SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20 (will be heard in Department 6)
Honorable Evette D. Pennypacker, Presiding (for Hon. Socrates Manoukian)

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: May 30, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

THIS CALENDAR WILL BE CALLED IN DEPARTMENT 6. IF YOU PLAN TO ATTEND REMOTELY, PLEASE USE THE DEPT. 6 TEAMS LINK FROM THE COURT WEBSITE.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR ORAL ARGUMENT: **Before 4:00 PM 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 at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

LINE #	CASE #	CASE TITLE	RULING
1	16CV300709	Joan Todd v. Dai Truong, et al.	Parties are ordered to appear for the debtor's examination.
2	24CV431640	Carla Gomez v KIP Glazer et. al.	Dr. Glazer's motion for judgment on the pleadings of the first cause of action is DENIED and of the second and third causes of action is GRANTED without leave to amend. Scroll to line 2 for complete ruling. Court to prepare formal order.
3	21CV385504	Mary Anderson vs Carrington College (CA), Inc. et al	Off calendar; matter settled.
4	22CV399892	Sanco Pipelines Incorporation vs FPC Builders, Inc.	Plaintiff's alternative motion for summary adjudication of the first cause of action of its complaint for breach of the subcontract is GRANTED. Plaintiff's motion is otherwise DENIED. Scroll to line 4 for complete ruling. Court to prepare formal order.
5	22CV405349	Sanjay Taxpro, Inc. vs Neil Jesani et. al.	Cross-complainant's motion to compel Cross-defendants' further responses to special interrogatories (set four) and for $1,920 in monetary sanctions is GRANTED. Unlike the responding party in *Singer v. Superior Court of Contra Costa County* (1960) 54 Cal. 2d 318, 325-326, Cross-defendants did answer the contention interrogatories regarding their affirmative defenses. Cross-defendants provided the information they have now, which is what Cross-complainants are entitled to. However, review of the separate statement indicates that Cross-defendants did not provide information responsive to the questions asked. Nor did Cross-defendants state whether, after a reasonable search, they produced all information currently in their possession, custody, or control. While *Singer v. Superior Court of Contra Costa County* (1960) 54 Cal. 2d 318, 325-326 teaches that Cross-defendants need not respond with all facts they intend to introduce at trial, they are required to produce all facts they have now. (*Id.* ("The interrogatories here involved do not call for 'all the facts' defendant intends to produce at the trial in support of the pleaded defenses. If the questions were that broad the trial court might well have been justified in refusing to compel answers. But the interrogatories here involved are not of that character. They carefully limit the questions to facts now known to defendant. They request a statement of 'what fact or facts form the basis for the allegation' of contributory negligence and assumption of risk. Thus, by their very language, it is obvious that the interrogatories do not request answers that would create a limitation. All that is requested are the facts now known to the defendant upon which it predicates its defenses. The plaintiff is entitled to that information.") The request for fees is DENIED. The Court finds the parties were substantially justified in bringing this issue to Court. Cross-defendants are ordered to serve verified supplemental responses to these interrogatories within 20 days of service of the formal order, which the Court will prepare.
6-7 15-16	23CV416108	Travelers Property Casualty Company of America vs Liberty Insurance Corporation	These motions are continued to June 11, 2024 at 9 a.m. in Department 20 to be heard with another pending motion to compel.
8	2014-1-CV-279969	T. Schweikert vs. Las Brisas Homeowners Association (HOA), et. al.	The parties are ordered to appear and explain whether any additional action needs to be taken regarding the contempt motion given that the parties have now reached a conditional settlement wherein the monetary component is agreed upon and the completion of Common Area repairs must be completed.
9	2015-1-CV-288601	E. Amador vs. D. Ororpeza, et. al.	Labor Commissioner's motion to amend judgment is GRANTED. The judgment entered on December 18, 2015 against Defendant Doroteo Oropeza in the amount of $4,763.47 is amended to remove her name and reflect judgment only as to co-defendant, Felipe Hernandez. This order will be reflected in the minutes. Moving party to promptly prepare amended judgment.
10	21CV390710	Institute for the Future vs Don Mullen et. al.	Defendants' motion for attorney's fees is GRANTED. Scroll to line 10 for complete ruling; Court to prepare formal order.

11	24CV431683	Mary Jones vs Barbara Negaaed et. al.	Plaintiff Mary Jones' motion for leave to file a second amended complaint is off calendar. Parties agreed to relief sought by stipulation dated April 30, 2024.
12-14	23CV412522	Dr. Tal Lavian vs. Cradar, A1 LLC	Motions to compel reset to June 27, 2024. Parties ordered to appear for trial setting.

Calendar Line 2
Case Name: *Carla Gomez, et al. v. Kip Glazer, et al.*
Case No.: 24CV431640

I. Background

This is an action for statutory violations related to a high school newspaper.

The Oracle is a student-run newspaper at Mountain View High School ("MVHS"). (Complaint, ¶ 11.) In the 2023-2024 school year, plaintiffs Hanna Olson and Hayes Duenow ("Student Plaintiffs") were student members of *The Oracle*, and plaintiff Carla Gomez was their faculty adviser. (Complaint, ¶¶ 2-4.) In the 2022-2023 school year, defendant Kip Glazer was MVHS's principal. (Complaint, ¶ 6.)

For the fifth issue of that school year's edition of *The Oracle*, the students chose to write, edit, and publish an in-depth article about a culture of sexual harassment at MVHS (the "Article"). (Complaint, ¶ 12.) On March 24, 2023, MVHS Assistant Principal John Robell called Gomez and expressed concern regarding a student who might be named in the Article as a serial sexual harasser of other students. (Complaint, ¶ 13.) Gomez said that she would not direct her journalism students to omit the student's name from the Article. (*Ibid.*)

On March 27, 2023, Principal Glazer addressed the journalism class, taking the position that the students should write about MVHS in a positive light. (Complaint, ¶ 14.) Glazer requested to review the final draft of the Article prior to its publication. (Complaint, ¶ 15, Ex. 1.) Later that day, a student reporter emailed Glazer a draft of the Article. (*Ibid.*) The draft did not use the alleged student harasser's real name, but instead identified him with the pseudonym "Tyler." (Complaint, ¶ 15, fn. 2.)

On the evening of March 27, 2023, Glazer visited with members of *The Oracle* staff as they were preparing the upcoming print issue of the newspaper. (Complaint, ¶ 16.) Glazer met with faculty adviser Gomez and three students. (*Ibid.*) Glazer used her authority and position to pressure the students to censor the article. (*Ibid.*) The students relented to Glazer's pressure and made extensive changes to the Article, including the removal of: specific disturbing incidents, identifying information relating to Tyler and another student ("Jack"), and expert opinions. (Complaint, ¶ 18.)

After making these changes to the Article, one of the students sent the revised draft to Glazer on the evening of March 28, 2023. (Complaint, ¶ 19.) Glazer responded by email with instructions for

further changes. (*Ibid.*) On March 31, 2023, the final version of the Article was published in the print and online versions of *The Oracle*. (Complaint, ¶ 21, Ex. 2.)

On April 24, 2023, Glazer announced her decision to remove Gomez as the journalism adviser and replace her with someone with a Career Technical Education (CTE) credential. (Complaint, ¶ 21.) Glazer's rationale for removing Gomez as the journalism adviser was pretextual. (Complaint, ¶ 22.) Glazer retaliated against Gomez by removing her as the journalism adviser because she supported the student journalists in their efforts to publish an uncensored version of the Article and refused assist Glazer in censoring the Article.

Counsel for the Student Plaintiffs and Gomez (collectively, "Plaintiffs") sent a letter to defendants Mountain View Los Altos High School District and Glazer (collectively, "Defendants") asserting various violations. (Complaint, ¶ 23, Ex. 3.) Gomez submitted a notice of claim to the school district pursuant to Government Code, section 900, et seq. (Complaint, ¶ 24.) The Student Plaintiffs seek injunctive relief preventing future censorship by Defendants. (Complaint, ¶ 28.) Plaintiff Gomez seeks injunctive relief and may also seek damages if her government claim is denied. (Complaint, ¶¶ 32-33, 38-39.)

Plaintiffs initiated this action on February 22, 2024, asserting:

1) Violation of Education Code section 48907 [Student Plaintiffs against all Defendants;
2) Violation of Education Code section 48907, subdivision (g) [Gomez against all Defendants];
3) Violation of Labor Code, section 1102.5 [Gomez against all Defendants].

On April 19, 2024, Defendants filed the instant motion for judgment on the pleadings, which Plaintiffs oppose.

II. Legal Standard

A defendant may move for judgment on the pleadings when the "complaint does not state facts sufficient to constitute a cause of action against the defendant." (Code Civ. Proc., § 438, subds. (b)(1) and (c)(1)(B)(ii).) "A motion for judgment on the pleadings may be made at any time up to and including the time of trial…." (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 7.)

"A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matter that can be judicially noticed. Presentation of extrinsic evidence is therefore not proper on a motion for judgment on the pleadings." (*Cloud v. Northrup Grumman Corp.* (1998) 67 Cal.App.4th 995, 999, internal citations omitted.)

The court must assume the truth of all properly pleaded material facts and allegations, but not contentions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Wise v. Pacific Gas and Elec. Co.* (2005) 132 Cal.App.4th 725, 738.) "The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law." (*Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 321-322, quoting and citing *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216).)

A motion for judgment on the pleadings "may be granted with or without leave to file an amended complaint or answer, as the case may be." (Code Civ. Proc., § 438, subd. (h)(1).) "Where a demurrer is sustained or a motion for judgment on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. [Citation.]" (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852 (*Virginia G*).)

III. Analysis

Defendant Glazer moves for judgment on the pleadings of all causes of action, contending the asserted statutes do not provide for individual liability. (Notice of Motion and Motion, pp. 1-2.)

A. First Cause of Action: Education Code § 48907

The Student Plaintiffs seek injunctive relief against all Defendants, alleging that Defendants' censorship of the Article constituted an unlawful prior restraint in violation of Education Code, section 48907 ("Section 48907"). (Complaint, ¶¶ 26-28.) Defendant Glazer argues she is immune from individual liability as a public school official and that Section 48907 does not provide for individual liability. (Defendant Glazer's Memorandum of Points and Authorities ("Mot."), p. 4, lns. 10-13.) The Student Plaintiffs contend the government immunity provisions are inapplicable because they seek only

injunctive relief. (Plaintiff's Opposition ("Opp."), p. 4, 19-20.) Plaintiffs also argue Section 48907 expressly requires school officials to show justification prior to implementing a limitation on student expression. (Opp., p. 5, lns. 8-10.)

In 1971, the California Legislature enacted, "the nation's first statutory scheme for protecting students' free expression on school campuses." (*Lopez*, *supra*, 34 Cal.App.4th at p. 1311.) In 1978, the Legislature revised that statutory scheme by enacting Section 48907, "which specifically protects student expression in official school publications." (*Smith v. Novato Unified School Dist.* (2007) 150 Cal.App.4th 1439, 1451 (*Smith*).) Section 48907 provides:

> (a) Pupils of the public schools … shall have the right exercise freedom of speech and of the press including, but not limited to … the right if expression in official publications … except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material that so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. [¶] …
>
> (d) There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to a limitation of pupil expression under this section. ...

(§ 48907, subds. (a), (d).)

Without directly stating that it applies here, Glazer raises the issue of immunity for public school officials under the Government Claims Act (Government Code, section 810, et seq.) (Defendant's Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings ("Mot."), p. 4, lns. 11-13.) "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (Gov. Code, § 820.2.) "Public entity employees are immune from liability for injuries caused by their discretionary acts or omissions. [Citations.]" (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 341 (*Nasrawi*).)

> An act or omission is considered discretionary (and subject to immunity) where it involves planning and policymaking. Immunity is considered appropriate for those basic policy decisions which have been expressly committed to coordinate branches of government because judicial interference with such decisions would be unseemly. To be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. By contrast, lower-level or ministerial decisions that merely implement a basic policy already formulated are not entitled to immunity.

(*Ibid.*, internal punctuation and citations omitted.)

Glazer contends there is nothing in Section 48907 stating that school officials may be held individually liable. However, Section 48907 specifically imposes obligations on school officials: "School officials shall have the burden of showing justification without undue delay prior to a limitation of pupil expression under this section." (Section 48907, subd. (d).). Government Code, section 814, also specifically states that the statute does not apply to nonmonetary relief: "Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee."

The obligation of school officials (such as Glazer) to show justification prior to a limitation of pupil expression under the statute represents a lower-level or ministerial act to implement a basic policy that is already in place. (See *Nasrawi*, *supra*, 231 Cal.App.4th at p. 341.) In sum, the court cannot say as a matter of law that Glazer, in her capacity as a school official, cannot individually be subject to a properly pleaded cause of action for non-monetary, injunctive relief under Section 48907.

Accordingly, the motion for judgment on the pleadings of the first cause of action is DENIED.

B. Second Cause of Action: Section 48907(g)

In the second cause of action, the Complaint alleges Defendants retaliated against Gomez in violation of Section 48907, subdivision g. (Complaint, ¶ 30.) Glazer asserts there is no individual liability for retaliation in violation of Section 48907, subdivision g, because nothing in the statute indicates that the Legislature intended to impose personal liability on employees. (Mot, p. 6, lns. 10-13.) Plaintiffs argue the legislative history of Section 48907 demonstrates the Legislature amended the

statute in 2008 to broaden its scope of protection rather than limit those who may be held liable under it. (Opp., p. 6, lns. 7-9.)

Section 48907, subdivision (g), states: "An employee shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in the conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution." The Legislature added this subdivision to Section 48907 in 2008. (See Section 48907, Amended Stats 2008, ch. 525, § 2; Sen. Bill No. 1370, effective January 1, 2009.)

There is a lack of controlling authority regarding this provision. Glazer stresses Section 48907 does not define "employee" and analogizes the statute to language in the Fair Employment and Housing Act (Gov. Code, § 12900, et seq. ["FEHA"]). (Mot., p. 5, lns. 7-16.) Glazer points to the following language from a California Supreme Court decision: "We conclude that the FEHA, like similar federal statutes, allows persons to sue and hold liable their employers, but not individuals." (*Reno v. Baird* (1998) 18 Cal.4th 640, 643 (*Reno*), superseded by statute as stated in *Martinez v. Michaels* (C.D.Cal. 2015) 2015 U.S. Dist. LEXIS 92180, *25, 2015 WL 433059 (*Martinez*) ["In fact, in 2001, after the California Supreme Court decided *Reno*, 'the California Legislature amended FEHA's harassment provisions expressly holding individual employees liable for their harassment.' [Citations.]"].)

Plaintiff relies upon comments from the June 10, 2008 Bill Analysis for Senate Bill 1370. (Opp., p. 6, lns. 7-26; citing Cal. Bill Analysis, SB 1370 (2007-2008 Reg. Sess.) (June 10, 2008) ("June 10 Bill Analysis").) According to Plaintiff, the legislative history of Senate Bill "demonstrates that the Legislature intended for the term "employee" to broaden the scope of the protections granted by that section, not to restrict who can be held liable under it." (Opp., p. 6, lns. 7-9.) Plaintiff refers to argument in June 10 Bill Analysis in favor of using the term "employees" rather than the narrower term "journalism teachers" to identify those whom Section 48907, subdivision (g), protects from retaliation. (See June 10 Bill Analysis, pp. 7-8.)

The June 10 Bill Analysis Plaintiff relies on may demonstrate that Senate Bill 1370's author and supporters intended to protect all school employees acting to protect student's free speech rights, rather than simply those with the title of "journalism adviser." But that is different from the question here:

whether school officials may be held individually liable for retaliation in violation of Section 48907. The Legislature could have expressly included a provision allowing employees to sue and hold individual employees liable for acts of retaliation under Section 48907, subdivision (g). The Legislature has done in other context, including with respect to FEHA, as discussed above.

Here, there is no language in the statute providing for liability against individual employees under Section 48907, subdivision (g) or controlling authority providing for such an interpretation of the statute. Therefore, the Court finds Gomez's cause of action for retaliation under Section 48907, subdivision (g), against Defendant Glazer individually, is unsupported by current law.

Accordingly, the motion for judgment on the pleadings of the second cause of action is GRANTED without leave to amend.[1]

C. Third Cause of Action

In the third cause of action, the Complaint alleges Defendants subjected Gomez to adverse employment action and retaliated against her through the acts of Glazer, in violation of Gomez's right under Labor Code, section 1102.5 ("Section 1102.5"). (Complaint, ¶¶ 35-37.) Glazer contends there is no individual liability under Section 1102.5. (Mot., p. 5, ln. 17.) Plaintiff argues a 2013 amendment to Section 1102.5 broadened the scope of the statute's prohibition on retaliation to include persons acting on behalf of employers. (Opp., p. 8, lns. 6-8.)

More specifically, Plaintiff argues Section 1102.5 subdivisions (a)-(d) previously began with the language: "An employer may not make, adopt, or enforce…," or "An employer may not retaliate…," but after the 2013 amendment, those subsections begin with the language: "An employer, *or any person acting on behalf of the employer*, shall not …." (Section 1102.5, Amended Stats 2013, ch. 577, § 5, Sen Bill. No. 666, effective January 1, 2014; emphasis added.) However, Plaintiff offers no evidence that the Legislature intended to make persons acting on behalf of an employer individually liable for violations of Section 1102.5.

[1] As in the case of a sustained demurrer, leave to amend is routinely granted following an order granting a motion for judgment on the pleadings. (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.) Nevertheless, "[i]f there is no liability as a matter of law, leave to amend should not be granted. [Citation.]" (*Schonfeldt v. State of Cal.* (1998) 61 Cal.App.4th 1462, 1465.)

Defendant Glazer persuasively argues that the statutory scheme including the "whistleblower" protections of Section 1102.5 does not provide for individual liability for violation of the statute. (Mot., pp. 5, ln. 17 – 6, ln. 7.) For example, Defendant cites *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1546, for the proposition that "a prerequisite to asserting a Labor Code section 1102.5 violation is the existence of an employer-employee relationship at the time the allegedly retaliatory conduct occurred. [Citation.]" Further, Labor Code, section 1104: states "In all prosecutions under this chapter, the employer is responsible for the acts of his managers, officers, agents, and employees." While the statutory scheme states that employers are responsible for persons acting on their behalf, it does not state that "persons acting on behalf of an employer" are individually responsible for their acts in violation of Section 1102.5.

The Court is not persuaded by Plaintiffs' argument that by broadening the scope of Section 1102.5 to include acts by "[a]n employer, or any person acting on behalf of an employer," the Legislature intended to make employees individually liable for acts done on the employer's behalf. As discussed previously with respect to section 48907, if the Legislature intended to extend liability to individuals, it could have expressly done so, as it has for harassment claims in the FEHA context. (*Lopez v. Routt* (2107) 17 Cal.App.5th 1006, 1016-1017 [discussing a distinction between conduct inside or outside the scope of necessary job performance for purposes of imposing personal liability upon employees].)

Plaintiffs reference to a 2020 trial court decision. (Opp., pp. 8, ln. 25 - 9, ln. 16, citing *Hodges v. Dyncorp* (Super Ct. San Bernardino County, 2020, No. CIVDS1933409) (*Hodges*)) does not change this analysis. It is well established that an unrelated trial court decision "has no precedential value and is not citable authority." (*Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360, 399, citing Cal. Rules of Court, rule 8.1115(a) [unpublished appellate court or superior court appellate department opinions "must not be cited or relied on by a court or a party in any other action]; see also *Santa Ana Hospital Med. Ctr. v. Belshe* (1997) 56 Cal.App.4th 819, 831 ["A written trial court ruling has no precedential value."]; see also *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [citation of unrelated trial court order improper].)

Accordingly, the motion for judgment on the pleadings of the third cause of action is GRANTED without leave to amend.

IV. Conclusion

The motion for judgment on the pleadings of the first cause of action is DENIED.

The motion for judgment on the pleadings of the second and third causes of action is GRANTED without leave to amend.

Calendar line 4
Case Name: *Sanco Pipelines Incorporated v. FPC Builders Inc., et al.*
Case No.: 22CV399892

Before the Court is plaintiff Sanco Pipeline Incorporated's motion for summary judgment or alternatively motion for summary adjudication. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

On or about September 1, 2017, plaintiff Sanco Pipelines Incorporated ("Plaintiff") and defendant FPC Builders Inc. also known as Full Power Construction, Inc. ("FPC") entered a written subcontract agreement ("Subcontract") in which Plaintiff agreed to provide construction labor, materials, and services relating to construction of Silvery Towers located at 188 W. St. James Street in San Jose including, but not limited to, furnishing and installing structural steel and miscellaneous metal work ("Project"). (First Amended Complaint ("FAC"), ¶¶10 and 18.) FPC agreed to pay Plaintiff the base amount of $1,704,776.79 for work performed as well as change orders and extra work performed by Plaintiff at the Project. (FAC, ¶18.) Throughout the course of the Project, the Subcontract was increased by at least one change order. (FAC, ¶19.)

At the special instance and request of FPC, Plaintiff furnished all labor, materials, equipment, and services necessary to perform its scope of work on the Project. (FAC, ¶20.) The reasonable value of Plaintiff's work incorporated into the Project was approximately $1,704,776.79, for which FPC agreed to pay, or directed Plaintiff to perform. (*Id.*)

Plaintiff provided all notices and substantially performed all obligations and conditions necessary and required of it under the Subcontract for payment, except for those obligations or conditions that have been waived, excused, or otherwise discharged. (FAC, ¶21.)

FPC breached the Subcontract by failing to pay to Plaintiff all sums due except for $1,535,415.51, whereby the principal sum of $169,361.28 remains due and owing. (FAC, ¶22.) Despite Plaintiff's demands for payment, FPC failed to pay Plaintiff all amounts due and owing to it under the Subcontract without justification or cause, and in violation of the terms and conditions of the Subcontract. (*Id.*)

On June 13, 2022, Plaintiff filed a complaint against defendants FPC, Full Power Properties LLC ("FPP"), Bank of China U.S.A. ("Bank"), International Fidelity Insurance Company ("IFIC") and Doe defendants asserting:

(1) Breach of Contract

(2) Common Count – Open Book Account

(3) Common Count – Account Stated

(4) Foreclosure of Mechanic's Lien

(5) Enforcement of Bonded Stop Payment Notice

(6) Recovery on Payment Bond

(7) Quantum Meruit

On September 12, 2022, Plaintiff dismissed Bank without prejudice.

On October 7, 2022, defendants FPC, FPP, and IFIC jointly answered Plaintiff's complaint.

On April 25, 2023, Plaintiff filed the operative FAC adding defendants FPP MB LLC and Federal Insurance Company ("FIC") and asserting:

(1) Breach of Construction Contract [against defendant FPC]

(2) Breach of Settlement Agreement

(3) Recovery on Mechanics Lien Release Bond

(4) Common Count – Open Book Account [against defendant FPC][2]

(5) Common Count – Account Stated [against defendant FPC]

(6) Recovery on Payment Bond

(7) Quantum Meruit [against all defendants]

On May 30, 2023, IFIC and on May 31, 2023, FPC, FPP, FPP MB LLC, and FIC answered Plaintiff's FAC.

On November 21, 2023, Plaintiff dismissed IFIC without prejudice.

On March 5, 2024, Plaintiff filed the motion now before the court, a motion for summary judgment/adjudication of its FAC against defendants FPC, FPP, and FPP MB LLC.

[2] By Plaintiff's own acknowledgment, Plaintiff's FAC incorrectly labeled the "Common Count – Open Book Account" as a third cause of action and, thus, incorrectly labeled the subsequent causes of action.

II. Plaintiff's motion for summary judgment is DENIED. Plaintiff's alternative motion for summary adjudication is GRANTED, in part, and DENIED, in part.

Plaintiff's FAC asserts seven causes of action, but Plaintiff's motion for summary judgment/adjudication only discusses the first, fourth, fifth, and seventh. By Plaintiff's own acknowledgment [in footnote 2], Plaintiff intends to pursue a motion to enforce liability on the third cause of action for mechanics lien release bond following entry of final judgment. Since Plaintiff's motion admittedly does not dispose of the entire FAC, Plaintiff's motion for summary judgment is DENIED. The court will now consider Plaintiff's alternative motion for summary adjudication.

A. Breach of contract.

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., §437c, subd. (a)(1).) "A plaintiff … has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant … to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., §437c, subd. (p)(1).)

To meet its initial burden, Plaintiff proffers the following evidence to establish each element of a breach of contract cause of action: Defendant FPP entered into a contract with defendant FPC for the construction at 188 W. Saint James Street in San Jose, California 95110, commonly known as Silvery Towers.[3] FPC subsequently entered into a subcontract with Plaintiff on or about September 1, 2017 for labor and materials for the installation of underground utilities for the Project.[4] The subcontract was for

[3] See Plaintiff's Separate Statement in Support of Motion for Summary Judgment or Alternatively Motion for Summary Adjudication ("Plaintiff's SS"), Fact No. 1.
[4] See Plaintiff's SS, Fact No. 2.

$1,375,210, plus any change orders and/or extra work directed by FPC during the Project.[5] Between November 2017 and December 2020, Plaintiff performed the agreed scope of work pursuant to the subcontract, including extra and change work reflected in written change orders.[6] At all times relevant to the subcontract, and while Plaintiff performed work on the Project, Plaintiff held a valid contractor's license, issued by the California Contractor License Board.[7] Plaintiff issued twelve invoices to FPC totaling $1,704,776.79 for its work at the Project.[8] Pursuant to the subcontract, upon receipt of Plaintiff's payment application, FPC was required to make payment no later than 45 days after the last day of the current month bill.[9] FPC did not pay Plaintiff in full for its work, including failing to pay Plaintiff its retention in the amount of $169,361.28.[10] FPC admits that it now owes Plaintiff a total principal amount of $169,361.28, which reflects the retention for the work performed.[11] In December 2020, Plaintiff completed its scope of work under the subcontract, in accordance with the requirements of the subcontract.[12] On January 13, 2021, Plaintiff applied for final payment for the principal sum of $169,361.28, which represents the retention due to Plaintiff on the Project.[13] Pursuant to the subcontract, upon completion of Plaintiff's work, FPC was required to pay Plaintiff the entire unpaid balance no later than 45 days after the last day of the current month bill, after certain other conditions have been met.[14] If, for any cause that is not the fault of Plaintiff, the conditions were not met, FPC was required to pay Plaintiff upon demand.[15] To date, FPC has not made payment on the final invoice for the retention in a principal amount of $169,361.28, despite multiple demands for payment from Plaintiff.[16] There is no evidence that Plaintiff's work was defective in any manner.[17] FPC acknowledges that there are no reasons for payment to be withheld other than "cash flow" issues and that the sum is due and owing.[18]

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[5] See Plaintiff's SS, Fact No. 3.
[6] See Plaintiff's SS, Fact No. 4.
[7] See Plaintiff's SS, Fact No. 5.
[8] See Plaintiff's SS, Fact No. 6.
[9] See Plaintiff's SS, Fact No. 7.
[10] See Plaintiff's SS, Fact No. 8.
[11] See Plaintiff's SS, Fact No. 9.
[12] See Plaintiff's SS, Fact No. 10.
[13] See Plaintiff's SS, Fact No. 11.
[14] See Plaintiff's SS, Fact No. 12.
[15] See Plaintiff's SS, Fact No. 12.
[16] See Plaintiff's SS, Fact No. 13.
[17] See Plaintiff's SS, Fact No. 14.
[18] See Plaintiff's SS, Fact No. 15.

FPC, through its representative, promised to pay the amount due to Plaintiff in writing and on numerous occasions.[19]

The court finds Plaintiff has met its initial burden of demonstrating each element of its claims for breach of contract against defendant FPC. FPC contends there are triable issues of material fact in dispute, directing the court to, "See generally Separate Statement"[20] and asserting that it has provided facts and identified documents which present a triable issue. However, FPC's opposition is unaccompanied by any evidence in opposition. "The defendant … shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, ***shall set forth the specific facts*** showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (Code Civ. Proc., §437c, subd. (p)(1); emphasis added.)[21] This naked argument by FPC is insufficient demonstrate a triable issue of one or more material facts exists as to Plaintiff's first cause of action for breach of contract.

Accordingly, Plaintiff's alternative motion for summary adjudication of the first cause of action of its complaint for breach of the subcontract is GRANTED.

B. Common Counts/ Quantum Meruit.

> A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. See, e.g., 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, sections 12, page 47; 91, pages 122-123; 112, pages 137-138. However, ***it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation***. *Willman v. Gustafson* (1944) 63 Cal. App. 2d 830 [147 P.2d 636] (there can be no implied promise to pay reasonable value for services when there is an express agreement to pay a fixed sum). See also 55 California

[19] See Plaintiff's SS, Fact No. 16.

[20] See page 3, lines 22 – 23 of the Memorandum of Points and Authorities in Support of Defendants FPC Builders, Inc., Full Power Properties, LLC and FPP MB LLC's Opposition to Plaintiff's Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Defendants' MPA in Opposition").

[21] See also Cal. Rules of Court, rule 3.1350, subd. (e) which states, in relevant part: "the opposition to a motion must consist of the following separate documents, titled as shown: …
(3) [Opposing party's][moving party's] evidence in opposition to [moving party's]motion for summary judgment or summary adjudication or both (if appropriate)

Jurisprudence Third, Restitution, sections 19, page 328 et seq.; and 58, and pages 375-376 (no ground to imply payment obligation in conflict with express contract).

…

When parties have an actual contract covering a subject, a court cannot--not even under the guise of equity jurisprudence--substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract. [Footnote omitted.]

(*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419-1420; emphasis added.)

Given the court's above ruling, it would be inconsistent for the court to grant summary adjudication on Plaintiff's third, fourth, and seventh causes of action for common counts/quantum meruit which seek recovery of the same damages sought in the first cause of action for breach of contract. (FAC, ¶¶23, 39, 43, and 53.)

Accordingly, Plaintiff's alternative motion for summary adjudication of the fourth, fifth, and seventh causes of action of its FAC for common counts/ quantum meruit is DENIED.

C. Prompt payment penalties/ prejudgment interest/ fees and costs.

Plaintiff also seeks summary adjudication that it is entitled to statutory prompt payment penalties, prejudgment interest, and fees and costs. The court must deny Plaintiff's motion because the relief sought is not authorized.

Code of Civil Procedure section 437c, subdivision (f)(1) states: "***A party may move for summary adjudication as to*** one or more causes of action within an action, one or more affirmative defenses, ***one or more claims for damages***, or one or more issues of duty, ***if that party contends*** that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or ***that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code***, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Emphasis added.)

Because this language specifically references Civil Code section 3294, it suggests only a claim for punitive damages may be summarily adjudicated. To hold otherwise would render the reference to Civil Code section 3294 superfluous. (See Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶¶10:41-10:43, pp. 10-12 to 10-13 citing *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91 (*Catalano*).) In *Catalano*, the court reiterated the policy behind summary adjudication motions and stated, "The purpose of the enactment of Code of Civil Procedure section 437c, subdivision (f) was to stop the practice of piecemeal adjudication of facts that did not completely dispose of a substantive area." (*Catalano*, *supra*, 82 Cal.App.4th at p. 97.)

Such an interpretation is also supported by Code of Civil Procedure section 437c, subdivision (t) which states: "Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages ***other than punitive damages*** that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision." (Emphasis added.)

Notwithstanding the reference to Civil Code section 3294, Code of Civil Procedure section 437c, subdivision (f)(1) only allows summary adjudication "if it completely disposes of … a claim for damages." Plaintiff requests relief which does not completely dispose of a claim for damages. The only avenue for such relief is to comply with Code of Civil Procedure section 437c, subdivision (t)[22] which Plaintiff has not done here.

Plaintiff's alternative motion for summary adjudication as to statutory prompt payment penalties, prejudgment interest, and fees and costs is therefore DENIED.

[22] A motion for partial summary adjudication pursuant to subdivision (t) must be pursuant to joint stipulation and order of the court. (See Code Civ. Proc., §437c, subd. (t)(1)-(2).)

Calendar line 4
Case Name: *Institute for the Future v. Don Mullen, et al.*
Case No.: 21CV390710

Defendant FFDAL, LLC (erroneously named herein as Carol Mullen - "FFDAL") seeks attorney's fees, as the prevailing party, against Plaintiff INSTITUTE FOR THE FUTURE ("IFTF").

Plaintiff's unopposed Request for Judicial Notice is GRANTED.

Plaintiff opposes the motion on two grounds: (1) that FFDAL was not a party to the contract and therefore cannot obtain attorney fees based on that contract; and (2) even if it can, the 32 hours FFDAL spent on their motion for summary judgment was excessive and unreasonable.

Plaintiff's first claim, that FFDAL was not a party to the lease, has already been rejected by this Court. (Plaintiff's RJN, Ex. B (Summary Judgment Order of March 8, 2024 pp9-10)). When Defendant brought its motion for summary judgment, Plaintiff argued that Defendant lacked standing because it was not a party to the lease. The Court found that FFDAL was the real party in interest, not Carol Mullen, and that IFTF had long ago admitted that fact and, thus, found it was a party to the lease. For these same reasons, and because it is the law of the case, the Court once again finds that FFDAL is the real party in interest and was a party to the lease.

Plaintiff next asserts that 32 hours is excessive for Defendant's motion for summary judgment. Plaintiff does not, however, point to particular entries that it deems repetitive or unnecessary. Plaintiff's conclusory statement that the amount of time Defendant spent is unreasonable is insufficient to defeat Defendant's claim that it reasonably spent 32 hours on the motion. Its time sheets are specific. A motion for summary judgment demands significant factual and legal support, requires a separate statement, and requires significant time even where there is only one cause of action. The Court finds the 32 hours claimed reasonable. Because Plaintiff takes no issue with any other fee requests, the Court accepts those as reasonable as well. The Court will not, however, award anticipatory time and therefore reduces the requested award by $1,150, reflecting time Counsel claims for its reply and the hearing.

Plaintiff shall pay attorney's fees of $63,690 to Defendant FFDAL as the prevailing party.