**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: 09-26-23 TIME: 9 A.M.**

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

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

**TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:**
(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

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

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

To **Join Teams Meeting** -Click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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

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

| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 21CV377639<br>Hearing: Order of Examination | CAN CAPITAL, INC. vs DOREEN JATTAN et al | It does not appear that a proper proof of service has been filed. All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If the debtor does not appear, the matter will be continued to allow proper notice. If there is no appearance by the moving party, the matter will be ordered off calendar. |
| LINE 2 | 22CV400035<br>Motion: Strike | Andrew McGee vs Power Personnel, Inc. et al | See Tentative Ruling. The Court will issue the final order. |
| LINE 3 | 22CV408434<br>Hearing: Demurrer | Jane Doe 1 et al vs Timothy Long et al | See Tentative Ruling. The Court will issue the final order. |
| LINE 4 | 22CV408434<br>Hearing: Motion to Strike | Jane Doe 1 et al vs Timothy Long et al | See Tentative Ruling. The Court will issue the final order. |

**SUPERIOR COURT, STATE OF CALIFORNIA**
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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.)**

| | | | |
|---|---|---|---|
| LINE 5 | 20CV361585<br>Motion: Summary Judgment/Adjudication | Kevin Odonnell vs Samaritan, LLC et al | See Tentative Ruling. The Court will issue the final order. |
| LINE 6 | 22CV394304<br>Motion: Compel | SOPHIA SERNA et al vs CARLOS CALLES | Notice is not proper as no amended notice was filed. If Defendant appears, motion will be continued to allow for proper notice. If Defendant fails to appear, motion will be taken off calendar. |
| LINE 7 | 23CV415220<br>Motion: Compel | Camille Lampkins vs Belmont Village, L.P. | Case has been moved to complex and reassigned to Department 19. Motion to Compel will be heard on November 15, 2023 at 1:30 pm in Department 19. |
| LINE 8 | 21CV389591<br>Motion: Withdraw as attorney | CHUANYONG WU vs TORI BLANCA et al | Attorney Michael Cohen shall appear to establish basis for motion to withdraw. If Mr. Cohen fails to appear, the motion will be taken off calendar. |
| LINE 9 | 22CV401091<br>Hearing: To disqualify Def Ahern | Coastal Properties Pullman Way, LLC, a California limited liability company vs Ahern Rentals, Inc., a Nevada corporation | See Tentative Ruling. Plaintiff shall submit the final order. |
| LINE 10 | | | |
| LINE 11 | | | |
| LINE 12 | | | |

**- oo0oo -**

**Calendar Line 2**
**Case Name:** ***Andrew McGee v. Power Personnel, Inc., et al.***
**Case No.:** **22CV400035**

Motion to Strike Portions of the First Amended Complaint by Defendant Power Personnel, Inc.

## Factual and Procedural Background

This is an employment action for claims including, but not limited to, discrimination, retaliation, and wrongful termination.

According to the first amended complaint ("FAC"), plaintiff Andrew McGee ("Plaintiff") was hired to work as a surgical supply chain clerk in December 2019. (FAC at ¶ 24.) On August 26, 2021, Plaintiff injured his wrist while pulling down heavy boxes. (Id. at ¶ 25.) Thereafter, he notified his employers of his disability and/or medical condition and ultimately could no longer continue working as he was forced to leave his shift. (Id. at ¶¶ 26-27.) Plaintiff was terminated from his employment on August 26, 2021. (Id. at ¶ 28.)

Plaintiff was employed by two business entities, each named as a defendant, and collectively referred to as "Employers" in the FAC: Power Personnel, Inc. ("Power") and Stanford Health Care ("SHC").[1] (See FAC at ¶¶ 3-5.) At all times relevant to the FAC, Power owned and operated a private staffing agency. (Id. at ¶ 6.) SHC owned and operated a private hospital. (Id. at ¶ 7.) The defendants acted in concert with one another to commit the wrongful acts alleged in the FAC. (Id. at ¶ 13.)

Plaintiff alleges defendants (or Employers) discriminated and retaliated against him by terminating his employment and for exercising his right to request leaving his shift early as an accommodation of his disability and/or medical condition. (FAC at ¶ 29.)

On June 14, 2022, Plaintiff filed a complaint against defendants setting forth causes of action for:

(1) Discrimination in Violation of Gov't Code, §§ 12940 et seq.;
(2) Retaliation in Violation of Gov't Code, §§ 12940 et seq.;
(3) Failure to Prevent Discrimination, Harassment, and Retaliation in Violation of Gov't Code, § 12940(k);
(4) Retaliation in Violation of Gov't Code, §§ 12945.2 et seq.;
(5) Failure to Provide Reasonable Accommodations in Violation of Gov't Code, §§ 12940 et seq.;
(6) Failure to Engage in a Good Faith Interactive Process in Violation of Gov't Code, §§ 12940 et seq.;
(7) Declaratory Judgment; and
(8) Wrongful Termination in Violation of the Public Policy of the State of California.

[1] Plaintiff dismissed defendant Global HR Partners LLC from this action on December 13, 2022.

On September 20, 2022, defendant SHC filed a demurrer to the complaint. The matter was heard and submitted on January 24, 2023. Thereafter, this court (Hon. Rosen) sustained and overruled the demurrer in part in an order filed March 1, 2023.

On March 9, 2023, Plaintiff filed the operative FAC alleging the same causes of action as the prior pleading.

On April 11, 2023, defendant SHC filed an answer alleging a general denial and affirmative defenses.

On May 8, 2023, defendant Power filed the motion presently before the court, a motion to strike portions of the FAC. Plaintiff filed written opposition. Power filed reply papers.

**Motion to Strike Portions of the FAC**

Defendant Power moves to strike alter ego and punitive damages allegations in the FAC. (See FAC at ¶¶ 12, 19-21, 37, 48, 60, 66, 78, 86, 94, 115 and Prayer for Relief at No. 4.)

**Untimely Opposition**

In reply, defendant Power argues Plaintiff filed an untimely opposition to the motion to strike. (See Reply at p. 3:17-21.)

Code of Civil Procedure section 1005, subdivision (b), requires all opposing papers to be filed and served at least nine court days before the hearing. No paper may be rejected for filing on the ground that it was untimely submitted for filing. (Cal. Rules of Court, Rule 3.1300(d).) If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must indicate. (Ibid.)

Here, the instant motion to strike was filed on May 8, 2023. The hearing on the motion is scheduled for September 26, 2023. Thus, Plaintiff had to file his opposition no later than September 12, 2023 to be considered timely.[2] Plaintiff did not file and serve his opposition until September 13, 2023, one day beyond the deadline imposed by the rules of court. Despite the late opposition, defendant Power timely filed and served reply papers addressing the substantive merits of the opposition. Furthermore, Power does not identify any prejudice as a result of the untimely opposition nor does there appear to be any prejudice in this instance. The court therefore will consider the merits of the opposition. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds]; see also *Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 32 [Cognizant of the strong policy favoring the disposition of cases on their merits…judges frequently consider documents which have been untimely filed.].)

**Legal Standard**

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (Code Civ. Proc., § 436, subd. (a).) A court may also strike out all or any part of a pleading not

[2] The court notes Friday September 22, 2023 is a court holiday.

filed in conformity with the laws of the State of California. (Code Civ. Proc., § 436, subd. (b).) The grounds for a motion to strike shall 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).)

Irrelevant matter includes "immaterial allegations." (Code Civ. Proc., § 431.10, subd. (c).) "An immaterial allegation in a pleading is any of the following: (1) An allegation that is not essential to the statement of a claim or defense; (2) An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense; (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (Code Civ. Proc., § 431.10, subd. (b).)

"As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice." (Weil & Brown, et al., *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2022) ¶ 7:168, p. 7(l)-76 citing Code Civ. Proc., § 437.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.' Such challenges lie only if these defects appear on the face of the complaint, or from matters judicially noticeable." (Id. at ¶ 7:169, p. 7(l)-76.)

"In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to the motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "In ruling on a motion to strike, courts do not read allegations in isolation." (*Ibid.*)

**Alter Ego Allegations**

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.] A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.] The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. [Citation.]" (*Sonora Diamond Corp. v. Super. Ct.* (2000) 83 Cal.App.4th 523, 538 (*Sonora*).)

"In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owners that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.]" (*Sonora, supra,* 83 Cal.App.4th at p. 538.)

" 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used. [Citation.]" (*Sonora, supra,* 83 Cal.App.4th at pp. 538-539.)

"To recover on an alter ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415 [complaint alleging individual defendant was owner of all stock of defendant corporation and personally made all its business decisions was not sufficient for alter ego liability]; see *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 235 [plaintiff sufficiently alleged unity of interest by alleging corporate entity was inadequately capitalized, failed to "abide by the formalities of corporate existence," and was dominated, controlled, and used by defendant as a "mere shell and conduit"].)

Defendant Power moves to strike paragraphs 12, 19, 20, and 21 as they are not supported by sufficient facts to establish alter ego liability. Instead, Power contends these paragraphs contain only boilerplate language and conclusory allegations which do not satisfy the pleading standard for alter ego liability. Plaintiff fails to address this argument in his opposition to the motion. (See Opp.). The court views this lack of opposition as a concession on the merits. (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal. App. 4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].)

Accordingly, the motion to strike paragraphs 12, 19, 20, and 21 is GRANTED WITH 10 DAYS LEAVE TO AMEND. (See *Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 360 [with respect to motion to strike, leave to amend is routinely and liberally granted to give the plaintiff a chance to cure the defect in question].) Given that Plaintiff was already granted leave to amend once on the issue of alter ego, the Court is not inclined to grant leave to amend again.

**Punitive Damages Allegations**

"In order to 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. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. 'Malice' is defined in the statute as conduct 'intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' is 'an intentional misrepresentation, deceit, or concealment of a

material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.' " (*Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63, internal citations omitted.)

Also, "[u]nder Civil Code section 3294, subdivision (b), punitive damages can properly be awarded against a corporate entity as a principal, because of an act by its agents, if the corporate employer authorized or ratified wrongful conduct. Ratification is shown if an officer, director, or managing agent of the corporation has advance knowledge of, but consciously disregards, authorizes, or ratifies an act of oppression, fraud, or malice." (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1124.)

"In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants' conduct may adequately plead the evil motive requisite to recovery of punitive damages." (*Monge v. Super. Ct.* (1986) 176 Cal.App.3d 503, 510.)

Defendant Power moves to strike paragraph 37 of the FAC which provides:

> Because the acts taken toward Plaintiff were carried out by officers, directors and/or managing agents acting in a deliberate, cold, callous, cruel and intentional manner, in conscious disregard of Plaintiff's rights and in order to injure and damage Plaintiff, Plaintiff requests that punitive damages be levied against Defendants and each of them, in sums in excess of the jurisdictional minimum of this Court.

Defendant Power also moves to strike paragraphs 48, 60, 66, 78, 86, 94, and 115 that similarly allege:

> The foregoing conduct of defendants individually, or by and through their officers, directors and/or managing agents, was intended by the Defendants to cause injury to the Plaintiff or was despicable conduct carried on by the Defendants with a willful and conscious disregard of the rights of Plaintiff or subjected Plaintiff to cruel and unjust hardship in conscious disregard of Plaintiff's rights such as to constitute malice, oppression, or fraud under Civil Code § 3294, thereby entitling Plaintiff to punitive damages in an amount appropriate to punish or make an example of Defendants.

Defendant Power further moves to strike Plaintiff's request for punitive damages in the Prayer for Relief. (See FAC at Prayer for Relief, No. 4.)

The aforementioned paragraphs are incorporated in Plaintiff's FEHA causes of action where California courts have awarded punitive damages with respect to such claims. (See *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1435 [A court can award Civil Code section 3294 punitive damages in a FEHA case.]; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147-1148 [California's punitive damages statute applies to actions brought under the FEHA].) Even so, a plaintiff must still demonstrate that a defendant is guilty of malice, oppression or fraud to recover punitive damages. (See *Commodore Home Systems,*

*Inc. v. Super. Ct.* (1982) 32 Cal.3d 211, 215 [punitive damages may be recoverable in a FEHA action where defendant has been guilty of oppression, fraud, or malice].)

Defendant Power persuasively argues the FAC consists only of conclusions and boilerplate allegations and is devoid of facts addressing malice, oppression, or fraud to establish punitive damages. (See *Grieves v. Super. Ct.* (1984) 157 Cal.App.3d 159, 166 ["Not only must there be circumstances of oppression, fraud or malice, but facts must be alleged in the pleading to support such a claim."]; *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872 [defendant's conclusory conduct as intentional, willful and fraudulent is a patently insufficient statement of "oppression, fraud, or malice, express or implied," within the meaning of section 3294.].) Nor are there facts alleging who on behalf of Power engaged in these acts and specifically authorized or ratified these acts to support punitive damages against a corporate entity.

In opposition, Plaintiff contends defendant Power willfully violated his rights by terminating his employment following notice of his disability. (See Opp. at p. 5:13-22.) Plaintiff however does not direct the court to any legal authority to support the argument that this is sufficient to support a request for punitive damages. (See *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153 [court may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he or she wants us to adopt].) Instead, Plaintiff relies on *Kelly v. Wal Mart Stores, Inc.* (S.D. Cal. 2017) 291 F.Supp.3d 1145 (*Kelly*) where the federal district court denied a motion for summary judgment in part with regards to punitive damages. (*Kelly, supra,* 291 F.Supp.3d at p. 1154.) *Kelly* however is not binding authority on this court. (See *People v. Uribe* (2011) 199 Cal.App.4th 836, 875 [federal authority may be regarded as persuasive by California state courts].) Nor is *Kelly* persuasive as that decision addressed a motion for summary judgment where the court has an opportunity to consider evidence on both sides to determine whether a triable issue of fact exists for determination at trial. (See *Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 451 ["The purpose of summary judgment is to determine whether the parties possess evidence that requires the weighing procedures of a trial."].) That is not the case here on a motion to strike which considers only the well pleaded facts of the complaint and materials subject to judicial notice. (See Code Civ. Proc., § 437, subd. (a); see also *SKF Farms v. Super. Ct.* (1984) 153 Cal.App.3d 902, 905 [a demurrer or motion to strike tests the pleadings alone and not the evidence or other extrinsic matters].) Based on these conclusory allegations, Plaintiff does not set forth sufficient facts of malice, oppression or fraud to support an award for punitive damages.

Consequently, the motion to strike the punitive damages allegations is GRANTED WITH 10 DAYS LEAVE TO AMEND.

**Disposition**

The motion to strike portions of the FAC is GRANTED in its entirety WITH 10 DAYS LEAVE TO AMEND.

The court will prepare the Order.

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**Calendar Lines 3 and 4**
**Case Name:** *Doe, et al. v. Long, et al.*
**Case No.:** 22CV408434

## I. Factual and Procedural Background

Plaintiffs Jane Doe 1, Jane Doe 2, and Jane Doe 3 (collectively, "Plaintiffs") filed a this First Amended Complaint ("FAC") against defendants TLCO 18, LLC aka The Hut, Timothy Long ("Long"), and Casey O'Connor ("O'Connor")(collectively, "Defendants") for sexual assault and harassment that occurred on the premises of The Hut.[3]

Defendants Long and O'Connor purchased The Hut in 2019 and hired Wendell Prieto ("Prieto") to serve as their agent, supervising employees, and running daily operations. (FAC, ¶ 15.) Prieto was later appointed the CEO of TLCO 18, LLC. (*Ibid*.) Prieto was at all times a registered sex offender. (*Ibid*.) Defendants also hired Elias Rodriguez ("Rodriguez") who acted as the assistant manager of The Hut. (*Id.* at ¶ 24.) Rodriguez had been previously fired from another bar/restaurant for complaints of sexual harassment and was known to sexually harass his female coworkers. (*Ibid*.)

Patrons of The Hut were not required to show proof of identification at the door and were allowed to order multiple alcoholic drinks at the counter using only identification for the person making the purchase. (FAC, ¶ 19.) Long and O'Connor failed to enact and enforce protocols and procedures to safeguard against over-consumption of alcohol. (*Id*. at ¶ 21.) Additionally, Long and O'Connor failed to provide the correct mandatory sexual harassment training to their employees. (*Id.* at ¶ 23.)

Several of The Hut's female employees fell victim to Rodriguez, suffering from harassment, intimidation, and unwanted sexual touching. (FAC, ¶¶ 25, 27, 28.) These harassed employees reported the incidents to Prieto both verbally and in writing. (*Id*. at ¶ 26.) Despite numerous reports of harassment, Prieto promoted Rodriguez to manager. (*Id*. at ¶ 27.)

On January 16, 2022, Plaintiffs, freshman university students under the age of 21, attempted to enter The Hut and ran into Rodriguez. (FAC, ¶ 31.) Rodriguez told them The Hut was closed but invited them in and offered to serve them free drinks. (*Ibid*.) He did not check or ask for their identification. (*Ibid*.) Once inside, Rodriguez made the Plaintiffs several alcoholic drinks. (*Id*. at ¶ 33.) Eventually, Jane Doe 2 became concerned about the alcohol being served after noticing a strange color in one of the drinks, and attempted to alert Jane Doe 1 and Jane Doe 3; however, they were inebriated and continued to drink. (*Ibid*.)

Around 11:30 PM, Rodriguez told Jane Doe 2 to go to an enclosed patio area on The Hut's property to help him arrange chairs. (FAC, ¶ 36.) She went outside and thereafter realized she was locked outside in the enclosed area. (*Ibid*.) She escaped the patio by climbing the fence and went to the front door of The Hut where she saw Jane Doe 1 being raped by Rodriguez. (*Id.* at ¶¶ 36-37.) Jane Doe 2 began yelling and Rodriguez then stepped aside. (*Id*. at ¶ 37.) Jane Doe 2 found Jane Doe 3 in the bathroom inebriated and vomiting. (*Id*. at ¶ 38.)

[3] The Hut is a popular, local bar located steps away from the Santa Clara University Campus and often frequented by the University's students. (FAC, ¶¶ 13-14.)

Jane Doe 2 and Jane Doe 3 had to carry Jane Doe 1 out of The Hut. (*Id*. at ¶ 38.)

After leaving The Hut, Plaintiffs called the police and Jane Does 1 and 3 were transported to the hospital. (FAC, ¶¶ 39-40.) Rodriguez was arrested later that night. (*Id*. at ¶ 41.)

On April 11, 2023, Plaintiffs filed the FAC against Defendants, asserting the following nine causes of action:

1) Negligent Hiring, Retention, and Supervision of Rodriguez;
2) Negligent Hiring, Retention, and Supervision of Prieto;
3) Premises Liability;
4) Negligent Infliction of Emotional Distress;
5) False Imprisonment;
6) Intentional Infliction of Emotional Distress;
7) Sexual Battery;
8) Negligence Per Se (Vicarious Liability); and
9) Negligence Per Se (Public Nuisance).

Defendants filed a demurrer and motion to strike portions of the FAC. Plaintiffs oppose both motions.

## II. Demurrer

### a. Legal Standard

A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) The only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

### b. Fifth and Seventh Causes of Action

Defendants demur to the fifth cause of action for false imprisonment and seventh cause of action for sexual battery on the ground they fail to state sufficient facts to constitute a cause of action.

Defendants essentially argue that while Plaintiffs may have stated a cause of action against Rodriguez, he is not a defendant in this case. (See Defendants' Memo, p. 7:23-24.) Additionally, Defendants assert that Plaintiffs' allegations that Defendants approved and ratified Rodriguez's sexual misconduct by employing him at The Hut are conclusory and insufficient to state a claim for false imprisonment or sexual battery. (*Id.* at p. 7:25-26.) In opposition, Plaintiffs contend they have alleged sufficient facts to support liability of Defendants through ratification. (See Plaintiffs' Opp., p. 9:20-22.)

"[A]n employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort. The failure to discharge an employee who has committed misconduct may be evidence of ratification. The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery. Whether an employer has ratified an employee's conduct is generally a factual question." (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1110-1111 [internal quotations and citations omitted].) Moreover, as "[r]atification is a permeation of the law of agency. . . [and agency] allegations are subject to general pleading requirements: It is a generally accepted rule . . . that [i]n order to state a cause of action against defendant for a wrong committed by his servant, the ultimate fact necessary to be alleged is that the wrongful act was in legal effect committed by defendant. This may be alleged either by alleging that defendant by his servant committed the act, or, without noticing the servant, by alleging that defendant committed the act." (*Id*. at p. 1112 [internal quotations omitted]; see also *Golceff v. Sugarman* (1950) 36 Cal.2d 152, 154 [stating same].)

Here, there are sufficient allegations Defendants ratified Rodriguez's sexual misconduct and tortious acts to survive a demurrer. The FAC alleges: Rodriguez was hired as an assistant manager of The Hut by Defendants (FAC, ¶¶ 24, 43); Defendants did not conduct a background or reference check on Rodriguez, which would have informed them of his history of sexual harassment (FAC, ¶ 24); patrons of The Hut were not asked to show proof of identification when purchasing alcohol and this was common knowledge among the owners of The Hut and the underage college students who frequented The Hut (FAC, ¶¶ 19, 30); Defendants did not provide the required training on sexual harassment to all supervisory employees, which included Rodriguez (FAC, ¶ 23); female employees working at The Hut made "numerous reports of harassment" against Rodriguez, both in writing and verbally to Prieto (FAC, ¶¶ 26-27); Defendants took no action against Rodriguez to stop his harassment after becoming aware of his actions (FAC, ¶ 27); and Defendants were warned about the sexual remarks that Rodriguez was making prior to the assault on Plaintiffs (FAC, ¶ 28). Additionally, the FAC alleges Defendants knew or should have known of Prieto and Rodriguez's unfitness and propensities to engage in sexually inappropriate behavior, or allowing it to occur at The Hut, and Defendants are liable for the acts of Prieto and Rodriguez under theories of vicarious liability, master-servant relationship, agency, and right of control. (FAC, ¶¶ 43-44.)

These allegations are sufficient at the pleading stage to state a claim that Defendants ratified the conduct of Rodriguez and Prieto and the Court declines to sustain the demurrer to the fifth and seventh causes of action on this basis.

Accordingly, the demurrer to the fifth and seventh causes of action is OVERRULED.

**c. Third Cause of Action**

Defendants demur to the third cause of action for premises liability on the grounds it fails to allege sufficient facts to state a claim. Defendants contend that Plaintiffs have failed to allege an essential element of premises liability by merely alleging a dangerous condition was created by allowing Rodriguez to work at The Hut. Defendants continue that there are insufficient facts to support Defendants' liability because The Hut was supposed to be closed and Plaintiffs were too young to be drinking legally. (Defendants' Memo, p. 8:14-21.)

"The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages." (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.) "Premises liability is grounded in the possession of the premises and the attendant right to control and manage the premises." (*Kesner v. Superior Ct.* (2016) 1 Cal.5th 1132, 1158.)

In support of their argument, Defendants rely on jury instructions for premises liability codified in CACI 1000, which provides that Plaintiff must prove the following:

1. That Defendants owned/leased/occupied/controlled the property;
2. That Defendants were negligent in the use or maintenance of the property;
3. That Plaintiffs were harmed; and
4. That Defendants' negligence was a substantial factor in causing Plaintiffs' harm.

(See CACI 1000.)

Defendants contend that Plaintiffs have insufficiently alleged that Defendants were negligent in the use or maintenance of the property. However, Defendants rely on Paragraphs 92 and 94 of the FAC, which are not incorporated as part of the third cause of action and not the subject of this argument on demurrer. (See Defendants' Memo, p. 8:18.) Moreover, Plaintiffs do allege the negligent use and maintenance of the property, as identified in Paragraph 75 of the FAC. (FAC, ¶ 75 ["Defendants breached their duty and were negligent in their use and maintenance of the property"].) Given these allegations, the Court finds there are facts sufficient to state a claim for premises liability.

Accordingly, the demurrer to the third cause of action is OVERRULED.

**d. First and Second Causes of Action**

Defendants demur to the first and second causes of action for negligent hiring, retention, and supervision of Rodriguez and Prieto, respectively.

Defendants contend that Plaintiffs have not alleged that Rodriguez and Prieto were acting in the course and scope of their employment when the Plaintiffs were harmed and therefore, the first and second causes of action fail. (Defendants' Memo, p. 9:12-13.) In opposition, Plaintiffs argue the first and second causes of action are based on direct liability, not vicarious liability. (Plaintiffs' Opp., pp. 10:8-9, 12:1-4.)

"Under a theory of negligent hiring, an employer is held responsible for its hiring decision. This is a theory of direct liability. It differs from respondeat superior, which is a theory of vicarious liability. Under a theory of respondeat superior, the employee must have been acting within the scope of his employment at the time of the wrongdoing, and then the employer is held liable for the employee's bad act. Thus, under a negligent hiring/retention theory, the issue is not whether the employee was acting within the scope of his employment, but whether the employer acted properly in hiring or retaining the employee." (*J.W. v. Watchtower Bible & Tract Society of New York, Inc.* (2018) 29 Cal.App.5th 1142, 1164.) Thus, despite Defendants' assertions, Plaintiffs are not required to allege that Rodriguez and Prieto were acting in the course and scope of their employment. Furthermore, the Court finds that sufficient facts have been pled in support of Plaintiffs' claims for negligent hiring, retention, and supervision. (See FAC, ¶¶ 51-57, 62-68.)

Based on the foregoing, the demurrer to the first and second causes of action is OVERRULED.

**e. Uncertainty**

Defendants additionally demur to the FAC on the ground of 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.) "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." (*Ibid*.) "[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

In this case, Defendants contend the FAC is uncertain as to punitive damages, and, as Plaintiffs note in opposition, a demurrer is not the proper procedural vehicle to attack punitive damages. (See *Grieves v. Superior Ct.* (1984) 157 Cal.App.3d 159, 163 [a demurrer does not lie to part of a cause of action and thus, punitive damage allegations are not subject to demurrers]; see also *Caliber Bodyworks, Inc. v. Superior Ct.* (2005) 134 Cal.App.4th 365, 384 ["[a] demurrer is not the appropriate vehicle to challenge a portion of a cause of action demanding an improper remedy"].) Regardless, Defendants are apparently aware of this fact, as they separately move to strike the punitive damages allegations, which will be addressed below. Furthermore, the FAC is not so uncertain that Defendants are unable to respond to the allegations against them.

Accordingly, the demurrer to the above stated causes of action on the ground they are uncertain is OVERRULED.

## III. Motion to Strike

**a. Legal Standard**

Pursuant to Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any 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. (See Code Civ. Proc., § 436.) In ruling on a motion to strike, the Court reads the pleading under attack as a whole, all parts in their context, and assuming the truth of all well pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a).)

**b. Allegations and Prayer for Damages**

Defendants move to strike the following:

1) Two paragraphs found in all of the first eight causes of action:

> The Defendants' continued employment of Rodriguez and Prieto, when they knew or should have known of their unfitness, and Defendants' authorization and ratification of their misconduct was in conscious disregard of the rights or safety of others including, but not limited to, Plaintiffs, so as to warrant the imposition of punitive damages pursuant to California Civil Code section 3294.
>
> Punitive Damages are further warranted against Defendants because they recklessly designated Prieto as CEO and entrusted him with daily operations. As the acting CEO, Prieto had advanced knowledge of the risk posed by Rodriguez and authorized and ratified his conduct in conscious disregard of the rights or safety of others including, but not limited to, Plaintiffs, so as to warrant the imposition of damages pursuant to California Civil Code section 3294.

(FAC, ¶¶ 58, 59, 69, 70, 80, 81, 88, 89, 98, 99, 108, 109, 117, 118, 130, 131.)

2) Paragraph 149: "Defendants' conduct was in conscious disregard of the rights or safety of others including, but not limited to, Plaintiffs, so as to warrant the imposition of punitive damages pursuant to California Civil Code section 3294. (FAC, ¶ 149.)

3) Prayer for Punitive Damages. (FAC, p. 27:1.)

**c. Punitive Damages Generally**

Civil Code section 3294, subdivision (b) allows for punitive damages where an employer had advanced knowledge of the unfitness of the employee and employed him with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. (Cal. Civ. Code, § 3294, subd. (b).) Further, "[w]ith respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (*Ibid*.; see also *White v. Ultamar* (1999) 21 Cal.4th 563, 572.)

For pleading purposes, in order to support a prayer for punitive or exemplary damages, the complaint must allege the "ultimate facts of the defendant's oppression, fraud or malice." (*Cyrus v. Haveson* (1976) 65 Cal.App.3d 306, 316-317.) Simply pleading the statutory terms "oppression, fraud or malice" is insufficient to adequately request punitive damages. (*Blegen v. Superior Ct.* (1986) 176 Cal.App.3d 503, 510- 511.) Therefore, specific factual allegations demonstrating oppression, fraud or malice are required. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.) However, the complaint will be read as a whole so that even conclusory allegations may suffice when read in context with facts alleged as to the defendant's wrongful conduct. (*Perkins v. Superior Ct.* (1981) 117 Cal.App.3d 1, 6-7.)

**d. Defendants' Arguments**

Defendants assert the following arguments in support of their motion to strike the punitive damages from the FAC: 1) Plaintiffs have not alleged conduct or actions by a managing agent of TLCO 18, LLC and have not alleged oppression, fraud, or malice; and 2) Plaintiffs' first, second, third, fourth, eighth, and ninth causes of action are based in negligence, and negligence cannot support a claim for punitive damages.

1. Managing Agent Allegations

Defendants first argue that Plaintiffs have failed to allege conduct or actions by a managing agent of TLCO 18, LLC. (See Defendants' Memo, p. 8:19-20.)

As cited above, pursuant to Civil Code section 3294, subdivision (b), a defendant can be liable for punitive damages if it authorized or ratified the wrongful conduct for which damages are awarded. (Cal Civ. Code, § 3294, subd. (b); see also Plaintiffs' Opp., p. 5:18-21, citing *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1153 [stating that Civil Code section 3294, subdivision (b) does not require "an additional explicit finding that the employer was guilty of fraud, oppression, or malice"].) The advanced knowledge or ratification must be on the part of an officer, director, or managing agent of the corporation. (See e.g., *Mazik v. Geico General Ins. Co.* (2019) 35 Cal.App.5th 455, 463-464.)

As this Court explains in greater detail above, Plaintiffs have sufficiently alleged that an officer, managing agent, or director, namely TLCO 18 LLC's CEO Prieto, had actual knowledge of Rodriguez's wrongful conduct. (See e.g., *Hart v. Nat'l Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1432-1433.) Thus, Plaintiffs have sufficiently alleged conduct by a managing agent and need not allege additional facts of oppression, fraud, or malice in this regard. As such, the Court declines to grant the motion to strike on this basis.

2. Negligence Allegations

Defendants next argue Plaintiffs' claims that sound in negligence cannot support a claim for punitive damages. (See Defendants' Memo, p. 9:1-2, 21-22.) In opposition, Plaintiffs assert there is no absolute bar to punitive damages in negligence actions and that punitive damages may sometimes by assessed in unintentional tort acts under Civil Code section 3294. (See Plaintiffs' Opp., p. 5:22-24, citing *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004 [stating "punitive damages sometimes may be assessed in unintentional tort actions under Civil Code section 3294 . . . so long as actual, substantial damages have been awarded"].)

"Where nonintentional torts involve conduct performed without intent to harm, punitive damages may be assessed when the conduct constitutes conscious disregard of the rights or safety of others. A conscious disregard of the safety of others may thus constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." (*Bell v. Sharp Cabrillo Hosp.* (1989) 212 Cal.App.3d 1034, 1044 [internal citations and quotations omitted]; see also *SKF Farms v. Superior Ct.* (1984) 153

Cal.App.3d 902, 907 [stating also "[e]ven 'nonintentional torts' may form the basis for punitive damages when the conduct constitutes conscious disregard of the rights or safety of others"]; *Penner v. Falk* (1984) 153 Cal.App.3d 858, 867 [stating same].)

Here, Plaintiffs allege facts, such as prior similar incidents, repeated reporting of Rodriguez's harassing behavior with female co-workers to Prieto, and a prior termination due to sexual harassment (see e.g., FAC, ¶¶ 24, 26-29), showing that Defendants were aware of the probable consequences of their failure to terminate Rodriguez, and their failure to implement procedures to safeguard patrons of The Hut (see e.g., FAC, ¶¶ 17, 21, 23, 77). The Court finds that these allegations are sufficient for pleading purposes and declines to grant the motion to strike on this basis as well.

Based on the foregoing, the motion to strike punitive damages allegations from the FAC is DENIED.

## IV. Conclusion and Order

The demurrer is OVERRULED in its entirety. The motion to strike is DENIED in its entirety.

The Court will prepare the final Order.

**- oo0oo -**

**Calendar Line 5**
**Case Name:** *Kevin Odonnell v. Samaritan LLC, et al.*
**Case No.:** 20CV361585

## I. Factual and Procedural Background

This is an action for elder abuse brought by plaintiff Kevin Odonnell ("Plaintiff") against defendants Good Samaritan Hospital, L.P. ("GSH") and Joseph Deschryver ("Deschryver") (collectively, "Defendants").

According to the allegations of the second amended complaint ("SAC"), on June 26, 2019, Plaintiff underwent spine surgery at GSH. (SAC, ¶ 36.) At all relevant times, Deschryver was the Administrator of GSH and a care custodian of Plaintiff. (SAC, ¶ 23.) On July 1, 2019, Plaintiff was discharged to White Blossom Care Center with complaints of stomach pain and a distended stomach; thereafter, Plaintiff's colon ruptured and he was throwing up black vomit. (SAC, ¶ 37.) On July 2, 2019, Plaintiff was returned to GSH, and required further operations, as well as placement on a colostomy bag and another bag to drain blood. (SAC, ¶¶ 38, 45.) Plaintiff had a bowel impaction with bowel perforation and had another surgery but went into septic shock. (SAC, ¶ 46.)

On July 5, 2019, a deep tissue injury was found on Plaintiff, which was inaccurately documented as having been present on admission. (SAC, ¶ 48.) On July 20, 2019, Plaintiff's care plan indicated he had a "skin integrity alteration—change in or modification of skin conditions," but did not indicate any interventions. (SAC, ¶ 49.) Plaintiff asserts that Defendants ignored his pressure sores for fifteen days and did nothing to provide him with the required care to address his known, acknowledged and ignored pressure sore risk. (*Ibid*.) On July 26, 2019, after six more days of inaction by GSH, Plaintiff was returned to the acute rehabilitation unit on the Mission Oaks campus. (SAC, ¶ 50.) His physical indicated he had a Stage IV pressure ulcer at his buttocks. (SAC, ¶ 56.) On August 6, 2019, Plaintiff was discharged to Santa Cruz Post Acute where his family was first apprised of the true severity of his injuries. (SAC, ¶ 57.)

Defendants knew or should have known Plaintiff was at high risk for the development and worsening of pressure sores; however, Plaintiff's needs were ignored by GSH staff due to the deliberate decision by the Defendants to understaff and underfund the hospital to maximize profits at the expense of the health and safety of infirm adults entrusted to their care such as Plaintiff. (SAC, ¶¶ 52, 63-72.)

Plaintiff asserts a single cause of action for elder abuse against Defendants. Currently before the Court is Defendants' motion for summary judgment. Plaintiff opposes the motion.

## II. Legal Standard

A motion for summary judgment "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 Civ. Proc., § 437c, subd. (c).)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

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. (*Augilar*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid*.) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id*. at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Augilar*, *supra*, 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id*. at p. 843.)

Furthermore, "a motion for summary adjudication may be made . . . as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).) "A party may seek summary adjudication on whether the cause of action, . . . or punitive damages claim has merit[.]" (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630; Code Civ. Proc., § 437c, subd. (f)(1).)

## III. Plaintiff's Objections

As an initial matter, the Court notes that objections do not need to be ruled upon when they do not comply with California Rules of Court, Rule 3.1354 ("Rule 3.1354"). Rule 3.1354 requires two documents to be submitted when evidentiary objections are made: the objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule. (See *Vineyard Spring Estates v. Superior Ct.* (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in the proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) Here Plaintiff submits one document that attempts to be both the objections and the proposed order, in violation of Rule 3.1354. That being said, the Court will rule on Plaintiff's objections in this instance. Plaintiff's counsel is reminded to follow all Rules of Court going forward.

In opposition, Plaintiff objects to the Young Declaration submitted by Defendants, on the grounds that Dr. Young lacks personal knowledge, has given an improper expert opinion, lacks foundation, multiple hearsay, and speculation. (See Plaintiff's Evidentiary Objections, Nos. 1-16.)

Objections Nos. 1 – 16 to the Young Declaration's Paragraphs 7, 7.1, 7.2, 7.3, 7.4., 7.5, 8, 8.1, 8.2, 8.3, 12, 13, and 14, on the ground Dr. Young lacks personal knowledge are OVERRULED. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 675 ["While lay witnesses are

allowed to testify only about matters within their personal knowledge, expert witnesses are given greater latitude"][internal cites omitted]; see also *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 766 [expert can base opinion on inadmissible evidence, including facts outside his personal knowledge, "provided such matter is 'of a type that reasonably may be relied upon by an expert in forming an opinion'"].)

Objections Nos. 1 – 16 to the Young Declaration's Paragraphs 7, 7.1, 7.2, 7.3, 7.4., 7.5, 8, 8.1, 8.2, 8.3, 12, 13, and 14, on the ground of improper expert opinion is OVERRULED. (*Pearce v. Linde* (1952) 113 Cal.App.2d 627, 630 [medical expert is qualified as a witness if it is shown he is familiar with the standards required of physicians under similar circumstances]; see also *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467 [expert must have enough knowledge and skill with the relevant subject to speak with authority and must be familiar with the standard of care to which defendant was held].)

Objections Nos. 1 – 16 to the Young Declaration's Paragraphs 7, 7.1, 7.2, 7.3, 7.4., 7.5, 8, 8.1, 8.2, 8.3, 12, 13, and 14, on the ground of lack of foundation are OVERRULED. (See *Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 505 [doctor's declaration did not lack foundation where he indicated he reviewed medical records, deposition transcripts, and plaintiff's declaration and explained his opinions in part by reference to medical records].)

Objections Nos. 1 – 16 to the Young Declaration's Paragraphs 7, 7.1, 7.2, 7.3, 7.4., 7.5, 8, 8.1, 8.2, 8.3, 12, 13, and 14, on the ground of multiple hearsay are OVERRULED. (See *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743 ["although hospital records are hearsay, they can be used as a basis for an expert medical opinion"]; see also *LAOSD Asbestos Cases* (2023) 87 Cal.App.5th 939, 947 ["Evidence Code section 801 governs the testimony of an expert witness, who may provide an opinion based on hearsay which need not always be based on personal knowledge"].)

Objections Nos. 1 – 16 to the Young Declaration's Paragraphs 7, 7.1, 7.2, 7.3, 7.4., 7.5, 8, 8.1, 8.2, 8.3, 12, 13, and 14, on the ground of speculation are OVERRULED. (*Cf. Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 ["expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural . . . an expert's opinion rendered without a reasoned explanation is worth no more than the reasons and facts on which it is based"].)

## IV. Elder Abuse

Plaintiff's sole cause of action is labeled as one for elder abuse pursuant to the Elder Abuse and Dependent Adult Civil Protection Act ("Elder Abuse Act"), Welfare and Institutions Code sections 15600, et seq. (See *Benedek v. PLC Santa Monica* (2003) 104 Cal.App.4th 1351, 1355 ["[t]he pleadings define the issues to be considered on a motion for summary judgment"].)

Defendants argue that, if the first cause of action is to be construed as one for elder abuse, Plaintiff cannot demonstrate all the elements of such a cause of action.

"The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect."

(*Delaney v. Baker* (1999) 20 Cal.4th 23, 33.) "Neglect is the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise. Neglect includes failure to provide medical care for physical . . . health needs. . . . Thus, the statutory definition of neglect speaks not of the undertaking of medical services, but of the failure to provide medical care." (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 208.) "The elements of a cause of action under the Elder Abuse Act are statutory, and reflect the Legislature's intent to provide enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect." (*Intrieri v. Superior Ct.* (2004) 117 Cal.App.4th 72, 82.)

Welfare and Institutions Code section 15610.07, subdivision (a)(1) states, "Abuse of an elder or a dependent adult" means … "[p]hysical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering." (Welf. & Inst. Code, § 15610.07, subd. (a)(1).)

Welfare and Institutions Code section 15610.57 goes on to state:

> (a) "Neglect" means either of the following:
>
> (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
>
> (2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.
>
> (b) Neglect includes, but is not limited to, all of the following:
>
> (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
>
> (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
>
> (3) Failure to protect from health and safety hazards.
>
> (4) Failure to prevent malnutrition or dehydration.
>
> (5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

(Welf. & Inst. Code, §15610.57; see also CACI, No. 3103.)

"The Elder Abuse Act does not apply to simple or gross negligence by health care providers. To obtain the enhanced remedies of section 15657, 'a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct." (*Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th 331, 336 (*Worsham*) [internal citations omitted]; see also Welf. & Inst. Code, § 15657.) "Recklessness refers to a subjective state of culpability greater than simple negligence, which has been described as a deliberate disregard of the high degree of probability that an injury will occur. Recklessness, unlike negligence, involves more

than inadvertence, incompetence, unskillfulness, or a failure to take precautions but rather rises to the level of a conscious choice of a course of action . . . with knowledge of serious danger to others involved in it." (*Worsham*, *supra*, 226 Cal.App.4th at p. 337 [internal citations and quotations omitted].)

Accordingly, Plaintiff must prove, by clear and convincing evidence, both that Defendants are liable for neglect and that Defendants are guilty of reckless, oppression, fraud, or malice in the commission of such neglect. (See *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404.)

A. Standard of Care and Causation

In support of their motion, Defendants present the declaration of David Young, M.D. ("Dr. Young"). Dr. Young states that based on his "education, knowledge, training and experience, it is [his] opinion that [GSH] . . . and its non-physician staff, including nurses, therapists and dieticians, at all times satisfied the applicable standards of care in providing care and treatment to [Plaintiff] in 2019." (UMF 46, 51; Young Decl., ¶ 8.) Dr. Young further states the nurses, bedside nurses, wound care nurse, physical therapists, and registered dieticians acted reasonably, appropriately, and met the standard of care in providing treatment to Plaintiff. (UMF, 46, 51; Young Decl., ¶¶ 8, 8.1, 8.2, 9, 10, 13.) Dr. Young additionally asserts that GSH's staffing plan was reasonable, appropriate, and met the standard of care. (UMF 48, 51; Young Decl., ¶ 8.2)

As to causation, Dr. Young states that in his opinion, "there is no causation. Based on [his] education, knowledge, training, and experience as a plastic surgeon . . . no alleged negligent conduct by the hospital or the hospital non-physician staff, including the nurses, therapists and dieticians, caused or was a substantial factor in causing, [Plaintiff's] left buttock DTI/pressure. . . . [Plaintiff's] left buttock DTI/pressure ulcer was unavoidable." (UMF 52, 53; Young Decl., ¶¶ 12, 13.)

Accordingly, Defendants have met their burden of demonstrating that Plaintiff's complaint lacks merit against them, and the burden now shifts to Plaintiff to demonstrate the existence of a triable issue of material fact as to breach of care and causation.

In opposition, Plaintiff submits the declaration of their own expert, Shahab Attarchi, M.D. ("Dr. Attarchi"). Dr. Attarchi states that, based on his experience, training, and employment as a licensed physician and hospitalist, to a reasonable degree of medical probability, "at all relevant times, the care and treatment rendered to [Plaintiff] at [GSH] during his admission between June 26, 2019 through August 11, 2019 did not comply with the standard of care, and that the actions and inactions by Defendant were the proximate cause of the development of the pressure sore on [Plaintiff's] sacrum." (DMF 45; Attarchi Decl., ¶¶ 3, 9.) Dr. Attarchi continues that, to a reasonable degree of medical probability, the GSH staff knew Plaintiff was a high risk for the development of pressure sores and failed to put in place the appropriate interventions to prevent the sores and failed to adhere to physician orders. (DMF 46; Attarchi Decl., ¶¶ 10-11.) Dr. Attarchi further asserts that, despite Dr. Young's declaration, Plaintiff's pressure sores were not "unavoidable" and had Plaintiff received the appropriate care and treatment, his wounds could have been avoided. (DMF 46; Attarchi Decl., ¶¶ 14-15.)

Accordingly, Plaintiff has demonstrated the existence of a triable issue of material fact as to both the breach of the standard of care and as to causation.

B. Recklessness

Defendants next argue that "this case does not show the 'reckless neglect' needed for elder abuse." (Defendants' Memo, p. 21:12-13.)

Defendants argue that allegations of understaffing, undertraining, and insufficient care plans do not amount to reckless neglect. (*Worsham, supra,* 226 Cal.App.4th at p. 338 [Sixth Appellate District held that allegations of failure to provide adequate staffing constituted nothing more than negligence in the undertaking of medical services, as opposed to a fundamental failure to provide medical care for physical and mental health needs].) To support their argument, Defendants rely on the Young Declaration. (See Defendants' Memo, p. 21:26, citing to UMF 47, 48.) Specifically, Dr. Young asserts that Plaintiff's pressure sore was not caused by inadequate staffing, nursing plans, or inadequate training but instead developed quickly due to Plaintiff's condition and could not have been prevented. (See Young Decl., ¶ 12.) Dr. Young further asserts that there is no evidence of neglect, or reckless neglect, or withholding of or failure to provide care, and no evidence that elder abuse caused, or was a substantial factor in causing Plaintiff's pressure sore. (*Id.* at ¶ 13.) Finally, Dr. Young asserts that the GSH nursing and other non-physician staff implemented all appropriate measures to manage Plaintiff's wound. (*Ibid*.)

Accordingly, Defendants meet their burden of demonstrating that Plaintiff's complaint lacks merit as to recklessness and the burden shifts to Plaintiff to demonstrate a triable issue of fact.

Plaintiff asserts there is evidence that "Defendants engaged in a continuous and systematic withholding of care sufficient to show reckless neglect of the Plaintiff." (Plaintiff's Opposition, p. 16:19-20.) The opinion of Dr. Attarchi raises a triable issue of material fact. In his declaration, Dr. Attarchi asserts that: 1) Defendants conduct fell well below the standard of care for the prevention of pressure sores in an elderly patient such as Plaintiff (DMF, 47; Attarchi Decl., ¶ 12); 2) Defendants knew Plaintiff was a high risk for the development of pressure sores and rated him as a high risk for skin impairments (DMF 46; Attarchi Decl., ¶ 11); 3) Defendants failed to implement appropriate interventions to prevent the wound (*ibid.*); 4) Plaintiff needed to be turned every two hours but was only turned sporadically and sometimes less than once per day (DMF 5, 46; Attarchi Decl., ¶ 11); 5) after discovering Plaintiff's pressure sore, Defendants failed to adequately treat and care for the wound (DMF 47; Attarchi Decl., ¶ 13); and 6) that the overall care and treatment of Plaintiff is consistent with the definition of neglect (DMF 46; Attarchi Decl., ¶ 17). (See *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 90 ["if a care facility knows it must provide a certain type of care on a daily basis but provides that care sporadically, or is supposed to provide multiple types of care but only provides some of those types of care, withholding of care has occurred. . . . the trier of fact must determine whether there is a significant pattern of withholding portions or types of care. A significant pattern is one that involves repeated withholding of care and leads to the conclusion that the pattern was the result of choice or deliberate indifference"].)

Therefore, Plaintiff has demonstrated the existence of a triable issue of material fact as to recklessness.

C. Individual Defendant

Defendants additionally contend there is no evidence that defendant Deschryver was personally involved in or ratified "understaffing" or that he personally provided or directed Plaintiff's medical care. (Defendants' Memo, p. 23:3-9.) To support this argument, Defendants cite to UMF 45, 46-48 and the Young Declaration, Paragraphs 7.3, 8.2, and 12. UMF 45 states that GSH staffed its hospital units according to the mandatory ratios and cites to over one-hundred pages of medical documents in support. The Court declines to review these medical documents, which do not indicate specifically where within each document the undisputed facts are located. (See *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1209-1210 [explaining why evidence must be supported by citation to exhibit, title, page, and line numbers, including "'to permit trial courts to expeditiously review complex motions for summary judgment to determine quickly and efficiently whether material facts are disputed'"].) Additionally, while UMF 46 and 48 state that there was no negligent conduct caused by GSH or its staff, Dr. Young's declaration does not specifically address Deschryver or the allegations pertaining to him. Thus, Defendants have failed to meet their burden in this regard.

## V. Medical Malpractice

Defendants additionally contend that "[d]espite its label, at its core, this is a medical negligence claim alleged as elder abuse to obtain enhanced damages." (Defendants' Memo, p. 16:9-10.) Thus, to the extent that the first cause of action can instead be construed as one for medical malpractice, Defendants have presented arguments to assert that Plaintiff cannot demonstrate all of the elements of such a cause of action.

"In any medical malpractice action, the plaintiff must establish: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310 [internal quotes omitted].)

Defendants argue that Plaintiff's SAC lacks merit because he cannot demonstrate a breach of the standard of care or causation of injuries.

A. Breach of Standard of Care

To prove the element of breach of the duty of care, a plaintiff must prove that the defendant's conduct fell below the standard of care that a person of ordinary prudence would exercise under similar circumstances. (*Flowers v. Torrance Memorial Hosp. Medical Ctr.* (1994) 8 Cal.4th 992, 997.) "The standard of care in a medical malpractice case requires that medical service providers exercise that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of their profession under similar circumstances." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215.)

Further, the "standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a

malpractice action and can only be proven by their testimony[.]" (*Sinz v. Owens* (1949) 33 Cal.2d 749, 753.) Thus, "California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports [its] motion with expert declarations that [its] conduct fell within the community standard of care, [it is] entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Munro v. Regents of Univ. of Cal.* (1989) 215 Cal.App.3d 977, 984-985 [internal quotations omitted]; *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542 [general rule that testimony of expert is required in every professional negligence case].)

As stated above, Defendants rely on Dr. Young's declaration, Defendants "at all times satisfied the applicable standards of care in providing care and treatment to [Plaintiff.]" (UMF 46, 51; Young Decl., ¶ 8.) Dr. Young additionally asserts that GSH's staffing plan was reasonable, appropriate, and met the standard of care. (UMF 48, 51; Young Decl., ¶ 8.2.)

Thus, as explained in more detail above, Defendants have made a prima facie showing of the nonexistence of a breach of the standard of care.

B. Causation

Similarly, the element of causation in a medical malpractice case can only be determined by expert medical testimony. (*Salasguevara v. Wyeth Labs.* (1990) 222 Cal.App.3d 379, 385.) Defendants must present sufficient expert testimony to show that Plaintiff's injury was not "caused by anything that defendants did or failed to do." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 508.)

As for causation, Dr. Young states that "there is no causation. Based on [his] education, knowledge, training, and experience as a plastic surgeon . . . no alleged negligent conduct by the hospital or the hospital non-physician staff, including the nurses, therapists and dieticians, caused or was a substantial factor in causing, [Plaintiff's] left buttock DTI/pressure. . . . [Plaintiff's] left buttock DTI/pressure ulcer was unavoidable." (UMF 52, 53; Young Decl., ¶¶ 12, 13.)

Thus, Defendants have made a prima facie showing of the nonexistence of causation.

Accordingly, Defendants meet their burden of demonstrating that Plaintiff's complaint lacks merit against them, and the burden now shifts to Plaintiff to demonstrate the existence of a triable issue of material fact as to breach and causation.

In opposition, Plaintiff relies on Dr. Attarchi's Declaration. Dr. Attarchi states that "at all relevant times, the care and treatment rendered to [Plaintiff] at [GSH] during his admission . . . did not comply with the standard of care, and that the actions and inactions by Defendant were the proximate cause of the development of the pressure sore on [Plaintiff's] sacrum." (DMF 45; Attarchi Decl., ¶¶ 3, 9.)

Accordingly, as stated above, Plaintiff has demonstrated the existence of a triable issue of material fact as to both the breach of the standard of care and as to causation.

Based on the foregoing, Defendants' motion for summary judgment is DENIED.

## VI. Summary Adjudication of Punitive Damages

Defendants seek summary adjudication of Plaintiff's claim for punitive damages. However, Defendants' motion is procedurally defective in violation of California Rules of Court, Rule 3.1350, subdivision (b), which states: "[i]f summary adjudication is sought, . . . the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (Cal. Rules of Court, Rule 3.1350, subd. (b); see also *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 743-44 ["[a] motion for summary adjudication tenders only those issues or causes of action specified in the notice of motion, and may only be granted as to the matters thus specified"]; *Gonzalez v. Superior Ct*. (1987) 189 Cal.App.3d 1542, 1545 [generally, a motion can only be granted on grounds specified in the notice of motion].) In addition, Defendants rely on the same arguments and evidence raised in support of their elder abuse claim to dispute Plaintiff's request for punitive damages. (See UMF 49-53.) The Court however has considered and rejected those arguments for reasons stated above.

Accordingly, Defendants' motion for summary adjudication is DENIED.

## VII. Conclusion and Order

Defendants' motion for summary judgment is DENIED. Defendants' alternative motion for summary adjudication is DENIED.

The Court will prepare the Order.

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**Calendar line 9**
**Case Name: *Coastal Properties Pullman Way, LLC, v. Ahern Rentals, Inc.***
**Case No.: 22CV401091**

Plaintiff Coastal Properties Pullman Way, LLC ("Coastal Properties") moves to disqualify Maria Bellafronto and her firm Hopkins and Carley (H&C) from representing Defendant Ahern Rental because multiple other counsel at H&C have previously represented Jim Zubillaga, the principal for Plaintiff, in this and other similar matters. Defendant opposes the request contending that (1) Plaintiff has no standing since it was Mr. Zubillaga, not Plaintiff, who had the attorney-client relationship with H&C; (2) the other matters in which H&C represented Plaintiff are not substantially similar to the current matter and the counsel involved in the other matters have no confidential information regarding Plaintiff; (3) H&C has erected an effective and timely ethical wall; and (4) Plaintiff waived its ability to move to disqualify H&C due to its extreme delay in bringing the motion which, if granted, would cause extreme prejudice to Defendant.

REQUEST FOR JUDICIAL NOTICE

Defendant's request for judicial notice of the articles of organization for the Plaintiff is denied as not necessary to resolving the issue before the Court. See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 (a court need not take judicial notice of a matter unless it "is necessary, helpful, or relevant").

LEGAL STANDARD

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.'" *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145 ("SpeeDee"). "Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility." *Id.*; see also *Kirk v. First American Title Ins. Co*. (2010) 183 Cal.App.4th 776, 792. "The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." *Id*. "The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." *Id*.

"Protecting the confidentiality of communications between attorney and client is fundamental to our legal system." *SpeeDee,* 20 Cal.4th at 1146. "[A] basic obligation of every attorney is '[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.'" *Id*., quoting Bus. & Prof. Code § 6068, subd. (e)(1). "[C]ourts analyzing questions of disqualification often look to the Rules of Professional Conduct for guidance." *Kirk,* 183 Cal.App.4th at 792. California Rule of Professional Conduct 1.9 addresses the ongoing duty of confidentiality and loyalty that an attorney owes his/her former clients, as it states: "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent." Cal. Rules of Prof. Conduct, Rule 1.9, subd. (a). In fact, "[a] former client may seek to disqualify a former attorney from representing an

adverse party by showing the former attorney actually possesses confidential information adverse to the former client." *H. F. Ahmanson & Co. v. Salomon Bros*. (1991) 229 Cal.App.3d 1445, 1452; see also *Costello v. Buckley* (2016) 245 Cal.App.4th 748, 754. "However, it is well settled actual possession of confidential information need not be proved in order to disqualify the former attorney." *H. F. Ahmanson & Co*., 229 Cal.App.3d at p.1452. "It is enough to show a 'substantial relationship' between the former and current representation." *Id*. "If the former client can establish the existence of a substantial relationship between representations, the courts will conclusively presume the attorney possesses confidential information adverse to the former client." *Id*.; see also *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 706 (stating that "[w]here the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is presumed and disqualification of the attorney's representation of the second client is mandatory"), quoting *Flatt v. Super. Ct. (Daniel)* (1994) 9 Cal.4th 275, 283.

To determine whether there is a substantial relationship between the subjects of the prior and current representation, the court examines the factual similarity, legal similarity, and nature and extent of the attorney's involvement with the cases. *Rosenfeld Constr. Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 576. "[S]uccessive representations will be 'substantially related' when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." *Jessen v. Hartford Casualty Ins. Co*. (2003) 111 Cal.App.4th 698, 713. In determining what is "substantially related," "the court should examine the time spent by the attorney on the earlier cases, the type of work performed, and the attorney's possible exposure to formulation of policy or strategy." *H. F. Ahmanson & Co*., *supra*, 229 Cal.App.3d at 1455.

"If the relationship between the attorney and the former client is shown to have been direct—that is, where the lawyer was personally involved in providing legal advice and services to the former client—then it must be presumed that confidential information has passed to the attorney and there cannot be any delving into the specifics of the communications between the attorney and the former client in an effort to show that the attorney did or did not receive confidential information during the course of that relationship." *Jessen*, 111 Cal.App.4th at 709. "As a result, disqualification will depend upon the strength of the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation." *Id*. "This is so because a direct attorney-client relationship is inherently one during which confidential information 'would normally have been imparted to the attorney by virtue of the nature of [that sort of] former representation,' and therefore it will be conclusively presumed that the attorney acquired confidential information relevant to the current representation if it is congruent with the former representation." *Id*., quoting *H. F. Ahmanson & Co*., 229 Cal.App.3d at 1454.

STANDING

Defendant first claims that Plaintiff does not have standing to bring this motion because H&C formerly represented Jim Zubillaga, not Coastal Properties. Citing *Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court (Parsons Corp.)* (1997) 60 Cal.App.4th 248, 257, Defendant argues that only where the individual is the alter ego of the entity, will

representation of one be considered representation of the other. But Defendant's view is too narrow. The Courts have found that disqualifying conflicts with nonclients can arise. "Conflicts can arise in California (and disqualification motions can be granted) based on the conjunction of (1) implicit obligations a lawyer takes on to maintain the confidences of a nonclient received in the course of representing a client, and (2) the unfair advantage that might accrue were such a lawyer to pursue substantially related litigation against the nonclient." *Acacia Patent Acquisition, LLC v. Superior Court* (2015) 234 Cal. App. 4th 1091, 1099. "[T]he principal focus should be the practical consequences of the attorney's relationship with the corporate family. If that relationship may give the attorney a significant practical advantage in a case against an affiliate, then the attorney can be disqualified from taking the case." *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal. App. 4th 223, 253 (disqualifying counsel who represented corporate client and its affiliate's insurer in subsequent litigation). If an attorney is deemed to have a duty of confidentiality to a nonclient arising out of such a past representation, courts apply the substantial relationship test from the successive representation doctrine to determine whether to disqualify counsel in a case against the nonclient. *Acacia Patent*, 234 Cal.App.4th at 1102.

H&C represented Mr. Zubillaga and his various entities in numerous litigations involving, among other issues, the sales, purchases, construction, and leases of real property. Decl. of Zubillaga ¶ 3. Mr. Zubillaga was the principal for the represented entities and the point of contact in each of those matters. Two of the disputes in which H&C represented Mr. Zubillaga and other entities, specifically the 2006 LoBue matter and the 2010 matter, involved landlord-tenant disputes involving breach of the lease and damage to the property. Decl of Zubillaga ¶¶ 8, 9, 12, 13. Here, Mr. Zubillaga is the principal of Plaintiff. The current matter concerns a real estate entity of Mr. Zubillaga and a breach of lease and property damage, among other issues. Given the similarity of the types of the disputes involved and that Mr. Zubillaga was the principal of the various entities and the direct contact in all of the former cases, the practical effect is that any confidence gained in the course of these other matters would advantage H&C in this matter. This matter, like the past matters, involves Mr. Zubillaga's business and litigation strategms, as well as his real estates practices. Accordingly, under the broader test as laid out in *Morrison Knudsen* and *Acacia Patent*, Mr. Zubillaga has standing to bring this disqualification motion.

DISQUALIFICATION BASED ON H&C'S PRIOR REPRESENTATION OF MR. ZUBILLAGA AND HIS ENTITIES

Successive representation creates a conflict when the former client can show a substantial relationship between the subjects of the prior and current representation. Here, Plaintiff demonstrates that there is a substantial relationship between several of the former representations of Plaintiff and the current case. The 2006 LoBue dispute was a commercial lease dispute wherein Mr. Zubillaga and entities were the defendants accused of breaching their lease. In the 2010 Fresno case, Plaintiff sued his tenant for failure to pay rent and damage to the property. In the present litigation, Plaintiff also claims that Defendant has breached the property lease and caused significant damage to the property. While the specifics of the breach and the property are distinct, there are similar and overlapping legal issues with respect to the former and current disputes. All of the disputes would involve the business practices and litigation strategy of Mr. Zubillaga. As such, "information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and

legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation." *Jessen,* 111 Cal.App.4th at 713.

While there is no direct relationship between Maria Bellafronto and Mr. Zubillaga, there is a direct relationship between Jeffrey Essner, his primary lawyer at H&C, and Mr. Zubillaga. Mr. Essner was hired over a number of years to represent Plaintiff in numerous disputes in his capacity as a principal for an LLC who owns commercial property. There can be no doubt that Mr. Essner was personally involved in providing legal advice and services to Mr. Zubillaga and in formulating strategy and policy for his lawsuits. As such, Mr. Essner is presumed to have acquired confidential information from Plaintiff. Mr. Essner is clearly disqualified from representing Plaintiff in this matter.

Because of Mr. Essner's involvement, there is a rebuttable presumption that the entire firm of H&C is disqualified. This issue is discussed below. But first, this Court also addresses the conflict arising from the work of attorney Andrew Ditlevesen on this case.

MR. DITLEVSEN'S INVOLVEMENT

Even if this court were to believe that the prior matters wherein H&C represented Mr. Zubillaga were not substantially related to the current case, there is an issue with respect to Mr. Ditlevsen. Mr. Ditlevsen worked for the law firm of Sweeney Mason when it represented Plaintiff in the dispute currently before the court. Mr. Ditlevsen has since moved to H&C which now represents Defendant. Because it is the same case, there is no issue that the matters are substantially related. Defendant claims this is not disqualifying because Mr. Ditlevsen's involvement in the case while at Sweeney Mason was "peripheral" and he did not receive confidential information. Opposition at pp. 13-16.

While Mr. Ditlevsen states that he did not "actively handle[]" Plaintiff's case while at Sweeney Mason. Decl. of Ditlevsen, ¶7. He has "no memory" of preparing documents for the Ahern case and "does not recall" having any telephone conversations with Mr. Zubillaga about the case. *Id*. at ¶9 He disputes having received "any highly critical or confidential information directly relating" to the case. *Id*. at ¶10. Yet, he conceded that he would be copied on "important matters" when the senior partner was unavailable. *Id*. at ¶8. Moreover, it is clear that he was copied on at least one a long email chain concerning the case in August of 2018. Exh. G attached to Decl. of Zubillaga.

Mr. Zubillaga declares that he provided Mr. Ditlevsen with confidential information, that Mr. Ditlevsen's involvement included at least one phone call with him about the case, emails regarding non-payments by Defendant to third parties, and working on a default in the case. Decl. of Zubillaga, ¶17. In his declaration in support of the reply brief, Mr. Zubillaga expands on the details of the conversation he had with Mr. Ditlevsen regarding the case, states that he exchanged over 200 emails with him on this and other matters, and declares that Mr. Ditlevsen represented him in a nearly identical dispute against a different defendant. Decl. of Zubillaga in Reply, ¶¶4-5. According to the lead attorney from Sweeney Mason, Scott Mangum, Mr. Detlevsen spent approximately 17.5 hours on this case while at Sweeney Mason. Decl. of Mangum, ¶9.

It is telling what Mr. Ditlevsen does and does not say in his declaration. He does not dispute preparing documents for this case or speaking with Mr. Zubillaga about the case. He

only states he does not recall it. He does not dispute receiving critical information – only "highly critical" information. He does not dispute receiving confidential information indirectly related to the case, only such information "directly related" to the case. Given that he represented Plaintiff in a similar suit, this is a significant distinction. It is clear Mr. Ditlevsen worked on the case on behalf of Plaintiff. Mr. Mangum states that Mr. Ditlevsen billed 17.5 hours on the case. Mr. Zubillaga's declaration includes specific information discussed with Mr. Ditlevsen. Moreover, Mr. Ditlevsen admits he was copied on emails of "important matters" whenever Mr. Mangum was unavailable. Accordingly, the Court finds that Mr. Ditlevsen's involvement was not merely peripheral and that one would expect he would, and did, receive confidential information. Accordingly, he is also disqualified from representing Defendant.

VICARIOUS DISQUALIFICATION

Even where there is a conflict, it is not inevitable that an entire law firm should be disqualified. Vicarious disqualification of the firm is the general rule. The Courts hold that while "we should presume knowledge is imputed to all members of a tainted attorney's law firm. . . in the proper circumstances, the presumption is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case." *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 801. "Once the moving party in a motion for disqualification has established that an attorney is tainted with confidential information, a rebuttable presumption arises that the attorney shared that information with the attorney's law firm… [and t]he burden then shifts to the challenged law firm to establish 'that the practical effect of formal screening has been achieved.'" *Id*. at 809-810. "The specific elements of an effective screen will vary from case to case, although two elements are necessary: First, the screen must be timely imposed; a firm must impose screening measures when the conflict first arises." *Id*. at 810. "Second, it is not sufficient to simply produce declarations stating that confidential information was not conveyed or that the disqualified attorney did not work on the case; an effective wall involves the imposition of preventive measures to guarantee that information will not be conveyed." *Id*. "The typical elements of an ethical wall are: [(1)] physical, geographic, and departmental separation of attorneys; [(2)] prohibitions against and sanctions for discussing confidential matters; [(3)] established rules and procedures preventing access to confidential information and files; [(4)] procedures preventing a disqualified attorney from sharing in the profits from the representation; and [(5)] continuing education in professional responsibility." *Id*. at 810-11.

Here, no effective wall was timely imposed. First, while Mr. Essner declares that he has been "ethically walled from working on this litigation," the wall was not imposed until March 16, 2022, a month after the firm was retained. Decl. of Essner, ¶5. This is not timely as it was not in place when the conflict first arose. Nor does the wall include Mr. Ditlevsen. See Ex. 1 to Decl. of Essner. Moreover, Mr. Ditlevsen does not indicate that he has been walled off. Decl. of Ditlevsen. Rather, Mr. Ditlevsen concedes that he did not include Plaintiff as a past client when hired by H&C and then declares that he has not discussed the case with anyone at H&C and is "unaware of the specifics of the lawsuit." Decl. of Ditlevsen, ¶12. This is exactly the kind of declaration that has been held to be insufficient. *Kirk*, 183 Cal.App.4th at 810. Moreover, Ms. Bellafronto's declaration makes it clear that even if a timely wall had been put into place, it is not effective. Mr. Ditlevsen received emails about the case in 2022, after he had moved from Sweeney Mason to H&C. Finally, the wall erected is insufficient under the standards laid out in *Kirk*, as it includes no separation of attorneys by physical, geographic or departmental designations, it outlines no procedures put in place to actually prevent access to

files, and states no procedures to prevent disqualified attorneys from sharing in the profits. See Ex. 1 to Decl. of Essner. Accordingly, the entire firm of Hopkins & Carley is disqualified.

PLAINTIFF'S DELAY IN BRINGING THE MOTION TO DISQUALIFY

Even where disqualification is proper, a party can waive their right to assert a conflict. "The trial court must have discretion to find laches forecloses the former client's claim of conflict." R*iver West, Inc. v. Nickel* (1987) 188 Cal. App. 3d 1297, 1309 (delay unreasonable where 3 years elapsed, firm put in over 3000 hours and incurred fees of over $300K). "Because of the law's concern for unhampered counsel on both sides of the litigation, 'mere delay' in making a disqualification motion is not dispositive. The delay must be extreme in terms of time and consequence." *Id*. at 1311. This standard has been upheld in subsequent cases. *See e.g., Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 844-45 (to result in a waiver, the "delay [and] … the prejudice to the opponent must be extreme"). Factors relevant to the reasonableness of a delay include the "stage of litigation at which the disqualification motion is made" and the complexity of the case. *Id.* at 846. Delay can also be "an indication that the alleged breach of confidentiality was not seen as serious or substantial by the moving party," and can suggest "the possibility that the 'party brought the motion as a tactical device to delay litigation.'" *Id.* at 847. "If the opposing party makes a prima facie showing of extreme delay and prejudice, the burden then shifts to the moving party to justify the delay." *Ontiveros v. Constable* (2016) 245 Cal.App.4th 686, 701.

Here, the delay and prejudice are not so extreme as to find a waiver or to shift the burden to Plaintiff. It is certainly true that Plaintiff knew of the conflict from the beginning of the case in February 2022. Plaintiff did not raise the issue until April, 2023, 14 months later. The Court cannot find, however, that the 14 month delay is extreme, as required. It is far short of the more than three years found in the *River* case. One factor the courts look to is the stage of litigation the case is in when the motion is brought. Here, the case is not yet at issue, as Defendant plans to file a cross-complaint, discovery is ongoing, and no trial date has been set. In *Ontiveros* the delay was found not to be extreme even though 16 months elapsed, where the case was not at issue, discovery was ongoing, and no trial date had been set. *Ontiveros*, 245 Cal.App.4$^{th}$ at 701-02. Nor is the prejudice sufficiently extreme to warrant waiver. This is not to say there is no prejudice to H&C. But the Court does not the find the delay and prejudice so extreme as to waive the disqualification in this case.

CONCLUSION

The motion to disqualify Maria Bellafronto and Hopkins and Carley is GRANTED. Plaintiff shall submit the final order.

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