**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**

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

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

**DATE: May 23, 2024 TIME: 9:00 A.M.**

**RECORDING COURT PROCEEDINGS IS PROHIBITED**

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

**FOR ORAL ARGUMENT:** **Before 4:00 PM today you must notify the:**

**(1) Court by calling (408) 808-6856 and**

**(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling**

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

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

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

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

| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| 1-3 | 23CV415836 | Jin Zhang vs Zhichao Lu | The motion to quash and for joinder are DENIED. Please scroll to lines 1-3 for complete ruling. Court to prepare formal order.<br><br>Parties are ordered to appear for the case management conference, which the Court will conduct at 9 am. |
| 4 | 23CV426913 | Dorothy Boakye-Donkor et al vs Michael Merino | Merino's Demurrer is OVERRULED. Scroll to line 4 for complete ruling. Court to prepare formal order.<br><br>Plaintiffs filed this action on November 29, 2023 (pending in D20), just days after Defendant here filed a declaratory relief action on November 15, 2023 (Case No. 23CV426329, pending in D6). It so happens that the undersigned Court is covering both department 6 and 20's law & motion calendars today. These cases are based on identical facts and include the same parties and should be consolidated. The Court orders the parties to appear for argument on this issue. |
| 5-6 | 22CV39229 | First Street Holdings, LLC et al vs Ronald Werner | Timothy Bumb's motion for summary adjudication on plaintiffs' declaratory relief claim (the validity of certain acts) is DENIED. Scroll to line 5 for complete ruling. Court to prepare formal order.<br><br>Timothy Bumb's motion to compel and for sanctions is DENIED. Plaintiffs stated in meet and confer that they would supplement their responses to special interrogatories once they had additional information, and they have since done so. It appears to the Court that further, good faith meet and confer would have produced the same result. Accordingly, Timothy Bumb's motion is denied. Court to prepare formal order. |
| 7 | 22CV408126 | Brad Thomas et al vs Rita Lechleitner, MD et al | Palo Alto Medical Group, Inc.'s motion for summary judgment against Plaintiffs' Mahshad Damali and Brad Thomas' complaint is CONTINUED to August 22, 2024 at 9 a.m. in Department 20 Scroll to line 7 for complete ruling. Court to prepare formal order. |
| 8 | 23CV421638 | Jane Doe vs San Jose Open Bible Church et al | Plaintiff's Motion to Quash Defendant San Jose Open Bible Church's deposition subpoenas for medical records is GRANTED, IN PART. The Court finds the documents sought from medical providers Plaintiff identified as providing treatment for harm she experienced from the alleged abused are directly relevant to Plaintiff's claims. However, the abuse allegedly occurred from 2015-2016. And, while the Court can understand Defendant's request for some records before the alleged abuse to assess Plaintiff's assertion that the treatment became necessary as a result of such abuse, going back to 2009 is overbroad. Accordingly, San Jose Open Bible Church may obtain records from these providers for 2014 to the present. These records shall be produced pursuant to a protective order to maintain their confidentiality. Court to prepare formal order. |
| 9 | 22CV406413 | Fabricio German Cota vs Robbie Matar | Compromise of Minor's claim is approved. Court to use form of order on file. |

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|---|---|---|---|
| 10-11 | 22CV408722 | Theranos, LLC vs Elizabeth Holmes | Elizbeth Holmes' motions to set aside default and to dismiss are DENIED. The Court is unable to locate a notice of motion with this hearing date. The Code of Civil Procedure, Rules of Court, and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Although Defendant is self-represented, self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Defendant also fails to rebut the presumption of service contained in the process server's declaration, which states that Defendant was personally served with the summons and complaint before she was incarcerated. Where a defendant moves to quash based on improper service of the summons and complaint, the burden is on the plaintiff to prove the validity of service by a preponderance of the evidence. (See *Boliah v. Superior Court (Bijan Fragrances, Inc*.) (1999) 74 Cal.App.4th 984, 991.) Plaintiff's filing of a proof of service creates a rebuttable presumption that service was proper, so long as the proof of service complies with applicable statutory requirements. (*Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426, 1442; see also *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205; see also Evid. Code § 647; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750 (a registered process server's declaration of service establishes a presumption that the facts stated in the declaration are true; *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 414-413 (where a defendant challenges the court's personal jurisdiction on the ground of improper service of process, the plaintiff has the burden of proving the facts required for effective service.) Defendant fails to overcome this presumption, and her motions are therefore DENIED. Court to prepare formal order. Parties are ordered to appear for argument. |
| 12 | 23CV421976 | Community Education Foundation, a Delaware Corporation vs George Eshoo et al | This motion is CONTINUED to June 20, 2024 at 9 a.m. in department 20 to be heard with Defendants' motion to increase and substitute undertaking for property. |
| 13 | 23CV428385 | Soulbrain CA, LLC et al vs Seung Pyo (Dominic) Lee et al | Min K. Chai's motion to be relieved as counsel for Defendant Interstellar CA Corp. is GRANTED. A company, regardless of corporate form, cannot represent itself in civil litigation in California. (See *Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 ("[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent."); *Ferruzzo v. Superior Court* (1980) 104 Cal. App. 3d 501, 503 ("The rule is clear in this state that, with the sole exception of small claims court, a corporation cannot act in propria persona in a California state court."); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978)21 Cal. 3d 724, 727 ("the Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record in behalf of another person, including a corporate entity.") Accordingly, if a substitution of counsel is not filed by the next court date set for January 9, 2025, at 10:00 a.m. in Department 20, Interstellar CA Corp. is ordered to appear and show cause why its answer should not be stricken and default be entered against it for failure to obtain counsel. Court to use proposed order on file. |

**Calendar Line 1**
**Case Name:** *Jin Zhang v. Hefei Reliance Memory Ltd., et al.*
**Case No.:** 23CV415836

Before the Court is specially appearing defendants Hefei Reliance Memory Ltd. and Hefei Ruibo Enterprise Consulting Management LLP's motion to quash service of summons. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

## I. Factual and procedural background.

According to the allegations of the First Amended Complaint ("FAC"), "this action seeks to remedy the fraudulent and … unlawful practices of defendant Hefei Reliance Memory Ltd. ("Reliance Memory PRC"), Reliance Memory Inc. ("Reliance Memory US"), Hefei Ruibo Enterprise Consulting Management LP ("HRECM") (collectively, Reliance Memory PRC, Reliance Memory US, and HRECM are hereafter referred to as the "Company"), and Zhichao Lu ("Lu") (collectively, defendants Company and Lu are hereafter referred to as "Defendants")." (FAC, ¶1.)

Plaintiff Jin Zhang ("Plaintiff") started working for Defendants on December 28, 2017 and was employed as defendant Company's general counsel from May 3, 2018 to May 30, 2021, and continued providing services until June 2, 2021. Defendant Lu induced Plaintiff to leave her employment at Marvell to work for him and defendant Company based upon a promise of millions of dollars in equity compensation which they continue to deny Plaintiff. (*Id*,) Additionally, after Plaintiff joined the employ of Defendants, Defendants engaged in further unlawful conduct including seeking to compel Plaintiff to forfeit earned wages and committing sexual harassment against Plaintiff and other female employees. (*Id.*) Plaintiff opposed such unlawful conduct, and the Company retaliated against Plaintiff by attempting to silence her and force her to waive her rights, reducing her job responsibilities, cutting off her benefits, wrongfully terminating her employment, and withholding her earned equity wages. (*Id.*)

On May 2, 2023, Plaintiff filed a complaint against Defendants.

On July 17, 2023, defendant Lu filed an answer to Plaintiff's complaint.

On July 18, 2023, defendants Reliance Memory PRC and Reliance Memory US jointly filed a motion to quash service of summons based upon defective service.

On August 2, 2023, defendant HRECM also filed a motion to quash service of summons based on defective service.

On August 24, 2023, defendant Lu filed a motion to dismiss or alternatively stay for *forum non conveniens*.

On November 30, 2023, the court (Hon. Frederick S. Chung) issued an order granting the motions to quash service of summons by defendants Reliance Memory PRC, Reliance Memory US, and HRECM.

On February 20, 2024, defendants Reliance Memory PRC and HRECM filed the motion now before the court, a motion to quash service of summons for lack of personal jurisdiction.

On March 29, 2024, this court issued an order denying defendant Lu's motion to dismiss or alternatively stay for *forum non conveniens*.[1]

On April 24, 2024, the court issued an order granting Plaintiff leave to file a FAC.

On April 19, 2024, Plaintiff filed the operative FAC which asserts causes of action for:

(1) Breach of Contract

(2) Breach of the Covenant of Good Faith and Fair Dealing

(3) Promissory Estoppel

(4) Unjust Enrichment/ Quantum Meruit

(5) Nonpayment of Wages Owed Upon Separation from Employment, Labor Code §201(a)

(6) Fraudulent Inducement

(7) Intentional Misrepresentation

(8) Negligent Misrepresentation

(9) Concealment

(10) Intentional Interference with Contractual Relations

(11) Retaliation, Gov. Code §12940(h)

(12) Retaliation, Lab. Code §1102.5(b)

(13) Retaliation, Lab. Code §98.6(a)

(14) Wrongful Termination in Violation of Public Policy

[1] On the same date the court issued its order, defendant Reliance Memory US filed a joinder in defendant Lu's motion to dismiss or stay action for *forum non conveniens* and taken under submission on 22 February 2024. Initially, the court notes that the joinder is untimely and does not provide Plaintiff with adequate notice. Secondly, even if considered, the court has already denied defendant Lu's motion to dismiss or stay and thus, defendant Reliance Memory US's joinder thereto is also denied.

(15) Unfair Competition

**II. Analysis.**

**A. Specially Appearing Defendant HRECM's motion to quash service of summons is GRANTED.**

Code of Civil Procedure section 418.10, subdivision (a)(1) states, in pertinent part, "A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her."

"Although the defendant is the moving party, the burden of proof is on the plaintiff." (Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶3:384, p. 3-112 citing *Floveyor International, Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 793 (*Floveyor*), et al.) "When jurisdiction is challenged by a nonresident defendant, the burden of proof is on the plaintiff to demonstrate that sufficient 'minimum contacts' exist between the defendant and the forum state to justify imposition of personal jurisdiction." (*Sibley v. Superior Court* (1976) 16 Cal.3d. 442, 445.) "[T]he burden of proof is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence." (*Evangelize China Fellowship, Inc. v. Evangelize China Fellowship, Hong Kong* (1983) 146 Cal.App.3d 440, 444; *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062 (*Snowney*); *HealthMarkets, Inc. v. Superior Court* (2009) 171 Cal.App.4th 1160, 1167-1168 (*HealthMarkets*); *In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 110.) The burden must be met by competent affidavits containing specific evidentiary facts or authenticated documentary evidence, not by allegations of an unverified complaint. (*In re Automobile Antitrust Cases I and II*, at p. 110.) If plaintiffs satisfy that burden, the burden shifts to the defendant to show the exercise of jurisdiction would be unreasonable. (*HealthMarkets*, at p. 1168; *Snowney*, at p. 1062.)

As it is Plaintiff's burden to establish jurisdiction, the court looks first at Plaintiff's opposition papers. Plaintiff's opposition only argues in support of establishing jurisdiction against defendant Reliance Memory PRC. As to defendant HRECM, Plaintiff states in a footnote, in relevant part, "Plaintiff does not oppose dismissal of Defendant Hefei Ruibo Enterprise Consulting Management

LLP."[2] With no request for dismissal being on file, the court will treat the absence of any argument concerning defendant HRECM as Plaintiff's failure to meet its burden of establishing jurisdiction.

Accordingly, specially appearing defendant HRECM's motion to quash service of summons for lack of personal jurisdiction is GRANTED.

**B. Specially Appearing Defendant Reliance Memory PRC and Limited Partnership's motion to quash service of summons is DENIED.**

"California courts may exercise personal jurisdiction on any basis consistent with the Constitution of California and the United States. [Citation.] The exercise of jurisdiction over a nonresident defendant comports with these Constitutions "if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate ' "traditional notions of fair play and substantial justice." [Citations.] [¶] 'The concept of minimum contacts ... requires states to observe certain territorial limits on their sovereignty. It "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." [Citation.] To do so, the minimum contacts test asks 'whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense in that State.' [Citation.] The test 'is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present.' " (*Snowney*, *supra*, 35 Cal.4th at pp. 1061-1062 (some internal quotations omitted).)

> Pursuant to Code of Civil Procedure section 410.10, California's long-arm statute: "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." The long-arm statute "manifests an intent to exercise the broadest possible jurisdiction," limited only by constitutional considerations of due process. (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445, [128 Cal. Rptr. 34, 546 P.2d 322]; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 (Vons), [58 Cal. Rptr. 2d 899, 926 P.2d 1085].) The general rule is that a state may exercise personal jurisdiction

[2] See fn. 1 of Plaintiff's Opposition to Defendant Hefei Reliance Memory Ltd's Motion to Quash Service of Summons ("Plaintiff's Opposition").

over a nonresident defendant "if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate "traditional notions of fair play and substantial justice." (*Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 444, quoting *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 326, [90 L. Ed. 95, 66 S. Ct. 154].) Stated another way, "the forum state may not exercise jurisdiction over a nonresident unless his [or her] relationship to the state is such as to make the exercise of such jurisdiction reasonable." (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147, [127 Cal. Rptr. 352, 545 P.2d 264].) As these tests suggest, the question of jurisdiction cannot be answered by the application of precise formulas or mechanical rules. Each case must be decided on its own facts. (*Id.* at p. 150.)

Personal jurisdiction may be either general or specific. (*Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984) 466 U.S. 408, 414-415, [80 L. Ed. 2d 404, 104 S. Ct. 1868]; *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 445.) General jurisdiction may lie for all purposes if a defendant has established a presence in the forum state by virtue of activities in the state which are "extensive or wide-ranging" (*Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 898-899, [80 Cal. Rptr. 113, 458 P.2d 57]) or "substantial . . . continuous and systematic." (*Cornelison v. Chaney*, *supra*, 16 Cal.3d at p. 148.) In such a case a defendant's contacts "take the place of physical presence in the forum as a basis for jurisdiction." (*Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 446.)

(*Integral Development Corp. v. Weissenbach* (2002) 99 Cal.App.4th 576, 583 – 584 (*Integral*).)

**1. General jurisdiction.**

A defendant whose contacts with a state are "substantial" or "continuous and systematic" can be hauled into court in that state in any action, even if the action is unrelated to those contacts. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415, 80

> L. Ed. 2d 404, 104 S. Ct. 1868 (1984). This is known as general jurisdiction. The standard for establishing general jurisdiction is "fairly high," *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986), and requires that the defendant's contacts be of the sort that approximate physical presence. See *Gates Lear Jet Corp. v. Jensen*, 743 F.2d 1325, 1331 (9th Cir. 1984). Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there. See *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1478 (9th Cir. 1986).

(*Bancroft & Masters, Inc. v. Augusta Nat'l Inc.* (9th Cir. 2000) 223 F.3d 1082, 1086; see also *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 536 (*Sonora*).)

"We start with the firm proposition that neither ownership nor control of a subsidiary corporation by a foreign parent corporation, without more, subjects the parent to the jurisdiction of the state where the subsidiary does business." (*Sonora*, *supra*, 83 Cal.App.4th at p. 540.) By Plaintiff's own allegation, Reliance Memory PRC is incorporated in China and wholly owns a subsidiary California corporation, defendant Reliance Memory US. (FAC, ¶¶18 – 19.) Under *Sonora*, ownership alone is insufficient to subject defendant Reliance Memory PRC to general jurisdiction in California. [3]

**a. Substantial or systematic and continuous contact.**

Plaintiff contends Reliance Memory PRC is subject to general jurisdiction because it has had sufficient contact with California. Plaintiff's counsel submits a declaration stating that "Plaintiff conducted a search on the official website of the United States Patent and Trademark Office" which showed that Rambus, Inc. ("Rambus"), a United States public company headquartered in San Jose, assigned 66 patents to defendant Reliance Memory PRC.[4] Even if credited, the evidence does not establish Reliance Memory PRC's affirmative contact with California. Exhibit H of Plaintiff's counsel's

[3] Plaintiff alleges Reliance Memory PRC and Reliance Memory US are separate and distinct entities. However, Plaintiff does not aid this court when it refers to the two entities jointly as "Reliance Memory." See page 4, line 21 of Plaintiff's Opposition.

[4] See ¶¶21 – 23 to the Declaration of Qiaojing Zheng in Support of Plaintiff's Opposition, etc. ("Declaration Zheng").

declaration is purportedly a true and correct copy of the assignment agreement by Rambus to Reliance Memory PRC but it does not indicate where such agreement was executed.

Plaintiff also offers her own declaration for the assertion that the patents were "used by Reliance Memory PRC in its business and product development efforts."[5] This statement is insufficient to establish that defendant Reliance Memory PRC had any substantial or systematic and continuous contacts with California.

Next, Plaintiff again points to her own declaration in which she states: "From 2018 to 2019, Rambus also designated a laboratory and conference room in its office building in Sunnyvale for Reliance Memory PRC's … use. Under this arrangement, [defendant] Lu and I met and worked there frequently." The court finds this statement too vague to support a finding of substantial or systematic and continuous contact.

Finally, Plaintiff proffers her declaration that Dr. Zhiqiang Wei, a highly experienced engineering professional, "worked for Reliance Memory full-time while being employed by Rambus. … Essentially, Rambus loaned one of its prominent employees to Reliance Memory."[6] Plaintiff's use of "Reliance Memory" to refer jointly to Reliance Memory PRC and Reliance Memory US renders this statement too vague.

It is plaintiff's burden to establish jurisdiction with specific evidentiary facts and authenticated documentary evidence. Plaintiff has not met this burden.

**b. Alter ego.**

Alternatively, Plaintiff argues Reliance Memory US is the alter ego of Reliance Memory PRC, and Reliance Memory US's presence in California must be attributed to Reliance Memory PRC, "so that in legal effect [Reliance Memory PRC] was a California corporation engaged in an ongoing California business and subject to the general jurisdiction of the California courts." (*Sonora*, *supra*, 83 Cal.App.4th at p. 537.)

> Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations.

[5] See ¶23 to the Declaration of Jin Zhang in Support of Plaintiff's Opposition, etc. ("Declaration Zhang").
[6] See ¶30 to the Declaration Zhang.

(*Wenban Estate, Inc. v. Hewlett* (1924) 193 Cal. 675, 696 [227 P. 723]; *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal. App. 4th 980, 993 [41 Cal. Rptr. 2d 618]; *Robbins v. Blecher* (1997) 52 Cal. App. 4th 886, 892 [60 Cal. Rptr. 2d 815].) A corporate identity may be disregarded--the "corporate veil" pierced--where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. (*Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal. App. 3d 405, 411 [93 Cal. Rptr. 338].) Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. (*Robbins v. Blecher*, *supra*, 52 Cal. App. 4th at p. 892; *Communist Party v. 522 Valencia, Inc.*, *supra*, 35 Cal. App. 4th at pp. 993-994.) The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal. App. 2d 825, 842 [26 Cal. Rptr. 806].)

In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. (*Automotriz etc. De California v. Resnick* (1957) 47 Cal. 2d 792, 796 [306 P.2d 1, 63 A.L.R.2d 1042]; *Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal. App. 3d 1351, 1358 [251 Cal. Rptr. 859]; *Alberto v. Diversified Group, Inc.*, *supra*, 55 F.3d at p. 205; *Calvert*, *supra*, 875 F. Supp. at p. 678.) "Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of

> the other." (*Roman Catholic Archbishop v. Superior Court, supra,* 15 Cal. App. 3d at pp. 406, 411; *Associated Vendors, Inc. v. Oakland Meat Co., supra,* 210 Cal. App. 2d at pp. 838-839.) Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. (See *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal. App. 4th 1269, 1285 [31 Cal. Rptr. 2d 433]; *Associated Vendors, Inc. v. Oakland Meat Co., supra,* 210 Cal. App. 2d at pp. 838-839; *Alberto v. Diversified Group, Inc., supra,* 55 F.3d at p. 205.) No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. (*Talbot v. Fresno-Pacific Corp.* (1960) 181 Cal. App. 2d 425, 432 [5 Cal. Rptr. 361].) Alter ego is an extreme remedy, sparingly used. (*Calvert, supra,* 875 F. Supp. at p. 678.)

(*Sonora, supra,* 83 Cal.App.4th at pp. 538-539.)

Plaintiff proffers evidence which she suggests support a finding that "a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist." However, an alter ego finding also requires "an inequitable result if the acts in question are treated as those of the corporation alone." Just as in *Sonora*,

> at least one of the two essential elements of the alter ego doctrine was not established; there was no evidence of any wrongdoing by either Diamond or Sonora Mining or any evidence of injustice flowing from the recognition of Sonora Mining's separate corporate identity. Without such evidence, the alter ego doctrine cannot be invoked.

(*Id.* at p. 539.)

Plaintiff here fails to show any wrongdoing by either Reliance Memory PRC or Reliance Memory US.[7] It is not enough for Plaintiff to rely on the allegations of her FAC. (*Id.* at p. 540 ("The District is plainly wrong to the extent it claims the inclusion in a complaint of alter ego allegations

[7] Although Plaintiff includes in her declaration statements concerning a termination [subsequently revoked], a reduction in her job responsibilities, and a change in her salary payment structure following Plaintiff's complaint(s) of sexual harassment, Plaintiff has not submitted any admissible evidence of a causal nexus between her complaints and these employment actions. (See ¶¶25-27 of the Declaration Zhang.) Temporal proximity is insufficient to establish a causal nexus. (See *Loggins v. Kaiser Permanente International* (2007) 151 Cal.App.4th 1102, 1112.) Plaintiff's subjective belief that there is a causal nexus is speculative. (Cf. *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 ("Speculation cannot be regarded as substantial responsive evidence.)

automatically gives the trial court jurisdiction over the defendant against whom such allegations are directed. …the plaintiff, in opposing the defendant's motion to quash, must present evidence to justify a finding that the requisite jurisdictional minimum contacts exist.")

**c. Agency/ Representative services doctrine.**

Plaintiff alternatively argues, agency may confer general jurisdiction in the forum state over a foreign corporation.

> The relationship of owner to owned contemplates a close financial connection between parent and subsidiary and a certain degree of direction and management exercised by the former over the latter. (*Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc.*, *supra*, 206 Cal. App. 3d at p. 9; *Calvert*, *supra*, 875 F. Supp. at pp. 678-679.)
>
> However, the case law identifies one situation when the acts of the parent may be found to trespass the boundaries of legitimate ownership and control of the subsidiary and expose the parent to the power of the state in which the subsidiary does business. Thus, where the nature and extent of the control exercised over the subsidiary by the parent is so pervasive and continual that the subsidiary may be considered nothing more than an agent or instrumentality of the parent, notwithstanding the maintenance of separate corporate formalities, jurisdiction over the parent may be grounded in the acts of the subsidiary/agent. (*Clark*, *supra*, 811 F. Supp. 1061, 1067.) In this instance, the question is not whether there exists justification to disregard the subsidiary's corporate identity, the point of the alter ego analysis, but instead whether the degree of control exerted over the subsidiary by the parent is enough to reasonably deem the subsidiary an agent of the parent under traditional agency principles. [Footnote.] (*Ibid*.) The jurisdiction acquired by the forum state under this rationale is general. (*Ibid.*)
>
> Control is the key characteristic of the agent/principal relationship. (*Cislaw v. Southland Corp.* (1992) 4 Cal. App. 4th 1284, 1292-1296 [6 Cal. Rptr. 2d 386].) Accordingly, if a parent corporation exercises such a degree of control over its subsidiary corporation that the subsidiary can legitimately be described as only a means through which the parent

acts, or nothing more than an incorporated department of the parent, the subsidiary will be deemed to be the agent of the parent in the forum state and jurisdiction will extend to the parent. (See *Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc.*, *supra*, 206 Cal. App. 3d at p. 9; *Kramer Motors, Inc. v. British Leyland, Ltd.* (9th Cir. 1980) 628 F.2d 1175, 1177; *Escude Cruz v. Ortho Pharmaceutical Corp.*, *supra*, 619 F.2d at p. 905; *Calvert*, *supra*, 875 F. Supp. 674; Clark, supra, 811 F. Supp. at p. 1067; *Gallagher v. Mazda Motors of America, Inc.* (E.D.Pa. 1992) 781 F. Supp. 1079, 1083-1084 (*Gallagher*); *Bellomo v. Pennsylvania Life Co.* (S.D.N.Y. 1980) 488 F. Supp. 744 (*Bellomo*).)

The nature of the control exercised by the parent over the subsidiary necessary to put the subsidiary in an agency relationship with the parent must be over and above that to be expected as an incident of the parent's ownership of the subsidiary and must reflect the parent's purposeful disregard of the subsidiary's independent corporate existence. (See *Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc.*, *supra*, 206 Cal. App. 3d at p. 9.) The parent's general executive control over the subsidiary is not enough; rather there must be a strong showing beyond simply facts evidencing "the broad oversight typically indicated by [the] common ownership and common directorship" present in a normal parent-subsidiary relationship. (*Calvert*, *supra*, 875 F. Supp. at p. 679; see also *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, *supra*, 556 F.2d at pp. 419-420 and numerous federal cases cited therein.) As a practical matter, the parent must be shown to have moved beyond the establishment of general policy and direction for the subsidiary and in effect taken over performance of the subsidiary's day-to-day operations in carrying out that policy. (*Calvert*, *supra*, 875 F. Supp. at p. 679; see also *Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc.*, *supra*, 206 Cal. App. 3d at p. 9; *American Intern. Airways v. Kitty Hawk Group* (E.D.Mich. 1993) 834 F. Supp. 222, 225; *Bellomo, supra*, 488 F. Supp. at p. 745.)

(*Sonora*, *supra*, 83 Cal.App.4th at pp. 541-542.)

General "jurisdiction [has been found] appropriate [when] the foreign parent corporation permitted the subsidiary to perform acts in the forum state that the parent would otherwise have had to perform itself as a part of the parent's expected business operations. … A foreign corporation is doing business in [the forum state] . . . when its [forum state] representative provides services beyond 'mere solicitation' and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." (*Id.* at pp. 542-543; citations and footnotes omitted.)

The "representative services" doctrine … supports the exercise of jurisdiction when the local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's *own* business, but the doctrine does not support jurisdiction where the parent is merely a holding company whose only business pursuit is the investment in the subsidiary." (*Id.* at p. 543; italics original.)

In support of application of this "representative services" doctrine, Plaintiff cites to her own declaration where she states, "Reliance Memory US executed numerous contracts and entered into transactions with U.S.-based partners and vendors on behalf of Reliance Memory PRC. While Reliance Memory US was the signatory to these contracts, Reliance Memory PRC handled the actual transactions and matters with these business partners and vendors."[8] The court finds this evidence lacking in foundation, not sufficiently specific, and too conclusory to support a finding that the representative services doctrine applies here.

Plaintiff also points to her own declaration to support an assertion that Reliance Memory PRC share numerous key employees.[9] Even so, the *Sonora* court held, "that the directors and officers were interlocking is insufficient to rebut the presumption that each common officer or director wore the appropriate 'hat' when making corporate and operational decisions for the respective entities." (*Id.* at p. 549.)

> The District maintains that the existence of common officers and directors between the two corporations supports the trial court's assumption of jurisdiction. The law is

[8] See ¶38 to the Declaration Zhang.
[9] See ¶¶34 – 37 to the Declaration Zhang.

> otherwise. It is considered a normal attribute of ownership that officers and directors of the parent serve as officers and directors of the subsidiary. (*United States v. Bestfoods* (1998) 524 U.S. 51, 69 [118 S. Ct. 1876, 1888, 141 L. Ed. 2d 43, 157 A.L.R. Fed. 735]; *AT&T*, *supra*, 94 F.3d at p. 591; *Calvert*, *supra*, 875 F. Supp. at p. 678.) "It is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose ]the parent corporation to liability for its subsidiary's acts. [Citations.] [P] This recognition that the corporate personalities remain distinct has its corollary in the well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do "change hats" to represent the two corporations separately, despite their common ownership. [Citations.]" (*United States v. Bestfoods*, *supra*, 524 U.S. at p. 69 [118 S. Ct. at p. 1888].)

(*Sonora*, *supra*, 83 Cal.App.4th at pp. 548-549 (some internal quotations omitted.)

Plaintiff has not met her evidentiary burden to establish that Reliance Memory PRC permitted Reliance Memory US to perform acts in California that Reliance Memory PRC would otherwise have had to perform itself as a part of Reliance Memory PRC's expected business operations. Thus, Plaintiff fails to establish general jurisdiction against defendant Reliance Memory PRC.

**2. Specific jurisdiction.**

> If a nonresident defendant's activities in the state are not sufficient to allow the forum state to exercise general jurisdiction for all purposes, the state may nonetheless exercise specific jurisdiction "if the defendant has purposefully availed himself or herself of forum benefits (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472-473, [85 L. Ed. 2d 528, 105 S. Ct. 2174]) and the 'controversy is related to or "arises out of" a defendant's contacts with the forum.' (*Helicopteros Nacionales De Columbia v. Hall*, *supra*, 466 U.S. at p. 414) (*Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 446.) Once a court decides that a defendant has purposefully established contacts with the forum state and that plaintiff's cause of action arose out of those forum-related contacts, the final step in the analysis involves balancing the convenience of the parties and the interests of the state in order to determine whether the exercise of personal jurisdiction is

fair and reasonable under all of the circumstances. (*Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at pp. 477-478; *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at pp. 447-448.)

(*Integral, supra*, 99 Cal.App.4th at pp. 583 – 584.)

**a. Purposeful availment.**

"The non-resident defendant must have purposefully directed its activities at forum residents, or purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of local law." (Weil & Brown (CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2010) at ¶3:226, p. 3-64 citing *Hanson v. Denckla* (1958) 357 U.S. 235, 253; *Vons*, *supra*, 14 Cal.4th at p. 446.) "Purposeful availment exists where the defendant purposefully and voluntarily directs its activities toward the forum state in an effort to obtain a benefit from that state." (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1067.)

" 'The purposeful availment inquiry … focuses on the defendant's intentionality. [Citation.] This prong is only satisfied when the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on' his contacts with the forum. [Citation.] Thus, the 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts [citations], or of the 'unilateral activity of another party or a third person.' [Citations.]" (*Elkman v. National States Ins. Co.* (2009) 173 Cal.App.4th 1305, 1317.)

"'Purposeful availment' requires that the defendant 'have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.' [Citation.] A contract with an out-of-state party does not automatically establish purposeful availment in the other party's home forum. [Citations.] Rather, a court must evaluate the contract terms and the surrounding circumstances to determine whether the defendant purposefully established minimum contacts within the forum. Relevant factors include prior negotiations, contemplated future consequences, the parties' course of dealings, and the contract's choice-of-law provision. [Citation.]" (*Stone v. Texas* (1999) 76 Cal.App.4th 1043, 1048 (*Stone*).) "'[W]ith respect to interstate contractual obligations . . . parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another

state" are subject to . . . sanctions in the other State for the consequences of their activities.' [Citations.] Due process requires a 'substantial connection' between the contract at issue and the forum state." (*Stone, supra,* 76 Cal.App.4th at pp. 1048 – 1049.)

Here, defendant Reliance Memory PRC admits it entered an employment agreement with Plaintiff, a United States citizen and California resident.[10] Except for "occasional, sporadic work trips to Hefei, China between June 2018 and August 2019," Plaintiff performed her work for defendant Reliance Memory PRC in California.[11] According to Plaintiff, defendants Lu and Reliance Memory PRC contemplated Plaintiff would be employed in California and perform the vast majority of her job duties in California and her work relied heavily upon her expertise as a United States patent attorney.[12]

Defendant Reliance Memory PRC's points out that its agreement includes a provision which states that it "shall be governed by and construed in accordance with all relevant, and applicable, laws, decrees, rules and regulations of the [People's Republic of China]."[13] The agreement also includes a provision which states, "If any labor dispute arises between the Employer and the Employee which cannot be resolved by negotiation, the dispute shall be resolved in accordance with the Law of [People's Republic of China] on Mediation and Arbitration of Labor Disputes."[14]

Apart from the choice-of-law provisions, the employment agreement between Plaintiff and defendant Reliance Memory PRC is distinguishable from the one in *Stone, supra,* 76 Cal.App.4th 1043. In *Stone,* the plaintiff was required to work and reside in Texas and was suing on his third one-year employment agreement, not on the first contract that gave rise to the plaintiff's initial recruitment from California. Here, the court finds defendant PRC did reach out to create a continuing relationship and obligations by entering into an employment agreement with a California citizen/resident and, thus, has engaged in purposeful availment.

**b. Claim arising from Defendant's forum-related activity.**

[10] See ¶¶8, 13, 14, 19, 21 of the Declaration Zhang; see also ¶8 and Exh. 1 to the Declaration of Zhichao Lu in Support of Defendant Zhichao Lu's Motion to Dismiss, etc. ("Declaration Lu").
[11] See ¶¶19 and 21 of the Declaration Zhang.
[12] See ¶¶22 and 23 of the Declaration Zhang.
[13] See Exh. 1 to the Declaration Lu.
[14] *Id.*

The next element required to establish specific jurisdiction against an out-of-state defendant is that "the controversy is related to or arises out of the defendant's contacts with the forum." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269.) The controversy here involves a breach of the very employment contract that defendant Reliance Memory PRC entered with the Plaintiff. Defendant Reliance Memory PRC admits[15] the agreement includes a provision requiring Reliance Memory PRC to transfer some equity interest in defendant HRECM to Plaintiff. In moving to quash, Defendant contends performance of this provision is impossible and even if it were possible, the provision does not create a continuing relationship or ongoing obligation. This controversy is related to and/or arises out of the employment agreement between Plaintiff and defendant Reliance Memory PRC.

**c. Reasonableness.**

"[T]he plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction." (*Vons, supra,* 14 Cal. 4th at p. 449.) If the plaintiff meets this initial burden, then the defendant has the burden of demonstrating "that the exercise of jurisdiction would be unreasonable." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 273.) Once a court decides that a defendant has purposefully established contacts with the forum state and that plaintiff's cause of action arose out of those forum-related contacts, the final step in the analysis involves balancing the convenience of the parties and the interests of the state to determine whether the exercise of personal jurisdiction is fair and reasonable under all of the circumstances. (*Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at pp. 477-478; *Vons Companies, Inc. v. Seabest Foods, Inc., supra,* 14 Cal.4th at pp. 447-448.)

> "The 'minimum contacts' doctrine provides no mechanical yardstick. Rather, personal jurisdiction depends on the facts of each case … the test being whether, under those facts, California has a sufficient relationship with the defendant and the litigation to make it reasonable ('fair play') to require him or her to defend the action in California courts. The following factors are usually considered:
>
> • The extent to which the lawsuit relates to defendant's activities or contacts with California;
>
> • The availability of evidence, and the location of witnesses;

[15] See page 14, line 27 to page 15, line 2 of the MPA ISO Motion to Quash Service of Summons and Complaint.

- The availability of an alternative forum in which the claim could be litigated (defendant's amenability to suit elsewhere);
- The relative costs and burdens to the litigants of bringing or defending the action in California rather than elsewhere; and
- Any state policy in providing a forum for this particular litigation (e.g., protection of California resident, or assuring applicability of California law)."

(Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶3:205, pp. 3-69 to 3-70 citing *World-Wide Volkswagen*, *supra*, 444 U.S. at p. 292.)

Reliance Memory PRC argues the exercise of jurisdiction here would be unreasonable because it is a Chinese company located in China, involves shares of a Chinese company (HRECM) owned by defendant Lu who primarily resides in China and all the documents/ witnesses, with the exception of Plaintiff, reside in China and it would be a burden for them to travel and participate in this lawsuit.[16]

Even if this court accepts Reliance Memory PRC's assertion that relevant witnesses are located outside of California, there is no evidence quantifying the associated costs of litigating in California and thus no basis for the court to measure/ balance the reasonableness or unreasonableness of litigating elsewhere. Consequently, Defendant Reliance Memory PRC has not met its burden of demonstrating "that the exercise of jurisdiction would be unreasonable."

For all the reasons discussed above, specially appearing defendant Reliance Memory PRC's motion to quash service of summons for lack of personal jurisdiction is DENIED.

[16] See ¶¶16 and 17 of the Declaration Lu.

**Calendar Line 4**
**Case Name:** *Dorothy Boakye-Donkor, et al. v. Michael Merino, et al.*
**Case No.:** 23CV426913

Before the Court is defendant Michael Merino's general and special demurrer on unverified complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

## I. Factual and procedural background.

Plaintiffs Dorothy Boakye-Donkor and Rattana Kim (collectively, "Plaintiffs") and defendant Michael Merino are co-owners of a certain property located at 950 South Wolfe Road in Sunnyvale ("Property"). (Complaint, ¶4.) A fourth owner, LeeNette Merino, is not a party to this action. (*Id.*) Each co-owner owns 25% of the Property. (*Id.*) Plaintiff Kim acquired her interest from Nanor Balabanian. (*Id.*)

On or about May 14, 2018, Merino, LeeNette Merino, Donkor, and Balabanian purchased the Property. (Complaint, ¶1.)[17] As part of this purchase, the parties entered a Tenancy in Common Agreement ("Agreement") on May 14, 2018 regarding the Property. (Complaint, ¶1 and Exh. A.) On or around May 1, 2019, Balabanian sold her share of the Property to plaintiff Kim. (Complaint, ¶2.) Pursuant to the Agreement, all original owners and their assigns agreed to grant each other reciprocal options to purchase another owner's share in the Property if two owners wished to improve the Property and one of the other two owners did not ("Option"). (Complaint, ¶3 and Exh. A.)

On or about October 20, 2019, Plaintiffs and LeeNette Merino voted to develop the Property with SM2design, Inc. and presented defendant Merino with a Professional Services Agreement which Merino refused to sign. (Complaint, ¶5.)

On August 2, 2023, pursuant to the Agreement, Plaintiffs timely and properly exercised the Option to purchase the Property. (*Id.*) On or around August 28, 2023, Plaintiffs sent a request to Merino to begin the process of determining the value of Merino's share, but Merino refused to participate in this process. (*Id.*) Plaintiffs then sent Merino an offer to purchase his share of the Property for $129,961.20 which was based on an analysis by Cici Wang, the real estate agent originally used by the parties to purchase the Property. (*Id.*) Merino ignored this offer. (*Id.*)

[17] Plaintiffs began re-numbering the paragraphs of the complaint after numbering the first five paragraphs.

On November 29, 2023, Plaintiffs filed a complaint against defendant Merino asserting specific performance and breach of contract. This is just days after Merino filed a declaratory relief action against Plaintiffs on November 15, 2023 (Santa Clara County Case No. 23CV426329), in which case Defendants there (Plaintiffs here) seek trial preference since only a declaratory judgment claim is asserted.

On 22 February 2024, defendant Merino filed the motion now before the court, a general and special demurrer to Plaintiffs' complaint.

## II. Analysis.

### A. Merino's demurrer to the second cause of action [breach of contract] of Plaintiffs' complaint is OVERRULED.

Plaintiffs' second cause of action for breach of contract alleges Merino "breached the TIC Agreement by failing to participate in the valuation of his interest in the Property and to sell his interest in the Property to the Plaintiffs." (Complaint, ¶15.)

"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.)

Merino demurs to Plaintiffs' second cause of action on the basis that he cannot be in breach of the Agreement as alleged because the Agreement, a copy of which is attached to the Plaintiffs' complaint, includes a provision in which the parties waived the right to compel any sale of the Property. Merino cites the general principle that, "facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence." (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1145-1146; see also *Holland v. Morse Diesel International, Inc.* (2001) 86 Cal.App.4th 1443, 1447, superseded on other grounds as stated in *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 521.) The provision of the Agreement Merino relies on states:

> ***Each of the Tenants in Common irrevocably waives any and all right that he may have to*** maintain an action for partition with respect to his undivided interest in the Property or

> to ***compel any sale thereof*** under any applicable laws now existing or subsequently entered.

(Complaint, Exh. A; emphasis added.)

> The Agreement also includes the following language:
>
> Any improvement, sale, or mortgaging of the Property may be made only of the entire Property and then only upon the written consent of all Tenants in Common. However, if two (2) of the Tenants in Common vote to improve, sell or mortgage the Property, said two (2) may acquire the interest of the remaining Tenant in Common by paying him the computed value.

(Complaint, Exh. A.)

It appears this is this Agreement language Plaintiffs alleged Merino breached. Plaintiffs' reliance on and interpretation of this language does not place a clearly erroneous construction of the Agreement and so the court will accept Plaintiffs' allegations as to the meaning of the Agreement. (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239 ("Where a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible. While plaintiff's interpretation of the contract ultimately may prove invalid, it was improper to resolve the issue against her solely on her own pleading. In ruling on a demurrer, the likelihood that the pleader will be able to prove his allegations is not the question."

Alternatively, Merino contends the relief Plaintiffs seek in this second cause of action would infringe on the restraining orders automatically imposed when Merino file for marital dissolution from LeeNette Merino.[18] The restraining order prohibits Merino from "transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, … without the written consent of the other party or an order of the court." The restraining order does not preclude

[18] Defendant Merino's request for judicial notice is GRANTED. Evidence Code section 452, subdivision (d) states that the court may take judicial notice of "[r]ecords of any court of this state." This section of the statute has been interpreted to mean that the trial court may take judicial notice of the existence of the court's own records. Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Woodell* (1998) 17 Cal.4th 448, 455.)

Plaintiffs from pursuing their claim for breach of contract/specific performance, since a transfer of the Property, should the Plaintiffs ultimately prevail, would be pursuant to a final judgment/order of the court and, thus, not violative of the restraining order.

Accordingly, Merino's demurrer to the second cause of action in Plaintiffs' complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

**B. Defendant Merino's demurrer to the first cause of action [specific performance] of Plaintiff's complaint is OVERRULED.**

"The availability of the remedy of specific performance is premised upon well established requisites. These requisites include: A showing by plaintiff of (1) the inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract. [Citations.]" (*Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571, 575.)

Merino demurs to the first cause of action for specific performance by, initially, repeating his earlier arguments that the first cause of action is contradicted by the language of the Agreement. For the same reasons discussed above, the court rejects this argument.

Merino demurs additionally to the first cause of action on the basis that Plaintiffs do not allege there was adequate consideration. Where the contract is written, consideration is presumed. (See Civ. Code, §1614—"A written instrument is presumptive evidence of a consideration.") The Agreement, a copy of which is attached to the complaint, is written and therefore adequate consideration is presumed. Likewise, as the Agreement itself is attached, the terms of the Agreement on its face appears just and reasonable. As Merino's own authority indicates, an allegation that the Agreement is just and reasonable would merely be a conclusion of law. (*Lifton v. Harshman* (1947) 80 Cal.App.2d 422, 434.)

Merino argues next that Plaintiffs have not alleged their own performance. "The plaintiff cannot enforce the defendant's obligation unless the plaintiff has performed the conditions precedent imposed

on him. [Citation.] Accordingly, the allegation of performance is an essential part of his cause of action. [Citation.]" (4 Witkin, California Procedure (4th ed. 1997) Pleading, §491, pp. 581 – 582.) "But the foregoing requirement is reduced to a mere formality by [Code Civ. Proc., §457[19]] which makes it unnecessary to set forth the facts of such performance: The plaintiff may allege, in general terms, that he has 'duly performed all the conditions on his part.'" (*Id.* at p. 582.) Such an allegation is found at paragraph 16 of the complaint.

Finally, Merino contends there is no explanation or allegation as to why a remedy at law would be inadequate in this situation. Civil Code section 3387 applies here. That section states, in relevant part, "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation." (See also *Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal. App. 4th 463; see also *Henderson v. Fisher* (1965) 236 Cal.App.2d 468, 473—"the party seeking specific performance need not establish inadequacy of the legal remedy and may rely upon this presumption.")

Accordingly, Merino's demurrer to the first cause of action in Plaintiffs' complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

[19] Code Civ. Proc., §457 states, "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance."

**Calendar Line 6**
**Case Name:** *First Street Holdings, LLC, et al. v. Timothy Bumb, et al.*
**Case No.:** 22CV393229

Before the Court is defendant/cross-complainant Timothy Bumb's motion for summary adjudication on plaintiff's declaratory relief claim (the validity of certain acts). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Factual and procedural background.

**First Amended Complaint**

Nominal defendant Bay 101 Technology Place Association ("Association") is a non-profit mutual benefit corporation that governs land in San Jose that is the subject of this action. (First Amended Complaint ("FAC"), ¶¶3 and 6.)

Plaintiff Brian Bumb ("Brian")[20] and defendant Timothy Bumb ("Tim") are co-managers of defendant T&B Management Group LLC ("T&B"). (FAC, ¶¶2 and 4.)

At the time of the filing of the original complaint, T&B was the manager of plaintiffs First Street Holdings, LLC ("FSH"); S.J. Bayshore Development, LLC ("Bayshore"); and S.J. Sweetwater Holdings LLC ("Sweetwater"). (FAC, ¶2.) T&B was since removed as manager of FSH, Bayshore, and Sweetwater. (*Id.*) Brian is now the manager of First Street, Bayshore, and Sweetwater. (FAC, ¶1.)

FSH, Bayshore, and Sweetwater currently own eight parcels of land on First Street in San Jose ("Parcels"). (FAC, ¶11.) The Parcels were previously owned by FSH. (*Id.*)

On June 13, 2016, the Bay 101 Technology Place Declaration of Covenants, Restrictions, and Common Easement Areas ("CC&Rs") was recorded. (FAC, ¶11.) The CC&Rs govern the Parcels. (*Id.*) Prior to January 31, 2022, the FSH, Bayshore, and Sweetwater operating agreements delegated the authority to vote on their behalf to defendant T&B. (*Id.*)

On July 12, 2017, Bayshore entered a lease with Sutter's Place Inc., dba Bay 101 ("Casino") for a parcel of land governed by the CC&Rs. (FAC, ¶12.) Defendant Tim owns 93% of Casino. (*Id.*) The lease states, "Tenant [Casino] shall have use of a minimum of 725 parking spaces on the Leased Premises or on a combination of the Leased Premises and other adjacent property either owned by or controlled by Landlord for a terms of the Lease." (*Id.*) Defendant Tim executed the lease on behalf of

[20] "For the sake of clarity, we refer to the [parties] by their first names. We mean no disrespect in doing so." (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 551, fn. 2.)

Bayshore and Casino. (*Id.*) Having executed the CC&Rs on behalf of T&B, Tim knew the CC&Rs did not grant Casino 725 exclusive parking spaces. (*Id.*)

On August 10, 2018, nominal defendant Association recorded its Articles of Incorporation with the California Secretary of State. (FAC, ¶13.) No bylaws were ever finalized. (*Id.*)

On June 13, 2019, Loren Vaccarezza, general counsel for The Flea Market, Inc. and Bumb & Associates, LLC and acting as agent for FSH, Bayshore, and Sweetwater, sent an email to David Van Atta, who drafted the CC&Rs, informing him that defendant Tim, plaintiff Brian, and John Garcia were the initial directors of nominal defendant Association. (FAC, ¶14.)

On June 14, 2019, David Van Atta adopted a resolution on behalf of the nominal defendant Association appointing defendant Tim, plaintiff Brian, and John Garcia as the initial directors. (FAC, ¶15.) The resolution further appointed Tim as President, Brian as Vice President, and John Garcia as CFO and Secretary. (*Id.*) While the resolution references an Exhibit A (Bylaws), no document was attached nor were bylaws agreed upon. (*Id.*)

On June 14, 2019 and June 26, 2020, nominal defendant Association listed defendant Tim as CEO and John Garcia as Secretary and CFO in its Statement of Information filed with the California Secretary of State. (FAC, ¶16.) The June 26, 2020 filing is the most up-to-date filing. (*Id.*)

Defendant Tim and plaintiff Brian have unresolved differences regarding numerous aspects of the Association, including the draft bylaws, draft parking plan, and draft Center Signage Program. (FAC, ¶17.) On October 6, 2021, Tim's counsel, Richard Patch, sent a letter to plaintiff Brian's counsel, Christopher Boscia, related to the electronic pylon sign and including a Center Signage Policy which grants Casino free and more advertising than other parcels. (*Id.*) In the letter, Tim's counsel warned, "[u]nilateral action by either [Tim] or [Brian] with regard to matters specified in Section 5.7 of the T&B Operating Agreement can be, and will be, enjoined or voided by a Court." (*Id.*) On October 22, 2021, Boscia sent Patch a letter in which he states the digital pylon sign was intended to be revenue generating. (FAC, ¶18.) Boscia warned that Tim has a direct conflict of interest since he has a duty to maximize revenue for owners of the Parcels as a co-manager of defendant T&B but is attempting to gain free advertising for Casino of which he is a 93% owner. (*Id.*)

Unable to agree on a course of action, Tim took the unauthorized and unilateral action to amend the CC&Rs, appoint Casino's general counsel (defendant Ron Werner) to nominal defendant Association's board, adopt bylaws, and create a draft parking plan to benefit Casino at the expense of all others. (FAC, ¶19.) Werner has a 1% interest in Casino. (FAC, ¶19 at fn. 1.) Tim appointed Werner to control nominal defendant Association's board of directors. (FAC, ¶20.)

On December 16, 2021, plaintiff Brian sent Werner a request for documents related to various entities in which plaintiff Brian has a financial interest, including documents related to the formation of nominal defendant Association and the CC&Rs. (*Id.*) Werner admitted he was counsel to the various entities including plaintiffs FSH, Bayshore, and Sweetwater, but refused to produce the documents and admitted he was simultaneously working as counsel for defendant Tim. (*Id.*)

On December 22, 2021, Werner sent an email to Brian in which he (1) attached a First Amendment and Supplement to the CC&Rs which Werner represented he previously recorded; (2) announced that he, Tim, and Brian are now the Board of Directors of nominal defendant Association; and (3) attached a notice and agenda of a special meeting of the Board to be held on December 27, 2021. (FAC, ¶19.) The agenda lists three items: (1) discussion and adoption of bylaws for the Association; (2) nomination and election of Tim as President, Brian as Vice President, and Werner as Secretary; and (3) adoption of the rules of signage. (*Id.*) The December 22, 2021 email from Werner is the first time Brian was sent any of the documents. (*Id.*)

On December 23, 2021, Brian (through counsel) sent a letter to Werner objecting to each of the items. (*Id.*) On December 29, 2021, Werner sent Brian notice that the signage policy was approved. (*Id.*)

The amendment to the CC&Rs (appointing the board of directors and adopting a parking management plan); adoption of the bylaws; and adoption of signage rules were structured to benefit Casino at the expense of the other parcels. (FAC, ¶¶21 – 26.) These actions taken by Tim and Werner were invalid. (FAC, ¶¶27 – 38.)

On January 11, 2022, Brian and others, individually and derivatively, filed a complaint against defendants Tim and Werner asserting causes of action for declaratory relief and breach of fiduciary duty.

On March 22, 2022, FSH, Bayshore, Sweetwater, and Brian (individually and derivatively on behalf of Association) filed the operative FAC which now asserts causes of action for:

**(1) Declaratory Relief**

**(2) Breach of Fiduciary Duty [by plaintiffs Bayshore and Brian, derivatively on behalf of Association against defendant Tim and nominal defendant Association]**

**(3) Breach of the Express Duty of Good Faith [by plaintiffs FSH and Sweetwater against defendant Tim]**

**(4) Breach of the Implied Duty of Good Faith and Fair Dealing [by plaintiffs FSH and Sweetwater against defendant Tim]**

**(5) Breach of Fiduciary Duty [by plaintiffs FSH, Bayshore, and Sweetwater against defendant Werner]**

**(6) Breach of Contract [by plaintiff Brian against defendant Tim]**

**Defendant Tim's Cross-Complaint**

On April 15, 2022, Tim filed a cross-complaint against Brian which alleges Tim and Brian are brothers who, for years, worked together to manage various Bumb family business interests. (Cross-Complaint, ¶9.) One of the original family businesses, Bumb & Associates, was founded in 1981 by the Bumb family patriarch, George Bumb Sr., as a California general partnership. (Cross-Complaint, ¶10.) In 2015, the owners of Bumb & Associates unanimously voted to reorganize/convert Bumb & Associates from a general partnership to a limited liability company formed under Delaware law and to form a management LLC (T&B) to be managed by Tim and Brian. (Cross-Complaint, ¶12.) The owners of Bumb & Associates also intended for Tim and Brian to manage other entities that the LLC would form to own various Bumb family real estate assets. (*Id.*)

T&B was formed in August 2015 with its current operating agreement becoming effective on September 29, 2015. (Cross-Complaint, ¶13 and Exh. 1.) Under the T&B operating agreement, Tim and Brian are co-managers and have equal voting rights and management power. (Cross-Complaint, ¶14.) Each has the sole power and authority to perform any and all acts on behalf of T&B except certain specified decisions which require the unanimous consent of both managers. (*Id.*) For those decisions requiring unanimous consent, no action could be taken if Tim and Brian did not agree unless the action was one of a few specifically designated "Major Decisions" which could be resolved through a deadlock procedure. (*Id.*)

On November 12, 2015, Bumb & Associates, the general partnership, was converted to Bumb & Associates LLC ("BA LLC"). (Cross-Complaint, ¶15.) The current operating agreement for BA LLC became effective July 1, 2016. (*Id.;* see also Exh. 2.) The current BA LLC operating agreement states that T&B is its sole manager and provides that T&B cannot be removed as manager so long as either Tim or Brian are active in the management. (*Id.*) T&B may only be removed if neither Tim nor Brian is actively involved and, in that event, upon the affirmative vote of a super-majority in interest of the members. (*Id.*) The constraints in the ability to replace T&B as manager of BA LLC reflected the Bumb family members' intent and purpose of the 2015 reorganization which arose from the fact that Tim and Brian were doing all the work to enhance the value of the family-owned properties and that Tim and Brian would only agree to continue to do so if guaranteed management authority except in the event of their future failure to be actively involved. (Cross-Complaint, ¶17.)

As part of the reorganization, additional LLC entities were formed to hold and develop investment properties under the management of T&B. (Cross-Complaint, ¶18.) Among others, FSH, Bayshore, and Sweetwater were formed under Delaware law. (*Id.*) The current operating agreements for FSH, Bayshore, and Sweetwater each provide that T&B can be removed from its management role only "upon the unanimous vote of the Members," reflecting the parties' intent for stable management and the original intent and basis for the 2015 reorganization. (*Id.*) Any attempt to remove T&B as manager by way of amendment or written consent is invalid. (*Id.*)

Bay 101 Technology Place ("Technology Place"), located at 1788 N. 1st Street in San Jose, is a mixed-use commercial/office/hotel project (including a casino) that is subdivided into eight parcels. (Cross-Complaint, ¶19.) The parcels at Technology Place are collectively owned by FSH, Sweetwater, and Bayshore. (Cross-Complaint, ¶20.) On 12 July 2017, Casino entered a lease with Bayshore for use of parcel four at Technology Place ("Lease"). (Cross-Complaint, ¶21 and Exh. 6.) Among other things, the Lease provides Casino with the use of a minimum of 725 parking spaces at Technology Place. (*Id.*)

The CC&Rs govern the use and operation of Technology Place. (Cross-Complaint, ¶23.) The CC&Rs required the creation of Association for the management and development of Technology Place. (*Id.*) The CC&Rs require all future owners of parcels at Technology Place, once developed, become members of the Association. (*Id.*) Among other things, the CC&Rs call for a Parking Management Plan

("PMP") to "govern the parking operations within [Technology Place] … and manage the distribution of parking spaces used by the various Parcels." (Cross-Complaint, ¶24.) A PMP was drafted pursuant to a 10 April 2019 independent parking analysis, but until December 2021, no PMP was finalized or recorded due, in part, to the lack of a board of directors for the Association. (*Id.*)

The CC&Rs also provide that the Association "shall maintain and operate a master pylon sign located on Parcel 1" and shall establish rules under a Center Signage Program ("Signage Rules") for the operation and "placement of signage on such master pylon[.]" (Cross-Complaint, ¶25.) Until December 2021, no Signage Rules were adopted or established due, in part, to the lack of a board of directors for the Association. (*Id.*) Since the inception of Technology Place, Parcel 1 has maintained a 55-foot tall master pylon sign that advertises the businesses at Technology Place, including Casino. (Cross-Complaint, ¶26.) A new LED sign has since been constructed as a replacement for the current pylon sign. (*Id.*)

The signage and parking rules for Technology Place and its parcels are essential to its marketability by ensuring parcel owners have the necessary rights to convey parking rights and signage rights to potential purchasers or tenants and to clarify for potential purchasers or tenants the rights held by those parcels. (Cross-Complaint, ¶27.)

The CC&Rs provide that "the activities and affairs of the Association shall be administered and overseen by the Board," which would "initially consist of three (3) directors appointed by [FSH] to serve until the date that is three (3) years after the date of recordation of [the] Declaration in the Official Records." (Cross-Complaint, ¶28.) On August 10, 2018, Articles of Incorporation were filed on behalf of Association, but FSH never appointed a board of directors or adopted any bylaws during the initial three years after recording the CC&Rs. (Cross-Complaint, ¶29.) On June 14, 2019, more than three years after the 13 June 2016 recording of the CC&Rs, a Statement of Information was filed with the Secretary of State naming Tim as CEO of the Association and John Garcia as Secretary and CFO. (Cross-Complaint, ¶30.) Also on June 14, 2019, David Van Atta as the original Sole Incorporator in 2018, executed a resolution ("Resolution") that purported to appoint Tim, Brian, and Garcia as the initial directors and to adopt Association bylaws. (*Id.*) This Resolution and appointment of directors was

invalid and untimely because Van Atta had no rights to appoint a Board. (Cross-Complaint, ¶31.) The CC&Rs vested such rights in FSH. (*Id.*)

In February 2020, an agreement was reached with potential buyers for 100% of the issued and outstanding shares of capital stock of Casino. (Cross-Complaint, ¶32.) The agreement, executed by the owners of Casino (including Brian), explicitly acknowledged and confirmed Casino's right to 725 parking spaces at Technology Place. (*Id.*) Due to the Covid-19 pandemic, development of Technology Place was substantially delayed and the stock purchase agreement for Casino was never completed. (*Id.*)

Since early 2020, Tim reached out to Brian to request the PMP and Signage Rules be adopted to resolve outstanding issues of parking and signage at Technology Place. (Cross-Complaint, ¶¶34-35.) Brian failed to adopt or even comment on proposed Signage Rules and instead, in early November 2021, began taking unilateral actions to install a new LED sign to replace the master pylon sign on Parcel 1 over Tim's objection. (Cross-Complaint, ¶36.) In correspondence between Brian and Tim's counsel, Brian's counsel asserted Signage Rules could not be created because "there are no bylaws and no board [to] create and enforce it." (Cross-Complaint, ¶37.)

On December 21, 2021, Tim, as co-manager of T&B, acting on behalf of FSH, and as manager of the members of the Association, executed an amendment to the CC&Rs ("First Amendment") which extended the time for FSH and the members of the Association to appoint a Board; appointed three individuals (Tim, Brian, and Werner) as initial directors; and adopted the PMP. (Cross-Complaint, ¶¶39 – 41.) The adopted PMP maintained the same allocation of parking spots set forth in the April 2019 draft PMP. (Cross-Complaint, ¶41.)

With the Association's Board properly appointed, on December 22, 2021, Werner provided Tim and Brian notice of the first meeting of the Board to be held on December 27, 2021 at which time proposed bylaws and Signage Rules for the Association would be considered for adoption. (Cross-Complaint, ¶42.) On December 23, 2021, Brian's counsel sent correspondence objecting to the Board meeting, First Amendment, and other actions taken by Tim. (Cross-Complaint, ¶43.) On December 27, 2021, Tim and Werner attended the noticed Board meeting and took actions by majority vote to elect the Officers of the Board, adopt the bylaws, and adopt the Signage Rules for Technology Place. (Cross-Complaint, ¶44.) Brian did not attend. (*Id.*)

On February 1, 2022, after initiating this lawsuit, Brian sent Tim various documents entitled "Written Consents" for various Bumb family entities including, but not limited to, FSH, Bayshore, and Sweetwater, as well as BA LLC ("Written Consents") which purport to remove T&B as manager of FSH, Bayshore, Sweetwater and BA LLC, among other entities, and appointed Brian as the sole manager of the same entities. (Cross-Complaint, ¶48 and Exh. 12-15.) With regard to FSH, Bayshore, and Sweetwater, the Written Consents claim to modify the respective operating agreements through an amendment requiring the vote of only a majority of members which purports to modify the provision requiring unanimous written consent to remove T&B. (*Id.*) With regard to BA LLC, the Written Consents claim to modify the operating agreement through an amendment requiring the vote of only a majority of members which purports to modify the provision stating that T&B cannot be removed as manager so long as Tim or Brian are active in the management. (*Id.*) On February 14, 2022, Tim sent Brian a letter objecting to Brian acting on behalf of a majority of the members of the LLC entities and amending their respective operating agreements to remove T&B as their manager. (Cross-Complaint, ¶49.) Tim explained that Brian's actions to issue the Written Consents was unlawful and invalid. (*Id.*)

Tim's cross-complaint against Brian asserts causes of action for:

**(1) Declaratory Relief (Invalidity of Written Consents)**

**(2) Declaratory Relief (Validity of Corporate Actions Taken by Timothy Bumb as Co-Manager of T&B)**

On May 16, 2022, plaintiff/cross-defendant Brian filed an answer to defendant/cross-complainant Tim's cross-complaint.

On May 17, 2022, defendant Tim filed (1) a demurrer to the second and fourth causes of action in plaintiffs' FAC; and (2) a motion to strike portions of plaintiffs' FAC on the ground that plaintiff Brian lacks standing to bring claims derivatively on behalf of nominal defendant Association.

On May 20, 2022, plaintiff Brian dismissed the claims he filed derivatively on behalf of nominal defendant Association. The request for dismissal expressly states, "The Association remains a defendant for all other purposes."

On June 15, 2022, Werner filed a demurrer to the first and fifth causes of action in plaintiffs' FAC. Werner also filed a joinder to defendant Tim's motion to strike portions of plaintiffs' FAC.

On December 23, 2022, the court issued an order overruling Tim and Werner's demurrers to the FAC and denying, as moot, Tim's motion to strike and Werner's joinder thereto.

On March 8, 2024, defendant Tim filed the motion now before the court, a motion for summary adjudication of the first cause of action of plaintiffs' FAC (labeled by Tim as "Motion 3" in a series of motions for summary adjudication).

**II. Analysis.**

**A. Tim's motion for summary adjudication of the first cause of action [declaratory relief (the Validity of Certain Acts)] of FSH, Bayshore, Sweetwater, and Brian's FAC (Motion 3) is DENIED.**

"A complaint for declaratory relief should show the following: (a) A proper subject of declaratory relief within the scope of C.C.P. 1060; (b) An actual controversy involving justiciable questions relating to the rights or obligations of a party." (5 Witkin, California Procedure (4th ed. 1997) §809, pp. 264 – 265; emphasis omitted.) Code of Civil Procedure section 1060 specifically provides:

> Any person interested under a written instrument … or under a contract, or who desires a declaration of his or her rights or duties with respect to another, … , may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties … including a determination of any question of construction or validity arising under the instrument or contract.

In their first cause of action, FSH, Bayshore, Sweetwater, and Brian "seek a determination and declaration as to the validity of: (1) the First Amendment and Supplement to the CC&Rs; (2) the appointment and purported election of Timothy Bumb, Brian Bumb, and Ronald Werner to the Board of Directors and/or as Officers of the Association; (3) the adoption of Bylaws for the Association; and (4) the adoption of the rules of signage. Plaintiffs seek a judgment declaring that each of these is invalid and unenforceable." (FAC, ¶43.)

On the first issue regarding amendment to the CC&Rs, the FAC alleges "Tim took the unauthorized, unilateral action to amend the CC&Rs" by executing and recording a "First Amendment and Supplement to the CC&Rs (hereafter, "First Amendment")." (FAC, ¶19 and Exh. E.) "The

amendment is signed by Tim Bumb, as manager of T&B, on behalf of and as the managing member of SJSH, SJBD, and FSH." (FAC, ¶22.)

Tim contends he properly amended pursuant to the provision allowing for amendment in the original CC&Rs. Tim first proffers some basic background information: Bay 101 Technology Place ("Technology Place") is a mixed-use commercial/office/hotel project (including a casino) that is subdivided into eight (8) parcels: Parcel 1 (the Signage Parcel); Parcel 2 (Hotel Parcel 2); Parcel 3 (Hotel Parcel 3); Parcel 4 (Casino Parcel); Parcel 5 (Parking Garage Parcel); Parcel 6 (Office Building Parcel); Parcel 7 (Parking Parcel); and Parcel 8 (Right of Way Parcel).[21] The parcels at Technology Place are now collectively owned by three entities: (i) First Street Holdings, LLC which owns the Signage Parcel, Hotel Parcel 2, Parking Garage Parcel, Office Building Parcel, Parking Parcel, and Right of Way Parcel; (ii) S.J. Sweetwater Holdings LLC which owns the Hotel Parcel 3; and (iii) S.J. Bayshore Development LLC which owns the Casino Parcel.[22] Brian and Tim signed the Bay 101 Technology Place Covenants, Conditions, and Restrictions and Common Easement Areas (the "CC&Rs") in June 2016.[23] On 13 June 2016, the CC&Rs were recorded with the County of Santa Clara.[24] The CC&Rs govern the use and operation of Technology Place.[25] All owners and occupants of Parcels 1-8 at Technology Place are subject to the declarations, limitations, easements, restrictions, covenants and conditions imposed by the CC&Rs.[26]

Paragraph 13.5(A) of the CC&Rs states:

> This Declaration may be amended only by the written consent and approval of no less than two-thirds (2/3) of the Voting Power of the Center Association; provided, however, that for so long as the Declarant holds Declarant's Reserved Rights under this Declaration, no such amendment shall be valid until and unless such amendment is considered and executed by the Declarant.[27]

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[21] See Separate Statement of Undisputed Facts in Support of Defendant and Cross-Complainant Timothy Bumb's Motion for Summary Adjudication on Plaintiffs' First Cause of Action for Declaratory Relief (The Validity of Certain Actions) (Motion 3) ["Motion 3 SSUF"], Issue No. 1, Fact No. 1.
[22] See Motion 3 SSUF, Issue No. 1, Fact No. 2.
[23] See Motion 3 SSUF, Issue No. 1, Fact No. 3.
[24] See Motion 3 SSUF, Issue No. 1, Fact No. 5.
[25] See Motion 3 SSUF, Issue No. 1, Fact No. 6.
[26] *Id.*
[27] See Motion 3 SSUF, Issue No. 1, Fact No. 12.

On December 21, 2021, First Street Holdings, S.J. Bayshore, and S.J. Sweetwater executed and recorded the First Amendment.[28] Tim signed as manager of T&B, the managing member of First Street Holdings, S.J. Bayshore, and S.J. Sweetwater.[29] First Street Holdings, S.J. Bayshore, and S.J. Sweetwater represented 100% of the Voting Power of the Association.[30]

Plaintiffs raise a triable issue of material fact by pointing out the portion of the provision in the CC&Rs authorizing amendment omitted by Tim. Tim correctly cites the first portion of paragraph 13.5(A) of the CC&Rs, above, but omits the last sentence which reads: "Any amendment ***must be certified in a writing executed and acknowledged by the President or Vice President of the Center Association*** and recorded in the Recorder's Office of the County of Santa Clara." Although Tim purportedly provided written consent on behalf of the Association, Tim attempted to certify the amendment as the "Chief Executive Officer" of the Association.[31] Tim did not sign the First Amendment as "President" of the Association.[32] Tim is not, and has never been, the President of the Association.[33] Tim's signature is the only signature on the First Amendment.[34]

At the very least, this presents a triable issue of material fact regarding the propriety and validity of the First Amendment. Since "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty," [Code of Civil Proc., §437c, subd. (f)(1)] the court need not proceed any further with defendant Tim's motion for summary adjudication.

Accordingly, defendant Tim's motion for summary adjudication on plaintiffs' declaratory relief claim (the validity of certain acts) is DENIED.

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[28] See Motion 3 SSUF, Issue No. 1, Fact No. 26.
[29] *Id.*
[30] See Motion 3 SSUF, Issue No. 1, Fact No. 26A.
[31] See Plaintiffs' Separate Statement of Undisputed Facts in Support of Opposition to Timothy Bumb's Motion for Summary Adjudication on Plaintiffs' First Cause of Action for Declaratory Relief (The Validity of Certain Actions) (Motion 3), Additional Facts in Response to Issue 1 ["Motion 3 Plaintiffs' AF"], Fact No. 21.
[32] See Motion 3 Plaintiffs' AF, Fact No. 22.
[33] See Motion 3 Plaintiffs' AF, Fact No. 45.
[34] See Motion 3 Plaintiffs' AF, Fact No. 23.

**Calendar line 7**
**Case Name:** *Brad Thomas, et al. v. Rita Lechleitner, M.D., et al.*
**Case No.:** 22CV408126

Before the Court is defendant Palo Alto Foundation Medical Group, Inc.'s motion for summary judgment. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Background

This is an action for medical negligence. Prior to September 13, 2021, plaintiff Mahshad Kamali had pain in her stomach and sought treatment. (First Amended Complaint ("FAC"), ¶ 13.) Plaintiff Brad Thomas is Kamali's spouse. (FAC, ¶ 2.) Rita Lechleitner, M.D., was employed by defendant Palo Alto Foundation Medical Group, Inc. (erroneously sued as Palo Alto Medical Foundation Group, Inc.; hereafter, "PAFMG"). (FAC, ¶ 3.) On September 13, 2021, Dr. Lechleitner performed gallbladder surgery on Kamali at defendant Good Samaritan Hospital (sued as Good Samaritan Hospital, a Public Benefit Corporation, and Good Samaritan Hospital, Limited Partnership; collectively hereafter, "Good Samaritan"). (FAC, ¶ 13.)

On September 14, 2021, Kamali woke up with immense pain and could barely breathe. (FAC, ¶ 14.) Thomas called Dr. Lechleitner, who said Kamali was probably dehydrated. (*Id.*) When drinking fluids did not help, Kamali and Thomas (collectively, "Plaintiffs") went to urgent care at Sutter Health. (FAC, ¶ 15.) There, Kamali was directed to the emergency room at Good Samaritan, where she was immediately put on a protocol for sepsis. (FAC, ¶ 16.)

At Good Samaritan, Dr. Lechleitner evaluated Kamali and ordered exploratory surgery of her abdomen. (FAC, ¶ 17.) The surgery revealed that Kamali's large intestine was perforated near the incision from the gallbladder surgery, and her abdomen was contaminated with feces. (*Id.*) Two inches of Kamali's large intestine had to be removed, and she had to stay in the hospital for a week to recover. (FAC, ¶ 18.)

On September 15, 2021, Thomas spoke with Dr. Lechleitner, who said she must have accidentally perforated Kamali's colon when she made the incision for the gallbladder surgery. (FAC, ¶ 19.) Dr. Lechleitner said that she prefers to perform surgery by hand rather than using technology.

(FAC, ¶ 20.) As a result of the surgery issues, Kamali had to stay in the hospital for nine days, and Thomas had to take nine days off work to care for their nine-year-old twins. (FAC, ¶ 21.)

During her hospital stay, Kamali was unable to move without immense pain and was often ignored by hospital staff. (FAC, ¶ 22.) The nursing staff did not tell her what medications she was on and instead simply told her to "press the button" which administered Fentanyl for pain management. (FAC, ¶ 23.) Kamali was able to return home on September 21, 2022, but remained in immense pain and was unable to drive until October 10, 2021. (FAC, ¶ 24.)

On November 18, 2021, Kamali was in severe pain and began vomiting. (FAC, ¶ 25.) She went to the emergency room at El Camino Hospital in Los Gatos and had to undergo a bowel obstruction protocol. (*Id.*) After several days, Dr. Lechleitner suggested another surgery to clear the bowel obstruction. (*Id.*) Kamali requested a second opinion, and while she did not have to undergo a third surgery, she had to stay in the hospital for another seven days. (*Id.*) She remained on a liquid diet for several weeks. (FAC, ¶ 26.) Due to the negligent care of Dr. Lechleitner and Good Samaritan, Kamali has been scarred and remains in significant pain. (*Id.*) Kamali cannot care for her children as she did before, cannot wear her normal clothing, and must obtain ongoing painful treatments. (*Id.*) In addition to her pain and suffering, plaintiff Kamali's relationships with her husband and children have been negatively impacted. (*Id.*)

Plaintiffs initiated this action on December 5, 2022 asserting (1) medical negligence; (2) negligent infliction of emotional distress; (3) violation of civil rights; and (4) intentional infliction of emotional distress. On February 28, 2023, Plaintiffs filed their FAC, which asserts claims for (1) medical negligence and (2) loss of consortium.

**II. Plaintiffs' Request for a Continuance**

Plaintiffs filed their opposition to the current motion on May 8, 2024. In it, they assert that PAFMG's motion for summary judgment is premature pursuant to Code of Civil Procedure section 437c ("Section 437c"), subdivision (h).

Section 437c, subdivision (h), states: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order

a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due."

Plaintiffs' opposition asserts the motion for summary judgment is premature, primarily because Plaintiffs' counsel, Mr. Griffith has been unable to propound discovery due to difficult circumstances in his personal life. (See, generally, Plaintiffs' Memorandum of Points and Authorities ("Plaintiffs' Opposition"), pp. 12-14.)

**A. Standard for Relief Under Section 437c, Subdivision (h)**

When faced with a request for relief under section 437c, subdivision (h), the trial court must determine whether the declaration or affidavit meets the substantive standards of the statute in that it demonstrates "'(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts.'" (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633 (*Frazee*), quoting *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623].)

"The reason for this 'exacting requirement' is to prevent 'every unprepared party who simply files a declaration stating that unspecified essential facts may exist' from using the statute 'as a device to get an automatic continuance.' 'The party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented.'" (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643 (*Chavez*), citing *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715-716 (*Lerma*).) If the party's submission fulfills these requirements, "the court shall deny the [summary judgment] motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." (Code Civ. Proc., § 437c, subd. (h).) "[I]n cases in which the opposing party (usually the plaintiff) has been thwarted in the attempt to obtain evidence that might create an issue of material fact, or discovery is incomplete, the motion for summary judgment should not be granted." (*Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 174.)

If the party does not meet the requirements for a mandatory denial or continuance, the court must still consider whether a party has established "good cause" for a discretionary denial, continuance, or

other relief. (*Chavez, supra*, 238 Cal.App.4th at p. 643.) The court's discretion must be exercised liberally in favor of granting a continuance: "The interests at stake are too high to sanction the denial of a continuance without good cause." (*Frazee, supra*, at 634; see also *Insalaco v. Hope Lutheran Church of West Contra Costa County* (2020) 49 Cal.App.5th 506, 517-520 [denial of request for continuance to perform site inspection was error]; *Hamilton v. Orange County Sheriff's Dept*. (2017) 8 Cal.App.5th 759, 766 [trial court abused its discretion by denying parties' joint request to continue summary judgment hearing for plaintiff to take necessary depositions]; *Denton v. City & County of San Francisco* (2017) 16 Cal.App.5th 779, 791-794 [oral request at hearing may be sufficient to show good cause for discretionary continuance].)

The Courts of Appeal appear to be split on the question of whether a discretionary request for denial or continuance itself may be denied as a result of a party's failure to show diligence in pursuing discovery. (See *Braganza v. Albertson's LLC* (2021) 67 Cal.App.5th 144, 152-157 (*Braganza*) [discussing cases]; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group, 2023), ¶ 10:207.20, pp. 10-95-10-96.) Several courts have held that where the non-moving party has failed to show diligence in pursuing discovery, a denial of any relief under section 437c, subdivision (h) is not an abuse of discretion. (*Braganza*, *supra*, 67 Cal.App.5th at pp. 152-157.)

Nevertheless, in *Chavez*, *supra*, the Court of Appeal stated that a discretionary request under section 437c, subdivision (h), should not be denied based on requesting counsel's lack of diligence whenever "the delay" that prompted the request "was not entirely caused by plaintiffs." (238 Cal.App.4th at p. 644.) Also, "[g]ood cause has been found where an attorney's 'dire medical condition' or other special circumstances prevented the completion of discovery." (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 533, citing *Lerma*, *supra*, at p. 716 [hospitalization of attorney sufficient good cause for discretionary continuance].)

**B. Plaintiffs' Affidavit**

Plaintiffs' request under section 437c, subdivision (h), relies on the declaration of their counsel, Ryan Griffith. (Affidavit of Ryan C. Griffith in Support of Plaintiffs' Opposition ("Griffith Decl.").) Mr. Griffith states that, in his Case Management Conference ("CMC") statement filed on May 12, 2023, he informed the court that his wife was pregnant and that he would have limited availability until

January 15, 2024. (*Id.* at ¶ 6.) Griffith's son was born in November 2023. (*Id.* at ¶ 9.) Griffith's mother passed away in late December 2023. (*Id.* at ¶ 30.)

There was a CMC on January 9, 2024, and according to Griffith, the court (Hon. Manoukian) was sympathetic to Griffith's personal situation and set the trial setting conference for October 29, 2024. (Griffith Decl., ¶¶ 14-15.) Two days later, on January 11, 2024, PAFMG filed the summary judgment motion now before the court without meeting and conferring with Griffith. (*Id.* at ¶ 18.) Later that same day, Griffith's father-in-law went on life support, and he passed away on January 14, 2024. (*Id.* at ¶ 22.)

Counsel for PAFMG, Mr. Marsh, stipulated to a continuance of the summary judgment motion from April 2, 2024 to May 23, 2024. (Griffith Decl., ¶ 27.) Griffith propounded requests for admissions and special interrogatories on March 7, 2024, and received responses on March 25, and supplemental responses on April 19. (*Id.* at ¶¶ 30, 32.) Griffith asserts that "the depositions that have not occurred yet" are essential. (*Id.* at ¶ 34.) Griffith states "[t]hese depositions include expert witness Dr. Greg Adams and Dr. Lecheitner." (*Id.* at ¶ 35.)

Griffith states that Dr. Adams' identity as an expert witness was not disclosed until PAFMG filed its summary judgment motion on January 11, 2024. (*Id.* at ¶ 36.) Griffith contends that Dr. Adams may lack the qualifications and personal knowledge necessary to offer an opinion. (*Id.* at ¶¶ 38-42.) Griffith further contends that Dr. Lechleitner's deposition is essential to understand how and why the gallbladder surgery resulted in the perforation of Kamali's colon. (*Id.* at ¶¶ 44-45.)

Griffith maintains it is not unreasonable to have not conducted depositions at this stage of the case because a trial date has not been set. (Griffith Decl., ¶ 46.)

**C. Analysis**

Plaintiffs' evidence is sufficient to support a mandatory continuance under Code of Civil Procedure section 437c, subdivision (h). There is reason to believe that facts essential to challenging the expert opinion of Dr. Adams may exist, and that such facts may be obtained through the depositions of Dr. Adams and Dr. Lechleitner. Counsel asserts that he was not aware of the identity of PAFMG's expert, Dr. Adams, until January 2024 and that he has encountered significant challenges and difficulties in his personal life in the last six to eight months.

Nevertheless, the court observes that attorney Griffith has not provided any timeline for the depositions that he contends are essential to opposing a motion that was filed more than four months ago. While the court is sympathetic to Griffith's circumstances, the lack of any clear timeline for either the depositions or a revised opposition – coupled with Griffith's assertion that not taking purportedly essential depositions is reasonable – raises the concern that Griffith will proceed to seek further continuances.

Plaintiffs' counsel asserts that PAFMG failed to comply with the California Rules of Court, rules 3.724 and 3.727 by filing a motion for summary judgment without first informing Plaintiffs. The rules cited pertain to the duty to meet and confer and the subjects to be considered at a case management conference. But neither of rules cited require a party to meet and confer before filing a motion for summary judgment, nor does Section 437c. Furthermore, Plaintiffs' counsel is reminded of his duties under the Rules of Professional Conduct to perform legal services with competence and to decline or terminate representation if his condition renders it unreasonably difficult to carry out the representation effectively. (See California Rules of Professional Conduct, rules 1.1, 1.16.)

The court is mindful of the Sixth District's holding in *Chavez* that a lack of diligence by a plaintiff is not a sufficient basis in and of itself to deny discretionary relief where the immediate difficulty in obtaining evidence to oppose a summary judgment motion "was not entirely caused by plaintiffs." (*Chavez, supra*, 238 Cal.App.4th at p. 644.) Certainly, some of the circumstances cited by attorney Griffith as reasons for delay were out of his control. Nevertheless, Plaintiffs have demonstrated an ongoing lack of diligence in completing discovery in this case. As PAFMG points out in reply, Plaintiffs could have scheduled the deposition of Dr. Lechleitner months ago. (PAFMG's Reply, p. 2, lns. 24-26.) Delays in this litigation with no clear plan for resolution prejudice Dr. Lechleitner, who must continue to report that she is a defendant in pending litigation. (*Id.* at p. 3, lns. 7-11.)

Even when a nonmoving party establishes the requirements for mandatory relief under Section 437c, subdivision (h), the court has the discretion as to the form of that relief. The court may "deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." Pursuant to the court's authority to make any order "as may be just" under the Section 437c, subdivision (h), the court now orders the following:

1. **The hearing date of PAFMG's motion for summary judgment is continued to August 22, 2024 at 9 a.m. in Department 20.**
2. **PAFMG may file and serve a supplemental opening memorandum of no more than 15 pages and any additional evidence on or before July 26, 2024;**
3. **Plaintiffs may file and serve a supplemental opposition of no more than 10 pages and any additional evidence on or before August 9, 2024;**
4. **PAFMG may file and serve a supplemental a supplemental reply of no more than 5 pages on or before August 16, 2024.**
5. **No further continuances or extensions.**