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

**Department 16**
**(Dept 16 is now hearing cases that were formerly in Dept 2)**
## Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

**DATE: 10-17-24 TIME: 9 A.M.**

**All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.**

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

**TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:**

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

**TO APPEAR AT THE HEARING**: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

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

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

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 24CV428897<br>Motion: Strike | Wendy Warren vs Roygbiv Real Estate Development, LLC | See tentative ruling. Court will prepare the final order. |

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| | | | |
|---|---|---|---|
| LINE 2 | 24CV440539<br>Hearing: Demurrer | Oscar Frias vs CITY OF SAN JOSE | Defendant demurrers claiming that Plaintiff failed to timely comply with the Government Claims Act. Defendant's unopposed request for judicial notice is GRANTED. Plaintiff filed a Declaration in Support of Late Claim Submission claiming that he filed his claim in January 2024, within the time constraints. However, Plaintiff has no proof of service for this and the City has declared it received no claim. Defendant repeatedly told Plaintiff's counsel of the need to file a claim (when there was still time) and even told him where to send such claim. See Decl. of Liu and Exh. D. Moreover, Plaintiff has failed to file any opposition to the demurrer. The failure to file a written opposition "'creates an inference that the motion or demurrer is meritorious.'" *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410. Accordingly, the demurrer is SUSTAINTED WITH NO LEAVE TO AMEND, as the complaint cannot be fixed due to the lack of filing a timely government claim. Defendant shall file the final order within 10 days. |
| LINE 3 | 21CV385612<br>Motion: Summary Judgment/Adjudication | Indradevi Joseph vs Xilinx, Inc. et al. | See tentative ruling. Court will issue the final order. |

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

| | | | |
|---|---|---|---|
| LINE 4 | 22CV404706<br>Hearing: Motion Summary Judgment | ROMA GANDHI vs CEDAR FAIR, LP et al | See Tentative Ruling. Court will prepare the final order. |
| LINE 5 | 23CV421443<br>Motion: Protective Order | HOT PALETTE CO., LTD vs RYOKO YAMAGUCHI et al | See Tentative Ruling. Defendant shall submit the final order. |
| LINE 6 | 24CV432268<br>Motion: Admissions Deemed Admitted | Bank Of America N.a. vs Udit Gupta | Notice appearing proper, the unopposed motion is GRANTED. Plaintiff shall submit the final order. |
| LINE 7 | 19CV359361<br>Motion to continue Trial | Duncan Miller vs Thelma Abiado et al | The motion to continue trial is denied. First, the complaint was filed Nov. 26, 2019 such that there is no more more time on the clock. See CCP 583.310. Secondly, if counsel did not have the time or availability to conduct the already-set trial, she should not have accepted the case. No good reason having been provided, the motion to continue is DENIED. |
| LINE 8 | 23CV411142<br>Motion: Approve Good Faith Settlement | Narendra Singh vs Monica Salazar Garcia et al | Good cause appearing and notice appearing proper, the unopposed motion for approval of good faith settlement is GRANTED. Moving party shall submit the final order. |
| LINE 9 | | | |
| LINE 10 | | | |
| LINE 11 | | | |
| LINE 12 | | | |

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| LINE 13 | | | |
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**- oo0oo -**

**Calendar Line 1**
**Case Name:** *Wendy Warren v. Roygbiv Real Estate Development, LLC*
**Case No.:** 24CV428897

## I. Factual and Procedural Background

Plaintiff Wendy Warren ("Plaintiff") brings this breach of contract action against defendant Roygbiv Real Estate Development, LLC ("Defendant").

According to the allegations of the complaint, Plaintiff is the owner of a commercial real property located at 19 N. Second Street in San Jose, California ("the Property"). (Complaint ("Compl."), ¶ 7.)

On or around March 18, 2020, Plaintiff and Defendant entered into a Standard Offer Agreement and Escrow Instructions for Purchase of Real Estate ("the Agreement") whereby Plaintiff agreed to sell the Property to Defendant for $6,500,000. (Compl., ¶ 8.)

From around April 17, 2020 until April 16, 2023, Plaintiff and Defendant executed five amendments to the Agreement. (Compl., ¶¶ 9-12, 15.) In the first amendment, the parties reaffirmed that the expected Close of Escrow ("COE") would occur on or before September 25, 2020. (Compl., ¶ 9.) In the second amendment, the parties agreed to extend the COE to March 31, 2021 and also agreed that Defendant would have six, 30-day options to extend the COE, but that Defendant would be required to pay Plaintiff a monthly $20,000, non-refundable deposit as consideration to extend the closing date. (Compl., ¶ 10.) These deposits would not be credited against the purchase price of the Property. (*Ibid*.)

In the third amendment to the Agreement, the parties again extended the COE and agreed Defendant would continue to pay the $20,000, non-refundable deposits until the date of closing. (Compl., ¶ 11.) The parties additionally agreed that if the COE did not occur before March 31, 2022, the price of the Property would increase to $6,700,000. (*Ibid*.) The parties then executed a fourth amendment to the Agreement, again acknowledging the $20,000 payments and the increased price of the Property. (Compl., ¶ 12.) They further agreed that Defendant would deposit $250,000 into escrow as consideration for the extension of the closing date and for Plaintiff's negotiation and execution of a second amendment to Plaintiff's agreement with her tenant Angelou's Mexican Grill ("Angelou's"), to terminate their lease early. (Compl., ¶ 13.) The $250,000 was to be immediately released to Plaintiff once the second amendment to the lease agreement was executed with Angelou's. (*Ibid*.) On April 17, 2023, Plaintiff and Angelou's executed their second amendment to the lease agreement. (Compl., ¶ 14.) On or around July 18, 2023, the parties executed the fifth amendment to the Agreement, where Defendant agreed to continue paying the $20,000 deposits and extending the COE to December 21, 2023. (Compl., ¶ 15.)

Despite three demand letters sent to Defendant, it failed and refused, and continues to fail and refuse, to release the $250,000 in funds per the terms of the fourth amendment to the Agreement. (Compl., ¶¶ 16-19.) As a result, Plaintiff was forced to personally pay Angelou's for the termination of its lease. (Compl., ¶ 20.) Additionally, Defendant has failed and refused to pay the $20,000 deposits for the months of November and December 2023, for a total of $40,000 in missed payments. (Compl., ¶ 21.)

On or around December 27, 2023, Plaintiff sent Defendant a demand letter to close escrow and notifying it that if escrow was not closed by January 5, 2024, Plaintiff would deem the Agreement terminated. (Compl., ¶ 22.) Defendant failed to close escrow. (Compl., ¶ 23.)

On January 1, 2024, Plaintiff filed her complaint against Defendant, asserting the following causes of action:

1) Breach of Contract – Specific Performance;
2) Breach of Contract – Money Damages; and
3) Declaratory Relief.

On April 24, 2024, Defendant filed a motion to strike a portion of Plaintiff's prayer for damages. Plaintiff opposes the motion and Defendant filed a reply.

## II. Plaintiff's Request for Judicial Notice

In support of her opposition, Plaintiff requests the Court take judicial notice of her operative complaint. Judicial notice of a complaint is unnecessary where it is the pleading under review. Accordingly, the request is DENIED. (See, e.g., *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1.)

## III. Legal Standard on Motion to Strike

Under section Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63, citing *Clauson v. Superior Ct.* (1998) 67 Cal.App.4th 1253, 1255.)

## IV. Motion to Strike

Defendant moves to strike the following from Plaintiff's complaint:
Paragraph 2, Page 8, Line 27: Plaintiff seeks "special" damages.

### a. Discussion

Defendant moves to strike Plaintiff's prayer for damages on the ground the complaint is devoid of specific facts and that merely alleging that Plaintiff seeks special damages is insufficient as a matter of law without supporting facts about how the damages were caused, a specific amount, and what damages were suffered.

"Civil Code section 3300 provides that in cases involving a breach of contract, 'the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefore.'" (*SCI California*

*Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 561, fn. 6, quoting Civ. Code, § 3300.) "Unlike general damages, special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties." (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968.)

"A defendant cannot be presumed to be aware of the special damages resulting from his act, and therefore, in order to prevent a surprise on him, this sort of damage must be specially set forth in the complaint . . . And an allegation that by reason of the breaches of contract the party has suffered special damages in a named sum, is not enough. The facts as to special damages must be stated with particularity. The amount of such damages must be stated with particularity. The amount of such damages must be given, and the means of occasioning them must be set forth." (*Shook v. Pearson* (1950) 99 Cal.App.2d 348, 351-352 (*Shook*) [internal citations and quotations omitted]; see also *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1095 ["Special damages must be pleaded with particularity."].)

In opposition, Plaintiff does not address the requirement that special damages must be pled with particularity. Instead, she argues that she seeks special damages only in the alternative if specific performance of the Agreement is not enforced. Further, she contends, if the Agreement is not enforced, then the resale of the Property, and any resulting expenses, as a result of Defendant's breach of contract, will be a natural consequence of Defendant's actions and recoverable as special damages under Civil Code section 3307.[1] (Opposition, p. 5:9-13.) Plaintiff additionally asserts that there will be additional special damages if the Agreement is not enforced, that Defendant would have knowledge of, such as: loss of Angelou's rental payments; putting the Property back on the market; finding an alternative buyer; and completing the sale process all over again. (Opposition, p. 5:17-20, 26-28.) Plaintiff contends that because Defendant is an established real estate development company, it should be aware of Plaintiff's special damages. However, this argument is insufficient for pleading purposes, where a defendant will not be presumed to be aware of special damages. (See e.g., *Shook*, *supra*, 99 Cal.App.2d at p. 351.) Furthermore, the above facts addressed in Plaintiff's opposition are not specifically alleged in the complaint and likewise, there is no specific amount of special damages alleged. The complaint is devoid of allegations regarding loss of a specific amount of rental income, or the cost of attempting to complete the sale process of the Property all over again. Rather, only Plaintiff's general damages are specifically alleged, totaling $290,000. (Compl., ¶ 23.) Based on Plaintiff's opposition, it is likely that she can amend her pleading to specifically allege special damages; however, as currently pled, the complaint is insufficient.

Defendant argues that leave to amend should be denied because of the Agreement's liquidated damages provision specifying that, in the event of Defendant's breach, Plaintiff

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[1] Plaintiff asserts that any special damages from Defendant's breach of contract will be a result of the "natural consequences" of Defendant's actions, pursuant to Civil Code section 3307. (Opposition, p. 5:10-13.) Civil Code section 3307 states: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him or her, consequential damages according to proof, and interest."

would be entitled to liquidated damages in the amount of $300,000 and then Defendant would be released from any further liability. (Motion, p. 7:24-28.) In opposition, Plaintiff argues that the validity of the liquidated damages provision is a question of fact not properly decided at the pleading stage. This is persuasive. (See *Vitatech Internat., Inc. v. Sporn* (2017) 16 Cal.App.5th 796, 806 [stating that the validity of a liquidated damages provision depends upon its reasonableness at the time the contract was made]; see also *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 106 [reasonableness is a question of fact].)

Accordingly, the motion to strike is GRANTED with 15 days leave to amend.

## V. Conclusion and Order

The motion to strike is GRANTED with 15 days leave to amend. The Court shall prepare the final order.

**- oo0oo -**

**Calendar Line 3**
**Case Name:** *Indradevi Sabrina Joseph v. Xilinx, Inc., et al.*
**Case No.:** 21CV385612

Xilinx, Inc. ("Defendant" or "Xilinx") moves for summary judgment, or in the alternative, summary adjudication against Indradevi Sabrina Joseph ("Plaintiff").

## I. Background

### A. Factual

Plaintiff was an "elite marketing specialist with unparalleled" status in her field and had developed significant expertise in branding and marketing issues specific to semiconductor companies. (Third Amended Complaint ("TAC"), ¶¶ 1, 21, 25.)

Dennis Segers ("Segers"), Chairman of the Board of Directors for Defendant Xilinx, wanted Plaintiff to join the company which was in dire need of a comprehensive rebranding and repositioning plan to boost the visibility of its products and jumpstart its stagnant sales. (TAC, ¶¶ 2-3 26 – 29.) Prior to working for Xilinx, Segers developed a close, personal and working relationship with Plaintiff, and she viewed Segers as her mentor. (TAC, ¶ 30.)

In a meeting on October 18, 2016, Segers asked Plaintiff to create a new rebranding and marketing strategy for Xilinx. (TAC, ¶ 34.) Segers had designs on becoming Xilinx's next CEO and, if the Board were to appoint him for that role, Segers told Plaintiff he wanted her to join Xilinx's marketing department. (*Ibid.*) Plaintiff agreed to assist Segers by creating a rebranding and repositioning strategy specific to Xilinx. (TAC, ¶ 35.) Plaintiff did not become a Xilinx employee or contractor in performing the task Segers asked her to do. (TAC, ¶ 36.)

In April 2017, Xilinx announced a multi-year CEO succession plan which included Victor Peng ("Peng") being named as "Xilinx's [CEO]." (TAC, ¶ 37.) After this announcement, Segers asked Plaintiff to continue her work developing a rebranding and repositioning strategy for Xilinx. (TAC, ¶ 38.)

On June 23, 2017, Plaintiff met with Segers in preparation for an introduction with Peng. (TAC, ¶ 41.) Plaintiff presented Segers with her analysis of Xilinx's market performance, market position, and examples of what branding and communication strategies appear to be working for comparable companies. (*Ibid.*)

On July 31, 2017, Segers introduced Plaintiff to Peng via email. (TAC, ¶ 42.) Plaintiff and Peng met in person for the first time on August 8, 2017, and Peng was very receptive to Plaintiff's rebranding and marketing strategy. (TAC, ¶ 43.) After this meeting, Peng met with Segers on August 12, 2017, and stated he was impressed by Plaintiff's rebranding and repositioning strategy and, based on Segers's recommendation and encouragement, Peng would name Plaintiff as Xilinx's Senior Vice-President of Marketing once the individual in that role resigned. (TAC, ¶ 44.)

On August 24, 2017, Plaintiff presented Peng an extensive analysis of the Xilinx marketing and "Investor Relations" program memorialized in voluminous PowerPoint slide presentations. (TAC, ¶ 46.) Plaintiff also prepared detailed plans to overhaul each area of the Xilinx customer experience. (*Ibid.*) Plaintiff's analysis was "so well received" by Peng that he

asked Plaintiff to help him work on "rebranding messaging and direct upcoming events" as he prepared to take over the CEO role. (*Ibid.*)

On September 11, 2017, Plaintiff presented her then current market analysis, rebranding strategy and repositioning to Xilinx executive staff and her work was well received by all. (TAC, ¶ 47.) Following this meeting, Peng verbally offered Plaintiff the position of Senior Vice-President of Marketing. (*Ibid.*) Plaintiff texted Segers letting him know and minutes later, Segers called to welcome Plaintiff to Xilinx. (*Ibid.*) After the September 11, 2017, meeting, Plaintiff and Peng were in frequent contact as Peng drew from Plaintiff's marketing expertise and the Xilinx-specific strategies she crafted. (TAC, ¶ 48.) Over time, Plaintiff saw her work product and strategies being incorporated wholesale into Peng's planning and presentations to the Board, Xilinx employees, and people outside of Xilinx. (*Ibid.*)

From October 2016 to the end of November 2017, Plaintiff had been spending more time working on the Xilinx rebranding and repositioning strategy and less time running her outside consultancy but at no time during this period did Xilinx compensate Plaintiff for her work. (TAC, ¶¶ 56, 65.) On December 11, 2017, Catia Hagopian ("Hagopian"), then Vice President of Legal Affairs, emailed Plaintiff an offer letter. (TAC, ¶ 63.) At the time, Peng agreed Plaintiff's start date would not be until after Peng was appointed CEO. (*Ibid.*) Plaintiff submitted a signed offer letter to Hagopian on December 26, 2017. (*Ibid.*)

In November 2017, as Plaintiff was preparing to step into her role, Xilinx provided Plaintiff with salary and grade level information for employees in the marketing department and "other organizational materials." (TAC, ¶ 76.) From November 2017 through January 2018, Plaintiff regularly emailed Xilinx employees in the marketing, finance, and human resources departments regarding the organizational structure, budget, and salaries for the department Plaintiff would soon manage. (*Ibid.*)

Through these materials and communications, Plaintiff discovered widespread sex-based pay disparities, sex discrimination, and sexual harassment within the marketing department. (TAC, ¶ 76.) Specifically, Plaintiff observed "a disproportionate number of positions at the highest pay grades were held by men, while women possessing the same responsibilities or skillset dominated the lower pay grades." (TAC, ¶ 77.) A nearly identical trend was in seen job titles, rankings, or levels where women were assigned titles that "understated their roles and contributions," which resulted in lower compensation than their male counterparts. (TAC, ¶ 78.) Plaintiff also discovered that women in Xilinx's marketing department often "bore additional burdens" on top of their full fulltime marketing work, and they received no additional compensation for this additional work. (TAC, ¶ 79.)

Plaintiff also learned of a sex-based hostile working environment. (TAC, ¶ 82.) As Plaintiff discovered in the leadup to her start date, women at Xilinx were at times disrespected, dismissed, demeaned, bullied, and undervalued relative to male employees. (*Ibid*.) Plaintiff learned that some women had complained about "mistreatment by a male senior manager" who continued to work at Xilinx with no repercussions. (*Ibid.*) Additionally, there were known allegations of sexual misconduct at Xilinx. (*Ibid.*) Retaliation against women who raised

complaints was "standard operating procedure"[2] within Xilinx as well. (TAC, ¶ 83.) Before, and after her employment at Xilinx commenced on February 2, 2018, Plaintiff raised numerous complaints and disclosed conduct that was unlawful or reasonably believed to be unlawful with Segers, Peng, Hagopian, and others at Xilinx. (TAC, ¶¶ 84 – 97.) The response from Xilinx's senior leaders was largely "dismissiveness" and "hostile." (TAC, ¶ 84.)

The TAC highlights several examples of Plaintiff's alleged protected activities ("APAs") regarding sexual harassment and other gender-based disparate treatment:

1) Complaints to Segers that Peng had attempted to "undress in front of [Plaintiff] at a photoshoot."

2) Complaints about a romantic relationship between departing Senior Vice President of Marketing Steve Glaser and one of his female subordinates – female Xilinx employees faced retaliation for reporting this alleged relationship.

3) Complaints about "inappropriate comments" made by a male Xilinx employee in the marketing department about Plaintiff's "attractiveness" and further complaints that this employee had screamed at and bullied women in the department.

4) Complaints to Nieto regarding a conversation that Plaintiff had overheard where a male employee "pushed a female employee up against a wall and attempted to forcibly kiss her."

5) Complaints that men in the sales department had discussed replacing a female employee with a "more attractive" person because customers enjoy looking "at a good-looking woman."

6) Plaintiff told her subordinate Tara Sims ("Sims") that she was concerned that Peng had a romantic interest in Plaintiff or treated her differently because of her gender.

(TAC, ¶¶ 85, 107.)

On January 10, 2018, on a phone call with Segers, Plaintiff described the frequent discrimination and harassment, as well as the female employees' fears of retaliation for speaking out. (TAC, ¶ 86.) Despite this information, Segers did nothing to address the issues. (TAC, ¶ 87.) Following their phone conversation, Plaintiff texted Segers and expressed her belief that Meyer should be terminated because of her failure to take any action to address the "toxic culture at Xilinx." (TAC, ¶ 87.) In response, Segers advised that Plaintiff "stay serious

[2] In or about September of 2017, the Executive Administrative Assistant to Peng, Edie Fischer ("Fischer"), warned Plaintiff about the "retaliatory regime" at Xilinx. (TAC, ¶ 83). Fischer identified Hagopian, Marilyn Meyer ("Meyer"), the Senior Vice President of Human Resources, and Andee Nieto ("Nieto"), the Senior Director of Human Resources, as "the members of a cabal referred to as the 'Three Musketeers' that would join forces to 'usher out' any women who spoke out at the Company," especially on matters related to sexism. (*Ibid.*)

minded [and] to focus on the task at hand," and that she should "keep [her] opinions to [herself] and [she would] be a rockstar." (*Ibid*.)

Plaintiff's complaints also focused on subjects of pay inequity and gender disparities in titles, job levels, and pay grades:

1) In December 2017, Plaintiff called Segers multiple times to express concerns about sex-based disparities in job titles, pay grades, and pay, based on salary information provided to her by Xilinx marketing department.

2) In January 2018, after a thorough review of job titles and responsibilities, Plaintiff color-coded her group's 2017 salaries in an Excel spreadsheet which laid bare the pay disparities between the compensation of men and women. Plaintiff showed Nieto the spreadsheet and discussed the apparent disparities between the compensation and titles of men and women in the marketing department.

3) On January 11, 2018, Plaintiff complained to Meyer about sex-based pay disparities she had identified in 2017.

4) In mid-December 2018, Plaintiff "verbally complained" to Peng that a female regional marketing leader in China and Taiwan, had "a lower pay grade and salary" than her male counterpart, who was stationed in Japan and Korea.

(FACC, ¶¶ 88-89, 93.)

On January 19, 2018, Plaintiff had an "impromptu meeting" with nine female members of the marketing department. (TAC, ¶ 94.) During this meeting, Plaintiff told the nine women that she knew that they were underpaid compared to the men at Xilinx, and that she would try to address the problem when she took over by correcting their titles and grade levels. (*Ibid*.) Over the subsequent days and weeks, Plaintiff met with "members of Human Resources and Legal Affairs" regarding her proposed vision to correct pay disparities. (TAC, ¶¶ 94-97.) Plaintiff also had several calls with Segers about the topic of unequal pay, and she raised the need to correct the salaries and titles of female employees in her department. (TAC, ¶ 97.) Plaintiff believed that the pay disparities could be corrected through her "proposed updated budget." (¶ TAC, 97.) Again, Segers pressured Plaintiff "to remain silent," and "to wait on solving any disparities or issues at [Xilinx]." (TAC, ¶ 97.)

Shortly after Plaintiff began her employment on February 2, 2018, she met with Nieto and the senior members of the "sales and vertical marketing team" and complained that "women in Marketing had been mistreated by the men in the Sales department; she expressed her opposition to the continuation of this mistreatment." (TAC, ¶ 100.) Throughout the month of February 2018, Plaintiff met with several of Xilinx's lead members, including Peng, to discuss her goal "to provide equitable treatment and pay for women." (TAC, ¶ 102.) Plaintiff also met with Vincent Tong ("Tong"), Executive Vice President of Global Operations and Quality, who suggested that the way Peng "interacted with female employees was strange," to which Plaintiff responded, female employees were "afraid to work with [Peng]." (TAC, ¶ 101.)

On the morning of February 20, 2018, Plaintiff met with Meyer who interrogated Plaintiff about January 19, 2018, "impromptu meeting" where Plaintiff acknowledged and stated her intent to correct sex-based pay disparities. (TAC, ¶ 116.) Meyer inquired whether Plaintiff had told the women in attendance at that meeting that they were underpaid and that there was pay inequity between female and male employees at Xilinx. (*Ibid.*) Plaintiff confirmed the statements, her belief that the statements were true, and told Meyer Xilinx should correct female employees' salaries and titles. (*Ibid.*) Meyer became enraged and made clear she would not address pay inequity. (*Ibid.*) Meyer also stated she would have to take action to protect the CEO and Chairman of the Board. (*Ibid.*)

On February 23, 2018, Peng terminated Plaintiff's employment. (TAC, ¶ 117.) When Plaintiff asked Peng about her termination, Peng claimed a number of factors were recently taken into consideration specifically mentioning Plaintiff had made comments to many of the women that Xilinx was going to have to correct. (TAC, ¶ 119.) Plaintiff inquired whether the "comments" concerned Plaintiff's statements regarding the treatment of women. (*Ibid.*) Peng responded, "you've said things," and refused to elaborate further twice citing "legal reasons" for his unwillingness to elaborate further. (*Ibid.*) The next day, Plaintiff briefly spoke with Segers regarding her termination. (TAC, ¶ 122.) Segers stated he had had dinner with Peng and that he similarly could not elaborate on the reasons for her termination due to "legal reasons." (*Ibid.*)

On June 13, 2018, a now former Xilinx employee confirmed to Plaintiff that her protected conduct was the reason for her termination. (TAC, ¶ 123.) The former Xilinx employee asked Segers why Plaintiff was terminated and Segers responded, "[Plaintiff] said the females were underpaid, and one sued." (*Ibid.*) Segers also stated correcting pay disparities would cost Xilinx too much. (*Ibid.*)

**B. Procedural**

On August 9, 2021, Plaintiff filed her initial complaint against Xilinx.

On September 20, 2021, Xilinx filed a demurrer to Plaintiff's complaint.

On December 3, 2021, prior to a hearing on Xilinx's demurrer, Plaintiff filed a first amended complaint ("FAC") which asserted causes of action against Xilinx for:

(1) Retaliation (Fair Labor Standards Act of 1938, as amended by the Equal Pay Act on 1963, 29 U.S.C. § 215, subd. (a)(3))
(2) Retaliation (California Fair Employment and Housing Act, Cal. Gov. Code, § 12940, et seq.)
(3) Retaliation (California Whistleblower Protection Act, Cal. Lab. Code, § 1102.5, subds. (b) & (c).)
(4) Retaliation (Cal. Lab. Code, § 98.6, subd. (a))
(5) Retaliation (Cal. Lab. Code, § 232.5, subd. (c))
(6) Fraud
(7) Conversion
(8) Common Law Copyright Infringement (Cal. Civ. Code, § 980, et seq.)
(9) Common Law Misappropriation of Business Ideas
(10) Unjust Enrichment

(11) Violation of the Unfair Competition Law (Cal. Bus. & Prof. Code, § 17200, et seq.)

On January 3, 2022, Xilinx filed a demurrer to Plaintiff's FAC.

On May 3, 2022, the Court issued an order sustaining, without leave to amend, Xilinx's demurrer to the second and fifth causes of action; sustaining, with leave to amend, Xilinx's demurrer to the seventh and ninth causes of action; but otherwise overruling Xilinx's demurrer to Plaintiff's FAC.

On May 13, 2022, Plaintiff filed a second amended complaint ("SAC") which asserted causes of action for:

(1) Retaliation (Fair Labor Standards Act of 1938, as amended by the Equal Pay Act on 1963, 29 U.S.C. § 215, subd. (a)(3))
(2) Retaliation (California Whistleblower Protection Act, Cal. Lab. Code, § 1102.5, subds. (b) & (c).)
(3) Retaliation (Cal. Lab. Code, § 98.6, subd. (a))
(4) Fraud
(5) Conversion
(6) Common Law Copyright Infringement (Cal. Civil Code, § 980, et seq.)
(7) Unjust Enrichment
(8) Violation of the Unfair Competition Law (Cal. Bus. & Prof. Code, § 17200, et seq.)

On June 13, 2022, defendant Xilinx filed a demurrer to Plaintiff's SAC.

On September 1, 2022, the Court issued an order sustaining, without leave to amend, defendant Xilinx's demurrer to the fifth cause of action; but otherwise overruling defendant Xilinx's demurrer to Plaintiff's SAC.

On September 22, 2022, Defendant Xilinx filed an answer to the SAC.

On August 18, 2023, Defendant Xilinx filed a motion for summary adjudication of the fourth, sixth, seventh and eighth causes of action of the SAC. Plaintiff filed opposition papers, and Xilinx filed reply papers. The parties stipulated to, *inter alia*, the filing of sur-reply papers by each side, and the Court issued an order permitting the same.

On February 15, 2024, the Court issued an order[3] granting Xilinx's motion for summary adjudication as to the fourth, sixth, and seventh causes of action, but denying the motion as to the eighth cause of action.

On June 5, 2024, Plaintiff filed motion for leave to file a third amended complaint ("TAC") to provide both additional detail and to clarify her claims for retaliation, which this

[3] After the January 9, 2024, hearing on Xilinx's first motion for summary adjudication, Xilinx moved for summary judgment, a second time, on January 19, 2024. Plaintiff subsequently moved for a trial continuance in February 2024, and the parties agreed on a stipulated trial schedule, which the Court adopted, that reset the hearing date for Xilinx's motion for summary judgment to July 2, 2024.

Court granted on July 9, 2024. That same day, Plaintiff filed the operative TAC which now asserts causes of action for:

**(1) Retaliation (Fair Labor Standards Act of 1938 ("FLSA"), as amended by the Equal Pay Act on 1963, 29 U.S.C. § 215(a)(3))**
**(2) Retaliation (California Whistleblower Protection Act, Cal. Lab. Code § 1102.5.)**
**(3) Retaliation (Cal. Lab. Code § 98.6)**
(4) Fraud
(5) Conversion
(6) Common Law Copyright Infringement (Cal. Civil Code § 980 et seq.)
(7) Unjust Enrichment
**(8) Violation of the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.)**

On August 2, 2024, Defendant Xilinx filed a motion for summary judgment or, in the alternative, summary adjudication, of the first through third, and eighth, causes of action of the TAC. Plaintiff filed timely opposition papers on October 3, 2024. Xilinx filed reply papers on October 11, 2024.

## II. Evidentiary Objections

### A. Plaintiff's Evidentiary Objections

Victor Peng Declaration

In connection with its opposition papers, Plaintiff submits objections, in the proper format and with the required proposed order, to evidence offered by Defendant in support of its motion for summary judgment. Specifically, Plaintiff objects to various portions of Victor Peng's declaration, on grounds of lack of personal knowledge, lack of foundation, and hearsay. (See Objection Nos. 1-4; see also Declaration of Victor Peng in Support of Xilinx Motion for Summary Judgment ("Peng Decl.,") pp. 2-3; Exhs. A-C.)

This Court OVERRULES Plaintiff's objections to portions of Peng's declaration. First, an objection on the ground of a lack of foundation is not a proper objection because the term "foundation," a colloquial term used to describe a wide variety of admissibility requirements, is too broad and indefinite. (*People v. Porter* (1947) 82 Cal.App.2d 585, 588; *People v. Modell* (1956) 143 Cal.App.2d 724, 729-730.) Second, declarations filed in support of a motion for summary judgment "shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (Code Civ. Proc., § 437c, subd. (d); see also Evid. Code, § 702, subd. (a) ["[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter"].) Peng, who is Xilinx's CEO, declares he "has personal knowledge of the facts stated herein and could competently testify regarding the contents if called to do so." (Peng Dec., ¶ 1.) He further declares that the attached Exhibit A is a "true and correct copy" of a portion of a text message exchange [he] had with Andee Nieto on February 9, 2018. (Peng Decl., ¶ 2.) Peng declares that he and Nieto "were discussing recent issues that had come up with Ms. Joseph." (Peng Decl., ¶ 2.) Finally, Peng declares that attached Exhibits B and C are "true and correct" copies of email

exchanges between Marilyn Meyer and himself on December 7, 2017, and January 8, 2018, respectively, and that these emails were produced by Xilinx in the instant matter. (Peng Decl., ¶¶ 3-4.) Peng's declaration adequately establishes personal knowledge for his assertions about Plaintiff's professional conduct and "derailing behaviors" given the undisputed fact that Plaintiff directly reported to Peng and communicated with him regularly while developing marketing strategies for Xilinx. (TAC, ¶¶ 69-72.)

According to Evidence Code section 1200, hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Plaintiff objects to various portions of Peng's declaration as hearsay but there is an exception to the hearsay rule for declarations in support of a motion for summary judgment. (*Windigo Mills v. Unemployment Ins. Appeals Bd*. (1979) 92 Cal.App.3d 586, 597 (*Windigo*) [hearsay is made specially admissible in connection with motions in general and summary judgment motions in particular]; see also Code Civ. Proc., § 437c, subds. (b)(1) & (2), (d).) This special authorization implies a hearsay exception, so that in the situations specified by statute, otherwise admissible testimony may be given by declaration, provided it is under oath. (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1107.)

Specifically, the Court disagrees that Peng's opinion statements regarding Plaintiff's "derailing behaviors" and "communication skills" do not indicate more than one layer of hearsay, and thus the objection is overruled. (See Objection No. 1.) The law is clear that lay opinion testimony is admissible if it is rationally based on the perception of the witness through personal observation and helpful to a clear understanding of his or her testimony. (Evid. Code, § 800, see also *People v. McAlpin* (1991) 53 Cal.3d 1289, 1306-1307.)

In sum, Plaintiff's objections on the grounds of a lack of foundation, lack of personal knowledge, and hearsay, are without merit. Accordingly, the objections are OVERRULED.

Marilyn Meyer Declaration

Next, Plaintiff objects to portions of the declaration of Marilyn Meyer ("Meyer"), Xilinx's Senior Vice President of Human Resources, on the same grounds alleged above. (See Objection Nos. 5-25; see also Declaration of Marilyn Meyer in Support of Xilinx's Motion for Summary Judgment ("Meyer Decl."), p. 2; Exhs. A-C.) This Court OVERRULES Plaintiff's objections to portions of Meyer's declaration. Meyer declares she "has personal knowledge of the facts stated herein and could competently testify regarding the contents if called to do so." (Meyer Dec., ¶ 1.) She further declares that the attached Exhibit A is a "true and correct copy" of a memorandum she "prepared while investigating various concerns raised about Ms. Sabrina Joseph." (Meyer Decl., ¶ 2.) Meyer also declares the following:

> While I was working for Xilinx, it was a regular part of my job to create and maintain business records like this. It was my standard practice to memorialize discussions associated with investigations like this promptly and as close as possible to when they took place. I followed that process when creating this memorandum, including by memorializing my discussions with the listed individuals at or about the same time as they took.

(Meyer Decl., ¶ 2.)

Additionally, Meyer declares that the attached Exhibit B is a "true and correct copy of an email exchange between me and two former Xilinx employees, Jeannie Hayward and Andee Nieto, from March 2018." (Meyer Decl., ¶ 3.) Meyer further declares the email exchanges involve "to the best of my recollection, near or around this time, Xilinx's Human Resources department reviewed pay equity issues in the CSM department." (*Ibid*.) Finally, Meyer declares the attached Exhibit C is a "true and correct copy" of a report she prepared following an investigation regarding various concerns that had been expressed about Ms. Sabrina Joseph:

> While I was working for Xilinx, it was a regular part of my job to create and maintain business records like this. This report summarized the findings from that investigation based on the information gathered during that process, which includes the information memorialized in Exhibit A and information conveyed to me by Ms. Hayward in Exhibit B.

(Meyer Decl., ¶ 4.)

With respect to the hearsay objection, as discussed above, there is an exception to the hearsay rule for declarations in support of a motion for summary judgment. (See *Windigo, supra,* 92 Cal.App.3d at p. 597.) Additionally, Meyers has personal knowledge of what was said to her during her investigation and what she included in her report.

Thus, Meyer's declaration adequately establishes personal knowledge and foundation for her assertions made in the investigation memorandum. (Code Civ. Proc., §437c, subd. (d) ["Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations"].)

Patrick Hammon Declaration

Plaintiff submits objections to the declaration of Xilinx attorney, Patrick Hammon ("Hammon Decl."). Specifically, Plaintiff objects to Exhibit G of Hammon's declaration. (See Objection Nos. 26-37; see also Hammon Decl., ¶ 8.) Plaintiff objects to Exhibit G, Peng's deposition transcript, on the grounds that Peng lacks personal knowledge, foundation, and is his testimony as to Plaintiff's alleged statements and that of HR are hearsay. (See, e.g., Objection No. 26.) This Court disagrees in light of its rulings above. Peng's deposition testimony is not based on speculation or a lack of personal knowledge but rather his and the witnesses' own beliefs and experiences. Any alleged hearsay statements appear to either have non-hearsay purposes (e.g. knowledge) or fall within recognized hearsay exceptions. (Code Civ. Proc., § 437c, subd. (d) ["Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations"]; see also Evid. Code, § 702 ["[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter"]; see *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 606 ["Except to the extent that an expert may give testimony not based on personal knowledge, under Evidence Code section 702, subdivision (a), which codifies a long-

existing rule of evidence, the testimony of every witness, whether expert or lay, concerning facts to which he testifies is inadmissible unless he has personal knowledge of those facts"].)

Accordingly, the Court OVERRULES Plaintiff's evidentiary objections, in its entirety.

**B. Xilinx's Evidentiary Objections**

In connection with its opposition papers, Xilinx submits objections, in the proper format and with the required proposed order, to evidence offered by Plaintiff in support of its opposition. Specifically, Defendant objects to various portions of Plaintiff's declaration, on grounds of lack of foundation, speculation, legal conclusion, and hearsay. (See Objections to Evidence Presented in Plaintiff's Opp. to MSJ ("Def. Obj. Nos"), 1-36; see also Declaration of Plaintiff in Support of her Opposition ("Joseph Decl.") Defendant also objects to portions of Plaintiff's counsel, Andrew Mezler's, declaration on the grounds of inadmissible evidence, lack of personal knowledge, and hearsay. (See Def. Obj. No. 39; see also Declaration of Andrew Mezler, ¶ 8.)

The Court declines to rule on these objections because it is not material to the outcome of the motion. (See Code of Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

## III. Defendant Xilinx's Proffered Evidence

In support of its motion to Plaintiff's first through third, and eighth causes of action of the TAC, Xilinx provides a separate statement and proffers the following facts:

1) Before Plaintiff's start date, she was given compensation and title information from the Xilinx's Human Resources department ("HR"), and Xilinx did not deny Plaintiff access to any compensation or titling information. (UMF Nos. 8-9; Hammon Decl., ¶ 10, Exh. I – Plaintiff Deposition Testimony ("Plaintiff's Depo.,") [November 4, 2021], 489:20-491:6).

2) Pre-employment, on January 19, 2018, Plaintiff called an "impromptu meeting" with nine female marketing employees who would eventually report to her. (TAC ¶ 94; UMF No. 20; Hammon Decl., ¶ 10, Exh. I, 446:24-454:13) At the start of the meeting, Plaintiff discussed her background and plans for the group. (UMF Nos. 20-21; Hammon Decl., ¶ 10, Exh. I – Plaintiff's Deposition; 446:24-454:13.) During this meeting:

    i. Plaintiff alleged her "influence" over Peng, Segers, and Xilinx, as a whole. (UMF Nos. 29, 33.)

    ii. Plaintiff "openly denigrated" men working at Xilinx, saying they "were making double for doing nothing and walking [or 'wandering'] around," and promised to let the "useless men go." (UMF Nos. 30-31, 34.)

iii. Plaintiff would later tell another employee that she needed "to let all old white men go to free compensation." (UMF No. 38).

iv. Near the end of the meeting, Plaintiff made a "passing comment" about pay discrepancies in her group. (UMF Nos. 30-31, 67.)

v. Plaintiff "ordered" the attendees "not to tell HR about the meeting," and threatened that if they did so, she would "find out." (UMF 28.)

3) Xilinx conducted an investigation into allegations that there was a pay disparity between males and females in the marketing department. Xilinx concluded that investigation on March 9, 2018. (UMF No. 41; Declaration of Marilyn Meyer in Support of Xilinx's Motion for Summary Judgment ("Meyer Decl.,") ¶¶ 3-4, Exhs. B-C.)

4) The results of Xilinx's investigation into allegations that there was a pay disparity between males and females in the marketing department were circulated within HR on March 13, 2018, with comments. The investigation revealed that there was no pay inequity in the marketing department and women either made more than or equal to their male counterparts. (UMF No. 42; Meyer Decl., ¶¶ 3-4, Exhs. B-C.)

**A. UMFs Relevant to Plaintiff's Workplace Conduct**

1) Before and during her employment, Mr. Peng began to notice a number of instances where Plaintiff was not displaying the kind of skill and experience expected of a Senior Vice President. (UMF Nos. 46, 59; Hammon Decl., ¶ 8, Exh. G – Peng Depo., 505:20-506:17; 574:2-10.)

2) At the time Peng decided to terminate Plaintiff's employment he was aware of an instance where Plaintiff shouted and became very aggressive with a security guard because, as he understood the situation, Plaintiff did not have a badge and the security person did not know who she was. (UMF No. 49; Hammon Decl., ¶ 8, Exh. G – Peng Depo., 584:16-585:1.)

3) Mr. Peng was forced to admonish Plaintiff in writing after she disparaged two senior marketing employees—Steve Glaser and Silvia Gianelli—referring to the pair as "Stevia" in an email to various Xilinx executives and high-ranking personnel, as an apparent joke based on her suspicion the two were romantically involved. (UMF Nos. 52-54, 74.)

4) Peng also learned that Plaintiff "wasn't entirely truthful about things," including an incident in which Plaintiff made false accusations about Gianelli, claiming she had engaged in unauthorized communications with the press, which turned out to be blatantly false. (UMF Nos. 61-62.)

5) After starting work at Xilinx, Plaintiff's "derailing behaviors" only continued, prompting Peng to try and coach her. (UMF Nos. 48, 53.)

6) Peng based his decision to terminate Plaintiff on his determination that she was not only, in his words, "ineffective," had "poor judgement," did not convey strong positional power, and exhibited behavior that was not "reflective of the cultural values that were important to us at the company," and in such a short time had left her group in "a bad state." (UMF Nos. 57, 66; Hammon Decl., ¶ 8, Exh. G – Peng Depo., 456:23-457:5; 505:21-506:8, 574:6-10.)

## IV. Plaintiff's Proffered Evidence

In opposition, Plaintiff provides a separate statement including a response to the facts proffered by Xilinx, as follows:

"Sham" Investigations

On February 11, 2018, Xilinx employee, Amy Attard ("Attard") made an HR complaint about pay disparities after Plaintiff reported women were underpaid, and this prompted an "investigation" conducted by Meyer. (PAMF Nos. 68-69; Melzer Decl., ¶¶ 13, 19; Exhs. J, P – Meyer Depo., pp. 136:13-137:20.) When Segers was deposed on how Xilinx conducted its internal investigations, he testified that the "normal course of—of action" was for management to ensure objectivity in pay equity studies and that utilizing third parties was a means to ensure impartial results. (PAMF No. 70; Melzer Decl., ¶ 25, Exh. V -Segers Depo., pp. 388:8-389:11.) But, Meyer "did not recall" drafting a written investigation plan, the witnesses that were purportedly interviewed "did not recall" an opportunity to review interview summaries for accuracy, there is no evidence that employees were asked whether they were "paid unequally," and "bonus information" was not included in the "compensation data analysis." (PAMF Nos. 72-75; Melzer Decl., ¶¶ 19, 22.) Despite these gaps in the information gathering phase, Meyer's email, dated March 14, 2018, conclusorily stated there was no pay disparity based on gender. (PAMF No. 75; Meyer Decl., ¶ 3, Exh. B.)

On February 20, 2018, Meyer "interrogated" Plaintiff about her January 19, 2018, meeting with female marketing employees. (PAMF Nos. 84-91; Joseph Decl., ¶¶ 121-128.) Although this was part of an ongoing HR investigation into Plaintiff's workplace conduct, Plaintiff was not given any opportunity to explain the pay disparity claims, and instead, Meyers continued to yell and reprimand Plaintiff for raising the issue. (*Ibid*.) Both Peng and Segers were aware of this "investigation." (PAMF Nos. 91-92.) Peng testified that another investigation into pay equity was done by a third party, but no details of that investigation have emerged to verify if it occurred, when it concluded, and what it found. (PAMF No. 93; Melzer Decl., ¶ 18, Exh. O (Peng Dep.), 496:17-497:9; id. at 602:1-11.)

Plaintiff's proffered evidence on the events leading up to her termination on February 23, 2018, largely mirror the TAC allegations outlined above. (PAMF Nos. 94-111.) For brevity's sake, the Court will not repeat them here.

PAMFs Relevant to Plaintiff's Workplace Conduct

1) Plaintiff never yelled at a Xilinx security guard. (PAMF No. 117; Melzer Decl., ¶ 27, Exh. X - Joseph Depo., pp. 1069:25-1070:2.)

2) Plaintiff never forbade Sims from going to the gym or cafeteria at Xilinx. (PAMF No. 121; Joseph Decl., ¶ 127.)

3) Plaintiff never stated that she wanted to terminate the women for going to dinner with Gianelli, nor did she say to Sims, "Fuck those bitches." (PAMF No. 122; Joseph Decl., ¶ 60.)

4) Sims lacks credibility given her motive to complain about Plaintiff to protect herself from disciplinary action. (PAMF NO. 124; Melzer Decl., ¶ 22, Exh. S – Sims Depo., pp. 90:10-24.)

## V. Defendant Xilinx's Motion for Summary Judgment, or Summary Adjudication

Pursuant to Code of Civil Procedure section 437c, Xilinx moves for summary judgment against Plaintiff, or in the alternative, summary adjudication of the first through third, and eighth causes of action.

### A. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, at p. 843.) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (§ 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.'" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action…The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 (*Alex R. Thomas & Co*), internal citations omitted; emphasis added.)

When a defendant moves for summary judgment, "its declarations and evidence must either establish a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted." (*Gray* v. *America West Airlines, Inc*. (1989) 209 Cal.App.3d 76, 81.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

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

**B. Merits of Defendant Xilinx's Motion**

Xilinx moves for summary adjudication of the first through third, and eighth, causes of action against Plaintiff on the ground that no triable issues of material fact exist with respect to each of these claims.

**1. Statute of Limitations**

**(1) First Cause of Action – Equal Pay Act/Fair Labor Standards Act ("FLSA") Claim**

Xilinx argues that Plaintiff's FLSA claim is time-barred because she has no evidence that Xilinx acted "willfully" for the exception to the two-year statute of limitations to apply. (MPA MSJ, p. 24:25-29; see also Xilinx Reply ISO MSJ ("Reply"), p. 4-7.) Defendant further concedes that the parties do not "disagree about the material facts" regarding the application of the limitations period, but only disagree on how the law should be applied. (Reply, p. 21:4-6). But, Defendant's concession is misplaced given that its proffered evidence to demonstrate a lack of "willfulness" is disputed, in part, by Plaintiff.

The FLSA provides that a plaintiff can bring a FLSA claim "within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of *a willful violation* may be commenced within three years after the cause of action accrued." (29 U.S.C. § 255, subd. (a), italics added.) An employer engages in "a willful violation" when it "knowingly or recklessly disregards" whether its conduct was prohibited by FLSA. (*Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, 908 (*Alvarez*); see also *McLaughlin v. Richland Shoe Co.* (1988) 486 U.S. 128, 129 , fn. 13 (*McLaughlin*) [An employer's violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the Act; if the employer acts "unreasonably, but not recklessly," in determining its legal obligation under the Act, its action should not be considered willful].)

**1) Defendant's Initial Burden**

It is undisputed that Plaintiff's FLSA claim arose on February 23, 2018, when Plaintiff was terminated and that she did not file her claim until August 9, 2021.[4] (TAC, ¶¶ 8, 13, 136-137.) Thus, even with tolling, Plaintiff's claim would be untimely if the two-year statute of limitations applies. However, if the three-year exception outlined in 29 United States Code section 255, subdivision (a) applies, the Complaint would not be time-barred.

To meet its initial burden, Xilinx proffers evidence, outlined in greater detail above, demonstrating its actions were not willful. (MPA MSJ, p. 24:27-32.) Specifically, Xilinx cites nondiscriminatory reasons for terminating Plaintiff: 1) she exhibited "derailing" and "erratic behavior"; 2) lacked professional judgment; 3) showed poor leadership skills; 4) and breached company protocol. (See UMF Nos. 19, 26, 35, 36-37, 39-40.) Xilinx claims these reasons were "wholly unrelated to [Plaintiff's] APAs." (MPA MSJ, p. 25:1-9.)

Xilinx also proffers evidence that before Plaintiff's start date, she was given compensation and title information from HR, and Xilinx did not deny Plaintiff access to any compensation or titling information. (UMF Nos. 8-9; Hammon Decl., ¶ 10, Exh. I – Plaintiff Deposition Testimony ("Plaintiff's Depo.,") 489:20-491:6). Finally, Xilinx proffers evidence of its internal investigation of Plaintiff's sex-based pay disparity. (UMF Nos. 41-42; Meyer Decl., ¶¶ 3-4, Exhs. B, C – Internal Investigation Memo.) Specifically, the company engaged in a "compensation data analysis" for the marketing department which revealed no gender-based pay disparities in the organization. (Meyer Decl., ¶ 3, Exh. B – Email Exchange.) Based on this proffered evidence, Xilinx concludes Plaintiff's allegations fail to demonstrate it knowingly attempted to evade the FLSA. (MPA MSJ, p. 25:1-9.) Additionally, Xilinx cites a district court opinion for the proposition that "where courts have found willfulness, there has generally been evidence suggesting that the employer deliberately attempted to evade the FLSA, such as by falsifying records, lying to investigators, or ignoring specific warnings about non-compliance." (*Rattler-Bryceland v. Boutchantharaj Corp.* (W.D.Okla. Sep. 5, 2023, No. CIV-22-106-R) 2023 U.S.Dist.LEXIS 179841, at *4 [citations omitted].) In light of this opinion, Xilinx contends Plaintiff has no evidence of such willful conduct by Xilinx. (MPA MSJ, p. 25:5-9.)

In Plaintiff's opposition to Defendant's separate statement, Plaintiff disputes, in part, the legitimacy of Xilinx's investigation into her pay disparity complaint. (See Plaintiff's Opposition ("Opp."), to Sep. Stat., p. 26:23-28.) Specifically, Plaintiff contends that Xilinx's internal investigation memorandum does not specify "any steps involved in analyzing pay equity beyond the creation and review of this "compensation data." (Opp. to Sep. Stat., p. 27.)

"'District court decisions have elaborated on the circumstances under which a finding of willfulness is warranted. 'Courts have found employers willfully violated FLSA where they ignored specific warnings that they were out of compliance, destroyed or withheld records to block investigations into their employment practices, or split employees' hours between two companies' books to conceal their overtime work.'" (*Williams v. Loved Ones in Home Care,*

[4] On May 29, 2020, the Judicial Council of California adopted California Rules of Court, emergency Rule 9 ("Rule 9"). In light of Rule 9, which tolled the statute of limitations for 178 days (April 6, 2020, to October 1, 2020), Plaintiff's statutory deadline was extended from February 23, 2020, to August 20, 2020. On February 17, 2021, Plaintiff and Defendant entered into a tolling agreement, and Plaintiff voluntarily withdrew from the agreement on July 25, 2021. (TAC, ¶¶ 136-137). Plaintiff's original complaint was file-stamped on August 9, 2021.

*LLC* (S.D.W.Va. Aug. 2, 2018, No. 2:17-CV-04162) 2018 U.S.Dist.LEXIS 129573, at *8-9 (*Williams*), quoting *Hantz v. Prospect Mortg., LLC* (E.D.Va. 2014) 11 F.Supp.3d 612, 615 (*Hantz*); see also *Mohammadi v. Nwabuisi* (5th Cir. 2015) 605 F.App'x 329, 331 [employers were found to have acted willfully when they "ignore[d] complaints brought to their attention" about their payment methods].)

Here, it is undisputed that Xilinx conducted an internal investigation in response to Plaintiff's pay disparity allegations. (UMF Nos. 41-42.) But, Plaintiff calls into question the adequacy or thoroughness of Xilinx's investigation. Notwithstanding the alleged questionable quality of Xilinx's investigative process, there is no evidence of the sort of willful conduct discussed in *Williams* and *Hantz, supra,* and to the contrary, Xilinx did respond to pay equity complaints via an investigation. (Meyer Decl., ¶ 3; Exh. B.) Moreover, there is no evidence that Xilinx "withheld records to block investigations or "ignored specific warnings that they were out of compliance." (*Williams, supra,* 2018 U.S.Dist.LEXIS 129573 at *8-9.) Pertinently, the email exchange between two former Xilinx HR employees, Hayward and Nieto, provide a summary of findings on the pay disparity issue. (Meyer Decl., ¶ 3, Exh. B.) The email screenshot also reveals two attachments: 1) an excel spreadsheet which includes a list of employees, and their respective salaries, in the marketing department, and 2) an investigation report for claims by Amy Attard. (*Ibid.*)

The Court acknowledges Plaintiff's concerns regarding "gaps in the information gathering phase", (PAMF No. 7), and while such conduct may be deemed "unreasonable" it does not amount to a willful violation of FLSA. (*McLaughlin, supra,* 486 U.S. at pp. 129, fn. 13; 134-135 [an employer that "act[s] without a reasonable basis for believing that it was complying with the [FLSA]" is merely negligent].)

Accordingly, Xilinx meets its initial burden to demonstrate that the first cause of action is barred by the statute of limitations. Consequently, the burden shifts to Plaintiff to establish a triable issue of material fact.

**2) Plaintiff's Burden**

Plaintiff argues that the question of whether Xilinx acted "willfully" when it terminated her, is a triable issue of fact, and courts "cannot determine the issue of willfulness as a matter of law." (Opp., p. 28:23-26.) Additionally, Plaintiff provides a string cite of cases generally holding that retaliation claims "inherently involve willful conduct." (Opp., p. 29:11-21; see *Kalestian v. Performing Arts Ctr*. (C.D.Cal. Oct. 21, 2016, No. 2:16-CV-05928-CAS (SKX)) 2016 U.S.Dist.LEXIS 146382, at *4; see also *Butler v. Cleburne County Comm'n* (N.D.Ala. Jan. 17, 2012, No. 1:10-cv-2561-PWG) 2012 U.S.Dist.LEXIS 82534, at *18.)

Plaintiff ultimately argues that Xilinx "is presumed to know the law," was put on "inquiry notice" as to whether it was in compliance with the statute, "and failed to make further inquiry." (Opp., p. 29:3-10, fn. 25.) Plaintiff cites *Flores v. City of San Gabriel* (2016) 824 F.3d 890, 906-907 for the proposition that disregarding the possibility that an employer is in violation of the FLSA, including failing to make an inquiry as to compliance, is "sufficient to demonstrate 'willfulness.'" (*Ibid.*)

The Court disagrees. First, the Court finds Xilinx's mere, tacit understanding that the FLSA prohibits firing an employee in retaliation for complaining about potential equal pay

violations, is not, as Plaintiff argues, sufficient "evidence of a willful violation." (Opp., p. 29:3-10, fn. 25.) To hold otherwise would "obliterate[] any distinction between willful and nonwillful violations." (See *McLaughlin*, *supra,* 486 U.S. at pp. 132-133; see also *Reedy v. Rock-Tenn Co.* (E.D.Ark. June 29, 2009, No. 4:08CV00413 JLH) 2009 U.S.Dist.LEXIS 55463, at *26 [raising concerns with management regarding her exempt status does not show that employer willfully disregarded the FLSA requirements].)

Under Plaintiff's interpretation, every violation of the FLSA that occurred when the employer knew the FLSA existed would be considered willful, which, as clarified by the Supreme Court, is what Congress intended to avoid in adopting a two-tiered statute of limitations. (*Ibid*.)

The Court agrees with Xilinx that the undisputed facts in the record show that the company did not act with knowing or reckless disregard as to whether its conduct was prohibited by the FLSA. Notably, in Plaintiff's TAC, she alleges that when transitioning into her new role, "Xilinx provided [Plaintiff] with salary and grade level information for the employees in the Marketing Department…" (TAC, ¶ 76), and Plaintiff regularly emailed "Xilinx employees in the marketing, finance, and Human Resources departments regarding…salaries for the department." (*Ibid.*) Plaintiff's own allegations reveal Xilinx's transparency in providing employee salary information, which is contrary to what was found in *Hantz, supra,* where there was evidence of willful withholding of information. (*Hantz, supra,* 11 F.Supp.3d at p. 615.) Finally, and pertinently, Plaintiff does not proffer any evidence demonstrating that Xilinx prevented employees from raising HR complaints regarding gender discrimination.

Instead, the factual record demonstrates that Xilinx was transparent with Plaintiff about employee salaries within the marketing department, and it took steps to inquire into, and investigate, both Plaintiff's and another employee's pay disparity claims. This is sufficient as a matter of law. For example, Xilinx HR analysts did a cross comparison of the salaries for male and female employees within the marketing department and a report was drafted with a finding that no pay disparity, on the basis of gender, existed. (See Meyer Decl., ¶ 3, Exh. B.) Although Plaintiff questions Xilinx's methodology and approach to its pay disparity investigation, Plaintiff does not point to any authority holding that an inadequate investigation amounts to willful conduct. Thus, as Xilinx correctly points out, this Court cannot "presume that conduct was willful in the absence of evidence." (MPA MSJ, p. 25:1-2; see also *Alvarez, supra,* 339 F.3d at p. 909.)

Finally, Plaintiff argues that "if a jury could find that Xilinx *intentionally* retaliated against Plaintiff, it could also find that Xilinx did so willfully." (Opp., p. 29:18-21.) But again, Plaintiff does not proffer evidence, other than her own uncorroborated declaration and testimony, that Xilinx intentionally retaliated against her because of her complaints. A "plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*King v. United Parcel Service, Inc.* 152 Cal.App.4th at p. 433; see also *Doe v. Dept. of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 733, quoting *King, supra,* 152 Cal.App.4th at p. 433.) Consequently, Plaintiff fails to meet her burden in demonstrating Xilinx's conduct was willful.

In sum, Plaintiff's first cause of action is time-barred, and even if this Court assumed it was not, Plaintiff has not provided evidence other than her own statements to prove causation or overcome Defendant's evidence that there were legitimate reasons for her firing.

Because Plaintiff fails to establish a triable issue of material fact as to the FLSA statute of limitations, this Court GRANTS Xilinx's motion for summary judgment as to the first cause of action.

**(2) Second and Third Causes of Action – Retaliation Claims**

Xilinx contends Plaintiff's claims under Labor Code sections 1102.5 and 98.6 are time-barred by a one-year statute of limitations prescribed by "section 340"[5] which applies to "[a]n action upon a statute for a penalty or forfeiture." (MPA MSJ, p. 25:22-28; see also Reply, p. 21:7-11.) Plaintiff maintains the Labor Code sections provide for compensatory civil damages, and because she did not seek "civil penalties", the three-year statute of limitations under Code of Civil Procedure section 338, subdivision (a) applies. (Opp., p. 26:18-23.) Plaintiff cites *Ayala v. Frito-Lay, Inc.* (E.D. Cal. 2017) 263 F.Supp.3d 891, 915-917 (*Ayala*), in support. (Opp., p. 26:22-23.)

"To determine the statute of limitations which applies to a cause of action, it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23 (*Hensler*), citing *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 214).) "[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code." (*Hensler, supra,* 53 Cal.2d at p. 214, citing *Maguire v. Hibernia S. & L. Soc*. (1944) 23 Cal.2d 719, 733.) The application of a one-year statute or a three-year statute turns on the nature of the remedy provided by the applicable Labor Code sections. Xilinx insists that Labor Code sections 1102.5 and 98.6 provide for civil penalties, necessitating the application of a one-year statute of limitations under Code of Civil Procedure section 340, subdivision (a) and cites *Shamsian v. Atl. Richfield Co*. (2003) 107 Cal. App. 4th 967, 978 (*Shamsian*) in support. (MPA MSJ, p. 25:29-33.)

This Court finds *Shamsian, supra,* 107 Cal.App.4th at pp. 977-978 to be instructive, but it acknowledges the case does not involve a cause of action (discussing civil penalties) under the Labor Code. The *Shamsian* court explains, in relevant part:

> Next, we turn to section 340, subdivision (a), *which provides that within one year a party may bring "[a]n action upon a statute for a penalty or forfeiture, if the action is given to an individual, or to an individual and the state, except if the statute imposing it prescribes a different limitation."* This statute fits the appellants' first cause of action because it is based upon a statute for a penalty which has been given to individuals as well as the state. Any other interpretation

[5] Xilinx repeatedly cites "Civil Code 340," which has long been repealed, and no longer exists under the California Civil Code. But, given Xilinx's heavy reliance on both state and federal cases that exclusively discuss Code of Civil Procedure section 340, this Court will assume Xilinx is relying on Code of Civil Procedure section 340.

> would violate the plain language of section 340, subdivision (a). Moreover, this interpretation brings section 340, subdivision (a) into harmony with section 338, subdivision (b). Accordingly, we conclude that a one-year limitation applies.
>
> Finally, we look to prior case law for affirmation. Generally, section 340, subdivision (a) applies if a civil penalty is mandatory. [Citation omitted.] In addition, "the settled rule in California is that statutes which provide for recovery of damages additional to actual losses incurred, such as double or treble damages, are considered penal in nature [citations], and thus governed by the one-year period of limitations stated in section 340, subdivision [(a)]. [Citations.]" [Citations Omitted.] Health and Safety Code section 25249.7, subdivision (b) provides that any person who violates Health and Safety Code section 25249.5 "shall be liable for a civil penalty[.]" Also, it provides a recovery in addition to the damages a plaintiff might otherwise recover, and it is therefore penal. Because the civil penalty is mandatory and penal, and the Act does not specify a different limitation on actions, prior case law supports our application of section 340, subdivision (a).

(*Shamsian, supra,* 107 Cal.App.4th at pp. 977-978, italics added.)

A three-year statute of limitations applies under California Code of Civil Procedure section 338 where the claim arises from "a liability created by statute, other than a penalty or forfeiture." (Code Civ. Proc., § 338.) Courts have held that "liability created by statute" means " ' "the liability is embodied in a statutory provision *and* was of a type which did not exist at common law." ' " (*Lehman v. Superior Court* (2006) 145 Cal.App.4th 109, 118, citing *Jackson v. Cedars-Sinai Medical Center* (1990) 220 Cal.App.3d 1315, 1320).)

Like the Health and Safety Code section discussed in *Shamsian, supra,* Labor Code section 1102.5, subdivision (f)(1) provides that "an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section." Similarly, Labor Code section 98.6, subdivision (b)(3), states, "In addition to other remedies available, an employer who violates this section is liable for a civil penalty…" Both sections do not specify a statute of limitations. Xilinx argues, in light of *Shamsian, supra*, a civil penalty is mandatory under both Labor Code sections 98.6 and 1102.5, and the one-year statute of limitations applies.

A statute imposes a penalty if it provides for the recovery of damages that are beyond, or apart from, the damages actually incurred. (See *Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 243 [the one-year limitations period under section 340 governs statutes which provide for mandatory recovery of damages in addition to actual losses because they are considered penal in nature].) In construing statutes, courts "must determine and effectuate legislative intent. To ascertain intent, [courts] look first to the words of the statutes, giving them their usual and ordinary meaning. If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs. Where the statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist." (*Lennane v. Franchise Tax Board* (1994) 9 Cal.4th 263, 268 [internal quotation marks and citations omitted].)

In her TAC, Plaintiff seeks "all legal and equitable remedies, including backpay and liquidated damages," and punitive damages, for her second cause action (Labor Code section 1102.5.) (TAC, ¶¶ 158-159.)

Plaintiff argues that while there is a split in federal authority with respect to Labor Code section 1102.5, "prevailing" case law supports the position that the three-year limitations period of Code of Civil Procedure section 338, subdivision (a) applies when an employee, like herself, does not seek a civil penalty provided in Labor Code section 1102.5, subdivision (f)(1). (Opp., pp. 30:10-15; see also *Newton v. Bank of America* (C.D.Cal. Mar. 23, 2017, No. CV 16-09581-AB (RAOx)) 2017 U.S.Dist.LEXIS 227593, at *5-6.) This Court will review the holdings of what Plaintiff considers "prevailing case law." (Opp., p. 30:10-15.)

**i. Civil Penalties under Labor Code section 1102.5**

In *Ayala, supra*, the plaintiff generally alleged a claim under Labor Code section 1102.5 and not under subdivision (f). (*Ayala, supra,* 263 F.Supp.3d at p. 917.) Plaintiff did not seek civil penalties, and her prayer for relief requested "only compensatory damages and punitive damages." (*Ibid.*) Given her request, the court concluded that '"plaintiff had brought an action upon a liability created by statute, other than a penalty or forfeiture.'" (*Ayala, supra,* at p. 917, quoting Civ. Proc. Code § 338(a); see also *Stone v. Travelers Corp.* (9th Cir. 1995) 58 F.3d 434, 438 [courts consider whether plaintiff seeks to redress a wrong to the public or a wrong to the individual to determine whether the request is a civil penalty].)

Ultimately, the *Ayala* court held that "under California law and specifically § 338(a), a three-year statute of limitations period applies to plaintiff's § 1102.5 claim as it was brought "under § 1102.5 and not under § 1102.5(f)" and the plaintiff sought to remedy individual harms. (*Ayala, supra,* at p. 917 [the three-year statute of limitations applies to the extent a claimant seeks damages].) The court provided the following detailed explanation for its decision:

> California Labor Code § 1102.5 forms the basis for two distinct claims. A plaintiff can bring a § 1102.5 claim for damages, which seeks *to remedy individual harms.* A plaintiff can also bring a § 1102.5(f) claim for civil penalties, *aimed to redress public wrongs*. Because claims based on §§ 1102.5 and 1102.5(f) seek to redress different harms, they implicate different types of primary rights, and give rise to separate and distinct causes of action. The appropriate limitations period will depend on the nature of the cause of action presented by plaintiff—that is, whether plaintiff brings a claim under § 1102.5 or § 1102.5(f).

(*Ayala, supra,* 263 F.Supp.3d at pp. 916-917, italics added.)

Similarly, in *Newton, supra,* although the court acknowledged that "the civil penalty is a mandatory award once liability is established—if the penalty is available or sought," the court concluded applying a three-year statute of limitations to Labor Code section 1102.5 claims for damages is more appropriate "given the statutory scheme and the legislative intent behind the 2003 amendments to the statute:

> That the § 1102.5 right of action for damages predates the civil penalty indicates that this conclusion aligns with legislative intent. Before the 2003 amendment adding the civil penalty, a § 1102.5 claim presumably was an "action upon a liability created by statute" with a three-year fuse. If the one-year statute of limitations applied once the civil penalty was added, then it would follow that the 2003 amendment to § 1102.5, which aimed to *expand* whistleblower protections, effectively *reduced* the time a whistleblower has to bring suit from three years to one. Such a result would be antithetical to the Legislature's suggested intent.

(*Newton v. Bank of Am.* (C.D.Cal. Jan. 18, 2018, No. CV 16-09581-AB (RAOx)) 2018 U.S.Dist.LEXIS 228955, at *10-16.)

The *Newton* court disagreed that a Labor Code section 1102.5 claim for damages is inseverable from a claim seeking the civil penalty (*Newton, supra,* U.S.Dist.LEXIS 228955, at *17), and found the *Ayala's* court's rationale persuasive. (*Ibid*.) The *Newton* court reiterated that claims based on violations of Section 1102.5, subdivisions (a) through (d) may be brought either to recover damages for individual harms suffered at the hands of an employer pursuant to Labor Code section 1105 or, if the employer is a corporation or limited liability company, to recover a civil penalty pursuant to Labor Code section 1102.5, subdivision (f). The *Newton* court further concluded:

> These different § 1102.5 remedies are distinct: they were conceived at different times, *compare* 1984 Cal. Stat. 3698 (creating § 1102.5), *and* 1915 Cal. Stat. 47 (creating the statute now codified as § 1105), *with* 2003 Cal. Stat. 3518 (creating the civil penalty in § 1102.5(f)),' and they address different harms. (*Ibid.*)
>
> It is consistent with legislative intent and other California statutory schemes to interpret a claim for damages for violations of § 1102.5 to carry a three-year statute of limitations as an "action upon a liability created by statute" despite the availability of a mandatory civil penalty in certain circumstances.
>
> The Court concludes that a California Labor Code § 1102.5 claim for damages and not a civil penalty is subject to the three-year statute of limitations provided by California Code of Civil Procedure § 338(a). Thus, the Court declines to revise its March 23, 2017 order denying Defendant Bank of America, N.A.'s motion to dismiss.

(*Newton v. Bank of Am.* (C.D.Cal. Jan. 18, 2018, No. CV 16-09581-AB (RAOx)) 2018 U.S.Dist.LEXIS 228955, at *16-17.)

Plaintiff asserts, by echoing the *Newton* court's holding that imposing a "rigid and uniform" one-year statute on the applicable Labor Code claims would be "antithetical" to the purpose of these laws, namely, to expand, not contract, whistleblower protections." (Opp., p. 27:13-24.) This Court finds Plaintiff's argument unpersuasive even under the holdings of *Newton* and *Ayala.*

As noted above, in her TAC, Plaintiff appears to seek equitable and liquidated damages for her own injuries as well as punitive damages for the "conscious disregard of the rights and safety of *Plaintiff and others*" under Labor Code section 1102.5, subds. (b) and (c). (TAC, ¶¶ 158-159, italics added.) Thus, even under the holdings of *Ayala* and *Newton,* Plaintiff's prayer for relief not only seeks to remedy "individual harms," but to also "redress public harms" – remedies for claims that would be time-barred per Code of Civil Procedure section 340.

There are numerous recent district court cases holding that even if the plaintiff does not explicitly request the Labor Code section 1102.5, subdivision (f) penalty, the one-year statute of limitations applies. (See, e.g., *Butler v. Prime Healthcare Centinela, LLC* (C.D.Cal. May 10, 2019, No. CV 19-1738 PA (SSx)) 2019 U.S.Dist.LEXIS 140427; see also *De La Rosa v. Autozoners, LLC* (C.D.Cal. Jan. 8, 2024, No. CV 23-06196 TJH (ASx)) 2024 U.S.Dist.LEXIS 4736, at *4-5; see *Feast-Williams v. Merrill Lynch Fenner Pierce & Smith Inc.* (C.D.Cal. Dec. 18, 2018, No. CV 18-06451 SJO (SSx)) 2018 U.S.Dist.LEXIS 230330, at *21-22; see also, *Mathews v. Happy Valley Conference Center, Inc.* (2019) 43 Cal.App.5th 236, 267 (*Mathews*) ["Labor Code section 1102.5, subdivision (f) states that the penalty specified therein is to be imposed in *addition* to other penalties."] [original emphasis]; see also *Delgado v. MillerCoors LLC* (C.D.Cal. Mar. 16, 2017, No. CV 16-5241 DMG (ASx)) 2017 U.S.Dist.LEXIS 43482, at *4 (*Delgado*) ["all Section 1102.5 claims — regardless of remedy sought — are subject to the one year statute of limitations"]; see also *Butler v. Prime Healthcare Centinela, LLC* (C.D.Cal. May 10, 2019, No. CV 19-1738 PA (SSx)) 2019 U.S.Dist.LEXIS 140427, at *8-9.) [one-year statute of limitations for an action upon a statute for a penalty applies to claim for violation of Labor Code section 1102.5].)

Specifically, this Court finds *Delgado* to be on point and thorough. In *Delgado*, like here, the plaintiff's claim would not be barred if a three-year statute of limitations applied. (*Delgado, supra,* 2017 U.S.Dist.LEXIS 43482, at *13.) Nevertheless, the court applied the one-year statute of limitations and emphasized that "in addition to other penalties...[the] civil penalty for each violation of § 1102.5...is mandatory," even though plaintiff did not explicitly demand civil penalties. (*Id.* at *4.) The *Delgado* court further clarified that disclaiming penalties under Labor Code section 1102.5 is insufficient to transform the statute of limitations from one year to three years. (*Id.,* at *4-5.) The court concluded that because plaintiff filed the suit nearly two years after any alleged retaliation, her claims were time-barred. (*Id.,* at *5.)

A closer reading of Labor Code section 1102.5 supports *Delgado's* interpretation. Labor Code section 1102.5, subdivision (c) prohibits an employer from retaliating against an employee "for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." (Lab. Code § 1102.5, subd. (c).) Labor Code section 1102.5, subdivision (f) further provides that "[i]n addition to other penalties, an employer that is a corporation or limited liability company *is liable for a civil penalty* . . . for each violation of this section." (Lab. Code. § 1102.5, subd. (f).) This language is mandatory. A claim under Labor Code section 1102.5, subdivision (c) is a claim for civil penalties and is therefore subject to the one-year statute of limitations.

Although the *Delgado* court's holding relied on an unpublished California Court of Appeal decision, the Court finds *Delgado* to be more persuasive than *Ayala* and *Newton*.

Additionally, this Court is persuaded by the above-cited authorities' practical approach to resolving the statute of limitations quandary under the Labor Codes. The approach taken by *Delgado* and its ilk, "promote certainty" and focuses on "defendant's underlying conduct," as noted by Xilinx. (MPA MSJ, p. 26:3-8.) The public policy being that this protects against "dilatory claims," fading memories of key witnesses, and promotes judicial efficiency. (See, e.g., *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395.)

**ii. Civil Penalties under Labor Code section 98.6**

Labor Code section 98.6, subdivision (b)(3)[6] of the statute expressly provides: "*In addition* to other remedies available, an employer who violates this section *is liable for a civil penalty* not exceeding ten thousand dollars ($10,000) per employee for each violation of this section, to be awarded to the employee or employees who suffered the violation." (Lab. Code, § 98.6, subd. (b)(3), italics added.) The plain language indicates a civil penalty is mandatory. Here, like under Labor Code section 1102.5, Plaintiff seeks "all legal and equitable remedies, including backpay and liquidated damages," and punitive damages for her third cause of action under Labor Code section 98.6. (TAC, ¶¶ 167-168.)

Parties have not pointed to any authority directly addressing the statute of limitations for Labor Code section 98.6, but notably, a federal district court case published this year, held that plaintiffs seeking any civil penalties as relief under both Labor Code sections 98.6 and 1102.5 are bound by a one-year limitations period per California Code of Civil Procedure section 340, subdivision (a). (*Gjovik v. Apple Inc.* (N.D.Cal. Oct. 1, 2024, No. 23-cv-04597-EMC) 2024 U.S.Dist.LEXIS 179086, at *19-21.) The court relied on *Minor v. FedEx Office & Print Servs*. (N.D.Cal. 2016) 182 F.Supp.3d 966, 988[7], which solely addressed a Labor Code section 1102.5 claim, but held that these claims "must be brought within three years" unless "the suit seeks the civil penalty provided in § 1102.5(f)," in which case "the claim is subject to a one-year limitations period"). Other than *Gjovik*, this Court has not found cases directly pertaining to the statute of limitations for Labor Code section 98.6, subdivision (b)(3), but courts have addressed substantially similar language in Labor Code section 1102.5, concluding the statutory penalty is mandatory and subject to the one-year statute of limitations as discussed above.

**iii. Defendant's Burden**

Given the plain language of the applicable Labor Code sections and legislative intent, the one-year limitations period for an action upon a statute for a penalty applies to Plaintiff's second and third causes of action. In light of this, Xilinx's evidence is sufficient to meet its

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[6] In her TAC, Plaintiff cites Labor Code section 98.6, subdivision (a). (TAC, p. 35:7-10.)

[7] Notably, in *Delgado*, *supra,* 2017 U.S.Dist.LEXIS 43482, at *5, the court declined to follow *Minor v. FedEx Office and Print Services, Inc.*, in which it held that a plaintiff must actively seek the Labor Code section 1102.5, subdivision (f) penalty to trigger the one-year statute of limitations period. (*Minor, supra,* 182 F. Supp. 3d at p. 988.) However, upon the *Delgado* court's inspection of the case *dicta*, it explained that the *Minor* court "did not analyze the statutory scheme; rather, it sidestepped the question" because the *Minor* plaintiff's claim was barred under either the one-year or three-year limitations period. (See *Delgado, supra,* 2017 U.S.Dist.LEXIS 43482, at *12.)

initial burden to establish a complete defense to the causes of action, i.e., that Plaintiff's retaliation claims are barred by the one-year statute of limitations under Code of Civil Procedure section 340. It is undisputed that Plaintiff's claims arose on February 23, 2018, when Plaintiff was terminated. (TAC, ¶ 179.) It is also undisputed that Plaintiff filed the initial complaint on August 9, 2021, and the tolling agreement she entered into with Xilinx on February 17, 2021, terminated upon Plaintiff's voluntary withdrawal from the agreement, on July 25, 2021. (TAC, ¶¶ 136-137.) Thus, the tolling agreement is of no consequence here. Since the applicable statute of limitations is one year, Plaintiff's claims would be time-barred.

Because Xilinx meets its initial burden to demonstrate that the above claims for retaliation are barred by the statute of limitations, the burden shifts to Plaintiff to establish a triable issue of material fact.

**iv. Plaintiff's Burden**

Plaintiff has not established a triable issue of material fact. In the instant case, even with the benefit of both Rule 9 and the expired tolling agreement between the parties (see TAC, ¶¶ 134-137), Plaintiff brought her retaliation claims on August 9, 2021, over two years from the time she was terminated on February 23, 2018.

Accordingly, Plaintiff's second and third causes of action are time-barred, and even if this Court assumed they were not, Plaintiff has not provided evidence other than her own statements to prove causation or overcome Defendant's evidence that there were legitimate reasons for her firing.

As with the first cause of action, Plaintiff does not proffer evidence, other than her own uncorroborated declaration and testimony, that Xilinx intentionally retaliated against her because of her complaints. A "plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*King, supra,* 152 Cal.App.4th at p. 433; see also *Doe v. Dept. of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 733, quoting *King, supra,* 152 Cal.App.4th at p. 433.)

Defendant's motion is GRANTED as to the second and third causes of action for retaliation.

In light of the above ruling, this Court need not address Xilinx's remaining arguments as to Plaintiff's second and third causes of action.

**2. Plaintiff's Eighth Cause of Action – Violation of the Unfair Competition Law ("UCL") or Business and Professions Code section 17200**

Plaintiff alleges "Xilinx engaged in unlawful and unfair business acts and practices such as terminating [Plaintiff's] employment in retaliation for complaining about discrimination and gender disparities and attempting to correct those disparities; taking possession and control of her rebranding and repositioning strategy…without compensating her in any way." (TAC, ¶ 216.)

Defendant Xilinx argues Plaintiff's UCL claim fails for the same reasons her other claims fail, and there is no dispute that Xilinx "did not engage in unfair competition." (MPA MSJ, p. 27:5-12.) Citing *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1144, Xilinx additionally argues that Plaintiff cannot establish that she is entitled to restitution or an injunction because a UCL action is "equitable in nature; and damages cannot be recovered." (MPA MSJ, p. 27:13-16.) In opposition, Plaintiff contends "Xilinx does not dispute that Plaintiff's UCL claim, to the extent premised on retaliation, survived the Court's summary adjudication motion and is not time barred." (Opp., p. 31:12-14.) In reply, Xilinx asserts that "Plaintiff does not dispute that, if her retaliation claims fail, so does her UCL claim," and in a footnote, Xilinx contends that Plaintiff has "abandoned her efforts to revive" the dismissed intellectual property claims. (See Reply, p. 21:12-15, fn. 19.)

The facts alleged in support of Plaintiff's UCL claim are the same as those stated in support of the first three causes of action. (TAC, ¶¶ 138-164, 216.) The viability of a UCL claim stands or falls with the antecedent substantive causes of action. (*Krantz v. BT Visual Images, LLC* (2001) 89 Cal.App.4th 164, 178.) Since Plaintiff's first three causes of actions are time-barred, her UCL claim necessarily fails.

Consequently, the motion for motion for summary adjudication as to the eighth cause of action is GRANTED.

## VI. Conclusion and Order

Defendant Xilinx's motion for summary adjudication of the first, second, third, and eighth causes of action is GRANTED.

The Court will prepare the final order.

**- oo0oo -**

**Calendar line 4**
**Case Name:** *Gandhi v. Cedar Fair, LP, et al.*
**Case No.:** 22CV404706

Cedar Fair, LP ("Cedar" or "Defendant") moves for summary judgment as to the operative Complaint filed by Roma Gandhi, an individual. ("Plaintiff".)

## VII. Background

### C. Factual

This premises liability action arises from an amusement park accident. According to allegations of the Complaint, on October 20, 2017, Plaintiff sustained a serious head injury while walking through a haunted house attraction located on 4701 Great America Parkway in Santa Clara, California. (Complaint, p. 4.) Specifically, during the walkthrough, Plaintiff hit an "unlit metal beam," resulting in head injuries, pain and suffering, and emotional distress. (*Ibid*.) Defendant owned and operated the attraction, and "recklessly and negligently" failed to maintain, manage, and/or repair, the dangerous condition. (*Ibid.*)

### D. Procedural

On September 26, 2022, Plaintiff filed the operative Complaint against Cedar. In her Complaint, Plaintiff indicated she complied with the applicable claims statutes. (Complaint, p. 2.) She asserts a single cause of action for premises liability.

On August 1, 2024, Defendant filed a motion for summary judgment ("MSJ") challenging Plaintiff's premises liability claim. Plaintiff filed two amended oppositions[8] to the motion on October 3, 2024. Defendant filed a reply on October 11, 2024.

## VIII. Cedar's Evidentiary Objections

Defendant submits objections to evidence offered by Plaintiff in opposition to Cedar's motion for summary judgment. As the objections are not in the proper format the Court need not rule on them. California Rules of Court, Rule 3.1354, subdivision (c) requires the filing of two documents: evidentiary objections and a separate proposed order on the objections, and both must be in one of the two approved formats set forth in the Rule. Instead, Defendant has filed a single document, listing objections with a place for the Court to checkmark its rulings, signed by Defendant's counsel, but with no place for a judge's signature.

In any event, the Court also declines to rule on these objections because it is not material to the outcome of the motion. (See Code of Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

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[8] Although Plaintiff filed two amended oppositions on the same date, they both appear to be substantively identical and include the same hearing date.

## IX. Motion for Summary Judgment

Pursuant to Code of Civil Procedure section 437c, the Cedar Fair moves for summary judgment as to Plaintiff's Complaint.

### C. Legal Standard

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

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action…The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72, internal citations omitted; emphasis added.)

When a defendant moves for summary judgment, "its declarations and evidence must either establish a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted." (*Gray* v. *America West Airlines, Inc*. (1989) 209 Cal.App.3d 76, 81.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

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

### D. Merits of the Motion

Defendant is seeking summary judgment on Plaintiff's single claim of premises liability on three grounds: 1) that Plaintiff's claim is barred by the affirmative defense of primary assumption of risk doctrine; 2) even if assumption of risk does not apply, Plaintiff cannot prove a claim for premises liability because Cedar did not have notice of the "purportedly hazardous condition," and; 3) the dangerous condition was open and obvious.

(Defendant's Memorandum of Points and Authorities in Support of MSJ ("MPA MSJ"), pp. 6-8.)

**i. Assumption of Risk Doctrine**

Defendant contends that Plaintiff assumed the risk of injury because the incident occurred while she was engaging in a recreational activity, namely, visiting a haunted house attraction where "dark lighting is essential." (MPA MSJ, p. 6:3-15; see also Defendant's Reply to Motion for Summary Judgment ("Reply"), p. 4:12-14.)

Primary assumption of risk is a question of law amenable to resolution by summary judgment because, if applicable, it negates the duty element of a negligence claim. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 313 ("*Knight*").) "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks." (*Connelly v. Mammoth Mountain Ski Area* (1994) 39 Cal.App.4th 8, 11, citing *Knight*, *supra*, 3 Cal.4th at pp. 314-316.) The doctrine bars recovery because no duty of care is owed as to these inherent risks. (*Ibid.*) Whether a risk is an inherent part of an activity "is necessarily reached from the common knowledge of judges, and not the opinions of experts." (*Staten v. Superior Court* (1996) 45 Cal. App. 4th 1628, 1635.)

In evaluating whether a case comes within the primary assumption of risk doctrine, a court must examine (1) the nature of the activity and (2) the plaintiff's and defendant's respective roles in, or relationships to, the activity. (*Yancey v. Superior Court* (1994) 28 Cal.App.4th 558, 562.)

Cedar generally asserts that "dark lighting" is essential to the recreational activity of a haunted house and given that it is inherent to the activity, Cedar's only duty is "not to increase the risk that would normally be inherent in the activity." (MPA MSJ, pp. 6:25-7:10.) Cedar concludes: "there is no evidence that it acted intentionally or recklessly, or took any action to increase any risks inherent in the activity." (MPA MSJ, p. 7:13-15.) In support, Cedar has submitted the required Separate Statement of Undisputed Material Facts ("UMFs") listing a total of 16 UMFs. Cedar's key proffered evidence include:

1) Clayton Lawrence ("Lawrence"), Cedar's corporate manager of "live shows development" provided the following testimony: "By design of these mazes we need to make them dark and scary so we can…give the guest experience a startle. And so yes, we—we purposely make dark corners and—and allow spaces for our monsters to pop out and do pop scares." (UMF No. 16; Declaration of David V. Roth ("Roth Decl."), p. 1:28; Index of Exhibits iso Defendant MSJ ("Cedar Index"), Exh. B – Lawrence's Deposition ("Lawrence Depo."), pp. 16:12-24, 54:13-55:1.)

2) Cedar attempted to "mitigate risk" in the following ways:

    a. A perimeter of rope lighting was placed at the corridor exit, which provided "illumination." (UMF Nos. 11-12; Roth Decl., p. 1:28; Cedar Index, Exh. B – Lawrence Depo, pp. 41:7-17, 43:17-25; Cedar

Index, Exh. C – Vickie Saling's Deposition ("Saling Depo."), pp. 38:23- 39:15, 40:15-41:22);

b. "Ambient lighting" also came from the outside through the open door at the maze exit. (UMF No. 11; Roth Decl., p. 2:1; Cedar Index, Exh. C – Saling Depo., p. 39:6-8);
c. A Cedar staff member with a flashlight directed guests toward the exit of the maze (UMF No, 11; Cedar Index, Exh. C – Saling Depo., p. 43:22-25); and
d. Safety signs physically posted at the entrance and exit to the haunted house maze warned guests of potential risks, including low lighting conditions. (UMF No. 14; Roth Decl., p. 1:28; Cedar Index, Exh. B – Lawrence Depo., pp. 51:10-52:9, 55:2-10.)

3) Saling, Cedar safety manager, would not have permitted the haunted house to remain open if the rope lighting was not on. (UMF No. 13; Roth Decl., p. 2:1; Cedar Index, Exh. C - Saling Depo., p. 41:7-22);

4) There were no prior incidents reported to Cedar of any guest walking into a pole at the haunted house attraction. (UMF No. 14; Cedar Index, Exh. C– Saling Depo., pp. 14:3-10, 15:10-23, 38:7-14.)

Defendant Cedar relies on *Griffin v. Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 498 (*Griffin*) for the following proposition: "Under the primary assumption of risk doctrine, an operator of a business that provides a recreational activity posing inherent risks of injury has no duty to eliminate those inherent risks." As noted by Defendant, *Griffin*, like this one, involves an injured patron at a haunted house attraction, but the similarities end there. (*Griffin, supra,* 242 Cal.App.4th at pp. 495-496.) Specifically, in *Griffin*, the plaintiff fell and sustained a wrist injury while running from an actor wielding a chainsaw. (*Ibid*.) Here, Plaintiff alleges she collided into a large, unlit and unprotected steel beam, in a narrow exit corridor. (See Plaintiff's Supplemental Material Facts, Nos. ("PSMF") 8-9, 32, 37.) Notably, the *Griffin* court acknowledged that primary assumption of risk does not provide absolute immunity and to illustrate this point, it provides the following example: "In contrast, this court reversed summary judgment in a primary assumption of risk case involving a fall injury where there was conflicting evidence on the adequacy of lighting where the plaintiff fell." (*Griffin, supra,* 242 Cal.App.4th at p. 504, citing *Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1059 (*Fazio*).) *Griffin* supports the conclusion that "conflicting evidence" on issues of lighting, and in this instance, the visibility of an unpadded steel beam, establishes a triable issue of material fact on whether Cedar used "due care not to increase the risks to a participant over and above those inherent in the activity." (*Griffin, supra,* 242 Cal.App.4th at p. 504.)

Next, Plaintiff disputes UMF Nos. 11-14 and 16, by alleging the following: 1) no rope lighting was lit on the date of the incident, yet the building's power was on; 2) no person with a flashlight was present at the time; 3) no ambient lighting was seen near the exit corridor; 4) no safety sign, specifically warned, of the potential risk of "hitting a large unprotected steel pole in the direct path of exiting patrons"; and 5) Cedar could have designed an attraction without this unanticipated hazard in an unlit corridor. (See Plaintiff's Amended Response to UMFs, pp. 4-5; Declaration of Mark D. Rosenberg ("Rosenberg Decl."), p. 2:4-7; Plaintiff's Amended

Index of Exhibits iso Opposition to MSJ ("Plaintiff Index"), Exh. 1[9] . – Photograph of the Exit Corridor; Plaintiff Index, Exh. 5 – Lawrence Depo., p. 40:11-25 ["Q. And as of October 20th, 2017, all guests who went through the…Haunted House were required to go through this three-foot corridor? A. Correct."]; Exh. F to Roth Decl. - Photograph of Steel Beam.) Notably, Lawrence's testimony confirms there was no rope lighting in the authenticated photographs of the exit corridor, taken a week after Plaintiff's injury. (See Rosenberg Decl., p. 2:22-23; Plaintiff Index, Exh. 5 – Lawrence Depo., pp, 41:25-42:14 ["no, there's no lighting where I stated the rope lighting would have been."])

Here, it appears Cedar admits the existence of an unlit, unprotected steel pole, and a fire extinguisher mounted on said pole:

> A. We had -- we had meetings regarding placement of that -- the fire extinguisher that was there, but nothing in relation to padding these -- these columns.
>
> …
>
> Q. Was there any lighting on the pole that was shown in Exhibit 6?
>
> A. There was no special light on that pole specifically, no.
>
> Q. And there was no lighting that was directed toward that pole specifically; is that correct?
>
> A. No. Just the rope lighting that would have passed by it.

(Rosenberg Decl., p. 2:22-23; Cedar Index, Exh. 5 – Lawrence Depo., pp. 35:21-25; 44:1-9.)

There is also a dispute as to whether the ambient "rope lighting" was lit on the day in question, which, as Cedar concedes, must be on when the attraction is open to the public:

> I do not remember it ever being off because *I would not have allowed the maze to be open. I would have had them replace it or turn it on before the maze would have been allowed to be open.* I have to make sure that me or one of my EMTs signs off that they can open the maze every day. That's where those daily inspections come from.

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[9] Rosenberg's Declaration notes the following: "EXHIBIT 1 is a true and correct copy of the photograph of the exit corridor taken by Rakesh Gandhi on October 27, 2017, and authenticated as Exhibit 5 to Clayton Lawrence's deposition and attached as EXHIBIT F to Defendant's Motion for Summary Judgment. (Rosenberg Decl., p. 2:4-7.) According to Rakesh Gandhi's (Plaintiff's father) Deposition ("R. Gandhi Depo."), he had taken the photograph (attached as Exhibit 1) on October 27, 2017, during operation hours. (Cedar Index, Exh. H – R. Gandhi Depo., p. 27:1-9.) R. Gandhi testified that when he observed the haunted house that day he did not recall "any light on the ground" in the area of the accident and "it was very dark." (*Id.,* p. 68:16-19.)

(See Rosenberg Decl., p. 2; Plaintiff Index, Exh. C – Saling Depo., p. 41:16-22, italics added; UMF No. 13 ["Vickie Saling would not have permitted the attraction to remain open if the rope lighting were not operating"].)

Based on common experience and this Court's review of relevant authority, there is at least a triable issue of material fact as to whether colliding into an exposed, and unlit, steel beam, located in a 3-feet wide exit corridor, is "a known hazard" when visiting a haunted house. (See *Knight, supra*, 3 Cal.4th at p. 325 [a defense of assumption of risk to liability applies to injuries resulting from "a specific, known and appreciated risk" to which the plaintiff had voluntarily consented; see also, *Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078, 1088-1089 ["even if… a slip in a shower is a known hazard of the use of a health club, there is at least a triable issue of material fact whether a slip and fall on algae on a pool deck is also a known hazard"].)

Thus, Defendant has failed to meet its initial burden to establish that there is no triable issue of material fact as to whether Plaintiff's collision into an unlit and unpadded, steel beam is a "specific, known and appreciated risk" any participant assumes at a haunted house attraction. (*Knight, supra*, 3 Cal.4th at p. 325; see also *Fazio, supra,* 233 Cal.App.4th at p. 1064 ["'Whether a given set of facts and circumstances creates a dangerous condition is usually a question of fact. [Citation.] The issue of a dangerous condition becomes a question of law only where reasonable minds can come to only one conclusion. [Citation].'"].)

Based on the above, there is a triable issue of material fact. Accordingly, Cedar's argument that the affirmative defense of primary assumption of the risk bars Plaintiff's premises liability claim is rejected.

**ii. General Duty for Premises Liability**

Alternatively, Defendant Cedar contends summary judgment is proper because Plaintiff cannot establish that Cedar is liable for failing to remedy "a purportedly hazardous condition of which it had no notice." (MPA MSJ, p. 8:9-11.) Cedar cites *Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1209 for the proposition that Plaintiff cannot point to evidence that would place a reasonably prudent person on notice of an unreasonable risk of harm given the lack of prior incidents and that the danger was open and obvious. (MPA MSJ, p. 8:13-18; UMF Nos. 2, 8, 15.) For reasons discussed below, these arguments are unpersuasive.

"Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties. [Citation.]" (*Delgado v. American Multi-Cinema, Inc*. (1999) 72 Cal.App.4th 1403, 1406, fn. 1.) "Premises liability is a form of negligence … and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611, 1619; see also CACI 1001 [stating in pertinent part that: "A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others."])

"An owner of real property is 'not the insurer of [a] visitor's personal safety . . .' However, an owner is responsible 'for an injury occasioned to another by [the owner's] want of ordinary care or skill in the management of his or her property . . .' Accordingly, landowners are required 'to maintain land in their possession and control in a reasonably safe condition,' and to use due care to eliminate dangerous conditions on their property." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943-944, internal citations and quotation marks omitted.) "The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156.)

There is also a separate notice requirement: "An owner is liable for harm caused by a dangerous condition, of which the owner had actual or constructive knowledge. An injured plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it, but failed to take reasonable steps to do so." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 431, citations omitted.)

**1. Notice of the Dangerous Condition**

In both its motion and reply, Cedar contends Plaintiff proffers no evidence demonstrating it had notice of any purportedly dangerous condition given that no prior similar incidents have occurred at the haunted house. (MPA MSJ, p. 8:7-10; see also Reply, p. 3:15-25.) This Court disagrees.

Cedar has failed to meet its burden at the first step of the summary judgment analysis as to notice. Specifically, it has not adequately shown that it had neither actual nor constructive notice of any dangerous condition in the haunted house attraction. Here, the relevant proffered evidence both parties agree on are: 1) Plaintiff hit an exposed steel pole, as she was exiting the attraction, and 2) there were no prior incident reports regarding injuries caused by the steel beam. (See UMF Nos. 3, 9, 15; see also PSMF No. 43; Roth Decl., p. 2:6-7; Cedar Index, Exh. F – Photo of Exit Corridor; Plaintiff Index, Exh. 1 – Photograph of Exit Corridor; Plaintiff Index, Exh. 6 – Saling Depo., pp. 36:21-25-37:1-16; 38:1-6; Plaintiff Index, Exh. 5 – Lawrence Depo., p. 40:21-25.) However, the parties' agreement ends there.

As noted above, Plaintiff's responses to Cedar's separate statement provides significant additional information regarding the incident that was not mentioned in Defendant's moving papers. Notably, Plaintiff disputes the following key UMFs relevant to notice:

1) UMF Nos. 11-14 – "Disputed. No rope lighting was lit on the date of the incident, no person with a flashlight was present at the time of the incident. No ambient lighting could be seen from the exit corridor." (Plaintiff Index, Exh. 1 - Photograph of Exit Corridor.)

Moreover, Cedar admits that it would not operate the maze without rope lighting, suggesting that Cedar was aware of the danger of not having rope lighting. See UMF No. 13 ["Vickie Saling would not have permitted the attraction to remain open if the rope lighting were not operating"].

Plaintiff's response to Cedar's proffered evidence is that the rope lighting or "ambient lighting" of any kind was not on at the time she collided into the exposed metal beam in the attraction hallway. (See Plaintiff's Supplemental Material Facts, Nos. ("PSMF") 7, 9, 28-34.) Additionally, she argues, the metal beam, coupled with the mounted "knee-high" fire extinguisher, obscured the hazard further, and resulted in a "knee contusion." (PSMF, ¶¶ 9, 29.) Notably, both Cedar and Plaintiff proffer evidence of a photograph of the exit corridor. (See Rosenberg Decl., p. 2; Exhs. 1, F – Photograph of Exit Corridor.) Plaintiff further proffers deposition testimony from Cedar staff members Saling and Lawrence, conceding that the rope lights were not lit in the photograph, the steel beam was exposed, the corridor was approximately 3-feet wide and the only exit, and the beam itself was unlit. (Plaintiff Index, Exh. 5 – Lawrence Depo., pp. 40:1-42:25; 50:1-9; Plaintiff Index, Exh. 6 - Saling Depo., p. 43:11-14.) Although Lawrence testified that the photograph in Exhibit 1 was not one that showed the steel beam during normal operation, he did concede that the Cedar team uses "low" or "dark" lighting to create a "scary" atmosphere during operating hours. (Plaintiff Index, Exh. 5 – Lawrence Depo., pp. 42:12-14.; 50:8-25.)

Given the above discussion, there is at least a triable issue of material fact as to whether Cedar had notice of the allegedly dangerous condition created by the existence of an exposed, unlit steel beam, within a dimly lit or unlit corridor in its haunted house attraction. Defendant operates a maze-type attraction where patrons are required to enter and exit from specific narrow corridors, one of which, was allegedly unlit with a concealed steel beam. A jury could reasonably conclude that Defendant knew or reasonably should have known that patrons could potentially hit the unlit steel beam located in a 3-feet wide corridor that is dimly lit. (See Exh. 6 to Rosenberg Decl. – Saling Depo, p. 15:10-20 ["We do all the building inspections"], p. 22:19-25 ["I would walk every single maze every day, push and pull and make sure nothing had been…you know, gotten loose or anything as I walked through].) It is undisputed that Cedar and its employees had notice of the steel beam conditions, and they admit as such in the proffered deposition testimony cited above. (Plaintiff Index, Exh. 5 – Lawrence Depo., pp. 35:22-25, 50:1-9.)

Thus, there is a triable issue of material fact as to whether Defendant should have taken reasonable steps to make the corridor safe in an attraction where patrons had only one required path to exit. (PSMF No. 43.) Even though no similar incident had previously occurred, (UMF No. 15), the danger of a patron hitting an exposed, and unlit, steel beam, in a dark and narrow exit corridor, was reasonably foreseeable in view of the configuration of the corridor. (Plaintiff Index, Exh. 1 – Photo of Exit Corridor.) Defendant thus had a duty to take reasonable measures to protect Plaintiff against such an incident notwithstanding the absence of prior similar incidents. "When an unreasonable risk of danger exists, the landowner bears a duty to protect against the first occurrence, and cannot withhold precautionary measures until after the danger has come to fruition in an injury-causing accident. Liability is particularly appropriate where the landowner has actual knowledge of the danger, e.g., where he or she has created the condition." (See *Robison v. Six Flags Theme Parks* (1998) 64 Cal.App.4th 1294, 1296.)

Accordingly, Defendant fails to demonstrate it had no notice of any dangerous condition, at least, with respect to the exposed and unlit steel beam. As noted above, Plaintiff's evidence largely disputes Defendant's key proffered evidence regarding the visibility of the steel beam and rope lighting. Consequently, Cedar fails to meet its initial burden on this basis, and the Court need not address Plaintiff's argument in opposition.

**2. Open and Obvious Conditions**

Finally, Defendant argues that it cannot be liable because the "purportedly" identified dangerous conditions were open and obvious: "The pole was not concealed in any way, and rope lighting, as well as other ambient lighting, illuminated the hallway where Plaintiff was walking. UMF 4, 11-13." (MPA MSJ, p. 8:19-22.) Additionally, Defendant asserts although it acknowledges there are exceptions to the rule, i.e., plaintiff was required to encounter danger, "the undisputed evidence shows that Plaintiff did not have to encounter the pole." (MPA MSJ, p. 8:22-26.) Specifically, Cedar alleges the attraction hallway in which Plaintiff was walking was 42 inches wide, and "Plaintiff simply walked into a pole," and that this evidence demonstrates Cedar is not liable for her injuries. (MPA MSJ, p. 8:24-26; UMF No. 10.) Again, this Court is unpersuaded by Cedar's argument for many of the reasons already discussed *supra*. Also, its argument under the "open and obvious" rule is largely undeveloped. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].) In any event, the Court, in its discretion, will address Cedar's argument.

With regard to a landowner/possessor/lessor/controller's obligations, "if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner [or possessor/lessor/party in control] is under no further duty to remedy or warn of the condition." (*Krongos v. Pacific Gas & Electric Co*. (1992) 7 Cal.App.4th 387, 393.) The determination of whether a particular danger is open and obvious rests upon an objective standard. (*Bunch v. Hoffinger Industries, Inc*. (2004) 123 Cal.App.4th 1278, 1295-1298.) Thus, the inquiry is whether the dangerous condition is obvious to a reasonable person, not the plaintiff in particular. (*Ibid*.; see, e.g., *Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 126-127 ["Any reasonable person would know that standing within a few feet of a high speed freight train is dangerous."].)

"Foreseeability of harm is typically absent when a dangerous condition is open and obvious . . . An exception to this general rule exists when 'it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it).' In other words, while the obviousness of the condition and its dangerousness may obviate the landowner's duty to remedy or warn of the condition in some situations, such obviousness will not negate a duty of care when it is foreseeable that, because of necessity or other circumstances, a person may choose to encounter the condition." (*Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14 Cal.App.5th 438, 447 (*Jacobs*) [internal citations omitted].) This exception has been construed as applying to defects on paths of egress and ingress to a property if they are the only means for invitees to enter or exit.

The Court will first turn to Defendant's contention that there was no necessity requiring Plaintiff to "to encounter the pole" at that moment, while making her way toward the haunted house exit. (MPA MSJ, p. 8:22-26.) Defendant additionally contends the hallway was 42 inches wide, there was lighting, and the steel beam was not concealed in any way. (MPA MSJ, p. 8:18-25.) However, there is a material dispute as to whether the corridor was lit at all, and whether the hallway was 42 inches wide. (See Plaintiff's Response to Sep. Stat., p. 3:17-22-4.) Notably, a Cedar employee testified that patrons were required to walk through the subject corridor to exit the attraction, the hallway was approximately three feet wide, and the exposed

steel beam was unlit. (Plaintiff Index, Exh. 5 – Lawrence Depo., pp. 28:17-25; 40:21-25-41:12-25-42:1-14; 50:1-9; Plaintiff Index, Exh. 6 - Saling Depo., p. 43:11-14.)

In light of *Jacobs,* which Cedar also cites, the exception to the open and obvious rule applies to defects, e.g., an unprotected, unlit steel beam, on paths of egress and ingress to a property if they are the only means for invitees to enter or exit. (*Jacobs, supra,* 14 Cal.App.5th at p. 447.) Plaintiff had no choice but to walk through the narrow exit corridor despite it containing a potential hazard. Liability extended to Defendant when plaintiff was required to exit the attraction via the subject corridor. (PSMF No. 43 [Cedar required patrons and Plaintiff to go down the subject exit corridor which led to the outside of the building.])

On this record, the Court cannot conclude that the exposed, unlit, steel beam was open and obvious to a reasonable person as a matter of law. While the steel beam in the photographs is visibly erect from the ground up, it is not only arguably obscured by a fire extinguisher (of similar color) mounted on the beam, but the visibility of the beam is also impacted by the location from which it is being viewed. Additionally, the steel beam arguably blends into the background given how noticeably dark the corridor is. Since reasonable minds can differ regarding the visibility of the steel beam, the Court will not grant Cedar's request for summary judgment on this basis as it fails to meet its initial burden.

**B. Conclusion**

The motion for summary judgment is DENIED.

The Court will prepare the Final Order.

**- oo0oo –**

**Calendar Line 5**
**Case Name: Hot Palette v. Ryoko Yamaguchi**
**Case No.: 23CV421443**

Under Cal. Code of Civil Procedure §§ 2030.030(c) and 2030.040(a), a party that attaches a declaration may propound more than 35 special interrogatories. A greater number of special interrogatories may be warranted based on: (i) the complexity or the quantity of existing potential issues; (ii) the financial burden of oral deposition; and/or (iii) the expedience of using this method of discovery to provide to the responding party the opportunity to conduct an inquiry, investigation, or search files or records to supply the information sought. Cal. Code Civ. Proc. § 2030.040. Plaintiff did apparently attach such a declaration to the discovery, claiming that more interrogatories are needed because the issues are "somewhat complex," it must prove damages, and each interrogatory must separately set forth each allegation.

In response, Defendant has moved for a protective order. If more than thirty-five special interrogatories are served, the responding party may "promptly move for a protective order." (Code Civ. Proc., § 2030.090(a).) The court is authorized to enter a protective order protecting a party "from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (Id., § 2030.090(b).) "In considering whether the discovery is unduly burdensome or expensive, the court takes into account 'the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.'" (*People ex rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1552 [quoting Code Civ. Proc., § 2019.030(a)(2)].) "[T]he propounding party shall have the burden of justifying the number of [additional] interrogatories." (*Id.*, § 2030.040(b).)

Here, Plaintiff has not met its burden to justify the number of additional interrogatories. Plaintiff only asserts that the issues are "somewhat" complex. The Court agrees that the case is not particularly complex. Although there are claims of fraudulent inducement and elder abuse, Plaintiff has not submitted any facts to explain or demonstrate how the addition of these claims requires additional interrogatories. Plaintiff claims the questions are needed to prove damages and yet Plaintiff fails to indicate which or how many questions even go to the issue of damages or why damages would require 32 additional questions. Plaintiff has submitted no declaration to support either the complexity of the case or why the other discovery tools are not sufficient. Plaintiff's speculation that Defendant could not sit through a long deposition, a reason not even asserted in its declaration, is not sufficient to meet its burden.

The motion for protective order to limit the number of special interrogatories propounded on Defendant/Cross-Complainant Yamaguchi to 35 is GRANTED. Defendant shall submit the final order.

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