SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: March 7, 2024 TIME: 9:00 A.M.

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

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

Scheduling motion hearings: Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV417765	Lynley Kerr Hogan v. Brian Bernasconi	Click on LINE 1 or scroll down for ruling.
LINE 2	18CV336673	Whispering Oaks Residential Care Facility LLC et al. v. Travelers Property Casualty Company of America et al.	Click on LINE 2 or scroll down for ruling.
LINE 3	22CV399300	State Farm Mutual Automobile Insurance Company v. Jose Guadalupe Herrera Macias	Click on LINE 3 or scroll down for ruling.
LINE 4	22CV401668	Steinberg Hart v. Z&L Properties, Inc.	OFF CALENDAR – motion withdrawn.
LINE 5	23CV417644	Ramiro Razo, Jr. v. Jack Ford Pustelnik et al.	OFF CALENDAR – motion withdrawn.
LINE 6	2015-1-CV-281200	Thu Le v. Frank Nguyen et al.	Motion to be relieved as counsel: parties to appear. This is the third calendaring of this motion. In two previous instances (3/21/23 & 10/5/23), counsel failed to appear.
LINE 7	16CV290689	TD Bank USA, N.A. v. Jose V. Rodriguez	Claim of exemption: judgment debtor argues that the $844.75 held by the Los Angeles County Sheriff is an educational "grant" under Education Code section 21116. The court reads section 21116 and the surrounding code provisions as applying to "grants" for the "founding, endowing, and maintaining" of colleges, universities, and other institutions of learning, which is not at all the situation here. (See Educ. Code, §§ 21100 *et seq.*) Section 21116 does not apply. Accordingly, the claim is DENIED, and the $844.75 shall be released to the judgment creditor.

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LINE 8	21CV387750	American Express National Bank v. Katye Balajadia	Motion to vacate conditional dismissal and for entry of judgment: parties to appear. Notice is apparently not proper, as plaintiff filed and served the motion without a hearing date, and there is no amended notice of hearing on file.
LINE 9	22CV404133	Han Guo v. Phillip Lee	Click on LINE 9 or scroll down for ruling.
LINE 10	23CV423906	Aung Naing v. Hyundai Motor America	OFF CALENDAR – motion withdrawn.

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Calendar Line 1
Case Name: *Lynley Kerr Hogan v. Brian Bernasconi*
Case No.: 23CV417765

Defendant Brian Bernasconi demurs to each of the causes of action in plaintiff Lynley Kerr Hogan's complaint. Although notice appears to be proper, the court has not received any opposition to the demurrer. While Bernasconi is represented by counsel, Hogan is self-represented, which may explain the lack of a filed opposition. Having reviewed the moving papers and the pleading in question, the court SUSTAINS in part and OVERRULES in part Bernasconi's demurrer.

This case arises out of a recorded interview between Hogan, Bernasconi, and Catherine Somers (Bernasconi's "podcast partner") on June 7, 2023. (Complaint, p. 3:4.)[1] After the interview, Hogan indicated to Bernasconi and Somers that she wanted to listen to the recording and wanted to play it on her own podcast, but Bernasconi allegedly deleted it. (*Id.* at p. 4:7, 4:10-11, 4:16-17.) Hogan filed this case two weeks later, on June 21, 2023. Her complaint lists five causes of action: (1) breach of contract, (2) conversion, (3) defamation/slander, (4) harassment, and (5) "negligent and intentional infliction of emotional distress."

There was apparently a written contract between Hogan, Bernasconi, and Somers, which had three provisions:

> 1 – "We agree to disagree and be as polite and respectful as possible during this session."
>
> 2 – "We will not do any live video or other audio recordings in the studio during the session."
>
> 3 – "All parties have the right (upon completion of this session) to decide whether we want to air this podcast via our podcast channels or not."

(Complaint, p. 3:24-28.)

1. First Cause of Action (Breach of Contract)

Although Bernasconi's demurrer correctly notes that the complaint contains numerous "breach of contract" allegations that have nothing to do with the express terms set forth above, the court disagrees that every single one of them fails to set forth a cause of action. For example, Hogan alleges that Bernasconi breached the contract by "failing to allow Ms. Hogan the 'right . . . to decide whether (she) wanted to air the podcast via (her) podcast channel.'" (Demurrer, p. 5:22-23 [quoting Complaint, p. 2:17].) The court finds that this alleges sufficient facts to constitute a potential breach of provision no. 3 above. Bernasconi argues that because this term says "we" rather than "each party," it means that "the decision to post the podcast was to be made with the consent of all the parties to the agreement," and Hogan "did not have a unilateral right to post the podcast." (Demurrer, pp. 5:26-6:2.) The court disagrees with this strained interpretation of the language. What kind of a "right . . . to decide" is it if the decision can only be made with the after-the-fact consent of all of the parties to the contract? That is

[1] The complaint does not have numbered paragraphs.

not a "right" at all—it is a nullity, and it would render the entirety of provision no. 3 meaningless. What Bernasconi is attempting to describe is a provision that says, "*The parties agree not to air this podcast on their podcast channels without the consent of the other parties*." That is very different from what provision no. 3 actually says.

Accordingly, the court finds that the complaint sufficiently alleges a breach of contract and OVERRULES the demurrer to the first cause of action.

2. Second Cause of Action (Conversion)

The demurrer to the second cause of action relies on the same argument—the notion that the parties' contract gave Hogan no "right" to the recording, and that it remained "his [Bernasconi's] personal property." (Demurrer, p. 7:26-28.) The court again rejects this reading of the contract and OVERRULES the demurrer to the second cause of action.

3. Third Cause of Action (Defamation/Slander)

Bernasconi argues that "the words constituting the alleged defamation must be specifically identified in the complaint," and then he cites *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612, fn. 5, among other cases, for the proposition that "an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." (Demurrer, p. 8:6-15.) The problem for Bernasconi is that Hogan's claim is for slander, not libel, which does not contain the same verbatim pleading requirement, as long as the "substance of the defamatory statement" is alleged. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 458.)

In this case, Hogan alleges that Bernasconi said she was "violent and mentally ill" and "questioned Ms. Hogan's mental health" in front of Somers. While somewhat vague and conclusory (and arguably an opinion rather than a provably false factual statement—something that the court does not decide today because neither side has addressed it), the court concludes for now that this is minimally sufficient to allege a slander claim. OVERRULED.

4. Fourth Cause of Action (Harassment)

Bernasconi argues that Hogan has failed to identify any statutory or common law basis for the fourth cause of action, and the court agrees. Although demurrers for uncertainty are generally disfavored, the court finds that there is not enough information in this cause of action to put Bernasconi on notice of the proper basis upon which to answer this cause of action. The court SUSTAINS the demurrer under Code of Civil Procedure section 430.10, subdivision (f), with 20 days' leave to amend.

5. Fifth Cause of Action (IIED and NIED)

The court also agrees with Bernasconi that the complaint does not sufficiently plead a cause of action for intentional infliction of emotional distress. Although the complaint alleges that Bernasconi's conduct was "outrageous," this is a conclusory statement. Indeed, the court has difficulty reconciling Hogan's allegations that Bernasconi's comments during the recorded interview were so "cruel" as to be outrageous and give rise to emotional distress—but also that Hogan "was pleased with the interview" and "looked forward to listening to the recording . . . along with Mr. Bernasconi and Ms. Somers" and putting it "on her own podcast." (Complaint, p. 4:4-11.) The court also has difficulty reconciling this allegation with the competing

allegation that it was the deletion of the recording itself that constituted the intentional infliction of emotional distress.

Finally, the court concurs with Bernasconi that there is no separate cause of action for negligent infliction of emotional distress; instead, "NIED" constitutes a basis for damages where there exists a breach of a *duty of care* by the defendant vis-à-vis the plaintiff.

In short, the court SUSTAINS the demurrer to the fifth cause of action under Code of Civil Procedure section 430.10, subdivision (e), with 20 days' leave to amend.

6. Conclusion

The court SUSTAINS the demurrer to the fourth and fifth causes of action with 20 days' leave to amend. The court OVERRULES the demurrer to the first, second, and third causes of action.

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Calendar Line 2
Case Name: *Whispering Oaks Residential Care Facility LLC et al. v. Travelers Property Casualty Company of America et al.*
Case No.: 18CV336673

In this motion to compel, plaintiffs Whispering Oaks Residential Care Facility, LLC, Whispering Oaks RCF Management Co., Inc., and Naren Chaganti ("Plaintiffs") seek further responses to their second set of document requests (Nos. 19-25) from defendant Travelers Property Casualty Company of America ("Travelers"). The court was originally scheduled to hear Travelers' motion for summary judgment on this date (March 7, 2024), but Plaintiffs filed an ex parte application arguing that they needed additional discovery (and a motion to compel that discovery) before they could adequately respond to the summary judgment motion, under Code of Civil Procedure section 437c, subdivision (h). Without addressing the merits of Plaintiffs' discovery argument, the court granted the ex parte application, continued the summary judgment hearing to May 10, 2024, and reserved this date for Plaintiffs' motion to compel. (See February 2, 2024 Order.) Having now considered the merits, the court DENIES the motion to compel.

This is Plaintiffs' third motion to compel responses regarding either the same or similar documents. On April 4, 2023, the court denied Plaintiffs' motion to compel, finding that documents such as Travelers' communications with third-party Cricket Wireless ("Cricket") and photographs communicated with Cricket were not relevant to the insurance coverage issues in this case. The court also found that many of the requested documents were privileged. On May 23, 2023, the court denied Plaintiffs' second motion to compel, finding that the document requests at issue overlapped "greatly" with the requests at issue in the first motion, and that in any event, the requests at issue in the second motion had been superseded.

Travelers argues that this motion is, at least in part, a motion for reconsideration in disguise, because it is "duplicative" of prior motions and "cover[s] old ground." (Opposition at p. 2:3-8.) At the same time, Travelers acknowledges that some of the items in the second set of document requests may be new, but it argues that the motion still fails on the merits. (*Id.* at p. 3:9-12.) The court generally agrees with Travelers, as follows.

Request No. 19: Plaintiffs fail to explain how documents evidencing or relating to Travelers' "knowledge and/or review of the lease" between Plaintiffs and Cricket have any potential relevance to this case. These documents might have some bearing on Travelers' coverage *of Cricket* in the separate lawsuit brought by Plaintiffs against Cricket, but they have no conceivable bearing on Travelers' coverage *of Plaintiffs* in the present case against third-party claims made against Plaintiffs. Just as in the first motion to compel, this request appears to be an improper attempt to obtain documents that might be used in Plaintiffs' other case against Cricket.

Plaintiffs argue in their motion that "they are first party insureds under the Travelers' [sic] policy as Cricket's lessor and its agents" and that they "have standing as first party insureds." (Notice of Motion at p. 2:11-13; Memorandum at p. 4:17.) The court does not see any valid basis for this conclusory assertion. The insurance policy at issue is a *third-party* liability policy to Cricket, not a first-party policy, and so the notion that Plaintiffs are somehow "first party insureds" under the policy appears to be rooted in wishful thinking rather than reality. Indeed, this court already determined that to the extent that Plaintiffs are "additional

insureds" under the "Technology Xtend" endorsement of the policy, it can only be for third-party insurance coverage. (See March 16, 2023 Order on Demurrer and Motion to Strike at p. 13:3-9 [finding that Plaintiffs indiscriminately mixed "allegations that are directed to damages for [their] *own* property loss" with claims "for *third-party* losses alleged against the Plaintiffs"] [emphasis in original].) DENIED.

Request No. 20: Similarly, Plaintiffs fail to explain how any "applications for insurance" by Cricket to Travelers would have any possible bearing on Plaintiffs' own third-party coverage or claims in this case. The court discerns none. DENIED.

Requests Nos. 21-24: These requests relate to Travelers' handling of claims by Plaintiffs as "additional insureds" in this case. According to Travelers, Plaintiffs never tendered any third-party claim to Travelers, and so there are no responsive documents. Plaintiffs argue that their "claim file is discoverable" because they "are not third parties" but rather "first parties." (Memorandum at p. 9:22-28.) This argument is a non-sequitur. If there are no claim files because Plaintiffs never made a tender, then there is nothing to be produced. Moreover, Plaintiffs continue to be fixated on their unsupported allegation that they are first-party insureds. DENIED.

Request No. 25: Finally, Plaintiffs argue that they are entitled to documents relating to Travelers' "discussions with Cricket or AT&T regarding termination of the Cricket lease." Once again, Travelers notes that there are no such documents, and so there is nothing to be provided. In addition, the court does not see any possible relevance of such documents to this case, even if they did exist.

Plaintiffs argue that these communications are relevant to the pending summary judgment motion, because one of Travelers' undisputed material facts ("UMFs") states: "Plaintiffs have produced no 'email communications' sent to Cricket 'in December 2011' (or at any other time) that urged Cricket or AT&T to violate or terminate the lease." (Notice of Motion at p. 2:18-20 [quoting Travelers' UMF No. 19].) According to Plaintiffs, this allegation "waives any privilege and opens the door to further discovery." (*Id.* at p. 2:21-23.) The court finds otherwise. Rather than relying on communications between itself and Cricket regarding the lease, Travelers appears to be relying in UMF No. 19 on the *absence* of any such communications, which is consistent with its position on this motion. Moreover, as Travelers notes, this is not an affirmative claim by Travelers in the case; rather, it is a defense to Plaintiffs' allegation—apparently unsupported—that communications between Robert Killingsworth and Cricket are what induced Cricket to terminate its lease. These are the same communications that Plaintiffs tried to obtain in their first motion to compel, which the court already denied. The court DENIES this request again.

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Calendar Line 3
Case Name: *State Farm Mutual Automobile Insurance Company v. Jose Guadalupe Herrera Macias*
Case No.: 22CV399300

Plaintiff State Farm Mutual Automobile Insurance Company ("State Farm") moves to compel further responses to form interrogatories and requests for production of documents from defendant Jose Guadalupe Herrera Macias ("Herrera"). The requests at issue are Form Interrogatories Nos. 2.3, 2.11, 4.1, 12.1-12.4, 12.6, 12.7, 16.1, 16.7, 16.8, 20.1, 20.1, 20.4, 20.5, 20.7, and 20.8, and Requests for Production Nos. 1, 2, and 4. In addition, State Farm requests $2,060 in monetary sanctions against both Herrera and his defense counsel.

For the reasons that follow, the court GRANTS the motion to compel; in addition, it GRANTS the request for monetary sanctions against Herrera only, not his counsel.

The responses given to the discovery so far consist entirely of objections. As such, they are insufficient on their face. The reason given by Herrera's counsel for this situation is simple: they have been unable to communicate with their client; indeed, they have *never* communicated with him. The only answer in the file is an unverified answer submitted by counsel. Herrera's counsel argues that the only proper solution "to prevent injustice and prejudice" to their client is for the court to issue a protective order against these requests, because State Farm is "attempting to capitalize on the missing Defendant." (Opposition at p. 2:7-11.) Counsel relies on *Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1583 (*Brigante*) for the proposition that the court may decline to compel discovery—or in that particular case, refrain from deeming RFAs admitted—in the interest of justice.

The court finds *Brigante* to be distinguishable and also finds that a protective order is not the appropriate remedy here. In *Brigante*, there was reason to believe that the defendant was unaware of the lawsuit, given that she had never been served (except by publication) and her whereabouts were unknown. By contrast, in this case, Herrera was *personally served* with the summons and complaint at his home address, where he apparently continues to reside, according to State Farm. Thus, Herrera has knowledge of this lawsuit, and given his counsel's numerous efforts to try to communicate with him and his failure to respond, the court concludes that he is deliberately avoiding this case, including deliberately avoiding discovery. Moreover, in contrast to the discovery in *Brigante*, the discovery at issue here consists of basic responses to form interrogatories and document requests, not the "sweeping use of RFAs" to establish liability and damages conclusively. (*Brigante*, *supra*, 20 Cal.App.4th at p. 1588.)

In view of the foregoing, the court sees no injustice in compelling Herrera to respond to the discovery at issue and in ordering monetary sanctions against him. The court finds that State Farm's request for $2,060 is reasonable, and the court orders Herrera to pay this amount within 30 days of notice of entry of this order to his counsel.

At the same time, the court finds that it would be unjust to order counsel to be jointly and severally liable for the monetary sanctions, given that it does not appear that there was anything else that could be done here to make their client respond. State Farm argues that "Defense Counsel did not need to serve unmeritorious objections" here, but the court finds that counsel's professional duty *required* them to serve objections—tepid as they may have been—

to preserve their client's interests to the best of their ability. (Reply at p. 8:24-27.) Thus, the sanctions order is only as to Herrera himself.

The motion is granted, and Herrera is ordered to provide substantive answers to the discovery at issue within 30 days of notice of entry of this order to his counsel. Herrera must also pay State Farm $2,060 within the same timeframe.

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Calendar Line 9
Case Name: *Han Guo v. Phillip Lee*
Case No.: 22CV404133

Plaintiff Han Guo moves to enforce a purported settlement agreement with defendant Philip Lee under Code of Civil Procedure section 664.6. In the alternative, Guo moves to enforce a separate purported acceptance of a Code of Civil Procedure section 998 offer from Lee. Because the court finds that neither settlement is enforceable under section 664.6, the court DENIES the motion.

1. The Alleged Email Agreement

First, Guo argues that an "April 10, 2023 email exchange demonstrates [that] the parties mutually consented to essential settlement terms—payment of $8,000 by Defendant in exchange for Plaintiff's dismissal . . . . These emails form an enforceable settlement contract under California law." (Memorandum at p. 4:1-4.) The court has reviewed these emails attached to the motion and finds that they are somewhat ambiguous as to whether the parties truly had a final enforceable agreement. But regardless of whether the emails may or may not form "an enforceable settlement contract under California law," they are unambiguously *not* enforceable in a motion brought under section 664.6. Section 664.6 expressly requires that the parties "stipulate, in a writing *signed by the parties* outside the presence of the court *or orally before the court*," to the settlement terms before the court can enter judgment pursuant to the terms of the settlement. (Emphasis added.) These emails were not signed by the parties outside the presence of the court. In fact, in one April 10, 2023 email, Guo's counsel says, "please sign/or [sic] have your client sign and return," and in reply, Lee's counsel says, "He would like to sign the agreement and make the payment by next April 21, 2023. I will have him sign it and get back to you." (Motion, Exhibit 2.) Thus, the emails themselves explicitly confirm that nothing was yet signed by the parties.

2. Section 998 Offer

Second, Guo moves in the alternative to enforce his purported acceptance of a section 998 offer for $6,000, 20 days after he served a formal objection to that same offer on April 7, 2023. Although the purpose of section 998 is to encourage settlements between parties, and although the meet-and-confer emails between counsel are somewhat ambiguous (again) as to whether Guo unequivocally rejected the 998 offer, the court finds that Guo's service of a formal objection—in which he states that Lee's offer "is not a good faith attempt to resolve the dispute," "has no value," and is something that "we cannot accept"—constitutes an unequivocal rejection. (Opposition, Exhibit C, p. 2:7-8, 2:12, and 2:20-21.) This is compounded by the fact that after serving the objection, the parties attempted to negotiate a different settlement agreement by email for $8,000 instead of $6,000, which ultimately also fell through, on April 13, 2023. Having already unequivocally rejected the section 998 offer by objecting to it, Guo's attempt to accept that offer on April 27, 2023 was ineffective.[2]

The motion is denied.

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[2] Contrary to Guo's apparent position, this is entirely different from "grumbling" about a settlement offer. (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376.) Whereas "grumbling" may not constitute a rejection of an offer, a formal written objection does.

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