SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

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

November 12, 2024
9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

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 will appear at the hearing to contest the tentative

If you fail to so notify the court or opposing side, the Court will not hear argument, and the tentative ruling will be adopted.

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

APPEARANCES

The Court strongly prefers in-person appearances.

If you must appear virtually, you must 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

COURT REPORTERS

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https://www.scscourt.org/general_info/court_reporters.shtml

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21SC086129	Mario Cruz vs Ellison Gary et al	The parties are ordered to appear for the debtor's examination.
2	23CV426559	JORGE GUERRERO vs CITY OF SAN JOSE et al	Defendant's demurrer is OVERRULED. Scroll to line 2 for complete ruling. Court to prepare formal order.
3	24CV432377	Eric Peschke et al vs Arthur Cook et al	Defendants' demurrer to the FAC is SUSTAINED with 20 days leave to amend from the service date of the final order. Scroll to line 3 for complete ruling. Court to prepare formal order.
4,12	24CV443760	Monique Maddy vs Jennifer Bailey et al	Defendants' demurrers are SUSTAINED with 20 days leave to amend from the service date of the final order. Scroll to lines 4, 12 for complete ruling. Court to prepare formal order.
5-6	23CV421475	Earl Browne, Jr. vs STANFORD HEALTH CARE	Defendant Stanford Health Care's motion to compel Plaintiff Earl Browne, Jr. to respond to Defendant's requests for production of documents (set one) and form interrogatories – employment law (set one) is GRANTED. A notice of motion with this hearing date and time was served on Plaintiff by electronic and U.S. mail on August 27, 2024. Defendant failed to oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. Defendant served this discovery on Plaintiff on December 12, 2023, granted Plaintiff numerous extensions to respond, and repeatedly warned Plaintiff Defendant would have to file a motion to compel if Plaintiff failed to respond. Still, to date, Plaintiff has served no responses. Although Plaintiff is self-represented, self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) And, where, as here, a responding party fails to timely respond to interrogatories, absent a demonstration that the failure to respond was due to mistake, inadvertence, or excusable neglect and responses have since been served, the responding party waives all objections to the interrogatories, including objections based on privilege or attorney work product. (Code of Civ. Proc. §2030.290(a).) Here, Plaintiff made no such effort or showing. Plaintiff is therefore ordered to serve code-compliant responses without objections and to produce all responsive documents within 20 days of service of the formal order, which the Court will prepare. The parties are ordered to appear at the hearing for trial setting.
7	22CV404444	CREDITORS ADJUSTMENT BUREAU, INC. vs GOLD STANDARD TERMITE AND PEST, INC.	Parties are ordered to appear for the debtor's examination.
8	23CV415796	QINGDAO TONGREN FOOD STUFF CO LTD vs AMERICAN TONGREN, INC. et al	Zi Li's motion to set aside default judgment is DENIED. Li is not a party to this case, and no default was entered against Li. Li claims to have served as Defendant's Chief Financial Officer from 2011 to 2021. However, Li is not Defendant's CFO now, but even if Li were, that would not give Li standing to set aside default entered against a corporate defendant. (*Turman v. Superior Court* (2017) 17 Cal.App.5th 969, 980 ["A corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations."].) Nor has Li demonstrated that they are a "real party in interest" or that the corporate veil can (or should) be pierced and "owners" brought in as real parties in interest. The matters Li raises in this motion to set aside are better addressed in the pending family court proceeding. Court will prepare formal order.

9	23CV420392	Cavalry Spv I, Llc vs Douglas Doan	Plaintiff's motion to set aside is GRANTED. A notice of motion with this hearing date and time was served by U.S. mail on October 3, 2024. Defendant failed to oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiff's counsel also submits a sworn statement outlining the mistake of stating the dismissal was "with prejudice" rather than "without prejudice." Accordingly, Plaintiff's motion is granted, and the dismissal is set aside. (Code Civ. Pro. §473.) Court will prepare formal order.
10	24CV432028	Fred Rassaii vs James Baptist	Plaintiff's motion to reclassify this case from limited to unlimited is DENIED. A party seeking to reclassify "must present evidence to demonstrate a possibility the damages will exceed $25,000. The trial court, without adjudicating the merits of the underlying case, should review the record to determine whether a judgment in excess of $ 25,000 is obtainable. If a jurisdictionally appropriate verdict may result, (i.e., if such a verdict is not virtually unobtainable) the court should grant the motion to reclassify the case as "unlimited." Concomitantly, the court may deny the motion only where it appears to a legal certainty that the plaintiff's damages will necessarily be $ 25,000 or less." (*Ytuarte v. Superior Court* (2006) 129 Cal. App. 4th 266, 279.) While the Court understands Plaintiff's frustration with the length of time the process is taking to obtain reimbursement for the full repair cost to his vehicle, the type of additional damages Plaintiff seeks are not recoverable in a negligence case involving property damage. And other than these non-recoverable damages, Plaintiff submits no evidence that the recoverable property damages would exceed the jurisdictional limit. Accordingly, Plaintiff's motion to reclassify is DENIED. Court will prepare formal order.
11	24CV446176	Usuamayak Danesi vs Tesla Motors, Inc.	Defendant Tesla Motor, Inc.'s motion to compel binding arbitration is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on October 4, 2024. Plaintiff failed to oppose the motion, inferring Plaintiff has no meritorious arguments. (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) And Plaintiff does not. There is a binding arbitration agreement between the parties in the Order Agreement and the Retail Installment Contract. Code of Civil Procedure section 1281.2 states: "the court shall order a matter to arbitration if it determines that there is an agreement to arbitrate and (1) the agreement has not been waived or (2) the agreement has not been revoked." (See also *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) "[A] party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) There is a presumption against waiver, and "when allocation of a matter to arbitration. . .is uncertain, we resolve all doubts in favor of arbitration." (*Cinel*, 206 Cal.App.4th at 1389; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.) There is no opposition, there is a binding arbitration agreement, and therefore this case is ordered to arbitration and stayed pending the outcome of that arbitration. The March 25, 2025 status conference shall remain as set. Court to prepare formal order.

Calendar Line 2
Jorge Guerrero v. City of San Jose, et.al. Case No. 23CV426559

Before the Court is Defendant City of San Jose's demurrer to the Plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Alleged Facts

According to the complaint, on December 6, 2022, Plaintiff was riding a motorized scooter at or near the intersection of Cottage Grove Ave. and Monterey Hwy in San Jose, when suddenly the wheel of the scooter struck an unknown substance/liquid and/or uneven pavement, causing his fall and severe injuries. (Complaint ¶¶ 20, 32.)

Plaintiff initiated this action on November 21, 2023, alleging causes of action for (1) dangerous condition of public property, (2) strict products liability, and (3) negligence.

II. Legal Standard

"The party against whom complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure] section 430.30, to the pleading on any one or more of the following grounds: (e) The pleading does not state facts sufficient to constitute cause of action, (f) The pleading is uncertain." (Code Civ. Proc., 430.10, subds. (e) (f).) A demurrer may be utilized by "[t]he party against whom complaint has been filed" to object to the legal sufficiency of the pleading as whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A*. (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts

found in exhibits attached to complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendant's sole ground for demurrer is insufficiency of the Plaintiff's government claim.

III. Request for Judicial Notice

Defendant requests judicial notice of Google Maps printouts depicting the intersection of Cottage Grove Ave and Monterey Highway, San Jose, California, 95110. (James Menees' Decl. Ex. 2.) Plaintiff objects on the grounds that extrinsic evidence cannot be considered in a demurrer and its proffered interpretation of facts are disputed. Plaintiff is correct, this document is not the proper subject of judicial notice, and Defendant's request is DENIED.

Plaintiff requests judicial notice of:

Exhibit A – Copy of Plaintiff's government claim filed on June 2, 2023;

Exhibit B – Copy of Defendant's notice of insufficiency sent on June 15, 2023, and received on June 20, 2023; and

Exhibit C – Copy of the Defendant's notice of rejection sent on July 3, 2023.

The Court can take judicial notice of the existence and content of the claim form and related correspondence. However, cannot take judicial notice of the truth of the matters asserted in these documents. (*Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 376.) Plaintiff's request is accordingly, GRANTED IN PART.

IV. Analysis

Defendant contends Plaintiff's government claim failed to provide the location and means of his injury, in violation of Gov. Code § 910(c). Defendant adds that due to the expansiveness of the area and Plaintiff's general and vague description of the place of his fall, it was and still is unable to investigate the facts on which his claim is based. In opposition, Plaintiff contends (1) his government claim substantially complied with the statutory requirements, and (2) Defendant did not provide sufficient time for response before rejecting the claim.

Under the Government Claims Act, "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented … until a written claim therefor has been presented to the public entity" and either acted upon or deemed

rejected. (Gov. Code § 945.4.) The claim must state the "date, place, and other circumstances of the occurrence or transaction which gave rise to the claim asserted and provide '[a] general description of the … injury, damage or loss incurred so far as it may be known at the time of presentation of the claim." (*Stockett v. Association of California Water Agencies Joint Powers Insurance Authority* (2004) 34 Cal.4th 441, 445; see Gov. Code, § 910.) "[A] claim need not contain the detail and specificity required of a pleading but need only 'fairly describe what [the] entity is alleged to have done." (*Stockett, supra*, 34 Cal.4th at 446 (quoting *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1426).)

Courts have found the complaint barred "[o]nly where there has been a 'complete shift in allegations, usually involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim." (*Id.* at 447 (internal quotations omitted).) "Where the complaint merely elaborates or adds further detail to a claim but is predicated on the same fundamental actions or failures to act by the defendants, court have generally found the claim fairly reflects the facts pled in the complaint." (*Id*.) The purpose of this requirement "is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454.)

Where a claimant attempts to comply with the government claim requirements, but the claim is deficient in some way, the doctrine of substantial compliance may apply. "Under the doctrine of substantial compliance, the court may conclude a claim is valid if it substantially complies with all of the statutory requirements for a valid claim even though it is technically deficient in one or more particulars." (*Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 713.) "The doctrine of substantial compliance requires no more than that the governmental entity be apprised of the claim, have an opportunity to investigate and settle it and incur no prejudice as a result of plaintiff's failure to strictly comply with the claims act." (*Elias v. San Bernardino County Flood Control Dist*. (1977) 68 Cal.App.3d 70, 75.) The Court, thus, must determine whether "there is sufficient information disclosed on the face of the filed claim to reasonably enable the public entity to make an adequate investigation of the merits of the

claim and to settle it without the expense of a lawsuit." (*City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447, 456.)

California courts have taken a liberal view of claims statutes where a reasonable attempt has been made to comply with the law in good faith. (*Johnson v. City of Oakland* (1961) 188 Cal. App. 2d 181, 184.) However, the doctrine of substantial compliance "cannot cure total omission of an essential element from the claim or remedy a plaintiff's failure to comply meaningfully with the statute." (*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1083.) "The cases involving omissions recognize that they are distinct from those involving defective compliance." (*Johnson v. City of Oakland,* 188 Cal. App. 2d at 183.)

Here, judicially noticed documents show that in his claim form, Plaintiff stated the place of the incident was "at or near Cottage Grove Ave, & Monterey HWY., San Jose, CA 95112." (Opposition, Ex. A) On June 15, 2023, Defendant sent Plaintiff, through his counsel, a "Notice of Insufficiency" of claim. The notice of insufficiency stated: "The claim fails to state the location of the occurrence or transaction that gave rise to the claim asserted." The Notice further informed Plaintiff that his "claim may be amended pursuant to Government Code section 910.6." (Opposition Ex. B) Citing *Hall v. City of Los Angeles* (1941) 19 Cal. 2d 198, Defendant argues that Plaintiff's failure to state a location is fatal to his claim. However, *Hall* is inapposite.

In *Hall,* plaintiff alleged she slipped and fell because of debris on a sidewalk. The claim form did not indicate the location of the incident, other than to imply that it occurred in the City of Los Angeles. The court noted that "[i]n a number of jurisdictions it has been held that a claim is fatally defective if it fails to designate the place of the accident in such a manner as to enable the officials to locate it." (*Id*. at 202-03). Relying on and following those cases, the court held that the "entire failure to designate in the claim the place where the accident occurred constituted such a failure to comply with the statutory requirements as to preclude plaintiff from maintaining the present action." (*Id*. at 203).

Unlike *Hall*, this is not a case where the designation of the place was so general and indefinite that there was no semblance of compliance with the statute. Here, Plaintiff made some

attempt to comply with the statute by designating the intersection of Cottage Grove Ave. & Monterey Hwy in San Jose.

Nor can Defendant's demurrer be sustained on the ground that Plaintiff was told the claim "may" be resubmitted. "The prerequisite of rejection may, [] be considered more of a procedural than a substantive requirement." (*Cory v. City of Huntington Beach* (1974) 43 Cal. App. 3d 131, 135, citing *County of Santa Clara* v. *Superior Court*, 4 Cal.3d 545, 549-550; *Taylor* v. *City of Los Angeles*, 180 Cal.App.2d 255, 262-263.)

Accordingly, Defendant's demurrer is OVERRULED.

Calendar Line 3
Eric Peschke, et al. v. Arthur Cook, et al. Case No. 24CV432377

Before the Court is defendants Arthur D. Cook's ("Arthur") and Kimberly Cook's ("Kimberly") (collectively, "Defendants") demurrer to plaintiffs Eric Peschke's ("Peschke"), Ronald Zimmerman's ("Zimmerman"), Patrick Berry's ("Berry"), and Roger Stanger's ("Stanger") (collectively, "Plaintiffs") first amended complaint ("FAC").[1] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Alleged Facts

According to the FAC, Peschke is a trustee of the Peschke-Suhr Family Trust (the "Peschke Trust"), dated September 27, 2003; Zimmerman is a trustee of the Ronald James Zimmerman and Donna Jane Zimmerman Revocable Trust (the "Zimmerman Trust"), dated May 12, 2004; Berry is a trustee of the Berry Family Trust (the "Stanger Trust"), dated February 17, 2011; and Stanger is a trustee of the Roger William Stanger Revocable Trust, dated January 20, 2004. (FAC, ¶¶ 2-5.) Arthur is a trustee of the Arthur D. Cook and Kimberly Cook Revocable Trust (the "Cook Trust"), dated January 28, 1999 and Kimberly is his spouse. (FAC, ¶¶ 6-7.) On May 29, 2015, the trustees of the Cook Trust, the Zimmerman Trust, the Stanger Trust, the Berry Trust, and the Peschke Trust (collectively, the "Members") signed a written operating agreement (the "Operating Agreement"). (FAC, ¶ 13.) The Members formed a limited liability company ("LLC"), which owns real property at 540 Martin Avenue in Santa Clara (the "Property"). (FAC, ¶ 1.) Plaintiffs collectively own seventy-seven and seven hundred seventy-sex thousandths percent (77.776%) of the total ownership of the LLC. (*Ibid*.) The Cooke Trust holds twenty-two and twenty-two thousandths percent (22.222%) of the total ownership of the LLC.[2] (FAC, ¶ 6.)

The Operating Agreement states the Members will exercise management, decisions, and control of the LLC and it permits Members to appoint officers and delegate functions regarding day-to-day operations to them. (FAC, ¶¶ 14-15.) It never references a single "manager" and

[1] As Defendants share a surname, the Court will refer to them by their first names, when necessary, for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)
[2] Each Plaintiff holds a membership interest of nineteen and four hundred forty-four thousandths percent (19.444%).

does not identify, appoint, or elect anyone, including Arthur, to be the LLC's lone manager. (FAC, ¶ 17.)

On June 1, 2015, Arthur improperly filed the Articles of Organization, and he signed them as the "Managing Partner". (FAC, ¶ 22.) The Operating Agreement stated the LLC was to be managed by all of its Members. (FAC, ¶ 23.) Plaintiffs and Arthur were part-owners of Buckles-Smith Electric Company ("Buckles") for many years, with the exception of Peschke, who was the Vice President of Services. (FAC, ¶ 25.) Zimmerman, Stanger, and Berry sold their ownership interests over the years and in October 2022, Arthur was the sole owner of Buckles. (*Ibid*.) In 2015, LLC and Buckles entered into a lease agreement (the "Lease") and Buckles was charged below market rent, which Members accepted due to the close relationship with Buckles as owners and/or key employees. (FAC, ¶ 27.) However, Members intended for Lease to be cancelled or renegotiated when Buckles was sold so they could receive market rate rent from the new owner. (*Ibid*.) On August 31, 2017, Arthur signed a first amendment ("First Amendment") to the Lease, on behalf of LLC, which lowered Buckles rent from $56,000 to $50,000. (FAC, ¶ 28.)

In October 2022, Arthur sold his Buckles stock to Rexel USA, Inc. ("Rexel") in exchange for $170 million. (FAC, ¶¶ 29.) In doing so, he signed a second amendment ("Second Amendment") to the Lease which included a term to keep the rent at $50,000 until December 31, 2032. (FAC, ¶ 30.) Arthur never informed Plaintiffs of the substance of the lease negotiations. (FAC, ¶ 31.) On July 19, 2023, Plaintiffs removed Arthur as the Managing Director and Chief Executive Officer of the LLC and he was replaced by Peschke. (FAC, ¶ 34.) On July 24, 2023, Peschke filed amended Articles of Organization, which clarified that the LLC would be member-managed, and a Statement of Information for the LLC. (FAC, ¶¶ 35-36.) Since his removal, Arthur refused to share information and documents with Plaintiffs, interfered with Plaintiffs decisions regarding the management and operation of the LLC, improperly held himself out as the Managing Director and/or CEO, prevented Peschke from being a signatory on the LLC's bank accounts, improperly filed documents with the Secretary of State. (FAC, ¶ 37.) As a Member through the Cook Trust and a signatory to the LLC's bank account, Kimberly refused to provide Plaintiffs with access to

the LLC's bank account, add Plaintiffs as authorized signatories to the account, and remove herself as an authorized signatory. (FAC, ¶ 38.)

On March 4, 2024, Plaintiffs filed their complaint and on September 11, 2024, they filed their FAC asserting claims for (1) declaratory relief, (2) specific performance, (3) breach of contract, (4) breach of covenant of good faith and fair dealing, and (5) breach of fiduciary duty. On October 14, 2024, Defendants filed the instant motion, which Plaintiffs oppose.

II. Deficient Notice of Demurrer

"A basic principle of motion practice is that the moving party must specify for the court and the opposing party the grounds upon which that party seeks relief. Code of Civil Procedure section 1010 requires that a notice of motion must state 'the grounds upon which it will be made.' California Rules of Court, rule [3.1110(a)] requires a notice of motion to state in its opening paragraph 'the nature of the order being sought and the grounds for issuance of the order.' . . .The purpose of these requirements is to cause the moving party to 'sufficiently define the issues for the information and attention of the adverse party and the court.' [Citation.]" (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1126.) "As a general rule, the trial court may consider only the grounds stated in the notice of motion." (*Id*.) However, "[a]n omission in the notice may be overlooked if the supporting papers make clear the grounds for the relief sought." (*Id*.)

In their notice of demurrer, Defendants state they demurrer specifically to the fourth cause of action, however in their memorandum of points and authorities ("MPA"), they assert arguments regarding joinder and standing, which apply to the entire case. While Plaintiffs responded to the arguments as only applying to the fourth cause of action, the MPA clearly applies them to the entire FAC, thus, Plaintiffs waive any argument regarding the deficiencies to motion. (*Tate v. Super. Ct.* (1975) 45 Cal.App.3d 925, 930 ["It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion."].) However, Defendants are admonished to comply with the court rules and procedures with respect to future filings.

III. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendants demur to the FAC, generally, and the fourth cause of action on the ground it fails to allege sufficient facts to state a claim. (See Code Civ. Proc., § 430.10, subd. (e).)

IV. Analysis

A. Fourth Cause of Action-Breach of Covenant of Good Faith and Fair Dealing

"The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties." (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.) "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually

made. [Citation]. The covenant thus cannot be 'be endowed with an existence independent of its contractual underpinnings.' [Citation] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 ("*Guz*").)

"The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract…[it] rests upon the existence of some specific contractual obligation" (*Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1204.) "In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which frustrates the other party's rights to the benefits of the contract." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1153 (*Love*).) A breach of implied covenant good faith and fair dealing involves something beyond breach of the contractual duty itself. (See *Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 528; see also *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54.) "Where breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." (*Guz, supra*, 24 Cal.4th at p. 327; see also *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1644 fn.3.)

Plaintiffs allege Defendants owed a duty of good faith and fair dealing in the performance of their obligations under the Operating Agreement. (FAC, ¶ 61.) They further allege Defendants breached that duty by (a) engaging in self-dealing transactions despite conflicts of interest, (b) failing and refusing to disclose such conflict of interest to the other Members and/or allowing the other Members to participate in such transactions on behalf of the LLC, (c) failing to be transparent to the other Members regarding LLC transactions and business, (d) failing to act in the best interests of the LLC and its Members, and (e) placing their own interest above those of the LLC and its Members. (FAC, ¶ 63.)

The Court is not persuaded by Defendants' contention that Plaintiffs fail to allege anything different than their breach of contract claim. Plaintiffs allege conduct by Defendants

which frustrated Plaintiffs' right to receive benefits under the contract. (See *Love, supra,* 221 Cal.App.3d at p. 1153.) Thus, Defendants demurrer to the fourth cause of action is OVERRULED.

B. Standing

"A limited liability company is a hybrid business entity formed under the Corporations Code and consisting of at least two "members" who own membership interests. The company has a legal existence separate from its members. Its form provides members with limited liability to the same extent enjoyed by corporate shareholders, but permits the members to actively participate in the management and control of the company." (*PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 963 [internal citations omitted] (*PacLink Communications Internat*).) "The principle governing derivative actions in the context of corporations apply to limited liability companies." (*Schrage v. Schrage* (2021) 69 Cal.App.5th 126, 150 (*Schrage*).) Under these principles, a corporation's shareholders "have no direct cause of action or right of recovery against those who have harmed [the corporation]," but they can "bring a derivative suit to enforce the corporations rights and redress its injuries when the [corporation] fails or refuses to do so." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 (*Grosset*).)

"Since a derivative suit enforces a corporate cause of action, any recovery ordinarily goes to the corporation rather than to the plaintiff-shareholder." (See *Avikian v. WTC Financial Corp.* (2002) 98 Cal.App.4th 1108, 1115.) "While in a derivative action the plaintiff shareholder sues the wrongdoers and joins the corporation as a defendant, the corporation is the real party in interest and the shareholder a 'nominal plaintiff.'" (Marsh, et al., Marsh's California Corporation Law (4th ed. 2004) §2.05[G], p. 2-51.)

Plaintiffs contend their fourth cause of action applies in their capacity as trustees for their respective trusts as members of the LLC and signatories to the Operating Agreement.

An action is derivative if " 'the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.' " (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106 (*Jones*).) An individual

cause of action exists only if damages to the shareholders *were not incidental* to damages to the corporation. (*Jones*, *supra*, 1 Cal.3d at p. 107 [emphasis added].)

> Shareholders may bring two types of actions, "a direct action filed by the shareholder individually (or on behalf of a class of shareholders to which he or she belongs) for injury to his or her interest as a shareholder," or a "derivative action filed on behalf of the corporation for injury to the corporation for which it has failed or refused to sue." (*Friedman*, Cal. Practice Guide: Corporations (The Rutter Group 2004) ¶ 6:598, p. 6-127.) "The two actions are mutually exclusive: i.e., the right of action and recovery belongs either to the shareholders (direct action) or to the corporation (derivative action)." (*Ibid*.) When the claim is derivative, the "shareholder is merely a nominal plaintiff … Even though the corporation is joined as a nominal defendant … , it is the real party in interest to which any recovery usually belongs." (*Friedman, supra*, ¶ 6:602, pp. 6-128.1 to 6-128.2.)

(*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 311-312.)

Here, the gravamen of the injury is to the LLC. To the extent the injury is to Plaintiffs, it was in their capacities as Trustees and/or Members, but not to any Plaintiff personally. Even if there was harm against Plaintiffs personally, it appears such harm would be incidental to the harm to the LLC and thus could not support an individual cause of action. (See *Jones, supra,* 1 Cal.3d 93, 107.) Moreover, Plaintiffs seek relief to recover the LLC's assets and prevent dissipation of those assets. (*Id*. at p. 106.) Plaintiffs fail to direct the Court to any authorities to support their contention that these facts support a direct claim and not a derivative claim. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [points asserted without supporting authority are waived].)

Corporations Code section 800, provides, "[n]o action may be instituted or maintained in right of any domestic or foreign corporation by any holder of shares or of voting trust certificates of the corporation unless" two conditions are met. (Corp. Code, § 800, subd. (b).) The first condition requires that "the plaintiff alleges in the complaint that plaintiff was a

shareholder, of record or beneficially, or the holder of voting trust certificates as the time of the transaction or any part thereof of which plaintiff complains or that plaintiff's shares or voting trust certificates thereafter devolved upon plaintiff by operation of law from a holder who was holder at the time of the transaction or any part thereof complained of." (Corp. Code, § 800, subd. (b)(1).) The second condition is that plaintiff must allege "with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort" and plaintiff must allege they "either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file." (Corp. Code, § 800, subd. (b)(2).)

Defendants do not dispute the first condition but they argue Plaintiffs fail to allege they made any official demand upon the officers of the LLC. Plaintiffs fail to respond to this argument nor do they allege that such a demand would be futile to make. (See *Fornaseri v. Cosmoart Realty & Bldg. Corp.* (1929) 96 Cal.App.549, 556 ["before a stockholder's suit for redress will lie in equity…demand must first be made upon the officers to institute appropriate proceedings, unless such demand would be futile."]; see also *Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222, 232 ["plaintiff must plead with particularity the attempts that were made to secure the board action before bringing suit, or alternatively, *the factual basis upon which the plaintiff believes* that a demand on the board was unnecessary, i.e., that a demand would have been futile."] [emphasis added].)

As a result, Plaintiffs fail to allege compliance with Corporations Code section 800, subdivision (b)(2) and their FAC is subject to demurrer. (See *Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1619.) It appears to the Court that Plaintiffs can amend their FAC to address this deficiency. Thus, Defendants' demurrer to the FAC is SUSTAINED with 20 days leave to amend from the service date of the final order.

Calendar Line 4
Monique Maddy v. Jennifer Bailey, et al. Case No. 24CV443760

Before the Court is (1) defendants Apple Inc.'s ("Apple") demurrer to plaintiff Monique Maddy's complaint ("Complaint"), and (2) defendant Jennifer Bailey's ("Bailey") demurrer to the Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Alleged Facts

According to the Complaint, in April 2019, Plaintiff was hired by Apple, and she came with extensive experience and qualifications. (Complaint, ¶ 6.) Plaintiff is African American, and she emigrated from Liberia. (*Ibid*.) Her first role was Apple Pay Lead for Latin America, and in this position, she was encouraged to falsify performance numbers to make the job performances of colleagues of non-African descent better than they actually were. (Complaint, ¶ 7.) She was removed from key negotiations and replaced by less-experienced and less-qualified employees of non-Africa descent. (*Ibid*.)

In 2020, Plaintiff made a formal complaint of race and/or national origin discrimination to Human Resources and she was subsequently demoted to the role of Payment Lead for Africa Apple Media Products ("Africa MP"). (Complaint, ¶ 8.) Bailey represented the role as a lateral transfer; however, Plaintiff's resources were removed while other team members of non-African descent were given more resources. (Complaint, ¶ 9.) Bailey assigned a less qualified person of non-African descent to manage her, and when Plaintiff began reporting to that manager, Bailey started excluding Plaintiff from important meetings, including some Plaintiff had organized. (*Ibid*.) Bailey also began ignoring Plaintiff's emails, messages, and requests for meetings with her. (*Ibid*.) After Plaintiff reported her concerns regarding Bailey's conduct, Bailey berated Plaintiff, called her a "nobody," told her she did not belong at Apple and that she should resign. (Complaint, ¶ 10.) Plaintiff was subjected to several incidents of discrimination and harassment by other employees and people in positions of authority over her. (Complaint, ¶ 11.)

Plaintiff filed a formal complaint of race and/or national origin discrimination, harassment, and/or retaliation to Human Resources in April 2023. (Complaint, ¶ 12.) After its

investigation, Apple informed Plaintiff there had been no discrimination or harassment against her. (*Ibid*.) On December 15, 2023, Apple terminated Plaintiff's employment. (*Ibid*.)

On July 24, 2024, Plaintiff filed her Complaint asserting (1) race and/or national origin discrimination in violation of the Fair Employment and Housing Act ("FEHA"), (2) race and/or national origin discrimination in violation of public policy, (3) harassment on the basis of race and/or national origin in violation of FEHA, (4) retaliation in violation of FEHA, (5) retaliation in violation of public policy, and (6) failure to prevent discrimination in violation of FEHA. On September 16, 2024, Apple and Bailey filed their respective motions, which Plaintiff opposes.

II. Apple's Demurrer

A. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts

found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Apple demurs to the third cause of action on the ground that it fails to allege sufficient facts to state a claim. (See Code Civ. Proc., § 430.10, subd. (e).)

B. Analysis

1. Third Cause of Action-Harassment on the Basis of Race and/or National Origin in Violation of FEHA (Gov. Code, § 12940, subdivision (j))

Government Code section 12940, subdivision (j)(1), prohibits employers from harassing employees because of their race, religious creed, national origin, mental or physical disability, gender, and age, among other things. (Gov. Code, § 12940, subd. (j)(1).) The elements of a FEHA harassment cause of action are (1) the plaintiff was a member of a protected class; (2) he or she was subjected to unwelcome harassment; (3) the harassment was based on the plaintiff's protected status; and (4) the harassment unreasonably interfered with his or her work performance by creating an intimidating, hostile, or offensive work environment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876 (*Thompson*).) Apple contends personnel management acts are not actionable and Plaintiff fails to state a prima facie claim of harassment.

"[H[arassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63 (*Janken*).) "[H]arassment focuses on situations in which the social environment of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communications an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 (*Roby*).) The plaintiff must show the harassment was sufficiently severe or pervasive so as to alter the terms and conditions of his or her employment. The conduct complained of "cannot be occasional, isolated, sporadic, or trivial; rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Hope v. California Youth Auth.* (2005) 134 Cal.App.4th 577, 588 (*Hope*).) Moreover, "a mere offensive utterance or…a pattern of social slights by either the employer or co-employees cannot properly be viewed as materially

affecting the terms, conditions, or privileges of employment for the purposes of section 12940, subdivision (a)." (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1381.)

"Whether the conduct of the alleged harassers was sufficiently severe or pervasive to create a hostile or abusive working environment depends on the totality of the circumstances." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869 (*Serri*).) The totality of the circumstances may include the frequency and severity of the conduct, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it reasonably interferes with work performance. (*Ibid*.) "Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing… and conduct [that] a reasonable person in the plaintiff's position would find severely hostile or abusive." (*Id*. at p. 870.)

Plaintiff's harassment claim is based on the following conduct:

- Bailey and others in positions of authority encouraged Plaintiff to falsify the job performance numbers for colleagues of non-African descent,
- She was removed from key negotiations and replaced by less-experienced and less-qualified employees of non-African descent,
- Bailey called her a "nobody," and told her she did not belong at Apple because she did not "fit" the company culture,
- She was told she should be friendly with an Asian woman on her team because they were both "minorities,"
- She was accused of having a "conflict of interest" in her role as Africa AMP Payment Lease due to her African descent,
- She was falsely accused of being angry under circumstances which implied she was an angry Black woman,
- She was demoted and her resources were reduced while Bailey expanded the resources for employees of non-African descent,
- She was assigned a less-qualified manager, who was not of African descent,

- She was excluded from important meetings, and
- Bailey ignored Plaintiff's emails, messages, and requests for meetings with her.

(Complaint, ¶ 29.)

Plaintiff's exclusion from meetings, demotion, or negative performance evaluation cannot alone form the basis of Plaintiff's claim for harassment. (See *Thompson, supra,* 186 Cal.App.4th at p. 879 [harassment does not include commonly necessary personnel management actions, such as hiring, firing, job assignments, promotion, demotion, performance evaluation, excluding from meetings, and laying off]; see also *Reno v. Baird* (1998) 18 Cal.4th 640, 647 ["Personnel management actions such as hiring and firing, job or project assignments, office or workstation assignments, promotion or demotion, performance evaluations, the provisions of support, the assignment or non-assignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do no come within the meaning of harassment"].)

In arguing that personnel management decisions can force the basis of a harassment claim, Plaintiff relies on *Roby, supra,* 47 Cal.4th 686 (*Roby*), in which the plaintiff suffered panic attacks that caused excessive sweating and had a nervous disorder that caused her to dig her fingernails into the skin of her arms, resulting in open sores. (*Id*. at p. 694.) Her supervisor was aware of this disability and made demeaning comments, gestures, and facial expressions to the plaintiff about her body odor and arm sores. (*Id*. at p. 695.) In addition to the offensive comments, the supervisor unfairly selected the job assignments and reprimanded her in connection with her performance. (*Id*. at p. 709.) The court considered both the offensive comments and the employment actions and held, "viewed together, the evidence is sufficient to support the jury's conclusion that [the supervisor] harassed [the plaintiff] in violation of the FEHA." (*Id*. at p. 711.)

Roby is distinguishable from the instant action because the alleged conduct in this matter did not occur with the same frequency or substance. Furthermore, in *Roby*, the court noted that the official employment actions "may have *contributed to* the hostile message that [the manager] was expressing to Roby, *in other, more explicit ways*." (*Id.* at p. 709 [emphasis added].) Plaintiff

alleges Bailey's comment that she was a "nobody," she did not belong at the company, and that she did not "fit" the company culture communicated a hostile message based on her race and/or national origin. However, Plaintiff fails to allege facts that the comment was based on her race or national origin. Bailey's comment is also different from the multiple comments and other conduct by the supervisor in *Roby,* which supported the conclusion that the official employment acts related to the hostile message.[3] Therefore, Plaintiff fails to provide a basis from which the Court can consider the official employment acts to establish harassment.

Plaintiff also alleges she was told to be friendly with an Asian woman on her team because they were both "minorities," she was accused by another employee of having a "conflict of interest" in her role as Africa AMP Payment Lease due to her African descent, someone in a position of authority accused her of being angry in a way that implied she was an angry Black woman, and Bailey condoned a false accusation that she doctored her colleague's presentation slides. While the first three incidents clearly pertain to Plaintiff's race and/or national origin, as alleged, the incidents appear to be sporadic or isolated rather than "a concerted pattern of harassment of a repeated, routine, or a generalized nature." (See *Hope, supra,* 134 Cal.App.4th at p. 588.) Moreover, Plaintiff does not allege that the conduct not involving employment actions was so severe or pervasive that it altered the conditions of her employment. (See *Jones, supra,* 152 Cal.App.4th at p. 1381 ["a mere offensive utterance or…a pattern of social slights by either the employer or co-employees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for the purposes of section 12940, subdivision (a)."].)

Plaintiff relies on Government Code section 12923 ("Section 12923"), which provides, "a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive work environment." (Gov. Code, § 12923, subd. (b).) However, Section 12923 does not relieve Plaintiff of her

[3] For similar reasons, the instant matter is factually distinguishable from *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 451 and *Cornell v. Berkley Tennis Club* (2017) 18 Cal.App.5th 908, 941.

obligation to set forth conduct giving rise to a hostile work environment, and she fails to do that here.

Thus, Apple's demurrer to the third cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

III. Bailey's Demurrer

Bailey demurs to the third cause of action on the ground it fails to allege sufficient facts to state a claim. (See Code Civ. Proc., § 430.10, subd. (e).)

Bailey asserts the same arguments as Apple and Plaintiff asserts the same responses in opposition, which the Court addressed above. Thus, Bailey's demurrer to the third cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.