SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

191 North First Street, San Jose, CA 95113

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"Every case is important" . . . . . "No case is more important than any other."— United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Thursday, 07 March 2024
TIME: 9:00 A.M.

This Department uses Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in-court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building. If the doors to the Old Courthouse are locked, please see the deputies at the metal detector next door at 191 North First Street.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit

photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	22CV398215	Helix Electric, Inc. vs FPC Builders Inc. et al	**Motion of Plaintiff for Summary Judgment/Adjudication.** Plaintiff Helix's alternative motion for summary adjudication of the first cause of action of its complaint for breach of the contract is GRANTED. Plaintiff Helix's alternative motion for summary adjudication of the second cause of action of its complaint for foreclosure of mechanic's lien is GRANTED. Plaintiff Helix's alternative motion for summary adjudication of the third cause of action of its complaint for quantum meruit is DENIED. Counsel for plaintiff is to provide notice of entry of this order. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 2	19CV358852	LSI Corporation, A Delaware corporation et al vs Kiran Gunnam et al	**Demurrer of Defendant Kiran Gunnam To Plaintiff's First Amended Complaint.** Defendant Gunnam's demurrer to the first cause of action in plaintiff LSI's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is OVERRULED. Defendant Gunnam's demurrer to the second cause of action in plaintiff LSI's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for promissory fraud is OVERRULED. Counsel for plaintiff is to provide notice of entry of this order. SEE ATTACHED TENTATIVE RULING.
LINE 3	19CV358852	LSI Corporation, A Delaware corporation et al vs Kiran Gunnam et al	**Motion of Defendant Kiran Gunnam to Seal Exhibit 1 in Support of the Demurrer to Plaintiff's First Amended Complaint.** The motion does not appear to be opposed and is GRANTED. Counsel for defendant is to provide notice of entry of this order. NO FORMAL TENTATIVE RULING.
LINE 4	23CV416519	Linda Lisner vs City of San José et al	**Motion of Defendant County of Santa Clara for Summary Judgment.** This defendant was dismissed on 22 January 2024. OFF CALENDAR.
LINE 5	23CV416519	Linda Lisner vs City of San José et al	**Motion of Defendant County of Santa Clara for Defense Costs pursuant to *Code of Civil Procedure*, § 1038.** The County requests $16,943.50 pursuant to ***Code of Civil Procedure***, § 1038. The county claims that the lawsuit against it lacked reasonable cause because it did not own or control the property in question. Did plaintiff oppose this motion? NO TENTATIVE RULING. The parties should use the tentative ruling protocol to advise this Court if they wish to appear and argue on the merits or submit on the papers presented.
LINE 6	19CV360733	Edward Kellar et al vs Richard Gregersen et al	**Motion of Plaintiffs to Compel Production of Documents.** This Court is inclined to GRANT the motion in its entirety and order code-compliant responses within 20 days of the filing and service of this Order. NO TENTATIVE RULING. The parties should use the tentative ruling protocol to advise this Court if they wish to appear and argue on the merits or submit on the papers presented. On another note, this Court noted that a proposed order for the hearing of 27 September 2023 was filed but never presented to this Department for execution.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 7	19CV360733	Edward Kellar et al vs Richard Gregersen et al	**Motion of Plaintiffs to Seal Records Filed in Support of Plaintiffs Motion to Compel Production of Documents.** The motion is GRANTED. Counsel for defendant is to provide notice of entry of this order. NO FORMAL TENTATIVE RULING.
LINE 8	21CV386353	Alan Carothers et al vs Pedro Ortega et al	**Motion of Plaintiffs to Quash Deposition Subpoenas for Production of Business Records.** OFF CALENDAR per moving parties.
LINE 9	21CV386407	Chipongolo Mulenga vs County of Santa Clara; Evelyn Mendez.	**Motion of Plaintiff for a Protective Order.** Should either party wish to contest this tentative ruling, both parties will represent to this Court that before appearing, they will have read the admonitions in the banner of this Tentative Ruling Page. The motion of plaintiff for a protective order to preclude Dr. Greene from questioning plaintiff about the recent domestic violence events is DENIED. The motion of plaintiff for a protective order to preclude discovery of documents pertaining to domestic violence issues is DENIED WITHOUT PREJUDICE to a proper showing as discussed above. SEE ATTACHED TENTATIVE RULING.
LINE 10	22CV400467	John Terzic vs Slavko Micic et al	**Motion of Plaintiff to Compel Defendant Martin Lettunich to Provide Further Responses to Requests and Production of Documents, Set One, Form Interrogatories, Set One, and for Monetary Sanctions in the Amount of $5250.00.** CONTINUED to 14 March 2024 at 9:00 AM in Department 20.
LINE 11	22CV400467	John Terzic vs Slavko Micic et al	**Motion of Plaintiff to Compel Defendant Slavko Micic to Provide Further Responses to Requests and Production of Documents, Set One, Form Interrogatories, Set One, and for Monetary Sanctions in the Amount of $5,250.00.** CONTINUED to 14 March 2024 at 9:00 AM in Department 20.
LINE 12	23CV412522	Dr. Tal Lavian vs Cradar, A1 LLC et al	**Motion Of Defendants Eran Dor And Yekutiel Josefsberg To Compel Plaintiff Dr. Tal Lavian to Provide Further Responses To Special Interrogatories, Set One, Special Interrogatories, Set Two, Request For Production Of Documents, Set One, And Requests For Production Of Documents, Set Two; To Compel Compliance With Production Demands AndRequestForMonetarySanctions.** On this Court's own motion, this motion will be CONTINUED to 28 March 2024 at 9:00 AM in Department 20 to be heard with the motion of plaintiff to compel responses to request for production of documents and for monetary sanctions. NO TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 13	23CV414335	Chrisitan Flores Valdez et al vs General Motors LLC a Delaware Limited Liability Company	**Motion of Plaintiff to Compel Defendant to Provide Further Responses To Requests For Production Of Documents And For Sanctions.** The motion is DENIED WITHOUT PREJUDICE to a further "Meet & Confer" as follows: the parties are to engage in a face-to-face session either in person or by video and record the conference. By way of example only, this Court has seen this particular motion and opposition on too many occasions to count. This Court has routinely ordered the defendant to produce documentation concerning complaints of the specific component at issue here either in this vehicle or in vehicles or in which the component was installed. NO FORMAL TENTATIVE RULING.
LINE 14	20CV366428	Pacific Office Automation, Inc. vs The Health Trust et al	**Motion of Defendant the Health Trust to Continue the Trial Date and Related Litigation Deadlines.** The motion was GRANTED. The current trial date and mandatory settlement conference date have been vacated by prior order on ex parte application. The current trial date is now 31 March 2025 at 8:45 AM. NO FORMAL TENTATIVE RULING.
LINE 15	20CV368062	Cheryl Buck vs Blu Homes, Inc.	**Motion of Wakako Uritani, Esq. and Lorber, Greenfield & Polito, LLP to Withdraw as Attorney To Defendant Blu Homes, Inc.** The motion was properly served upon the client. No opposition has been filed. Counsel for defendant seeks to withdraw as counsel due to Blu Homes going out of business. Therefore, counsel is filing this motion to withdraw as counsel. Counsel alleges that his client and Gemini Insurance Company will not be prejudiced by the withdrawal. The motion to be relieved as counsel is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and an order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel should add the next court date (Dismissal Review 06 June 2024 at 10:00 AM in Department 20) on ¶ 8 pf the proposed order and submit it to this Department via the Clerk's efiling queue. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 16	22CV398744	Maricela Garcia vs Pacific States Industries, Incorporated et al	**Motion of Defendants for Relief from Waiver of Objections to Plaintiff's Discovery Requests, Set One.** The opposition papers have been reviewed. The motion is GRANTED. (Code of Civil Procedure, §§ 2030.290(a); 2031.300(a); ***City of Fresno v. Superior Court*** (1988) 205 Cal.App.3d 1459, 1467; see ***Elston v. City of Turlock*** (1985) 38 Cal.3d 227, 231.) This Court has ruled on the matter on the basis of the papers and supporting affidavits and without oral argument. (***Ensher, Alexander & Barsoom v. Ensher*** (1964) 225 Cal.App.2d 318, 325, 327; ***Wilburn v. Oakland Hospital*** (1989) 213 Cal.App.3d 1107, 1111; 6 Witkin, ***California Procedure*** (5th Ed. 2020), Proceedings Without Trial, § 36.) "The judge is not required to listen to oral arguments on a motion, but has discretion to decide the matter solely on the basis of supporting affidavits." (***Ensher, Alexander & Barsoom v. Ensher***, supra; see also ***Wilburn v. Oakland Hospital*** (1989) 213 Cal.App.3d 1107, 1111.) NO FORMAL TENTATIVE RULING. Counsel for defendant is to provide notice of entry of this order.
LINE 17	23CV413531	Otis Elevator Company vs FPC Builders , Inc., a California corporation et al	**Motion of Leodis Matthews, Esq, to Withdraw as Attorney To FPC Builders Inc, Full Power Properties LLC, and FPP MB LLC.** The motion was properly served upon the client. No opposition has been filed. Counsel for defendant seeks to withdraw as counsel due to a breakdown of the attorney-client relationship. Communication between client and counsel has deteriorated due to an irreconcilable breakdown of the attorney-client relationship (***Estate of Falco v. Decker*** (1987) 188 Cal.App.3d 1004, 1014.) Therefore, counsel is filing this motion to withdraw as counsel. Counsel alleges that his client will not be prejudiced by the withdrawal. Counsel also states that The CCD Law Group has been acting as counsel for defendants. This Court is aware that these attorneys have been appearing for these clients and other matters. The motion to be relieved as counsel is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and an order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel should add the next court date (Case Management Conference 04 June 2024 at 10:00 AM in Department 20) on ¶ 8 pf the proposed order and submit it to this Department via the Clerk's efiling queue. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 18	23CV416507	Cesar Morales vs Peter Morales	**Motion of Leodis Matthews, Esq, to Withdraw as Attorney To FPC Builders Inc, Full Power Properties LLC, and FPP MB LLC.** The motion was properly served upon the client. No opposition has been filed. Counsel for defendant seeks to withdraw as counsel due to a breakdown of the attorney-client relationship. Declares that conduct of the client makes it unreasonably difficult to carry out the representation effectively. Therefore, it appears that the relationship between client and counsel has deteriorated due to an irreconcilable breakdown of the attorney-client relationship (***Estate of Falco v. Decker*** (1987) 188 Cal.App.3d 1004, 1014.) Therefore, counsel is filing this motion to withdraw as counsel. Counsel alleges that his client will not be prejudiced by the withdrawal. The motion to be relieved as counsel is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and an order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel should add the next court date (Case Management Conference 04 June 2024 at 10:00 AM in Department 20) on ¶ 8 pf the proposed order and submit it to this Department via the Clerk's efiling queue. NO FORMAL TENTATIVE RULING.
LINE 19	23CV420051	Christel Richey et al vs Deborah Gonzales et al	**Motion of Plaintiff for Trial Preference.** The motion of plaintiff for preferential trial setting is GRANTED. The parties should meet and confer and agree on a trial date on four months from today or thereabouts. Counsel for plaintiff is to provide notice of entry of this order. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 20	21CV385100	Ali Uyanik vs Mark P. Marriott; Maira Major Marriott; Alexis J. Marriott.	**Motion of Plaintiff to Depose the Three Defendants and for Production of Documents**. Plaintiff seeks an order compelling the defendants to appear for a deposition. Plaintiff also seeks production of certain records at the time of the depositions. The issue appears to be a breakdown in the "meet & confer" process in setting the depositions. The deposition of defendant Alexis Marriott (a college student) was set for 19 December 2023 but then counsel for plaintiff unilaterally canceled the deposition. In ¶ 14 of her declaration, Ms. Bentley states that Mr. Day has failed to provide dates of availability for any of the three defendants' depositions see intends to take. Instead, he filed this motion, despite the time defense counsel's office spent in working with him to schedule the depositions. The declaration filed by counsel for plaintiff in reply to the opposition papers does not seriously dispute that he did not follow-up with providing alternate dates for the depositions of the defendants after he unilaterally canceled the deposition of Alexis Marriott. Failing to properly meet and confer before filing a motion of this type is a discovery abuse (***Code of Civil Procedure***, § 2023.010(i).) The motion of plaintiff to compel the three defendants to appear for a deposition is GRANTED. The parties are to properly meet and confer and set the depositions, preferably within 30 days of the filing and service of this order. Defense counsel makes a code-compliant request for monetary sanctions which is GRANTED. Counsel for plaintiff is to pay counsel for the defendants the sum of $1,500.00 for costs and fees incurred in opposing this motion. Said sanctions are to be paid within 30 days of the filing and service of this order. Counsel for defendants is to provide notice of entry of the order. NO FORMAL TENTATIVE RULING.
LINE 21			SEE ATTACHED TENTATIVE RULING.
LINE 22			SEE ATTACHED TENTATIVE RULING.
LINE 23			SEE ATTACHED TENTATIVE RULING.
LINE 24			SEE ATTACHED TENTATIVE RULING.
LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
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(For Clerk's Use Only)

CASE NO.: 22CV398215 **Helix Electric, Inc. v. FPC Builders, Inc., et al.**
DATE: 07 March 2024 **TIME: 9:00 am** **LINE NUMBER: 01**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 06 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Motion Of Plaintiff For Summary Judgment, or, In The Alternative, Summary Adjudication.

I. Statement of Facts.

Defendants Full Power Properties, LLC and FPP MB LLC ("Owners") are fee simple owners of certain parcels of land. (Complaint, ¶¶3 – 5.)

On or about 2 February 2015, defendant Owners and defendant FPC Builders, Inc. fka Full Power Construction ("FPC") entered into a written prime contract wherein defendant FPC, as general contractor, covenanted and agreed to do all the work and furnish all the materials necessary to construct the San Jose Silvery Towers project, a work of improvement located at 180 West Saint James Street in San Jose ("Subject Property"). (Complaint, ¶11.)

On or about 29 December 2015, plaintiff Helix Electric, Inc. ("Helix") and defendant FPC entered into a written subcontract agreement in which plaintiff Helix agreed to act as a subcontractor to defendant FPC for the aforementioned work of improvement on the Subject Property for an agreed written contract price of $21,948,000 which defendant FPC agreed to pay. (Complaint, ¶12 and Exh. A.)

Plaintiff Helix has performed all things necessary and required of it under the written contract with defendant FPC. (Complaint, ¶¶13 – 14.) The labor, services, and material furnished by plaintiff Helix which remains unpaid has a reasonable and current market value of $1,032,431.40 which defendant FPC agreed in writing to pay. (Complaint, ¶15.) Plaintiff Helix served defendants a verified Claim of Mechanics Lien on 26 January 2022. (Complaint, ¶18 and Exh. D.)

On 10 May 2022[1], plaintiff Helix filed a complaint against defendant FPC and defendant Owners asserting causes of action for:

(1) Breach of Contract [against FPC]

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

(2) Foreclosure of Mechanics' Lien [against all defendants]

(3) Quantum Meruit [against all defendants]

On 17 August 2022, defendants FPC and Owners jointly filed an answer to plaintiff Helix's complaint.

On 13 November 2022, plaintiff Helix filed the motion now before the court, a motion for summary judgment/ adjudication of its complaint against defendants.

On 8 February 2024, the court issued an order granting a motion to be relieved as defendants' counsel.

On 22 February 2024, Darius T. Chan and Henry Yu of CCD Law Firm filed a notice of appearance for defendants FPC and Owners and also filed opposition to plaintiff Helix's motion for summary judgment/ adjudication.

II. Summary Judgment in General.

Any party may move for summary judgment. (*Code of Civil Procedure*, § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Code of Civil Procedure*, § 437c, subd. (c); *Aguilar, supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see *Evidence Code*, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar, supra,* at p. 851.) A defendant moving for summary judgment may satisfy its initial burden either by producing evidence of a complete defense or by showing the plaintiff's inability to establish a required element of the case. (*Code of Civil Procedure*, § 437c, subd. (p)(2); *Aguilar, supra,* at p. 853.)

If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civil Procedure, § 437c, subd. (p)(2); see *Aguilar, supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* at p. 850, fn. omitted.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id.* at p. 843.)

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

III. Analysis.

A. Plaintiff Helix's motion for summary adjudication is GRANTED, in part, and DENIED, in part.

1. 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 Helix proffers the following evidence to establish each element of a breach of contract cause of action: Helix is a licensed electrical subcontractor with California Contractors State License Board license number 483309.[2] On 2 February 2015, defendant FPC, as general contractor, entered into a prime contract with defendant Full Power Properties LLC, as property owner, for construction of the San Jose Silvery Towers project located at 180 West Saint James Street in San Jose.[3] Defendants Owners are one and the same related entities or successor entities and owners of the Subject Property and Project.[4]

On 29 December 2015, plaintiff Helix and FPC entered into a written subcontract agreement wherein Helix agreed to act as an electrical subcontractor for FPC as general contractor on the Project.[5] Plaintiff Helix provided, at FPC's request, work, labor, services, and related materials to FPC, which were used and consumed in the construction of said work of improvement on the Project.[6]

On or about 8 February 2016, plaintiff Helix served a 20-day Preliminary Notice on FPC and Full Power.[7] On or about 6 February 2020, plaintiff Helix served an amended 20-day Preliminary Notice on FPC and FPP.[8]

Throughout the course of the Project, plaintiff Helix and FPC entered into ninety (90) amendments, i.e., change orders, to the Subcontract Agreement with a total value of $10,431,004.17.[9] Following execution of the change orders, the total value of work performed under the Subcontract Agreement is $32,379,004.17.[10]

FPC's acceptance of the materials and labor along with the invoices and change orders without rejection, revocation, or objection confirms that the parties agreed to the labor and materials identified in the invoices and change orders as reflected in the Final Contract Status Report.[11]

FPC does not contend Helix's work on the Project was not completed and does not contend Helix's work on the Project was deficient.[12]

To date, plaintiff Helix has been paid $31,002,428.97, leaving a balance due to plaintiff Helix for work performed on the Project of $1,376,575.20.[13] Plaintiff Helix completed all of its work on the Project and FPC has not paid plaintiff Helix in full for the work, labor, services, and related materials provided on, and delivered to, the Project by plaintiff Helix.[14] Plaintiff Helix fully performed its obligations under the Subcontract Agreement.[15]

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[2] See Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Plaintiff's UMF"), Fact No. 1.

[3] See Plaintiff's UMF, Fact No. 3.

[4] See Plaintiff's UMF, Fact No. 4.

[5] See Plaintiff's UMF, Fact No. 5.

[6] See Plaintiff's UMF, Fact No. 6.

[7] See Plaintiff's UMF, Fact No. 7.

[8] See Plaintiff's UMF, Fact No. 8.

[9] See Plaintiff's UMF, Fact No. 13.

[10] See Plaintiff's UMF, Fact No. 14.

[11] See Plaintiff's UMF, Fact Nos. 15 and 19.

[12] See Plaintiff's UMF, Fact No. 16.

[13] See Plaintiff's UMF, Fact No. 17.

[14] See Plaintiff's UMF, Fact No. 18.

On 26 January 2022, plaintiff Helix served and recorded a verified claim of mechanic's lien in the amount of $1,032,431.40, which represented the reasonable value, and the amount due, owing, and unpaid, for the labor and materials provided on the Project by plaintiff Helix.[16] The mechanic's lien was actually recorded by the Santa Clara County Recorder's office on 11 February 2022.[17]

Based upon the **evidence** presented, the court finds plaintiff Helix has met its initial burden of demonstrating each element of its claims for breach of contract against defendant FPC. I

In opposition, defendant FPC contend there are triable issues of material fact in dispute, directing the court to, "See generally Separate Statement"[18] and asserting that it has provided facts and identified documents which present a triable issue.

However, defendant FPC's opposition is unaccompanied by any evidence or a separate statement 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 of Civil Procedure, § 437c, subd. (p)(1); emphasis added.)[19]

This naked argument by defendant FPC is insufficient to show that a triable issue of one or more material facts exists as to plaintiff Helix's first cause of action for breach of contract.

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

2. Foreclosure of Mechanic's Lien.

> "A mechanics' lien is the remedy provided by the California Constitution as implemented by the statutes; it enforces against the owner of property payment of the debt incurred for the performance of labor, or the furnishing of material used in construction. (*Heberling v. Day* (1922) 59 Cal. App. 13, 22 . . . .) The purpose of the statute, Civil Code sections 3082 through 3267, is to provide protection to the supplier of materials or services used in an improvement to land, and to ensure that the supplier receives the payment due. (*Nolte v. Smith* (1961) 189 Cal. App. 2d 140, 144 . . . .) The supplier requires this protection because of the contribution which increases the value of the property. The lien holder is part of an industry which is composed of thousands of individuals and entities, 'all more or less experienced, more or less dependable, more or less honorable in their business practices, through whom money, paid out by the owner at the top must filter down.' (See Owner Liability for Construction Costs (1977) 52 State Bar J. 526, 527.) A project may involve thousands of dollars, months of construction, and multiple contractors, including

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[15] See Plaintiff's UMF, Fact No. 20.

[16] See Plaintiff's UMF, Fact No. 21.

[17] See Plaintiff's UMF, Fact No. 22.

[18] See page 4, line 2 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").

[19] 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: …

(2) [Opposing party's][moving party's] separate statement of in opposition to [moving party's]motion for summary judgment or summary adjudication or both;

(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)

numerous subcontractors during different phases of construction. Oftentimes, the subcontractors may not know the name of the owner of the property.

"The constitutional scheme requires a balancing of the interests of lien claimants and property owners. Our statutes relating to mechanics' liens result from the legislative adjustment regarding the respective rights of lien claimants with those of the owners of property improved. (*Borchers Bros. v. Buckeye Incubator Co.* (1963) 59 Cal. 2d 234, 239 . . .; *Baker v. Hubbard* (1980) 101 Cal. App. 3d 226, 233-234 . . . .) Therefore, whenever possible, the statutes pertaining to the enforcement of mechanics' liens should be liberally construed to effectuate the purposes of the law. (*Consolidated Lumber Co. v. Bosworth, Inc.* (1919) 40 Cal. App. 80, 86 . . . .)

(*Fontana Paving, Inc. v. Hedley Brothers, Inc.* (1995) 38 Cal.App.4th 146, 153-154.)

"A person that provides work authorized for a work of improvement, including, but not limited to, the following persons, has a lien right under this chapter: … (b) Subcontractor." (Civ. Code, §8400.)

In moving for summary adjudication of this second cause of action for foreclosure of Mechanic's Lien, plaintiff Helix proffers evidence which this court finds sufficient to meet its initial burden. (See Plaintiff's UMF, Issue No. 2, Fact Nos. 39 – 56.)

In opposition, defendants FPC and Owners contend there are triable issues of material fact in dispute, directing the court to, "See generally Separate Statement"[20] and asserting that they have provided facts and identified documents which present a triable issue.

However, defendants FPC and Owners' opposition is unaccompanied by any evidence or a separate statement 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.) This naked argument by defendants FPC and Owners is insufficient to show that a triable issue of one or more material facts exists as to plaintiff Helix's first cause of action for breach of contract.

Accordingly, plaintiff Helix's alternative motion for summary adjudication of the second cause of action of its complaint for foreclosure of mechanic's lien is GRANTED.

3. Common Count/ 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 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.)

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[20] See page 4, line 2 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").

In light of the court's finding and ruling above, it would be inconsistent for the court to concurrently grant summary adjudication on plaintiff Helix's third cause of action for quantum meruit which seeks recovery of the same damages sought in the first cause of action for breach of contract. (See Complaint, ¶¶15 – 17, 27 – 28, and 30 – 32.)

Accordingly, plaintiff Helix's alternative motion for summary adjudication of the third cause of action of its complaint for quantum meruit is DENIED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The current trial-related dates shall REMAIN AS SET.

VI. Order.

Plaintiff Helix's alternative motion for summary adjudication of the first cause of action of its complaint for breach of the contract is GRANTED.

Plaintiff Helix's alternative motion for summary adjudication of the second cause of action of its complaint for foreclosure of mechanic's lien is GRANTED.

Plaintiff Helix's alternative motion for summary adjudication of the third cause of action of its complaint for quantum meruit is DENIED.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

---oooOooo---

Calendar Line 2

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 19CV358852 **LSI Corporation v. Kiran Kumar Gunnam, et al.**
DATE: 07 March 2024 **TIME: 9:00 am** **LINE NUMBER: 02**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 06 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Defendant's Demurrer
To Plaintiff's First Amended Complaint.

I. Statement of Facts.

In or around 21 January 2008, defendant Kiran Kumar Gunnam ("Gunnam") commenced employment with plaintiff LSI Corporation ("LSI"). (First Amended Complaint ("FAC"), ¶10.) Prior to his employment with plaintiff LSI, defendant Gunnam was a student/ employee of Texas A&M University ("TAMU") and his Ph.D. work generated confidential information concerning LDPC decoder architectures, including source code and unpublished patent applications. (*Id.*)

As consideration for his employment with plaintiff LSI, defendant Gunnam executed an Employee Invention and Confidential Information Agreement ("EICI Agreement") on or around 21 January 2008. (FAC, ¶11.)

During the course of his employment, defendant Gunnam had access to a document management system maintained by plaintiff LSI to store documents ("TWiki Server"). (FAC, ¶16.) The TWiki Server stored documents that were within the scope of defendant Gunnam's employment as well as documents unrelated to defendant Gunnam's employment. (FAC, ¶17.)

Defendant Gunnam was able to access the TWiki Server with a unique user ID specific to him. (FAC, ¶18.) During his employment with plaintiff LSI, defendant Gunnam routinely accessed, viewed, modified, downloaded and uploaded documents on the TWiki Server. (FAC, ¶19.) For example, on or around 19 June 2010, defendant Gunnam uploaded a document to the TWiki Server entitled, "McLarenClientServerDesignGuide_2009_09_16.doc." ("McLaren Design Guide"). (*Id.*)

On or around 10 December 2010, plaintiff LSI concluded a three-month investigation into defendant Gunnam's unauthorized publication of an article containing LSI confidential information. (FAC, ¶20.) Plaintiff LSI informed defendant Gunnam that the unauthorized publication violated his responsibilities as an employee and "may have created a competitive disadvantage to LSI since it contains LSI proprietary information." (*Id.*) Plaintiff LSI emphasized that defendant Gunnam's misconduct was a serious violation and issued a formal reprimand. (*Id.*)

During the course of the investigation, plaintiff LSI blocked defendant Gunnam's access to its internal network, including but not limited to the TWiki Server. (FAC, ¶21.) On 4 January 2011, unaware of the block, defendant Gunnam repeatedly attempted to access the server. (*Id.*)

On 13 January 2011, defendant Gunnam emailed his superior taking responsibility for the unauthorized publication, apologizing, and executing a formal acknowledgment of his wrongdoing. (FAC, ¶22.) In light of defendant Gunnam's apparent contrition, plaintiff LSI restored defendant Gunnam's access to the network on 15 January 2011 and later restored defendant Gunnam's access to the TWiki Server. (*Id.*)

In early March 2011, defendant Gunnam gave plaintiff LSI notice of his intent to resign his employment effective 18 March 2011. (FAC, ¶23.) Also in early March 2011, defendant Gunnam again accessed the TWiki Server to view technical documents related to plaintiff LSI's McLaren and Spyder architectures and technical features contained therein. (FAC, ¶24.)

When defendant Gunnam accessed the TWiki Server during his last few months of employment, he downloaded plaintiff LSI's confidential material and retained that material following the conclusion of his employment in violation of the EICI Agreement. (FAC, ¶25.) Defendant Gunnam resigned his employment with plaintiff LSI effective 18 March 2011. (FAC, ¶26.) Despite being bound by the EICI Agreement during and after his employment with plaintiff LSI, defendant Gunnam breached his obligations under the EICI Agreement. (FAC, ¶27.)

On 12 December 2018, TexasLDPC Inc. ("TexasLDPC") filed a complaint against Broadcom Inc. ("Broadcom") in the United States District Court for the District of Delaware ("Delaware Action"). (FAC, ¶28.) In its complaint, TexasLDPC alleges LSI and its parent company, Broadcom, have sold products that infringe patents and copyrights licensed by TexasLDPC from TAMU. (*Id.*)

Defendant Gunnam is listed as an inventor on the face of the asserted TAMU patents and is the author of the purported copyrighted source code that Broadcom and LSI are accused of infringing. (*Id.*) Defendant Gunnam was involved in the development of LSI's LDPC decoder architectures that TexasLDPC asserts infringe TAMU's patents and copyrights. (FAC, ¶29.)

TexasLDPC's lawsuit against LSI and Broadcom relies heavily on confidential technical documents alleged to describe the McLaren read channel architecture that are included in the two compilations that were later published without LSI's authorization on Scribd.com. (FAC, ¶30.) But for defendant Gunnam's breaches of the EICI Agreement, TexasLDPC would not have been able to bring its action against LSI and Broadcom for infringement of TAMU's patents. (*Id.*)

Defendant Gunnam's wife, Annapurna Yarlagadda, is the CEO, CFO, and Secretary of TexasLDPC and held these roles prior to and at the time TexasLDPC's complaint was filed in December 2018. (FAC, ¶¶3 and 31.) TexasLDPC's pleadings disclosed and relied upon LSI's confidential and proprietary information prepared by defendant Gunnam and other employees in connection with their work for LSI in relation to the design and development of semiconductor products, including reproductions of several internal LSI documents. (FAC, ¶32.)

TexasLDPC's pleadings also included a link to confidential and proprietary LSI internal presentations and documents that were published without LSI's permission on www.scribd.com. (FAC, ¶33.) In addition, other confidential and proprietary LSI documents were published without LSI's permission on www.scribd.com. (FAC, ¶34.) The www.scribd.com links were created on the same date by the same person. (FAC, ¶35.) On information and belief, defendant Gunnam provided, directly or indirectly, LSI's confidential and proprietary information published on www.scribd.com. (FAC, ¶46.)

Defendant Gunnam authored or otherwise had access to the confidential and proprietary information improperly used and disclosed in the TexasLDPC complaints. (FAC, ¶¶36 – 38.) After leaving plaintiff LSI, defendant Gunnam improperly kept copies of emails and other documentation that contained confidential technical information and internal discussions with management and in-house counsel as to whether LSI should license TAMU's technology (at Gunnam's urging). (FAC, ¶39.) Later, defendant Gunnam gave those emails to TexasLDPC's counsel to assist in suing LSI on behalf of TexasLDPC. (*Id.*)

Defendant Gunnam forwarded confidential patent applications filed by TAMU to various individuals at LSI in May 2008. (FAC, ¶40.) In January 2009, defendant Gunnam placed confidential source code that purportedly came from TAMU into an LSI directory to which he controlled access. (*Id.*) This confidential TAMU source code was later copyrighted and is now being asserted as the basis of copyright infringement. (*Id.*) Defendant Gunnam encouraged others to access this material. (*Id.*)

In order to encourage TAMU to pursue patent protection for his Ph.D. work and to assist TAMU in licensing the work to plaintiff LSI, defendant Gunnam disclosed plaintiff LSI's confidential information to TAMU. (FAC, ¶41.)

Defendant Gunnam disclosed confidential information concerning his work on LDPC decoders for plaintiff LSI to a competitor, Marvell Semiconductor, his prior employer, thus jeopardizing plaintiff LSI's future competitiveness. (FAC, ¶42.)

Plaintiff LSI did not authorize the use or dissemination of the confidential and proprietary information disclosed in TexasLDPC's complaints, published on www.scribd.com, disclosed to TAMU, or disclosed to an LSI competitor. (FAC, ¶43.)

On 18 November 2019[21], plaintiff LSI filed a complaint against defendants Gunnam and Yarlagadda asserting causes of action for:

(1) Breach of Contract [versus Gunnam]

(2) Breach of Covenant of Good Faith and Fair Dealing [against Gunnam]

(3) Intentional Interference with Contract [against Yarlagadda]

(4) Inducement to Breach Contract [against Yarlagadda]

On 23 January 2020, defendants Gunnam and Yarlagadda filed a demurrer to plaintiff LSI's complaint and a special motion to strike plaintiff LSI's complaint pursuant to Code of Civil Procedure section 425.16.

On 14 October 2021, the court issued an order granting defendant Gunnam's special motion to strike the first and second causes of action and denying defendant Yarlagadda's special motion to strike the third and fourth causes of action. The court deemed defendant Gunnam's demurrer to the first and second causes of action moot and overruled defendant Yarlagadda's demurrer to the third and fourth causes of action.

On 22 May 2023, the Sixth District Court of Appeal reversed the court's 14 October 2021 ruling and directed this court to enter a new order denying defendant Gunnam's special motion to strike and granting defendant Yarlagadda's special motion to strike.

On 25 July 2023, remittitur issued and this court resumed jurisdiction.

On 12 September 2023, plaintiff LSI filed a motion for leave to amend its complaint. On 8 December 2023, the court granted plaintiff LSI's motion for leave to amend the complaint.

On 18 December 2023, plaintiff LSI filed the operative FAC which now asserts causes of action against defendant Gunnam for:

(1) Breach of Contract

(2) Promissory Fraud

On 8 January 2024, defendant Gunnam filed an answer to plaintiff LSI's FAC and also filed the motion now before the court, a demurrer to plaintiff LSI's FAC.

II. Demurrers In General.

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (*Code of Civil Procedure*, §

[21] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).

430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (*Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (*Yolo County Dept. of Social Services v. Municipal Court* (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) "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.' [Citation.]" (*Id.* at pp. 213-214; see *Cook v. De La Guerra* (1864) 24 Cal. 237, 239: "[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.")

III. Analysis.

B. Procedural violation.

As a preliminary matter, plaintiff LSI contends defendant Gunnam failed to comply with his obligation in Code of Civil Procedure section 430.41, subdivision (a) which states, in relevant part, "Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." The demurring party shall file and serve with its demurrer a declaration stating that: (1) the means by which the demurring party met and conferred and that the parties did not reach agreement; or (2) that the party who filed the pleading failed to respond or otherwise failed to meet and confer in good faith. (Code Civ. Proc., § 430.41, subd. (a)(3).) According to plaintiff LSI, defendant Gunnam has not complied with this requirement and has neither met and conferred nor filed the requisite supporting declaration. Indeed, the declaration accompanying defendant Gunnam's demurrer lacks any discussion of Code of Civil Procedure section 430.41.

Nevertheless, "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (Code Civ. Proc., §430.41, subd. (a)(4).) In view of the statutory language and in furtherance of judicial economy, the court will consider defendant Gunnam's demurrer on its merits. The court reminds all parties that they should not treat Code of Civil Procedure section 430.41 as a procedural hurdle and should, instead, undertake the obligations set forth therein with sincerity and good faith.

C. Defendant Gunnam's demurrer to plaintiff LSI's FAC.

1. Defendant Gunnam's demurrer to the first cause of action [breach of contract] in plaintiff LSI's FAC is OVERRULED.

Defendant Gunnam demurs on the ground that the first cause of action for breach of contract is barred by the applicable statute of limitations. A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.)

A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading [and matters of which the court may properly take judicial notice]. (*Id.*, at pp. 1315-1316.)[22] When evaluating whether a

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[22] See also *Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 992-993: "'[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense.'" (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191 [213 Cal. Rptr. 3d 850]; accord, *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [151 Cal. Rptr. 3d 827, 292 P.3d 871] [application on demurrer of affirmative defense of statute of limitations based on facts alleged in a complaint is a legal question subject to de novo review]; *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 224 [115 Cal. Rptr. 3d 274] ["'It must appear clearly and affirmatively that, upon the face of the complaint [and matters of which the court may properly take judicial notice], the right of action is necessarily barred.'"].)

claim is time-barred, the court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*Id.*, at p. 1316.)

Defendant Gunnam asserts, without opposition from plaintiff LSI, that the applicable statute of limitations for a breach of written contract cause of action is four years. (See Code Civ. Proc., §337.) "[A] cause of action for breach of contract ordinarily accrues at the time of breach regardless of whether any substantial damage is apparent or ascertainable." (*Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 246.) "Ordinarily, a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted." (*Waxman v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1954) 123 Cal.App.2d 145, 149.)

By defendant Gunnam's own acknowledgment, there are five distinct breach of contract allegations. For this court to sustain defendant Gunnam's demurrer to this cause of action, defendant Gunnam must establish that all five of these distinct breaches are clearly and affirmatively barred by the four year statute of limitations. This is because a defendant cannot demur to a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action;" *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 274—"A demurrer challenges a cause of action and cannot be used to attack a portion of a cause of action.")

As defendant Gunnam recognizes, one of the five distinct breaches of contract is premised upon plaintiff LSI's allegation, found at paragraph 42 of the FAC, that defendant Gunnam "disclos[ed] confidential information concerning his work on LDPC decoders for LSI to a competitor, Marvell Semiconductor, his prior employer, thus jeopardizing LSI's future competitiveness."

The FAC makes no mention of when such conduct occurred, but defendant Gunnam contends the timing of this alleged conduct is encompassed by plaintiff LSI's "three-month investigation into Gunnam's unauthorized publication of an article containing LSI confidential information" which allegedly concluded on 29 December 2010. (FAC, ¶20.) However, it is this court's opinion that it does not appear "clearly and affirmatively" from the allegations of the FAC that the alleged disclosure of confidential information to Marvell Semiconductor is the same "unauthorized publication of an article containing LSI confidential information."

In order to establish that the alleged disclosure to Marvell Semiconductor occurred in 2010, defendant Gunnam requests the court take judicial notice of a document entitled, "2010 Annual Performance Summary for Kiran K. Gunnam" which purportedly references an incident where defendant Gunnam sent an email to a "very high-ranking person in a competitor company." Defendant Gunnam relies upon Evidence Code section 452, subdivision (h) which allows a court to take judicial notice of facts and propositions not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Defendants provide this court with no persuasive authority (nor is the court aware of any authority) that a performance review and/or the content therein qualifies as a fact or proposition "not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Accordingly, defendant Gunnam's request for judicial notice is DENIED.

Even if the court took judicial notice as requested, defendant Gunnam has not clearly and affirmatively demonstrated that (1) the incident involves the disclosure of confidential information concerning Gunnam's work on LDPC decoders for LSI or (2) that the incident is the same incident which forms the factual basis for the allegation found at paragraph 42 of plaintiff LSI's FAC. Since defendant Gunnam has not established that the alleged breach of contract found at paragraph 42 of plaintiff LSI's FAC is clearly and affirmatively barred by the statute of limitations and since a demurrer does not lie to a portion of a cause of action, defendant Gunnam's demurrer to the first cause of action in plaintiff LSI's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is OVERRULED.

2. Defendant Gunnam's demurrer to the second cause of action [promissory fraud] in plaintiff LSI's FAC is OVERRULED.

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to

induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*); see also CACI, No. 1900.)

"'Promissory fraud' is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973 – 974; see also CACI, No. 1902.)

Defendant Gunnam demurs to the second cause of action of plaintiff LSI's FAC on the ground that LSI has not alleged that defendant Gunnam had a pre-contract intent not to live up to the promises he made in the EICI Agreement. In *Tarmann v. State Farm Mutual Automobile Ins. Co.* (1991) 2 Cal.App.4th 153, 159, the court explained, "To maintain an action for deceit based on a false promise, one must specifically allege and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing."

"Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 482.) Something more than nonperformance is required to prove the defendant's intent not to perform his promises. "A promise of future conduct is actionable as fraud only if made without a present intent to perform. (Civ. Code, §1710, subd. 4; [Citation omitted.]) " 'A declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud. [Citation.]' " [Citation omitted.] Moreover, " 'something more than nonperformance is required to prove the defendant's intent not to perform his promise.' [Citations.] ... [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury." (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481.)

Defendant Gunnam acknowledges plaintiff LSI's allegation at paragraph 58 of the FAC that defendant Gunnam "did not intend to perform these promises [made in the EICI Agreement to, among other things, not use and/or disclose LSI's confidential and proprietary information] when [he] made them." These allegations are sufficient for purposes of pleading fraudulent intent. (See 5 Witkin, California Procedure (4th ed. 1997) Pleading, §684, p. 143—"Intent, like knowledge, is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient.")

Instead, defendant Gunnam argues such an allegation of his pre-contract intent not to keep his promises is implausible because it would mean that defendant knew in January 2008 "that LSI would decide in mid-2009 to use his university research in certain of its products, that the Patent Office would (in 2013) grant certain patents to [TAMU], that LSI would then choose to sell products that infringed those patents, and that [TAMU] would decide to license a start-up to assert those patents against LSI."[23] Plausibility is not something that the court need decide at the pleading stage. "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.)

To the extent plaintiff LSI relies upon the same breaches of contract as a factual basis to support its allegation of defendant Gunnam's fraudulent intent, defendant Gunnam repeats his earlier argument that those alleged breaches of contract are barred by the statute of limitations. However, as discussed above, the court does not find defendant Gunnam's statute of limitations argument to be dispositive. Accordingly, defendant Gunnam's demurrer to the second cause of action in plaintiff LSI's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for promissory fraud is OVERRULED.

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[23] See page 12, lines 3 – 7 of the Memorandum of Points and Authorities in Support of Defendant Gunnam's Demurrer to Plaintiff LSI's FAC.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

This Court will set the matter for a Trial Setting Conference on Tuesday, 07 May 2024 or at 11:00 AM. Prior to the TSC, counsel should meet and confer and agree upon a trial date 6 to 8 months after that date.

VI. Order.

Defendant Gunnam's demurrer to the first cause of action in plaintiff LSI's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is OVERRULED.

Defendant Gunnam's demurrer to the second cause of action in plaintiff LSI's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for promissory fraud is OVERRULED.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV386407 Chipongolo Mulenga vs County of Santa Clara; Evelyn Mendez
DATE: 07 March 2024 TIME: 9:00 am LINE NUMBER: 09

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 06 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Plaintiff
for a Protective Order
Concerning Mental Health Examination.

I. Statement of Facts.

The facts of this important matter are well known to this Court and counsel.

II. Motion Of Plaintiff for a Protective Order re: Mental Examination.

By order of this Court filed on 04 December 2023, this Court granted the motion of Defendants to conduct a mental examination of plaintiff. This Court noted that "[i]nformation concerning extrinsic causes of emotional distress is directly relevant because they bear directly on the nexus between Plaintiff's claims and the conduct of the Defendants."

This Court incorporates that order as part of the decision-making in this motion.

Shortly before Christmas of last year, plaintiff suffered domestic violence at the hands of a partner in the home that they shared which not only harmed her but endangered their infant son. Her partner and infant son's father, Chasen Gonzalez, was arrested and criminally charged for domestic battery. The couple is now engaged in a family law dispute over custody of the son.

This Court notes that plaintiff asserts the privacy rights of her infant son and Mr. Gonzales. Plaintiff, however, has made no attempt to treat this information as confidential, such as by filing a motion under seal.

On the day after the first interim order in the Family Court, defense counsel wrote to counsel for plaintiff that "we have learned that there may be recent domestic violence issues involving Plaintiff." Apparently the County now is demanding all of plaintiff's documents and communications concerning all aspects of the active criminal in child custody cases.[24]

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[24] ""All DOCUMENTS, including but not limited to text message, iMessage, email, and social media communications, between YOU and any other person . . . relating to" the family law or domestic violence criminal matters, including "all such DOCUMENTS regarding the proceedings themselves, the underlying subject matter of the proceedings, and the emotional impact the proceedings have had or are having on YOU."

In the current motion, plaintiff now seeks a protective order concerning the examination, arguing that it should be limited to assessing the causes of plaintiff's severe emotional distress caused by the county in and around January 2021, as well as when that severe distress abated, and should not be allowed to probe into plaintiff's recent familial issues, which occurred three years later.

Plaintiff also seeks protection from defendants' numerous discovery requests that relate solely to the family violence issue.

Plaintiff argues that her severe emotional distress caused by the County began in the summer of 2020 and continued no later than June 2023. That severe emotional distress ended long before the domestic violence incident and thus the letter cannot have any connection with causing the former.[25]

The defense, on the other hand, directs the attention of this Court to the statement in plaintiff's moving papers that the incident of domestic violence caused plaintiff to suffer severe emotional distress.[26]

As a side note, it appears that somehow the County attempted to purchase the plaintiff's personal injury case in the Bankruptcy Court.

The parties also inject issues concerning settlement discussions which this Court has declined to read.[27]

III. Analysis.

The pertinent sections of ***Code of Civil Procedure***, § 2032.320(a, b, c,) are as follows:

"(a) The court shall grant a motion for a physical or mental examination under Section 2032.310 only for good cause shown.

(b) If a party stipulates as provided in subdivision (c), the court shall not order a mental examination of a person for whose personal injuries a recovery is being sought except on a showing of exceptional circumstances.

(c) A stipulation by a party under this subdivision shall include both of the following:

(1) A stipulation that no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed.

(2) A stipulation that no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages.

> "For discovery purposes, information is relevant if it "might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement . . . ." (citation omitted.) Admissibility is not the test and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence. (citation omitted.) These rules are applied liberally in favor of discovery (citation omitted) and (contrary to popular belief), fishing expeditions are permissible in some cases. (citation omitted.)[28] Although fishing may be improper or abused in some cases, that is not of itself

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[25] "But Defendant cannot do so here because those emotional injuries that are in controversy (i.e., the severe distress) did not exist in December 2023, so Defendants cannot do so on a theoretical level, let alone in actuality." (Plaintiff's moving papers, page 13, lines 18-20.)

[26] "In that email, and in the telephonic meet and confer that followed, we stated our analysis that the level of intrusion into Plaintiff's sensitive familial situation was not warranted given that—as defense counsel knew—"the emotional distress Ms. Mulenga[] suffered as a result of the allegation in her complaint have lessened to garden variety, not severe" and that, as a consequence, probing into this issue was not relevant given the latter severe emotional distress stemming from her familial trauma would have no bearing on the severe emotional distress Plaintiff suffered at the hands of Defendants. (Tolman Decl., ¶ 7.)" (Plaintiff's moving papers, page 7, lines 18-24.)

[27] If the parties are indeed "hesitant to disclose any substance of settlement communications without a compelling need," (Plaintiff's moving papers, page 9, fn.2), then don't.

[28] "[T]he claims that a party is engaged upon a fishing expedition is not, and under no circumstances can be, a valid objection to an otherwise proper attempt to utilize the provisions of the discovery statutes. Should the so-called fishing expedition be subject

an indictment of the fishing expedition per se. More specifically, the identity of witnesses must be disclosed if the witness has 'knowledge of any discoverable matter,' including fact, opinion and any information regarding the credibility of a witness (including bias and other grounds for impeachment). (citations omitted.) (***Gonzalez v. Superior Court***, 33 Cal.App.4th at 1546.)

A. Right to Privacy

Both physical and mental medical records are protected by a right to privacy. (***Board of Med. Quality Assurance v. Gherardini*** (1979) 93 Cal.App.3d 669, 679; see also ***Civil Code***, § 56.10 (health care providers may not disclose confidential medical information without either a court order or the permission of the patient) six.) Discovery of medical records requires a two-part test. Discovery must be directly relevant to a cause of action or defense. (***Britt v. Superior Court (San Diego Unified Port Dist.)*** (1978) 20 Cal.3d 844, 859-862.) Discovery is allowable only where the party seeking discovery has no other means of attaining the information. (***Palay v. Superior Court (County of Los Angeles)*** (1993) 18 Cal.App.4th 919, 933-934.[29])

Medical records are not discoverable for the lifetime of the patient, but only for periods of time where the records may relate to physical or mental injuries alleged in the lawsuit. (***Britt v. Superior Court****, supra,* (1978) 20 C.3d 844, 864.) If the request passes the two-part test, the court must 'carefully balance' the claimed right of privacy versus the public interest in obtaining just results in litigation. (***Valley Bank of Nevada v. Superior Court (Barkett)*** (1975) 15 Cal.3d 652, 657.)

B. Relevancy to Causes of Action.

Direct relevance is required in a case involving privacy issues. (see ***Boler v. Superior Court*** (1987) 201 Cal.App.3d 467, 472; see also ***Tylo v. Superior Court (Tylo)*** (1997) 55 Cal.App.4th 1379, 1387.)

Medical records are relevant to the issue of damages. Information concerning extrinsic causes of emotional distress is directly relevant because they bear directly on the nexus between Plaintiff's claims and the conduct of the Defendants. (see ***Tylo***, at 1388.)

In general, discovery requests for all physical and mental medical information about a plaintiff in a personal injury action may be impermissibly overbroad. (***Hallendorf v. Superior Court*** (1978) 85 Cal.App.3d 553, 555.) Some of the information requested might not be directly relevant to Plaintiff's claims.

C. Plaintiff's Allegations.

Defendants assert that in this particular case, plaintiff has made her mental health and issue in this case. Her first amended complaint filed on 22 March 2022 includes the allegations and prayer for relief noted above. (FAC ¶¶ 51, 73, 75 and Prayer for Relief ¶ 2.[30])

Plaintiff's June 3, 2022 written discovery responses include her assertions that she suffered "anxiety" and "severe depression, with symptoms including extreme loss of sleep, loss of appetite, frequent crying, withdrawal from family and friends and other social activities, and other similar symptoms." (Cormier Decl. ¶ 3 and Ex. A (Amended Response to Interrogatory 212.2).) She further stated that, while her condition had "improved over time, she still

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to other objections, it can be controlled." (***Greyhound Corp. v. Superior Court of Merced County*** (1961) 56 Cal.2d 355, 386). "[T]he court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs and expenses, including attorney's fees, as the court may deem reasonable." (***Greyhound Corp. v. Superior Court of Merced County***, supra at 370-371.)

[29] "[***Palay*** and other cited cases] are disapproved only to the extent they assume, without conducting the inquiry ***Hill v. National Collegiate Athletic Assn***. requires, that a compelling interest or compelling need automatically is required when a party seeks discovery of private information. (***Williams v. Superior Court*** (2017) 3 Cal.5th 531, 531.)"

[30] She alleges that she "continues to suffer emotional distress, humiliation, shame, anxiety, depression, and embarrassment" (First Amended Complaint (FAC) ¶ 51) and that she "suffered and continues to suffer severe and continuous humiliation, emotional distress, and physical and mental pain and anguish." (FAC ¶ 73.) Plaintiff seeks punitive damages against Defendant Mendez. (FAC ¶ 75 and Prayer for relief.)

suffers from mild anxiety and bouts of depression" relating to her former County employment. (Ibid.) At her deposition on 20 December 2022, Plaintiff testified that her alleged treatment "continues to affect every aspect of [her] life emotionally." (Cormier Decl. ¶ 4 and Ex. B (Mulenga Depo. at 678:9-24).)

Defendants have the right to evaluate the veracity of Plaintiff's claims. (***Vinson v. Superior Court*** (1987) 43 Cal.3d 833, 842.) Some of the documents requested albeit not all might be directly relevant. Defendant has a right to accumulate records that are relevant, and which might give reason to determine that a mental health examination is in order.

Accordingly, the Court finds that medical documents at least after the date of the accident would have direct relevance to Plaintiff's claims.

C. No Less Intrusive Means to Discover Relevant Information.

Defendants are entitled to seek medical information to ascertain whether there are extrinsic causes of emotional distress. (see ***Davis v. Superior Court*** (1992) 7 Cal.App.4th 1008, 1017-1018.[31]) Medical records are the only feasible way to probe the Plaintiff's physical and mental state over a period of time. (***Palay v. Superior Court*** (1993) 18 Cal.App.4th 919, 933–934.) There are no other less intrusive means of discovering extrinsic causes of emotional distress.

D. "Garden Variety" and "Severe" Mental Distress.

The parties again discuss the difference between "garden-variety emotional distress" and emotional distress which may justify allowing the defendants to obtain a mental health examination in this case.

As noted in the order of this court granting the motion of the defense for a psychiatric examination of the plaintiff, the difference has not been very clearly explained in the cases.

For starters, plaintiff has not explained the difference between the two forms of mental distress or how counsel was able to distinguish one type from another in this case.

As previously noted, this Court has obtained some guidance from ***Pringle v. Wheeler*** (2021) U.S.Dist.LEXIS 92441 which has attempted to quantify what the statute might mean:

> "Garden variety emotional distress has been described as "ordinary or commonplace emotional distress, that which is simple or usual***." Fitzgerald v. Cassil***, 216 F.R.D. 632, 637 (N.D. Cal. 2003) (internal quotation marks and citation omitted). "In contrast, emotional distress that is not garden variety 'may be complex, such as that resulting in a specific psychiatric disorder.'" Id. (citation omitted). Courts have found the following allegations go beyond "garden variety" emotional distresses and are specific enough to place a plaintiff's mental state in controversy. See, e.g., ***Mandujano v. Geithner***, No. C 10-01226 LB, 2011 WL 825728, at *2 (N.D. Cal. Mar. 7, 2011) ("loss of sleep, migraines, weight loss, fear, growing a beard to hide, and other severe anxiety"); ***Greenhorn v. Marriott Int'l, Inc.***, 216 F.R.D. 649, 651 (D. Kan. 2003) ("emotional trauma causing insomnia, severe depression, avoidance, withdrawal, suicidal [*9] ideation, suspiciousness, social discomfort, low self-esteem, [and] resentfulness") (internal quotation marks omitted); ***Dornell v. City of San Mateo***, No. 12-cv-06065 CRB (KAW), 2013 WL 5443036, at *4 al. Sept. 30, 2013) (anxiety, high blood pressure, chest pain, sleeplessness, weight gain, inability to focus and loss of interest in daily life activities and hobbies***); K. Oliver v. Microsoft Corp.***, No. 12-cv-00943 RS (LB), 2013 WL 3855651, at *2 (N.D. Cal. July 24, 2013) (extreme anguish, humiliation, emotional

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[31] "Petitioner here has clearly limited her claim to pain and suffering associated with the injuries to her body. Nothing prevents real party from seeking records directly relevant to such claim by a narrowly drawn discovery request. If such a request were made, the trial court could then evaluate the respective interests of the parties and the necessity and appropriate extent of disclosure according to the standards set forth hereinabove."

In ***Davis***, the court held that "that the mere act of filing a personal injury action asking for general damages for pain and suffering does not tender the plaintiff's mental condition so as to make discoverable postinjury psychotherapeutic records." (***Davis v. Superior Court***, supra at 1011.)

distress, physical distress, increased risk of reoccurrence in breast cancer, and physical injuries resulting from stress); ***Tamburri v. SunTrust Mortgage Inc.***, No. 11-cv-02899 JST (DMR), 2013 WL 942499, at *3-4 (N.D. Cal. Mar. 11, 2013) (suicidal ideation, paranoia, chest pains, blinding and debilitating headaches that are "frightening in their intensity," multiple cracked teeth from jaw grinding, and loss of mental clarity); ***Varfolomeeva v. United States***, 2017 U.S. Dist. LEXIS 201100 (E.D. Cal. 2017) ("depression, post-traumatic stress disorder," "suicidal ideation, and a phobia of walking on the street"); ***Ayat v. Societe Air France***, No. C 06-1574 JSW JL, 2007 WL 1120358, at *4 (N.D. Cal. Apr. 16, 2007) ("Both depression and post-traumatic stress disorder constitute a specific mental or psychiatric injury or disorder.").

On the other hand, courts have found "humiliation, mental anguish, and emotional distress" are "garden variety" emotional distresses do not put a plaintiff's mental state in controversy. See ***Turner***, 161 F.R.D. at 97. For example, ***in Montez v. Stericycle, Inc.***, No. 1:12-CV-0502-AWI-BAM, 2013 WL 2150025, at *4 (E.D. Cal. May 16, 2013), the court found that "Plaintiff ha[d] not placed his mental injury in controversy as Plaintiff's mental anguish claims [were] those [*10] garden-variety emotional distress claims naturally flowing from an unlawful termination." The court further noted that "Plaintiff ha[d] not undergone mental health treatment for emotional or psychological reasons," "[did] not claim an ongoing mental injury," and there was "no indication that he will attempt to offer medical evidence to support his emotional distress damages." Id.; see also ***Rund v. Charter Commc'ns, Inc.***, No. CIV. S-05-0502 FCDGG, 2007 WL 312037, at *2 (E.D. Cal. Jan. 30, 2007) (finding an independent mental examination not appropriate given "plaintiff's abandonment of any claim for serious psychological/psychiatric injury," where '[s]uch a claim [was] not realistically possible in the absence of medical proof, i.e., records testified to by the appropriate medical personnel," and "[p]laintiff made it crystal clear that he has not sought medical treatment, and would not be presenting any medical evidence concerning emotional injury***"); Ford v. Contra Costa Cty.***, 179 F.R.D. 579, 580 (N.D. Cal. 1998) ("Because defendants have presented little more than Ford's prayer for emotional and mental distress damages, they have not met their burden under FRCP 35(a).").

Pringle's claim for general "mental and emotional distress," "pain and suffering," and "stress, internal turmoil, trauma, and anxiety" are akin to "garden variety" emotional distresses. Cases where mental condition was in controversy involved, in addition to general claims like anxiety, more specific mental injuries such as post-traumatic stress disorder, depression, insomnia, and suicidal ideation. As Regan acknowledges, Pringle "never sought mental health treatment or medication." (***Pringle v. Wheeler*** (N.D.Cal. Apr. 16, 2021, No. 19-cv-07432-WHO) 2021 U.S.Dist.LEXIS 92441, at *11.[32])

Both sides make very reasonable arguments in this interesting matter. It is this Court's responsibility to adequately protect the privacy rights of the Plaintiff while, at the same time, not to deprive the Defendants of an

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[32] Absent contrary precedent under state law, California courts have found federal decisions "persuasive" in interpreting similar provisions of the California Act. (See ***Greyhound Corp. v. Superior Court of Merced County*** (1961) 56 Cal.2d 355, 401; ***Nagle v. Superior Court*** (1994) 28 Cal.App.4th 1465, 1468; ***Vasquez v. California School of Culinary Arts, Inc.*** (2014) 230 Cal.App.4th 35, 42-43; Weil & Brown, ***Civil Procedure Before Trial*** (The Rutter Group 2019) § 8:19, p. 8A-10.)

Where California discovery rules and cases do not expressly address a particular issue which has been addressed by federal courts, California courts may look to federal cases for guidance. Federal decisions have historically been considered persuasive because of the similarity of California and federal discovery law. (***Nagle v. Superior Court*** (1994) 28 Cal. App. 4th 1465, 1468***; Liberty Mut. Ins. Co. v. Superior Court*** (1992) 10 Cal. App. 4th 1282, 1288; *see also* 2-50 California Deposition and Discovery Practice § 50.04; Weil & Brown, ***Civil Procedure Before Trial*** (The Rutter Group 2007) P 8:19, p. 8A-15.)

Although the California and federal codes developed in different directions during the latter part of the 20th century, the 1986 Discovery Act brought California into closer alignment with the Federal Rules, indicating that "federal cases are likely to play an even more prominent role in the future." (***Liberty***, 10 Cal. App. 4th at 1288.) These federal cases are to be deemed "persuasive" authority, "and their reasoning is accepted where applicable in California." (***Greyhound Corp. v. Superior Court of Merced County*** (1961) 56 Cal. 2d 355, 401.)

opportunity to contest Plaintiff's claims of damages. (See ***Gonzalez v. Superior Court*** (1995) 33 Cal.App.4th 1539, 1542.

In support of the underlying motion to compel the mental examination, defendants have provided the Declaration of John M. Greene, MD, board certified in general and forensic psychiatry. Dr. Greene has summarized the parameters of his proposed evaluation consisting of an examination and administration of psychological testing. He opines that plaintiff's current presentation of emotional distress, even though alleged to be "garden-variety," is by her own report related to a prior level of "severe," and encompasses an alleged condition is characterized by periods of exacerbation and remission and that this should therefore be objectively assessed. (¶ 5.) He believes it is necessary to conduct the clinical examination 3 to 3 ½ hours hours. (¶ 7.) The psychological testing will take 2 to 3 hours (¶ 8.)

In support of the current motion, defendants have submitted a second declaration from Dr. Greene. He has provided expert testimony in court on 15 occasions concerning individuals who have suffered from domestic violence. He further states:

> "When individuals in a legal matter allege emotional distress, including garden-variety emotional distress as a consequence of the events underlying the legal issue, it is important for them to be examined, in order to obtain objective evidence that they have, in fact, experienced emotional distress as well as the predominant cause of their suffering. Unfortunately, individuals may also suffer from domestic violence while still experiencing emotional distress from the events underlying the legal issue. In these circumstances, it is imperative to determine, through examination and psychological testing, the potential extent of symptoms they have suffered as a result of domestic violence, and the potential extent of symptoms they have suffered as a result of events alleged in their legal case, in order to come to an objective understanding of the presentation of these potential issues."

(Declaration of John M. Greene, MD (filed on 23 February 2024) ¶ 4.)

Plaintiff has not provided any medical support in opposition to the motion.

E. Balancing Test.

"The mere initiation of a sexual harassment suit, even with the rather extreme mental and emotional damage plaintiff claims to have suffered, does not function to waive all of plaintiff's privacy interests, exposing her persona to the unfettered mental probing of defendants' expert. Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy. At the same time, plaintiff cannot be allowed to make her very serious allegations without affording defendants an opportunity to put their truth to the test. (***Vinson v. Superior Court*** (1987) 43 Cal.3d 833, 841-42.)" (***Zuckowich v. JP Morgan Chase Bank Imaged***, 2017 Cal.Super.LEXIS 35233, *1-2) (internal punctuation modified.)

> "***Schlagenhauf*** [***v. Holder*** (1964) 379 U.S. 104 [13 L. Ed. 2d 152, 85 S. Ct. 234] thus stands for the proposition that one party's unsubstantiated allegation cannot put the mental state of another in controversy. [¶] It is another matter entirely, however, when a party places his own mental state in controversy by alleging mental and emotional distress. Unlike the bus driver in ***Schlagenhauf***, who had a controversy thrust upon him, a party who chooses to allege that he has mental and emotional difficulties can hardly deny his mental state is in controversy. To the extent the decision in ***Cody v. Marriott Corp.***, 103 F.R.D. 421, is inconsistent with this conclusion, we decline to follow it. (See also ***Reuter v. Superior Court*** [1970] 93 Cal.App.3d 332, 340.)" (***Vinson v. Superior Court*** (1987) 43 Cal.3d 833, 839.)

Insofar as the discovery requests for documents is concerned, this Court has not been able to arrive at a conclusion concerning good cause for the issuance of a protective order to preclude discovery based on the insufficiency of the scope of the question presented, the burden involved in producing these requests, what privileges if any might apply. No separate statement has been provided for this Court to analyze.

Good cause appearing, this Court rules as follows:

The motion of plaintiff for a protective order to preclude Dr. Greene from questioning plaintiff about the recent domestic violence events is DENIED.

The motion of plaintiff for a protective order to preclude discovery of documents pertaining to domestic violence issues is DENIED WITHOUT PREJUDICE to a proper showing as discussed above.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The trial date and settlement conference date will REMAIN AS SET.

VI. Conclusion.

The motion of plaintiff for a protective order to preclude Dr. Greene from questioning plaintiff about the recent domestic violence events is DENIED.

The motion of plaintiff for a protective order to preclude discovery of documents pertaining to domestic violence issues is DENIED WITHOUT PREJUDICE to a proper showing as discussed above.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV420051 **Christel Richey et al vs Deborah Gonzales et al**
DATE: 07 March 2024 **TIME: 9:00 am** **LINE NUMBER: 19**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 06 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Plaintiff
For Preferential Trial Setting.

I. Statement of Facts.

Plaintiff filed this complaint for damages and equitable relief on 28 July 2023.[33]

The complaint generally alleges that plaintiff is currently 88 years old and is suffering declining health do to her advanced age and medical conditions. Counsel for plaintiff is informed and believes that plaintiff has a medical diagnosis of advanced fibrosis/cirrhosis of the liver.

Counsel for plaintiff further believes that plaintiff's husband who was admitted to the facility on 23 December 2022 for rehabilitation after a short hospitalization for abdominal pain and liver issues. The decedent's family spoke to the staff on his admission and insisted that someone had to be with him at all times when he was up because of limited strength in his arms and legs and was at risk for falling.

On 01 January 2023, the gentleman was escorted to the bathroom by a caregiver who left the decedent alone inside the bathroom. He fell hard onto the floor, landing on his right leg and hitting his head. He began yelling for help and was found with the said partially in the shower and his body on the floor. He had a right comminuted hip fracture and closed fractures of his right femur in eight places.

Decedent underwent surgery on 03 January 2023. He eventually died at El Camino Hospital on 29 March 2023 allegedly a result of neglect at the defendants' facility. Plaintiffs alleged that there was chronic shortage of staff at the hospital, especially for the short term acute care patients following a surgery or hospitalization. The short staffing was the cause of the decedent being left alone in the bathroom.

Plaintiff's overall condition and prognosis continues to steadily decline, compounded by the fact that she has been experiencing depression due to her husband's untimely death.

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[33] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California **Rules of Court** state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).

Plaintiff filed the current motion on 03 October 2023. The Humangood defendants answered the complaint on 11 October 2023.

II. Motion For Preferential Trial Setting.

Plaintiff now moves for an order granting her a preferential trial setting pursuant to ***Code of Civil Procedure***, §§ 36(a). Defendants oppose the motion on the grounds that the claims of plaintiff are unsupported by competent medical evidence.[34]

III. Analysis.

A full resolution of this motion requires this Court to consider the intended and unintended consequences of a motion for trial preference.

A. The Right of a Plaintiff to Preference.

The plaintiffs who bring preference motions generally argue that "***Code of Civil Procedure***, § 36 is a legislative recognition of the maximum that "justice delayed is justice denied." (***Warren v. Schecter*** (1997) 57 Cal.App.4th 1189, 1199.)

Code of Civil Procedure, § 36(a)(1, 2) state: "A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings: (1) The party has a substantial interest in the action as a whole. (2) The health of the party[35] is such that a preference is necessary to prevent prejudicing the party's interest in the litigation."

The intent of the legislature behind ***Code of Civil Procedure***, § 36(a) is to safeguard litigants who qualify against the acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried and to obtain the appropriate recovery. (See ***Switcher v. Superior Court*** (1989) 212 Cal.App.3d 1082, 1085; see also ***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1203.) An elderly plaintiff does not need to be terminally ill in order to qualify for preference under Section 36(a). (Id.)

If a party opposes preferential setting, that party must present competent evidence. (See Well & Brown, Cal. Practice Guide: ***Civil Procedure Before Trial*** (The Rutter Group 2022) ¶ 9:102.10.) But even if the Court finds that Defendants did present admissible evidence, that evidence does not support denying Diego's motion in light of the plain nature of his age and apparently declining health condition.

"An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36 may be signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under subdivision (a) of Section 36."

"A civil action shall be entitled to preference, if the action is one in which the plaintiff is seeking damages which were alleged to have been caused by the defendant during the commission of a felony offense for which the defendant has been criminally convicted." (***Code of Civil Procedure***, § 37(a).) "The court shall endeavor to try the action within 120 days of the grant of preference." (***Code of Civil Procedure***, § 37(b).)

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[34] "There is absolutely no concrete showing that an accelerated trial date is necessary to prevent prejudice to Plaintiff and that her ability to participate in trial will differ if the trial was held later rather than sooner. There is no evidence indicating that Plaintiff is near death or incapacity. Although Plaintiff may be over 70 years old and have health issues (controllable through monitoring), it does not automatically entitle her to an accelerated trial date above all other litigants. It is also important to note that there is no evidence that her physical condition is deteriorating." (Opposition papers, page 3, lines 15-21.)

[35] "An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36 may be signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under subdivision (a) of Section 36."

"Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party." (***Code of Civil Procedure***, § 36(f).)

"'The Legislature intended [section 36(a)] to be mandatory. [Citation.]" (***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1204 [holding that trial setting preference under ***Code of Civil Procedure***, § 36 prevails over the Trial Court Delay Reduction Act of 1986.].

"The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations. [Citation] Accordingly, subdivision (a) of section 36 is mandatory and absolute in its application in civil cases " [Citation]. (***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1205.)

"The Legislature intended section 36 to be mandatory in circumstances that appear to be present here. (§ 36, subds. (a) & (f) [court "shall set the matter for trial" (italics added) where party to civil action is over 70, has substantial interest in action, and preference is necessary because of party's health]; ***Fox v. Superior Court*** (2018) 21 Cal.App.5th 529, 535 ["preference must be granted" where party meets standard and "[n]o weighing of interests is involved"]; ***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1204 [statute "grants a mandatory and absolute right to trial preference"]; ***Swaithes v. Superior Court*** (1989) 212 Cal.App.3d 1082, 1085[36] [trial court "has no power to balance the differing interests of opposing litigants in applying the provision"]; ***Koch-Ash v. Superior Court*** (1986) 180 Cal.App.3d 689, 694 [§ 36 "must be deemed to be mandatory and absolute" and "no discretion is left to trial courts"]; ***Rice v. Superior Court*** (1982) 136 Cal.App.3d 81, 86–87.)" (***Isaak v. Superior Court*** (2022) 73 Cal.App.5th 792, 798.[37])

B. Due Process Concerns of a Defendant.

"The term 'due process of law' asserts a fundamental principle of justice which is not subject to any precise definition but deals essentially with the denial of fundamental fairness, shocking to the universal sense of justice." (***Gray v. Whitmore*** (1971) 17 Cal.App.3d 1, 20.) "Substantive due process. . . . . deals with protection from arbitrary legislative action, even though the person whom it is sought to deprive of his right to life, liberty or property is afforded the fairest of procedural safeguards. (*Id.* at 21.)

Defendants in addition to the insufficiency of the showing that plaintiff has a dire medical condition that justifies trial preferential setting, defendants claimed that scheduling the trial date within 120 days does not allow the parties sufficient time to complete the meaningful and legitimate discovery required for the defense of such a lawsuit.

> "We are aware that the provisions of ***Code of Civil Procedure*** section 36 are mandatory. (***Swaithes v. Superior Court*** (1989) 212 Cal.App.3d 1082.) We are also aware that ***Swaithes*** briefly indicates that this preference can operate to truncate the discovery rights of other parties. (Id., at p. 1085.) However, we are also aware that the due process implications of this approach have not yet been decided. (See ***Peters v. Superior Court*** (1989) 212 Cal.App.3d 218, 227.) In this case, we recognize that it may not be possible to bring the matter to trial within the technical limits of ***Code of Civil Procedure*** section 36, subdivision (f). However, defendant Esepenth has

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[36] "The application of section 36, subdivision (a), does not violate the power of trial courts to regulate the order of their business. Mere inconvenience to the court or to other litigants is irrelevant. (citation omitted.) Failure to complete discovery or other pretrial matters does not affect the absolute substantive right to trial preference for those litigants who qualify for preference under subdivision (a) of section 36. The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations. (citation omitted.) Accordingly, subdivision (a) of section 36 is mandatory and absolute in its application in civil cases whenever the litigants are 70 years old. (citation omitted.)
(***Swaithes v. Superior Court*** (1989) 212 Cal.App.3d 1082, 1085-1086.)

[37] ***Izaak*** discussed the ability of the trial courts to deny the preference statutes in the context of coordinated cases pursuant to California Rules of Court, rule 3.504.

not appeared before this court to argue the matter." (***Roe v. Superior Court*** (1990) 224 Cal.App.3d 642, 643, fn. 2.)

This Court recognizes the argument that the causes of action alleged here (elder abuse, negligence, violation of resident rights, wrongful death, survivorship) are complex and multifaceted. The due process arguments raised by the defendants are well taken by this Court.

C. The Right of the Defense to Bring a Motion for Summary Judgment.

The defense also argues that setting the matter within 120 days does not allow sufficient time for the filing and hearing on a motion for summary judgment. This Court finds it interesting that the defense believes it has a good motion for summary judgment while apparently not having completed discovery. This Court is further aware that by far and away, most summary judgment motions are denied.

Nevertheless, case law holds that the court is required to hear a timely motion for summary judgment notwithstanding the Court's motion reservation system. (***Wells Fargo Bank v. Superior Court*** (1989) 206 Cal.App.3d 918 (trial court may not "refuse to hear a summary judgment motion filed within the time limits of ***Code of Civil Procedure***, §437c); ***Sentry Insurance Co. v. Superior Court*** (1989) 207 Cal.App.3d 526, 529: trial court's refusal to hear timely motion for summary judgment overturned.)

If the defense were to file a motion for summary judgment today, the setting of a trial date could adversely affect the rights of the defendants to file a motion, whether meritorious or not.

It appears that at the present time no motion for summary judgment has been filed. Hopefully by now that defense is in a position to advise this Court on how their future motion for summary judgment is proceeding and when it will be filed.

D. Other Concerns.

The parties have not informed the Court about the status of discovery, what depositions have been taken, what depositions remain, whether there is going to be a request for a physical examination of anyone,[38] and the readiness of experts to complete work and be properly deposed.

All too often, this Court has granted a motion for preference and set a trial date, only to have the moving party and the defense to agree that more time is needed to conduct discovery.

C. Conclusion.

The motion of plaintiff for preferential trial setting is GRANTED. The parties should meet and confer and agree on a trial date on four months from today or thereabouts.

IV. Tentative Ruling and Hearing.

The Tentative Ruling was duly posted.

V. Case Management.

This hearing was continued to this date, 07 March 2023 at 9:00 AM in this Department, for further hearing on the motion. No party has filed supplemental papers.

A Case Management Conference is set for today at 10:00 AM and will be heard immediately following this motion.this Court would appreciate on an update concerning the status of discovery.

VI. Conclusion and Order.

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[38] This Court raises this point only because it has seen motions filed by defendants to examine a plaintiff in other preference motions.

The motion of plaintiff for preferential trial setting is GRANTED.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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