action's allegations are insufficient is not a proper basis for a motion for summary judgment. (See *Murphy v. Allstate Ins. Co*. (1978) 83 Cal.App.3d 38, 46 (stating that "it is not the function of a motion for summary judgment to test the sufficiency of the pleadings"); see also *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596 (stating that "[i]t is not the purpose of the procedure under section 437c to test the sufficiency of the pleadings"); see also *Coyne v. Krempels* (1950) 36 Cal.2d 257, 262 (California Supreme Court stating same); see also *Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 560 (stating same); see also *C. L. Smith Co. v. Roger Ducharme, Inc*. (1977) 65 Cal.App.3d 735, 744 (stating same).)

Chen also argues, without citation to any authority, that "Plaintiff cannot now claim any breach of fiduciary duty, breach of duty of loyalty, conversion, false advertisement, and passing off for the simple reason that it never owned any of the intellectual property." (Def.'s memo, p.15:23-26.) First, this argument does not address the sixth cause of action for intentional interference with contractual relations and prospective economic advantage. Second, for reasons already stated, Chen fails to establish the application of the doctrine of collateral estoppel. Accordingly, Chen fails to meet her initial burden as to the alternative motion for summary adjudication of the sixth cause of action, and the alternative motion for summary adjudication of the sixth cause of action is DENIED.

Chen's motion in the alternative for summary adjudication of the seventh cause of action

Chen tersely asserts that the seventh cause of action for account stated is without merit because "[t]he allegations shows that it is only Defendant [Gangyou] who entered an oral agreement with Plaintiff… [n]o one else." (Def.'s memo, p.17:3-13, citing complaint, ¶ 105.) Here, it is true that the complaint alleges an oral agreement between Gangyou and Plaintiff. However, this allegation does not demonstrate the nonexistence of an agreement between Plaintiff and Chen. The seventh cause of action may be mislabeled or inadequately allege facts sufficient to constitute a cause of action for account stated; however, as previously stated, this argument that a cause of action's allegations are insufficient is not a proper basis for a motion for summary judgment. (See *Murphy v. Allstate Ins. Co*. (1978) 83 Cal.App.3d 38, 46 (stating that "it is not the function of a motion for summary judgment to test the sufficiency of the pleadings"); see also *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596 (stating that "[i]t is not the purpose of the procedure under section 437c to test the sufficiency of the pleadings"); see also *Coyne v. Krempels* (1950) 36 Cal.2d 257, 262 (California Supreme Court stating same); see also *Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 560 (stating same); see also *C. L. Smith Co. v. Roger Ducharme, Inc*. (1977) 65 Cal.App.3d 735, 744 (stating same).)

Chen believes that because the complaint alleges that Li sent emails containing a confidential marketing presentation for Quintara customers, those allegations somehow precludes the possibility of Chen committing false *Murphy v. Allstate Ins. Co*. (1978) 83 Cal.App.3d 38, 46 (stating that "it is not the function of a motion for summary judgment to test the sufficiency of the pleadings"); see also *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596 (stating that "[i]t is not the purpose of the procedure under section 437c to test the sufficiency

of the pleadings"); see also *Coyne v. Krempels* (1950) 36 Cal.2d 257, 262 (California Supreme Court stating same); see also *Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 560 (stating same); see also *C. L. Smith Co. v. Roger Ducharme, Inc*. (1977) 65 Cal.App.3d 735, 744 (stating same).)

Chen fails to meet her initial burden as to the alternative motion for summary adjudication of the seventh cause of action, and the alternative motion for summary adjudication of the seventh cause of action is DENIED.

Chen's argument regarding factually devoid discovery responses

At the conclusion of Chen's supporting memorandum, she argues that Plaintiff's factually devoid discovery responses shift the burden of proof to it. (See Def.'s memo, pp.17:14-27, 18:1-27, 19:1-17.) However, this is not one of the grounds for summary judgment or summary adjudication articulated in Chen's notice of motion, nor is it referenced in Chen's separate statement of undisputed material facts. Moreover, Chen does not reference the contents of the purported factually devoid response, how each response was factually devoid, and what cause(s) of action might be affected. As such, Chen fails to meet her initial burden with this non-noticed argument.

Chen's arguments in reply are unconvincing

In reply, Chen makes arguments regarding an ex parte application to continue the hearing on the motion for summary judgment, certain evidence presented by Plaintiff, and arguments attempting to distinguish the above stated California law regarding the duty of loyalty. These arguments have been considered but they are unconvincing.

Chen's motion for summary judgment, or, in the alternative, for summary adjudication is DENIED in its entirety.

The Court will prepare the Order.