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: 07-25-24 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	23CV410152 Hearing: Demurrer	ELIZABETH REMULLA vs PRESCITA BAGUNAS	See Tentative Ruling. Court will prepare the final order.
Department 3 – line 3	23CV423451 Hearing: Demurrer	Remulla v. Bagunas	See Tentative Ruling. Court will prepare the final order.
LINE 2	21CV391518 Motion: Summary Judgment/Adjudication	Juan Velazquez vs Hanson Drywall, Inc.	See Tentative Ruling. Court will prepare the final order.
LINE 3	23CV410152 Reserved: Summary Judgment	Gary Bozzo vs Msalam Sara, MD et al	Notice appearing proper and good cause appearing, the unopposed motion for summary judgment/adjudication of Defendant Bich-Ha Le Nguyen is GRANTED. Defendant has made a prima facie case and Plaintiff has failed to present any evidence to demonstrate a material issue of fact. Moreover, the failure to file a written opposition "'creates an inference that the motion or demurrer ismeritorious.'" *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410. Defendant shall submit the final order.

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LINE 4	20CV361307 Motion: Compel	Kristy Bailey et al vs Vintage Towers et al	Defendant Avanath Capital Management's ("Defendant") unopposed motion to compel Plaintiff Joseph Machado to respond to request for form interrogatories set one is GRANTED. The request for sanctions against Plaintiff and his counsel for $930 is GRANTED. Responses and sanctions shall be provided to Defendant within 15 days of receipt of the final order. Defendant shall submit the final order.

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LINE 5	19CV353189 Motion: Vacate	Navy Federal Credit Union vs Marovan Zaiter	Parties are ordered to appear at the hearing either in person or by video through the remote link on the court's website. The tentative ruling is that that motion to vacate is DENIED. Defendant has provided no evidence even by declaration that s/he never lived at the address served. The filing of a proof of service that complies with applicable statutory requirements by itself creates a rebuttable presumption that service was proper. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441.) Additionally, a declaration of service by a registered process server establishes a presumption that the facts stated in the declaration are true. (Evid. Code, § 647; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.) Defendant's statements (not even made under penalty of perjury) are insufficient to rebut the presumption.

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LINE 6	21CV385612 Motion: Seal Records	Indradevi Joseph vs Xilinx, Inc. et al.	Unopposed motion to seal is granted, but only to the extent it was granted in the court's order of April 5, 2024: The Motion to Seal is GRANTED to the following extent: Defendant may file the exhibits under seal and publicly file redacted versions of Exs. A, B, and C to Ex. T of the Fuschetti Declaration. Defendant shall only redact the names of the employees who participated in the investigation, not including the names of those who conducted the investigation or the name of the plaintiff as revealed in Exs. A and B, and shall redact the names of the individual employees in Exhibit C.
LINE 7	23CV425372 Hearing: Appointment of counsel	Tyghe Mullin vs Matthew Delorenzo	See Tentative Ruling. The Court will file 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 8	2008-1-CV-129132 Hearing: To correct clerical error in application for renewal of judgment	C. Hulse vs T. Conway, et al	Parties are ordered to appear. Defendants' opposition was not timely. The Court exercises its discretion to consider it nonetheless, given that Plaintiff was able to reply and has not been prejudiced. Plaintiff is correct that Defendants' attempts to dismiss or correct the renewed judgment are too late, as Defendants had 60 days from the date of the renewed judgment of 6/16/22 to vacate or correct that judgment and failed to do so. CCP § 683.170. He cannot now argue, therefore, that the judgment against Ms. McVay is not valid. Plaintiff now attempts to correct and lower the renewed judgment, pursuant to § 473(d). The court is inclined to grant the motion, but notes that it does not see where Plaintiff filed the proposed amended renewed judgment. The court wants to see the proposed judgment before granting the motion.
LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			

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

LINE 16			
LINE 17			

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Calendar Line 1
Case Name: *Remulla v. Bagunas*
Case No.: 23CV423453

This is an action for the breach of a loan agreement. According to the allegations of the initial complaint, on January 1, 1999, plaintiff Elizabeth Remulla ("Plaintiff") loaned defendant Prescita Bagunas ("Defendant") $30,000 so that Defendant's daughter could go to the United States and pursue her dream of becoming a nurse. (See initial complaint, ¶¶ BC-1-2, attachment BC-1.) Defendant agreed to repay the loan of $30,000 once her youngest daughter became a nurse. (See initial complaint, attachment BC-1.) On January 1, 2000, Defendant and her family immigrated to the United States, and on November 1, 2022, Defendant's youngest daughter became a gainfully employed nurse. (*Id*.) On December 1, 2022, Plaintiff contacted Defendant by phone and requested that Defendant repay the loan as agreed or, in the alternative, commence with installment payments of $3,000 per month. (*Id*.) Despite a subsequent demand for repayment from Plaintiff's counsel, Defendant has since failed to respond to the demands for repayment, and on September 25, 2023, Plaintiff filed the initial complaint against Defendant, asserting causes of action for breach of contract and common counts. (*Id*.)

Defendant demurred to the initial complaint on the grounds that the first cause of action for breach of contract failed to allege facts with sufficient particularity, the second cause of action for common counts fails to state facts sufficient to constitute a cause of action since it is dependent on the first cause of action, the first cause of action is barred by the statute of frauds, and the alleged contract is fatally uncertain.

On February 29, 2024, Plaintiff filed a first amended complaint ("FAC") against Defendant, asserting a single cause of action for breach of contract. Defendant demurs to the FAC.

The FAC is not a sham pleading

Defendant argues that she demurred to the initial complaint on the ground that it was barred by the statute of frauds and the FAC omits certain allegations to avoid the statute of frauds. Defendant asserts without citation to any authority or relevant portions of the initial complaint or FAC that "[b]ased on the facts of the complaint the terms of the contract could not have been completed within a year… [because i]t is not possible for a family in the Philippines to receive the proper immigration papers to the United States, have the youngest daughter attend the requisite educational curriculum to qualify to become a nurse in the United States, to pass the nursing board, become licensed as a nurse, and become gainfully employed all within one year." (Def.'s memorandum of points and authorities in support of demurrer to FAC ("Def.'s memo"), p.10:2-7.)

Civil Code section 1624, subdivision (a) states that a contract is invalid if "by its terms[, it] is not to be performed within a year from the making thereof." (Civ. Code § 1624, subd. (a).) However, "[i]t is well settled that the oral contracts invalidated by the statute because not to be performed within a year include only those which *cannot* be performed within that period." (*Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 281 (emphasis original); see also *White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 343, fn. 2 (California Supreme Court stating that "[t]o fall within the words of the provision, therefore,

the agreement must be one of which it can truly be said *at the very moment it is made*, 'This agreement is not to be performed within one year'; in general, the cases indicate that *there must not be the slightest possibility that it can be fully performed within one year*") (emphasis original).)

Here, Defendant provides no explanation as to why there is no possibility that the terms of the contract could not have completed within a year. Moreover, even if the possibility of performance within a year is unlikely, there are no judicially noticeable facts that preclude the possibility of performance of the contract within a year. Defendant fails to establish that the oral contract is within the statute of frauds.

The FAC adequately alleges facts sufficient to constitute a cause of action for breach of contract.

Defendant argues that the FAC fails to allege facts sufficient to state a cause of action for breach of contract because it: fails to identify the date that Jackie did become a nurse in the United States; fails to explain to the court how Defendant had been misinformed; fails to establish the element of consideration; fails to specifically allege the material contractual terms on the complaint or the terms of repayment. (See Def.'s memo, pp.10:18-28, 11:1-28, 12:1-28, 13:1-28, 14:1-12.)

A complaint for breach of contract must include: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff therefrom. (See *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913.) Additionally, if the defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.)

Here, the FAC alleges: an oral contract between the parties for the loan of $30,000 with Defendant to repay the loan once Jackie Salvador Bagunas became a nurse, Plaintiff in fact loaned Defendant the $30,000 and Jackie Salvador Bagunas became a nurse some years ago. (See FAC, ¶¶ 6-8, 14-18.) This is sufficient for purposes of demurrer. Defendant cites to *Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, to support her assertion that "a demurrer… also tests whether those facts are pleaded with sufficient certainty and particularity" (Def.'s memo, p.8:26-28), however, *Banerian* involved a cause of action for legal malpractice, not breach of contract. (See *Banerian, supra*, 42 Cal.App.3d at pp.611-613 (noting that the case is for legal malpractice, stating that "[a]ctionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence… the issue is whether or not there was a duty as a matter of law").) Moreover, *Banerian, supra,* does not address or mention the certainty or particularity of facts alleged; instead, the court noted that "the plaintiffs have failed to make any allegations which demonstrate a legal duty on behalf of the defendant" and "conclude[d] that it was not error for the trial court to rule, as a matter of law, that defendant had no duty to notify plaintiffs' insurance carrier of the Preece action and that there was no negligence in defendant's failure to do so." (*Id.* at pp.613, 616.) *Banerian* does not support Defendant's argument. Defendant also cites to *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, however, that case analyzes the sufficiency of evidence on a motion for summary judgment, not the sufficiency of allegations. Accordingly, Defendant's arguments lack merit.

Defendant's demurrer to the FAC is OVERRULED in its entirety.

The Court will prepare the Order.

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Department 3 - Calendar Line 3
Case Name: *Remulla v. Bagunas*
Case No.: 23CV423451

This is an action for the breach of a loan agreement. According to the allegations of the initial complaint, on January 1, 1999, plaintiff Elizabeth Remulla ("Plaintiff") loaned defendant Cherry Anne Bagunas ("Defendant") $20,000 so that Defendant could go to the United States and pursue her dream of becoming a nurse. (See initial complaint, ¶¶ BC-1-2, attachment BC-1.) Defendant agreed to repay the loan of $20,000 once she became a nurse. (See initial complaint, attachment BC-1.) On January 1, 2000, Defendant and her family immigrated to the United States, and on November 1, 2022, Defendant became a gainfully employed nurse. (*Id*.) On December 1, 2022, Plaintiff contacted Defendant by phone and requested that Defendant repay the loan as agreed or, in the alternative, commence with installment payments of $2,000 per month. (*Id*.) Despite a subsequent demand for repayment from Plaintiff's counsel, Defendant has since failed to respond to the demands for repayment, and on September 25, 2023, Plaintiff filed the initial complaint against Defendant, asserting causes of action for breach of contract and common counts. (*Id*.)

Defendant demurred to the initial complaint on the grounds that the first cause of action for breach of contract failed to allege facts with sufficient particularity, the second cause of action for common counts fails to state facts sufficient to constitute a cause of action since it is dependent on the first cause of action, the first cause of action is barred by the statute of frauds, and the alleged contract is fatally uncertain.

On February 29, 2024, Plaintiff filed a first amended complaint ("FAC") against Defendant, asserting a single cause of action for breach of contract. Defendant demurs to the FAC.

The FAC is not a sham pleading

Defendant argues that she demurred to the initial complaint on the ground that it was barred by the statute of frauds and the FAC omits certain allegations to avoid the statute of frauds. Defendant asserts without citation to any authority or relevant portions of the initial complaint or FAC that "[b]ased on the facts of the complaint the terms of the contract could not have been completed within a year… [because i]t is not possible for BAGUNAS to receive the immigration paperwork to gain entry into the United States, to pass the nursing board, become licensed as a nurse, and become gainfully employed all within one year." (Def.'s memorandum of points and authorities in support of demurrer to FAC ("Def.'s memo"), p.10:2-6.)

Civil Code section 1624, subdivision (a) states that a contract is invalid if "by its terms[, it] is not to be performed within a year from the making thereof." (Civ. Code § 1624, subd. (a).) However, "[i]t is well settled that the oral contracts invalidated by the statute because not to be performed within a year include only those which *cannot* be performed within that period." (*Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 281 (emphasis original); see also *White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 343, fn. 2 (California Supreme Court stating that "[t]o fall within the words of the provision, therefore, the agreement must be one of which it can truly be said *at the very moment it is made*, 'This agreement is not to be performed within one year'; in general, the cases indicate that *there must*

not be the slightest possibility that it can be fully performed within one year") (emphasis original).)

Here, Defendant provides no explanation as to why there is no possibility that the terms of the contract could not have completed within a year. Moreover, even if the possibility of performance within a year is unlikely, there are no judicially noticeable facts that preclude the possibility of performance of the contract within a year. Defendant fails to establish that the oral contract is within the statute of frauds and the FAC is not a sham pleading.

The FAC adequately alleges facts sufficient to constitute a cause of action for breach of contract.

Defendant argues that the FAC fails to allege facts sufficient to state a cause of action for breach of contract because it: fails to identify the date that Defendant became a nurse in the United States; fails to explain to the court how Defendant had been misinformed; fails to establish the element of consideration; and, fails to specifically allege the material contractual terms on the complaint or the terms of repayment. (See Def.'s memo, pp.10:16-28, 11:1-28, 12:1-28, 13:1-28, 14:1-12.)

A complaint for breach of contract must include: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff therefrom. (See *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913.) Additionally, if the defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.)

Here, the FAC alleges: an oral contract between the parties for the loan of $30,000 with Defendant to repay the loan once she became a nurse, Plaintiff in fact loaned Defendant the $20,000 and Defendant became a nurse some years ago. (See FAC, ¶¶ 6-8, 14-18.) This is sufficient for purposes of demurrer. Defendant cites to *Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, to support her assertion that "a demurrer… also tests whether those facts are pleaded with sufficient certainty and particularity" (Def.'s memo, p.8:26-28), however, *Banerian* involved a cause of action for legal malpractice, not breach of contract. (See *Banerian, supra*, 42 Cal.App.3d at pp.611-613 (noting that the case is for legal malpractice, stating that "[a]ctionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence… the issue is whether or not there was a duty as a matter of law").) Moreover, *Banerian, supra*, does not address or mention the certainty or particularity of facts alleged; instead, the court noted that "the plaintiffs have failed to make any allegations which demonstrate a legal duty on behalf of the defendant" and "conclude[d] that it was not error for the trial court to rule, as a matter of law, that defendant had no duty to notify plaintiffs' insurance carrier of the Preece action and that there was no negligence in defendant's failure to do so." (*Id*. at pp.613, 616.) *Banerian* does not support Defendant's argument. Defendant also cites to *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, however, that case analyzes the sufficiency of evidence on a motion for summary judgment, not the sufficiency of allegations. Accordingly, Defendant's arguments lack merit.

Defendant's demurrer to the FAC is OVERRULED in its entirety. The Court will prepare the Order.

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Department 16 - Calendar Line 3
Case Name: *Velazquez v. Hansen Drywall, Inc., et al.*
Case No.: 21CV391518

Hanson Drywall Inc., a California business organization ("Hanson Inc." or "Defendant,") moves for summary judgment, or, in the alternative, summary adjudication, as to the operative Complaint filed by plaintiff Juan Velazquez, an individual ("Plaintiff").

I. Background

A. Factual

This is an employment discrimination action. According to allegations of the Complaint, on or around April 26, 2021, Plaintiff, an allegedly disabled individual, began working for Hanson Inc. as a journeyman. (Complaint, ¶ 10.) Approximately two weeks later, Plaintiff sustained a work-related injury. (Complaint, ¶ 11.) Specifically, while at work, Plaintiff was hit by a heavy object, which rendered him unconscious "for a few seconds." (*Ibid*.) Plaintiff was in pain because of the injury, and subsequently informed his foreman about the incident. (Complaint, ¶ 12.) Although the foreman promised to report the incident and injury, he failed to advise Plaintiff to seek medical attention, and instead, asked Plaintiff to continue working that day. (*Ibid.*) The next day, on April 27, 2021, Plaintiff returned to work, and his supervisor, James Hanson, asked Plaintiff why he did not go to a hospital after sustaining an injury. (Complaint, ¶ 13.) Plaintiff explained that he was never advised to seek medical attention. (*Ibid.*) After later seeking medical attention, Plaintiff was given a doctor's note advising Plaintiff to take medical leave until May 2, 2021. (Complaint, ¶ 14.) Upon his return to work on May 2, 2021, Plaintiff allegedly faced "disparate treatment" by Defendant's staff. (Complaint, ¶ 15.) Plaintiff was given a heavier workload compared to other employees. (*Ibid*.)

On May 7, 2021, when paychecks were due, Plaintiff was only paid for two days of work, and Plaintiff immediately informed Joshua Hanson, the owner of Hanson Inc. about why he was "only paid for two days." (Complaint, ¶ 16.) The owner perceived this inquiry as a threat and verbally attacked Plaintiff. (*Ibid.*) The foreman assured Plaintiff the owner would not fire Plaintiff and asked that Plaintiff continue working. (Complaint, ¶ 17.) Plaintiff complied. (*Ibid.*) In or around mid-May 2021, Defendant's owner asked Plaintiff to pick up his missing payments, but Plaintiff noticed that not only was his pay "short again," by 8 hours, but other employees were missing wages as well. (Complaint, ¶ 19.) Plaintiff did not complain about the pay discrepancy in fear of losing his job. (*Ibid.*) On May 14, 2021, Plaintiff was terminated by Defendant. (Complaint, ¶ 20.)

On approximately May 21, 2021, Plaintiff went to Defendant to pick up his final paycheck. (Complaint, ¶ 22.) During that time, a Hanson Inc. supervisor asked Plaintiff to sign a resignation form. (*Ibid*.) After refusing to sign, Plaintiff was informed that he would not get a final paycheck. (*Ibid*.) Plaintiff was allegedly paid one week later, following his termination. (*Ibid*.)

B. Procedural

Plaintiff timely filed a Complaint of Discrimination with the California Department of Fair Employment and Housing ("DFEH") and obtained a right to sue letter, dated July 30, 2021. (Complaint, ¶ 23.) Plaintiff claims he has exhausted his administrative remedies to pursue claims under the Fair Employment and Housing Act ("FEHA"). (*Ibid*.) Plaintiff initiated the instant action on November 23, 2021, with the filing of the operative Complaint, which asserts the following claims: (1) FEHA discrimination based on disability (Gov. Code, § 12940 et seq); (2) failure to accommodate-FEHA; (3) failure to engage in the interactive process-FEHA (Gov. Code, § 12940 et seq.); (4) FEHA retaliation (Gov. Code, § 12940, subd. (a)); (5) retaliation (Lab Code, §§ 98.6 and 1102.5 et seq); (6) failure to provide an accurate wage statement in violation of Labor Code, § 226, subd.(a); and (7) waiting time penalties (Labor Code, §§ 201-204). On May 1, 2024, Defendant Hanson, Inc. filed the instant motion for summary judgment, or in the alternative summary adjudication, which Plaintiff opposes. Defendant filed a reply on July 19, 2024.

II. Evidentiary Objections

Plaintiff asserts various objections in his opposition to Defendant's separate statement of undisputed material facts ("UMFs"). His objections, which involve UMFs regarding his payroll check amounts, employee title, and Hanson Inc. employee statistics, are not procedurally proper. (See Defendant's Separate Statement ("Def. Sep. Stat.,") UMF Nos. 22, 45, 50, 63-64, 66, and 69; see also Plaintiff's Response to Def. Sep. Stat. ("RMFs,") pp. 9, 20-21, 29-31, 33.

Written evidentiary objections must be made in a separate document and must not be re-stated or re-argued in the separate statement. (Cal. Rules of Court, rule 3.1345(b).) Objections must identify the specific item of evidence that is objectionable. (*Ibid.*) Here, Plaintiff improperly asserts objections within his opposition to Defendant's separate statement that he did not include in a separate document containing his evidentiary objections. (See Plaintiff's Opposition ("Opp.,") to Def. Sep. Stat., pp. 9, 20-21, 29-31, 33.) Therefore, Plaintiff's evidentiary objections do not comply with California Rules of Court, rule 3.1354(b).

Additionally, evidentiary objections must be accompanied by a proposed order that complies with the requirements set forth in California Rules of Court, rule 3.1354(c). Plaintiff has not provided a proposed order.

Accordingly, the Court declines to rule on Plaintiff's objections based on the above-described defects. (*Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 ("*Vineyard*") [trial courts only have duty to rule on evidentiary objections presented in proper format].)

III. Motion for Summary Judgment

Pursuant to Code of Civil Procedure section 437c, Defendant moves for summary judgment, or, in the alternative, summary adjudication, as to Plaintiff's operative Complaint.

In moving for summary judgment, Defendant makes the following arguments: (1) the first (FEHA discrimination), second (failure to make a reasonable accommodation), third (failure to engage in the interactive process), and fourth (FEHA retaliation) causes of action fail because Plaintiff cannot establish that he suffered from a disability, or alternatively, that Defendant had knowledge of Plaintiff's disability; (2) Plaintiff's fourth cause of action additionally fails because Defendant's actions were taken for legitimate, non-retaliatory reasons, namely, lack of work for plaintiff's role as "framer"; (3) Plaintiff's fifth cause of action fails because Hanson's action was taken for legitimate, independent reasons, even if

plaintiff had engaged in activities protected by Labor Code section 1102.5; (4) Plaintiff's sixth cause of action for inaccurate wage statements fails because the wage statements provided to Plaintiff comply with Labor Code section 226; and (6) Plaintiff's seventh cause of action for waiting time penalties fails because Plaintiff was tendered his final wages but rejected them.

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, 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. Plaintiff's Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the

action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citations and quotation mark omitted.)

In support of its opposition, Plaintiff requests the Court to take judicial notice of the existence of the following document to provide an overview of the Plaintiff's medical diagnosis known as "cervicalgia":

1) Cleveland Clinic website, Overview: What is neck pain (cervicalgia)? <https://my.clevelandclinic.org/health/symptoms/21179-neck-pain>

Defendant opposes the request for judicial notice. Evidence Code section 452, subdivision (h) states that judicial notice may be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Plaintiff's document is a Cleveland Clinic medical webpage that defines "cervicalgia" and lists general symptoms, causes, and care and treatment options for this condition. (See Plaintiff's Request for Judicial Notice ("RJN") in Support of Plaintiff's Opposition ("Opp.") to Defendant's Motion for Summary Judgment ("MSJ,") p. 2.) Plaintiff concludes "[t]he existence of a document may be judicially noticeable, and the truth of statements contained in the document and its proper interpretation are subject to judicial notice if those matters are reasonably undisputable." (*Ibid.*)

The request for judicial notice of this document is DENIED. Plaintiff does not merely seek judicial notice of the existence of this document. Rather, Plaintiff requests that the Court take judicial notice of the truth of the matters stated in the document. "Beyond the mere fact that the [document] exists, the availability of the [document] on the Internet hardly renders the content of the [document] 'not reasonably subject to dispute.'" (*Conlan v. Shewry* (2005) 131 Cal.App.4th 1354, 1364.)

Accordingly, Plaintiff's request for judicial notice of a medical webpage providing an overview of "cervicalgia" is DENIED.

C. Summary Judgment/Adjudication in FEHA Discrimination/Retaliation Cases

Special rules govern the allocation of the burden of proof on motions for summary judgment in wrongful termination and employment discrimination cases, under both federal and state law. " 'Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.' [Citation.]" (*Moore v. Regents of Univ. of Calif.* (2016) 248 Cal.App.4th 216, 233.) Because direct evidence of discrimination is seldom available, courts use a system of shifting burdens as an aid to the presentation and resolution of such cases both at trial and on a motion for summary judgment. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354-355 (*Guz*).) "California has adopted a three-stage burden-shifting test established by the United States Supreme Court for trying employment discrimination claims that are based on the

disparate treatment theory. Under this '*McDonnell Douglas*[1] test,' (1) the plaintiff must establish a prima facie case of discrimination; (2) if the plaintiff is successful, the employer must offer a legitimate nondiscriminatory reason for its actions; and (3) if the employer produces evidence on that point, the plaintiff must show that employer's reason was a pretext for discrimination." (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144, citations omitted; see also *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 (*King*).)

When the employer is the moving party, the initial burden rests with the employer to show that no unlawful discrimination occurred. (Code Civ. Proc., § 437c, subd. (p)(2); see *Guz, supra*, 24 Cal.4th at pp. 356-357; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1523 [employee has no obligation to produce evidence until defendant "has established either the existence of a complete defense or the absence of an essential element of plaintiff's claim."].) The employer may do this by presenting admissible evidence either: negating an essential element of the employee's claim; or showing some legitimate, nondiscriminatory reason for the action taken against the employee. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202-203.)

i. Plaintiff's First through Fourth Causes of Action: Discrimination Based Upon Disability, Failure to Accommodate, Failure to Engage in the Interactive Process, and FEHA Retaliation.

Here, Defendant argues it is entitled to summary judgment or summary adjudication on the first through fourth causes of action because Plaintiff's claims all rely on a theory that he was terminated by Defendant as a result of his alleged disability. (Memorandum of Points and Authorities in Support of Motion by Defendant Hanson Drywall, Inc. for Summary Judgment, or in the alternative, Summary Adjudication ("MPA MSJ,") p. 8:11-15.) But, it contends, Plaintiff did not have a FEHA disability, or alternatively, Defendant did not have knowledge of any alleged disability. (*Ibid.*) Defendant further notes that Plaintiff failed to request an accommodation for "any known disability." (MPA MSJ, p. 8:22-26.) Defendant concludes Plaintiff cannot reasonably obtain needed evidence to overcome these deficiencies. (*Ibid*.)

1. Plaintiff's First Cause of Action – FEHA Disability Discrimination

Plaintiff's operative Complaint alleges that he suffered from "disparate treatment" by Defendant when given heavier workloads after his medical leave ended, and that he was ultimately terminated as a result of his disability. (Complaint, ¶¶ 31, 37.)

The FEHA expressly prohibits physical disability discrimination. (See Gov. Code, § 12940, subd. (a).) "'A prima facie case for discrimination "on the grounds of physical disability under the FEHA requires plaintiff to show: (1) *he suffers from a disability;* (2) he is otherwise qualified to do his job; and (3) *he was subjected to adverse employment action*

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[1] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). Notably, the *McDonnell Douglas* test does not apply to Labor Code section 1102.5 claims. (See *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 714.)

because of his disability."' [Citation.]" (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344-345 (*Arteaga*).)

"The FEHA proscribes two types of disability discrimination: (1) discrimination arising from an employer's intentionally discriminatory act against an employee because of his or her disability (disparate treatment discrimination), and (2) discrimination resulting from an employer's facially neutral practice or policy that has a disproportionate effect on employees suffering from disability (disparate impact discrimination) [citations omitted].)." (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1002 (*Scotch*). In his operative Complaint, Plaintiff solely argues disparate treatment discrimination. (Complaint, ¶ 31.)

Defendant argues that Plaintiff cannot establish a prima facie case of disability discrimination because he did not suffer from a FEHA disability – the first required element of disability discrimination. (MPA MSJ, p. 10:11.) Specifically, it asserts Plaintiff does not possess needed evidence to demonstrate he suffered from a disability. (MPA MSJ, p. 10:11-15.) Defendant concludes that Plaintiff's alleged injury "did not make accomplishing his job difficult," and he was not limited in a major life activity. (MPA MSJ, p. 10:11-15; see *Arteaga, supra,* 163 Cal.App.4th at p. 348 [medical condition causing pain is only a disability if it affects employee's ability to work].)

Under the FEHA, a physical disability includes having a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (1) affects one or more of the neurological, immunological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic, lymphatic, skin, and endocrine systems; and (2) limits a major life activity. (See Gov. Code, § 12926, subd. (m)(1).) A disability "limits" a major life activity if it makes the activity difficult. (See Gov. Code, § 12926, subd. (m)(1)(B).) A "major life activity" is construed broadly to include physical, mental, and social activities, and working. (See Gov. Code, § 12926, subd. (m)(1)(B)(iii).) Whether a major life activity is limited "shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the *mitigating measure itself limits a major life activity*." (See Gov. Code, § 12926, subd. (m)(1)(B)(i), italics added.)

(a) Existence of a Disability - Defendant's Burden

Defendant asserts Plaintiff's discovery response that he suffered from a "head injury," does not qualify as a disability without more information. (MPA MSJ, p. 9, fn. 1; UMF No. 33; Declaration of Harrison Osaki in Support of MSJ ("Osaki Decl.,") ¶ 4; Exh. B - Plaintiff's Responses to Defendant's Form Interrogatories, p. 7:5-9.) Defendant argues Plaintiff is not limited in a major life activity which is demonstrated by the following evidence:

(1) Plaintiff did not seek medical care the day of the incident (UMF No. 7);
(2) After resting for 2 hours, Plaintiff continued working the day of his injury (UMF Nos. 6, 8; see also Exh. D – Plaintiff's Depo., pp. 190:14-17, 193:2-16)[2];

[2] Plaintiff's deposition testimony regarding the incident in question contain inconsistencies. On the one hand, Plaintiff testifies that after resting for two hours he continued working because he was "a lot more relaxed," but then later testifies that he continued working despite not

(3) A day after the injury, Plaintiff returned to work (UMF No. 8);
(4) The Doctors on Duty ("DOD") Injury Report noted Plaintiff was "in no apparent distress," and further indicated Plaintiff was unable to perform usual work until he followed up with the Emergency Room (Osaki Decl., ¶ 7; Exh. E - DOD Injury Report UMF Nos. 12, 14-15.);
(5) The DOD Report did not specify any physiological reason for why Plaintiff was unable to perform usual work (*Ibid*.)*;*
(6) Plaintiff's Dominican Hospital Note excused Plaintiff from approximately 5 days of work, but it did not state reasons for his inability to work, and had no work restrictions noted (UMF Nos. 18, 20);
(7) Plaintiff testified that the Hospital Note did provide restrictions upon his return to work, however, contrary to Plaintiff's testimony, the Hospital Note provides that Plaintiff is to return to work without restrictions. (UMF Nos. 20, 24; Osaki Decl., ¶¶ 8, 10; see also Exh. F – Hospital Note; Exh. H - Juan Velazquez Deposition Transcript ("Plaintiff Depo.") pp. 197:7-25-198-1-8);
(8) Plaintiff verified and confirmed the Hospital Note's contents at his deposition. (*Ibid*);
(9) Plaintiff's prescription for medication from Dominican Hospital provided that it should be "only taken as needed for pain" (UMF No. 22; Osaki Decl., ¶ 9; Exh. G – Plaintiff's Prescription);
(10) Plaintiff testified that the only documents demonstrating the alleged disability referred to in the Complaint are the Hospital Note, prescription for medication, and hospital invoice. (UMF No. 23; Osaki Decl., ¶ 10; Exh. H - Plaintiff's Depo., Vol. II, pp. 255:24-25-258);
(11) The only communications Plaintiff provided to Defendant Hanson, Inc. were: "(1) the Medical Records; and (2) verbal anticipated return-to-work date." (UMF No. 28);
(12) After April 27, 2021, Plaintiff did not seek any further medical care (UMF No. 9); and
(13) After the incident, Plaintiff's performance resumed as usual. For example, he could produce metal boxes in the same capacity as he had done prior to April 27, 2021. (UMF No. 32.)

(See MPA MSJ, pp. 10:16-28-11:1-11.)

In sum, Defendant has provided evidence indicating that Plaintiff resumed work, without any work restrictions, as corroborated by Plaintiff's Hospital Note and DOD report. As pointed out by Defendant, Plaintiff conceded in both his deposition testimony and opposition that no work restrictions were noted in his Hospital Note. (UMF No. 31; Osaki Decl., ¶ 10; Exh. H - Plaintiff Depo., p. 201; Compendium of Evidence in Support of Opp. ("Comp. Evid.,"); Exh. 2 – Plaintiff Depo., p. 202.) Defendant has met its initial burden to demonstrate that Plaintiff did not suffer from a FEHA disability.

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feeling better because he "could not do anything about it." (Plaintiff's Depo., pp. 193:2-16-194:5-9.) 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*.)

(b) Plaintiff's Burden

In opposition, Plaintiff contends his work-related head and shoulder injury (caused by a large piece of lumber striking him) constituted a disability, namely "cervicalgia," for the purposes of the FEHA. (Plaintiff's Opposition to MPA MSJ ("Opp.,") p. 6:25-28; Comp. Evid., Exh. 4 – Incident Report; Exh. 5 – DOD Injury Report; Opp. to Def. Sep. Stat., p. 2 – Plaintiff's Response to Material Fact ("RMF") No. 4.) Plaintiff further argues that despite reporting his injury to Defendant's foreman, Defendant did not send Plaintiff for an evaluation until the next day. (Opp., p. 6:25-28; RMF Nos. 4-5; Complaint, ¶ 48.)

Plaintiff further asserts that he was told by a provider at Dominican Hospital that "he should not lift [or] push object[s] weighing more than twenty-five ponds," but concedes the Hospital Note placing plaintiff on medical leave did not include such restrictions. (Opp., p. 7:6-13.) Plaintiff further argues that Defendant's reliance on *Arteaga, supra*, 163 Cal.App.4th 327, is misplaced because that case is distinguishable from Plaintiff's situation where Plaintiff was diagnosed with a physical condition called "cervicalgia" and the DOD report suggests that he suffered from neurological problems. (Opp., p. 7:14-21; RMF No. 12; Declaration of Counsel Ronald L. Zambrano in Support of Opp. ("Zambrano Decl., iso Opp.,") ¶ 7; Exh. 7 – DOD Injury Report.)

Plaintiff submits the following evidence:

(1) Despite Plaintiff's injury and Robert's apparent acknowledgment Plaintiff may need medical attention, Defendant did not send Plaintiff for evaluation until the day after his injury April 27, 2021. (Declaration of Plaintiff Juan Velazquez ("Velazquez Decl.,") ¶ 3; Exh. 9 – Text Messages to Foreman; Exh. D - Plaintiff Depo., pp. 189:3-190:14-17;
(2) Plaintiff was then sent for care at Doctors on Duty, where he was examined, and his care provider generated a report (Osaki Decl., ¶ 7; Exh. E - "DOD Report"; UMF 11);
(3) Under the heading, "NEUROLOGIC, Entry No. 19" of the DOD Report, it states: "cranial nerves: III slow; VI abnormal on right" (Exh. E);
(4) The same DOD report included a diagnosis of "cervicalgia" and indicated Plaintiff was "unable to perform usual work until ER follow up. (Exh. E);
(5) When Plaintiff sought emergency follow-up at Dominican Hospital, Plaintiff was provided with a Hospital Note excusing him from work for less than a week, and Plaintiff testified he was given the following verbal instruction: "he should not lift of push object weighing more than twenty-five pounds." (UMF Nos. 18-20; Osaki Decl., ¶ 8; Exh. F – Hospital Note; Plaintiff Depo., pp. 197:7-24-198:1-12);
(6) But, Plaintiff concedes the note placing Plaintiff off work did not include said restrictions. (Plaintiff Depo., pp. 197:7-24-198:1-12); and
(7) Plaintiff promptly provided Defendant Hanson, Inc. with his medical documentation which included the DOD report, ER Report, Hospital Note, and Prescription. (UMF No. 26; see also Opp., pp. 6:25-28-7:1-13.)

Construed broadly under *Aguilar, supra*, 25 Cal.4th at p. 843, Plaintiff's evidence indicates he suffered some mild neurologic impairment, however, the evidence falls short in

establishing that the impairment limited his ability to conduct regular work duties upon his return from medical leave. Notably, Plaintiff testified that, after resting, he was able to return to work the day of the injury. To further corroborate the fact that Plaintiff was not limited in a major life activity, Defendant highlights the following section in Plaintiff's deposition transcript: "Q. What did Robert tell you? A. That he was going to report it. That was it. He said, "That's fine, take a break and rest a little bit." And I sat down for a little bit and after I continued working and the day ended." (Osaki Decl., ¶ 6; Exh. D – Plaintiff's Depo, p. 190:14-17.)

Plaintiff's medical documentation further demonstrated he showed no apparent distress after the alleged injury, the ER doctor noted no work restrictions in the discharge/hospital note, and Plaintiff concedes this fact. (Osaki Decl., ¶ 8; Exh. F – Hospital Note; Plaintiff Depo., pp. 197:7-24-198:1-12.) Notably, his prescription list consists of over-the-counter pain medication, to be taken as needed. (Osaki Decl., ¶ 9; Exh. G – Plaintiff's Prescribed Medication.) Thus, although Plaintiff possibly demonstrates that he suffers from a physiological condition (i.e., cervicalgia) he does not provide any evidence demonstrating that it limited his normal ability to work. (See Gov. Code, § 12926, subd. (m)(1) [physical disability must limit a major life activity].) In fact, his deposition testimony indicates otherwise. The relevant portion of Plaintiff's deposition testimony, states, as follows:

> Q. Did you feel better after going to the hospital?
>
> A. Yes. Because they gave me some medication to be able to relax and everything.
>
> …
>
> Q. And when you returned to work what -- what work were you doing?
>
> A. They switched me from where I was from doing metal framing to making the boxes for the air conditioning units.
>
> …
>
> Q. *Now, were you able to do them?*
>
> A. *Not at the capacity at which they were requesting.*
>
> …
>
> Q. *At what capacity could you do it?*
>
> A. *The way we were doing, what was normal.*
>
> …
>
> Q. *So when you returned to work, were you able to perform your work? Yes or no?*

A. *No.*

Q. *Why not?*

A. *Because the work was too much. They wanted it faster and it wasn't possible for me to do it by myself.*

(Comp. Evid; Exh. 1 – Plaintiff's Depo., Vol. I, pp. 200: 15-24; 202:21-25-203:4-9, italics added.)

Based on this testimony, it appears Plaintiff could still perform his normal work duties despite being diagnosed with cervicalgia, and Plaintiff does not mention any cervicalgia-related pain or difficulties that would prevent him from conducting his normal work at his former capacity. Plaintiff simply concludes that the work "was too much" and he could not keep up with the *new* capacity of work. He did not attribute this inability to any work-related disability. Thus, the testimony contradicts what Plaintiff states both in opposition, and in his responses to request for admissions, namely that he was restricted in performing his normal duties. (Osaki Decl., ¶ 5; Exh. C – Request for Admissions, Set One, p. 5.) Notably, even though Plaintiff testified at his deposition testimony that his ER doctor verbally provided him with work restrictions, this statement is uncorroborated. Plaintiff fails to provide evidence of such work restrictions either in the form of hospital discharge notes, or a declaration from his treating doctor. (Compend. Evid; Exh. 1 – Plaintiff's Depo., Vol. I, p. 197:1-6.)

Next, in opposition, Plaintiff argues that a lack of written work restrictions does not by itself establish he did not have a physical disability after he returned to work and cites *Head v. Glacier Northwest, Inc.* (9th Cir. 2005) 413 F.3d 1053, 1058 (*Head*)[3], a Ninth Circuit Court of Appeals case, for this proposition. First, this case is distinguishable because it does not address FEHA disability. Additionally, the court is not bound by the decisions of lower federal courts. (See *Hargrove v. Legacy Healthcare, Inc.* (2022) 80 Cal.App.5th 782, 789, fn. 4 [the decisions of lower federal courts are not binding on this court].) Further, and particularly important, Plaintiff's citation to this case is devoid of reasoned explanation as to why it is controlling or persuasive authority. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 [points asserted without reasoned argument need not be considered].) This Court finds the federal case unpersuasive given that the plaintiff in *Head* presented overwhelming evidence of a cognizable mental health disability under the American Disabilities Act that severely impacted her day-to-day functioning. (See *Head, supra,* at pp. 1058-1062; see also Reply, p. 9:1-6.)

Finally, this Court disagrees with Plaintiff's contention regarding Defendant's reliance on *Arteaga, supra*. Plaintiff misstates the factual background of *Arteaga.* Specifically, Defendant cites *Arteaga, supra,* 163 Cal.App.4th 327, 348, for the proposition that pain alone does not necessarily constitute or establish a disability. As pointed out in Defendant's reply, contrary to Plaintiff's statement that the *Arteaga* plaintiff's medical examination showed no "physiological condition," (see Opp., p. 7:14-17,) plaintiff had carpal tunnel syndrome and

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[3] As correctly noted in Defendant's reply, *Head, supra,* is overruled in part by *Murray v. Mayo Clinic* (9th Cir. 2019) 934 F.3d 1101, 1105, which held that "an ADA discrimination plaintiff bringing a claim under 42 U.S.C. § 12112 must show that the adverse employment action would not have occurred but for the disability." (See Reply, p. 9, fn. 27.)

complained of symptoms of pain and numbness in his fingers and arms. (*Arteaga, supra,* at p. 349; see also Reply, p. 8:7-17.) The court held that "*pain alone* without some corresponding limitation on activity is *insufficient* to establish a disabling impairment. . . An assessment must be made to determine how, if at all, the pain affects the specific employee. In this case, the pain and numbness did not make work difficult for [the plaintiff]." (*Arteaga, supra,* at p. 348 [original emphasis].) Thus, *Arteaga* stands for the position that while the mere existence of pain does not, by itself, constitute a disability, if the pain affects an employee's ability to do his work, it may constitute a disability under FEHA. In *Arteaga*, the court found that the plaintiff's pain and numbness did not interfere with his ability to do his regular duties. (*Id.* at p. 349.) Similarly, here, Plaintiff has failed to provide assessments or medical documentation demonstrating that prior to Defendant Hanson, Inc. making its decision to terminate Plaintiff, he suffered from disabling pain, and this pain affected Plaintiff's ability to do his normal work. Both the medical records and deposition testimony cited and discussed above demonstrate the opposite – that Plaintiff did not exhibit any signs of distress, had no required work restrictions, and he could continue work at his "normal capacity" as stated at his deposition.

Accordingly, Plaintiff's evidence fails to raise a triable issue of material fact as to the first required element of FEHA disability discrimination, namely, that he suffers from a FEHA disability.

a. Knowledge of Disability – Defendant's Burden

Alternatively, Defendant Hanson, Inc. asserts, in both its motion and Reply that even if Plaintiff had a physical disability, it was not given notice of this alleged fact. (MPA MSJ, p. 11:18-21; Defendant's Reply to Plaintiff's Opp. ("Reply,") p. 9:8-15.)

Defendant argues that Plaintiff cannot show Defendant had knowledge of a disability when it decided to terminate Plaintiff. Defendant contends that at the time the decision to terminate Plaintiff was made, all that was known was that Plaintiff was suffering from shoulder and head pain, and the Hospital Note merely indicated Plaintiff needed rest for less than a week and that Plaintiff had no restrictions. (MPA MSJ, p. 13:15-22; see also UMF Nos. 18-21; Osaki Decl., ¶ 8; Exh. F – Hospital Note.)

Government Code section 12940, subdivision (m) provides that it is an unlawful employment practice for an employer or other entity covered by this part to fail to make reasonable accommodation for *the known* physical or mental disability of an applicant or employee. However, "[s]ection 12940, subdivision (m) requires an employer to accommodate only a *known* physical … disability. The employee bears the burden of giving the employer notice of his or her disability. Although no particular form of request is required, [t]he duty of an employer reasonably to accommodate an employee's handicap does not arise until the employer is aware of respondent's disability and physical limitations. [T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. [internal citations and quotations marks omitted]." (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252-1253 (*Avila*).) Defendant relies on *Avila* for the proposition that it was not sufficiently apprised of Plaintiff's alleged disability per Government Code section 12940, subdivision (m). (MPA MSJ, pp. 11:18-28-13; see also Reply, p. 9:8-21.)

The *Avila* case is highly instructive. In *Avila, supra,* the medical forms submitted by the *Avila* plaintiff merely stated that plaintiff had been previously hospitalized for three days. (*Avila, supra,* 165 Cal.App.4th at p. 1252.) The *Avila* court held that the conclusion the Plaintiff was disabled was not the only reasonable interpretation of the known facts, and the fact that plaintiff was hospitalized for only three days and then returned to work, days later, without restrictions or accommodations was consistent with the conclusion that the plaintiff did not suffer from a condition that qualifies as a disability. (*Avila, supra,* 165 Cal.App.4th at pp. 1248-1249.) Here, it is undisputed that on April 27, 2021, Defendant's foreman was informed that Plaintiff reportedly injured his shoulder and head at work, (see Osaki Decl., ¶ 8; Exh. H - Plaintiff Depo., p. 189), but Plaintiff did not seek same day medical care, he resumed work without complaint the same day of injury, he was not hospitalized for any number of days unlike the *Avila* plaintiff, he was on medical leave for less than a week, and he had no documented work restrictions or specific requests for accommodations. (See UMF Nos. 6-8, 12, 18, 20, 22.) Thus, like the situation in *Avila,* albeit less dire, although Defendant knew, prior to terminating Plaintiff, that he had suffered a workplace injury, neither the medical records nor Plaintiff's testimony establish that Defendant would have been sufficiently apprised of an alleged FEHA disability.

Finally, Defendant Hanson, Inc. argues that given that it was not put on notice regarding Plaintiff's alleged disability, it follows that Plaintiff could not have made a request for a known disability. (MPA MSJ, p. 14:1-7; Reply, p. 10:3-11.) Although Plaintiff testified that his doctor advised him not to lift more than twenty-five pounds, he points to no evidence that he informed Defendant of this alleged restriction. Defendant has met its burden here.

b. Knowledge of Disability - Plaintiff's Burden

In opposition, Plaintiff raises much of the same arguments *supra* regarding the existence of his alleged FEHA disability. (Opp., p. 8:18-21.) Plaintiff maintains that he gave Defendant documents listing a specific diagnosis of "cervicalgia" and kept Defendant informed of his continuing pain and need for accommodations. (Opp., p. 8:18-19.) He concludes, "there is little doubt Defendant knew of Plaintiff's disability." (Opp., p. 8:20-21.)

Here, the evidence simply does not demonstrate any foul play or Defendant's "willful blindness to the truth" of Plaintiff's alleged disabling physical disability. (Opp., p. 8:18-21.) As noted in Defendant's motion, the Hospital Note did not communicate to Defendant that Plaintiff was disabled, and it did not affirmatively indicate that Plaintiff must return to work with restrictions or work accommodations. (MPA MSJ, p. p. 13:15-19; UMF No. 20.) Plaintiff did not affirmatively request these restrictions or accommodations upon his return to work either, and based on his testimony, he told the foreman he had pain and difficulty for the *new tasks*, but provided no further feedback on how to accommodate for that pain:

> Q. Okay. So when you returned to work…were you able to resume your normal duties?
>
> A. *I was working in my normal activities, but there was a change of work because before I was making -- putting together, like, metal frames, and they changed me to do the job of Sheetrock, which was heavier*. And then after that they put more pressure on me to -- and ordered to do a lot more work even though they knew that I hadn't recovered well.

> Q. Did you tell anybody that you hadn't recovered well?
>
> A. I told them that I still had pain in my back and my shoulder, but they didn't take it into account…
>
> …
>
> Q. So what is it that you told your foreman?
>
> A. Well, I told him that my back hurt and my shoulder when I picked up the sheet -- the towels of Sheetrock -- the pieces of Sheetrock. Correction. And he said that I had to finish the job the way it was because that was the work, and I said, "Okay."

(Zambrano Decl. iso Opp., ¶ 4; Compend. Evid; Exh. 2 – Plaintiff Depo., Vol II, pp. 327:21-25; 328:1-8, 20-25.)

Notably, the above-quoted deposition testimony demonstrates that Plaintiff was able to complete his normal activities, and that the pain and struggle occurred once Plaintiff was given additional tasks. Consequently, Plaintiff's normal performance during and after the work-related incident further precluded Defendant's notice of Plaintiff's alleged disability. (UMF Nos. 12-28; see also *Avila, supra,* 165 Cal.App.4th at pp. 1252-1253 ("[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. [internal citations and quotations marks omitted]."].)

For these reasons, this Court finds that Plaintiff has not presented evidence of a triable issue of material fact as to Defendant's knowledge of Plaintiff's disability prior to Plaintiff's termination. Accordingly, the motion for summary judgment of the first cause of action is GRANTED.

2. Plaintiff's Second Cause of Action (Failure to Accommodate)

"It shall be an unlawful employment practice . . . For an employer or other entity covered by this part to fail to make reasonable accommodation *for the known physical or mental disability* of an applicant or employee." (Gov. Code, § 12940, subd. (m), emphasis added.) "An employer is not required to make an accommodation 'that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.'" (*Scotch, supra,* 173 Cal.App.4th 986 at p. 1003.) "The elements of a failure to accommodate claim are (1) *the plaintiff has a disability under the FEHA,* (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Id.* at pp. 1009-1010, italics added.)

Defendant incorporates the facts and arguments presented regarding the first cause of action for FEHA disability discrimination. (MPA MSJ, pp. 14:26-28-15:1-14.) Consequently, it succeeds for the same reasons discussed above. Specifically, because Plaintiff has failed to raise a triable issue as to whether he has a disability and whether that disability was communicated to Defendant, the second cause of action fails for the same reason as the first.

Accordingly, summary adjudication of the second cause of action is GRANTED on the basis that Plaintiff has not established that he suffered from a cognizable disability under FEHA.

3. Plaintiff's Third Cause of Action: Failure to Engage in the Interactive Process

"The FEHA makes it unlawful for an employer 'to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.'" (Gov. Code, § 12940, subd. (n).) Government Code section 12940, subdivision (n), imposes separate duties on the employer to engage in the "interactive process" and to make '"reasonable accommodations." (*Scotch, supra,* 173 Cal.App.4th at p. 1003 [citations omitted].)

Defendant incorporates the facts and arguments presented regarding the first cause of action for FEHA disability discrimination. (MPA MSJ, pp. 14:26-28-15:1-14.) Consequently, it succeeds for the same reasons discussed above. Specifically, because Plaintiff has failed to raise a triable issue as to whether he has a disability and whether that disability was communicated to Defendant, the third cause of action fails for the same reason as the first.

Accordingly, adjudication of the third cause of action is GRANTED on the basis that Plaintiff has not established that he suffered from a cognizable disability under FEHA.

4. Plaintiff's Fourth Cause of Action: FEHA Retaliation

Plaintiff contends that Defendant Hanson Inc. retaliated against him by terminating his employment on account of his disability and for engaging in protected activity. (Complaint, ¶¶ 84, 86.) Defendant move for summary judgment as to the fourth cause of action for retaliation in violation of FEHA, asserting Plaintiff fails to raise a triable issue of material fact. (MPA MSJ, p. 17:20-21.)

It is unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [the FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]." (Gov. Code, § 12940, subd. (h).)

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)

As part of a prima facie claim for retaliation, Plaintiff must prove that he partook in such a protected activity. This showing does not require Plaintiff to have filed a formal complaint. (*Yanowitz, supra,* 36 Cal.4th 1028, 1047). The employee must, however, have opposed activity that the employee reasonably believes constitutes unlawful discrimination.

(*Id.* at p. 1047.) "[C]omplaints about personal grievances or vague" remarks do not qualify as protected activity. (*Ibid.*) This is because the crucial question in determining whether the employee has engaged in a protected activity is whether the employer was on notice of what conduct it needed to investigate for wrongdoing. (*Ibid*.)

The basis of this cause of action relies on the fact that Plaintiff has a FEHA-based disability that Defendant knows about. In light of this Court's ruling on the first through third causes of action, Plaintiff has failed to establish a triable issue of material fact as to whether he suffered from a known disability. Consequently, Plaintiff's fourth claim fails and the Court need not address Defendant's remaining argument regarding its legitimate reason for terminating Plaintiff. (MPA MSJ, p. 17:24-27-18:4-9.) Thus, the motion for summary judgment of the fourth cause of action is GRANTED.

5. Plaintiff's Fifth Cause of Action: Violation of Labor Code sections 1102.5, subdivision (b), and 98.6.

In the operative Complaint, Plaintiff alleges "he was terminated by Defendants as a result of his disability and complaints regarding Defendants' wage and hour Violations." (Complaint, ¶¶ 97, 99.)

Defendant argues that the fifth cause of action for violation of Labor Code sections 1102.5 and 98.6[4] fails because Plaintiff did not engage in protected activity within the meaning of these Labor Code sections. (MPA MSJ, p. 19:5-11.) Alternatively, Defendant argues that even if Plaintiff engaged in protected activity regarding his alleged disability and wage and hour complaints, Plaintiff was discharged for independent and lawful reasons. (MPA MSJ, p. 19:12-17.) Given that Plaintiff has failed to establish a known FEHA-based disability, Plaintiff's claim that he was terminated as a result of his disability under both Labor Code sections 1102.5 and 98.6 necessarily fails.

As to whether Plaintiff engaged in protected activity regarding complaints about his alleged wage and hour violations, Labor Code section 1102.5, subdivision (b) states: "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or

[4] In its motion, Hanson, Inc. contends Plaintiff has improperly alleged retaliation under Labor Code section 98.6 because Plaintiff only briefly mentions "denial of meal and/or rest breaks, workplace, or of workplace safety" in his Complaint. (Complaint, ¶¶ 90-91; MPA MSJ, p. 18:27-28-19:1-4.) It appears that Plaintiff inadvertently asserts this boilerplate claim given that the Complaint, opposition, and Plaintiff's Compendium of Evidence are devoid of any further allegations or facts regarding denial of meal and/or rest breaks. This Court agrees with Defendant that Plaintiff provides an inadequate basis for Labor Code section 98.6. However, this Court will address Plaintiff's retaliation claim under Labor Code section 1102.5, subdivision (b).

federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (Lab. Code § 1102.5, subd. (b).)

Labor Code section 1102.6 supplies the framework for litigating and adjudicating Labor Code section 1102.5 whistleblower claims. (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 712 *Inc.* (*Lawson*); see also Opp., p. 13:17-28.) "By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a 'contributing factor' to an adverse employment action. [Citation.] Then, once the employee has made that necessary threshold showing, the employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities. [Citation.]" (*Lawson, supra,* 12 Cal.5th at p. 712.) "Under section 1102.6, a plaintiff does not need to show that the employer's nonretaliatory reason was pretextual." (*Lawson, supra,* 12 Cal.5th at pp. 715-716.)

A legitimate, nondiscriminatory reason is one that is unrelated to prohibited bias and that, if true, would preclude a finding of discrimination. The employer's evidence must be sufficient to allow the trier of fact to conclude that it is more likely than not that one or more legitimate, nondiscriminatory reasons were the sole basis for the adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 [citations omitted].) The burden is then on the plaintiff employee to rebut with evidence raising an inference that intentional discrimination occurred. "The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive." (*Id*. at p. 1159.) Summary judgment for the employer should be granted where, "given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz, supra,* 24 Cal.4th at p. 362.)

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.)

a. Defendant's Burden

In its motion, Defendant simply argues Plaintiff's claim that his wage-related complaints are protected by Labor Code section 1102.5 fails. (MPA MSJ, p. 19:5-11.) Alternatively, Defendant argues that even if Plaintiff engaged in protected activity, its reasons for discharging Plaintiff was for legitimate, nonretaliatory reasons, namely, there was a shortage of work for Plaintiff, a "framer." (MPA MSJ, p. 19:12-17.) Defendant presents Lisa Best's Declaration[5] ("Best Decl.,") in support of this proposition. (Best Decl., ¶¶ 9-12;

[5] In its Reply, Defendant persuasively asserts that Lisa Best, Hanson, Inc.'s payroll and office manager, regularly managed Defendant's business operations and was in regular contact with Defendant's management team. (See Reply, p. 7:7-14; Best Decl., ¶¶ 1-4.) Defendant

Zambrano Decl. iso Opp., ¶ 5; Comp. Evid.; Exh. 3 – Deposition of Lisa Best, p. 20:16-25.) Given this Court's ruling on Best's declaration, (see footnote 5), this Court accepts Defendant's proffered evidence:

> 7. Plaintiff Juan Velazquez…was hired on April 9, 2021. Attached hereto as Exhibit A is a true and correct copy of an email concerning PLAINTIFF's hiring. PLAINTIFF was one of the 10 new employees who were considered only "framers."
>
> …
>
> 9. Framing is not always required on HANSON's projects. If any framing is required on a project, it is approximately 5-10% of the work required on the project.
>
> 10. Sometime between April 2021 and May 2021, there was a lack of available work. All of HANSON's job sites experienced a lack of work. There was a particular lack of work for framers. HANSON began laying off employees. It began laying off employees who were considered only "framers." In April/May 2021 HANSON laid off approximately twenty (21) workers in various positions (not only framers) from multiple jobsites.
>
> 11. All employees who could only frame for drywall, who were hired at the time of PLAINTIFF's hiring or thereafter, were laid-off due to lack of available work.
>
> 12. On May 14, 2021, HANSON laid-off PLAINTIFF due to lack of available work…

(Best Decl., ¶¶ 7, 9-12; Exh. A – Email Concerning Plaintiff's Hiring.)

Defendant's sole evidence – Best's declaration – is presented to demonstrate that an adverse employment reaction occurred for "legitimate, independent reasons" under *Lawson, supra,* 12 Cal.5th at p. 712. Here, Hanson Inc. bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action occurred because

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concludes Best was "in a position" to make statements regarding the day-to-day operations at Hanson, Inc. (*Ibid.*) This Court agrees. (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"].)

there was a shortage of framing jobs. Best's declaration is credible given her approximately four years of experience as an office and payroll manager at Hanson Inc. (Best Decl., ¶¶ 1-4.) Thus, this declaration is sufficient to meet Defendant's burden of proof.

In opposition, Plaintiff asserts Best's deposition testimony regarding her job titles since 2020 and employee statistics from April 2021 directly contradicts paragraphs five and six of her declaration. (Opp., p 12:27-28; see also Best Decl., ¶¶ 5-6; Comp. Evid.; Exh. 3 - Best Depo., pp. 19-20.) Upon inspection of the portion of Best's deposition testimony provided by Plaintiff, Best's sole discussion of her roles at Hanson Inc., since 2020, is largely consistent with her declaration. Additionally, and as stated in Defendant's reply, paragraphs five and six of Best's declaration make no mention of employee statistics for April 2021. (See Reply, p. 7:20-25.) Further, the Court's review of the portion of Best's deposition testimony provided by Plaintiff also makes no mention of employee statistics from April 2020. Thus, Plaintiff has not shown that Best's deposition testimony contradicts her declaration.

b. Plaintiff's Burden

Here, Plaintiff contends that his missing wage complaints to Defendant Hanson, Inc. constitutes protected activity:

> On or about May 7, 2021, when paychecks were due, Plaintiff was only paid for two days. Plaintiff inquired about why he was only paid for two days. About an hour later, Plaintiff was called back by Joshua Kalub Hanson, owner of Defendant HANSON, to tell Plaintiff that his inquiry about the discrepancy in pay was a threat. Joshua Kalub Hanson continued to tell Plaintiff, "You are a bad dog, go fuck yourself." Plaintiff assured Joshua Kalub Hanson that Plaintiff was not threatening him, but that Plaintiff was just inquiring so Plaintiff could be paid.

(Osaki Decl., ¶ 4; Exh. B - Plaintiff's Responses to Defendant's Form Interrogatory No. 201.1, p. 6:22-28.)

Plaintiff further states, in opposition, that Defendant's owner threatened to terminate Plaintiff after making his initial wage complaint, and that Defendant's "independent" reasons for terminating Plaintiff are false because "there was a lot of framing work available." (Opp., pp. 13:5-11-14:24-28.) Plaintiff's proffered evidence, in support, is his own deposition testimony and a self-serving text message to his foreman, which the foreman did not respond to. (Comp. Evid; Zambrano Decl. iso Opp., ¶¶ 1, 11; Exh. 1 – Plaintiff's Depo, Vol. I, pp. 205:12-23-206:1-9; Exh. 9 – Text Message to Foreman.) Plaintiff presents his testimony to show the Defendant was aware of his complaint for missing wages, that Defendant's owner reacted aggressively, and subsequently fired Plaintiff because of his wage complaint. Plaintiff fails to provide any corroborating evidence to support his testimony, and thus he fails to carry his burden. *King, supra,* 152 Cal.App.4th at p. 433 ("plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations").

Finally, even if Plaintiff successfully met his burden, Defendant has demonstrated, for reasons stated above, that it had legitimate, independent reasons for terminating Plaintiff's

employment absent the whistleblowing activities. Thus, Plaintiff's retaliation claim under Labor Code section 1102.5, subdivision (b) fails.

Accordingly, Defendant's motion for summary judgment of the fifth cause of action of Plaintiff's Complaint (Labor Code section 1102.5 retaliation) is GRANTED.

6. Plaintiff's Sixth Cause of Action: Inaccurate Wage Statements (Lab. Code § 226, subd. (a))

Plaintiff alleges that Defendant failed to provide him with accurate wage statements because those provided to him did not accurately reflect the actual hours worked or wages earned. (Opp., p. 15:6-9.)

Under California law, various types of information *must* be furnished on a pay stub when wages are paid to an employee, including, among other things, the applicable hourly rate and total hours worked. (Lab. Code, § 226, subd. (a); *Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136, 1146.) If an employer fails to provide a wage statement, provides one that is inaccurate, or provides one that makes it difficult for an employee to determine certain information (e.g., amount of gross wages or net wages paid), an employee is deemed to suffer an injury. (Lab. Code, § 226, subd. (e)(2).)

a. Defendant's Burden

Defendant argues that the wage statements provided to Plaintiff complied with Labor Code section 226. In support of this argument, Defendant proffers the following evidence:

1) "[D]uring his deposition, Plaintiff carefully reviewed his wage statements and confirmed that they were accurate," (Osaki Decl., ¶ 10; Exh. H – Plaintiff's Depo., p. 325:1-12,) and when asked whether he had any other issues with the wage statements, Plaintiff replied, "No" (*Ibid.*);
2) Defendant provided all copies of Plaintiff's wage statements as evidence of accurate wages (Osaki Decl., ¶¶ 10-11; Exh. H - Plaintiff's Depo., p. 322:2-25; Exh. I – Defendant's Response to Plaintiff's Request for Production - Plaintiff's Wage Statements); and
3) Declaration of Lisa Best ("Best Decl.,") ¶ 10, which includes the following exhibits: a) an email to a Hanson Inc. staff member verifying the hourly rate for new employees such as Plaintiff; b) copies of Plaintiff's payroll and final wages checks, both of which were remitted on Plaintiff's last day of employment (May 14, 2021); and c) a copy of a certified mailing receipt for Defendant's mailing of Plaintiff's final wages dated May 17, 2021. (Best Decl., ¶¶ 13-15; Exhs. A-D.)

Defendant has met its initial burden here. For example, as noted above, Defendant presents as evidence various copies of Plaintiff's wage statements, exhibits of Plaintiff's regular payroll checks, final wages check, and the dates in which they were negotiated or issued, namely, May 14, 2021. A certified mail receipt is also proffered as evidence of Defendant's attempt to mail Plaintiff's final check three days after discharge. Defendant also presents an email sent by its office manager, Lisa Best, to a fellow Hanson Inc. employee regarding new employee hourly rates, verifying the hourly rate noted on the wage statements.

Defendant has proffered more than enough evidence to demonstrate the accuracy of Plaintiff's wage statements.

Notably, Plaintiff's own deposition testimony further corroborates that the payments were accurate:

> Q. So I'm placing before you Exhibit F. Those are your wage statements. Can you review them, please?
>
> A. (Complying.)
>
> Q. Are you done reviewing Exhibit F?
>
> A. Yes.
>
> Q. Do these -- are these your wage statements?
>
> A. Yes
>
> A. It's not correct.
>
> Q. Okay. And is it not correct because you claim that you are missing the days that you missed work after your accident on April 26th?
>
> A. Correct.
>
> Q. Okay. So look at page 89, and I want to direct you to the center of the page. It says, "Pay 8 Period 4/27 to 5/1," and to the left it says, "Hours:" Do you see that?
>
> A. Yes, I see it.
>
> Q. Okay. Now, if you turn the page to page 90 in the same exhibit, I'm going to bring your attention to the same middle of the page where it says Pay Period 4/27 to 5/1. So it is the same pay period as that on page 89, the previous page. And the hours here are. Do you see that?
>
> A. Yes.
>
> Q. Did you receive these two checks that we just looked at on page 89 and 90?
>
> A. Yes, I received the checks after the problem that I had with the company, between the company and myself.
>
> Q. Okay. But you received the two checks; correct?
>
> A. Yes.
>
> **…**
>
> Q. …do you see any other issues with your wage statements?

A. No.

Q. Okay. So you've received all of the wages that you earned while working at Hanson Drywall, Inc.; correct?

A. Yes.

Q. Okay. And you were also paid for the time that you were -- you didn't go to work after your accident; correct?

A. Yes

(Zambrano Decl. iso Opp., ¶ 4; Exh. H - Plaintiff's Depo., pp. 317:18-25; 322:2-22; 325:4-11, italics added.).

b. Plaintiff's Burden

In opposition, Plaintiff claims that the wage statements he received did not accurately reflect the number of hours he worked. The only evidence Plaintiff has provided in support of this conclusion is the same deposition testimony Defendant relies on. (See Exh. H - Plaintiff's Depo., p. 322:2-25.) But, as Defendant points out, Plaintiff's deposition testimony is inconsistent and, in fact, strengthens Defendant's position that Plaintiff's wage statements are accurate. (See Reply, p. 10:15-17.) To illustrate, during his deposition, when Plaintiff was presented with copies of his wage statements, he initially stated they were incorrect, but later retracted that statement by confirming that the wage statements were accurate and that he was paid while on medical leave. (*Ibid*.) Consequently, Plaintiff's deposition testimony is insufficient to raise a triable issue of material fact as to inaccurate wage statements. Defendant's motion for summary judgment as to the sixth cause of action is GRANTED.

7. Seventh Cause of Action: Waiting Time Penalties (Lab. Code §§ 201-204)

Finally, Plaintiff seeks waiting time penalties for Defendant's alleged failure to pay him full compensation for all hours worked (including compensation prior to his medical leave) upon termination. (Opp., p. 15:9-11.)

If an employer "willfully" fails to pay wages when due to an employee who is discharged or quits, the employee's wages continue at the same rate until paid or until suit is filed, but not for more than 30 days. (Lab. Code, § 203; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.) Unpaid wages are due immediately upon discharge or within 72 hours after resignation. (Lab. Code, §§ 201 and 202.) "Willful" means the employer intentionally failed or refused to pay a wage obligation that was due. (*Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1076.) The term does not require a showing that the employer knew of its obligation and intentionally refused to act. (*Ibid*.) A good faith dispute that any wages are due "will preclude imposition of waiting time penalties under [Labor Code] Section 203." (Cal. Code Regs., tit. 8, § 13520.) Based on Defendant's proffered evidence discussed below, Defendant meets its initial burden of proof here.

a. Defendant's Burden

Defendant relies on Best's Declaration and accompanying exhibits B and C as evidence of timely payment. The relevant portions of Best's declaration state, as follows:

> 12. On May 14, 2021, HANSON laid-off PLAINTIFF due to lack of available work. HANSON had prepared two checks for PLAINTIFF: (1) a regular payroll check; and (2) a check for his final wages.
>
> 13. On May 14, 2021, I was in the office when PLAINTIFF arrived to pick up his checks. HANSON provided PLAINTIFF with both the payroll check and the check for his final wages. HANSON communicated to Plaintiff that he was laid off. PLAINTIFF became upset. PLAINTIFF only took his regular payroll check but refused to take his check for final wages. Attached hereto as **Exhibit B** is a true and correct copy of the payroll check, including the date that it was negotiated by PLAINTIFF. Attached hereto as **Exhibit C** is a true and correct copy of the check for final wages, including the date that it was negotiated by PLAINTIFF.
>
> 14. On May 14, 2021, PLAINTIFF negotiated his payroll check. See **Exhibit B.**
>
> 15. On May 14, 2021, following PLAINTIFF's refusal to take his final wage check, HANSON mailed Plaintiff's final check via certified mail to his mailing address…Attached hereto as **Exhibit D** are true and correct copies of the U.S. Postal Service Certified Mailing Receipts.

(Best Decl., ¶¶ 12-15; Exhs. B-D.)

The above-quoted declaration demonstrates Defendant's timely payment of Plaintiff's final paycheck. (Best Decl., ¶¶ 13-14; Exhs. B-C.) The attached Exhibit C, which is a copy of Plaintiff's final wage check, was initially refused by Plaintiff according to Lisa Best, Hanson, Inc.'s office manager. (See Best Decl., ¶¶ 13, 15.) Notably, the final paycheck includes an issue date of May 14, 2021, the date of Plaintiff's termination. (Exh. C – Final Wage Check.) According to Best's declaration and Exhibit C, Defendant ultimately negotiated his check for final wages on May 17, 2021, three days after his termination. (See Best Decl., ¶ 17; Exh. C.) Given this Court's above ruling on Best's declaration, this Court accepts her statement that Plaintiff allegedly rejected his last paycheck, which is further corroborated by the accompanying exhibit of the final wage check and receipt of mailing of said check. (*Ibid.*)

b. Plaintiff's Burden

In opposition, Plaintiff makes the following statement without citing any evidence, in support: "because these wages were withheld, Plaintiff did not receive all wages earned and unpaid at the time of his termination, subjecting Defendant to waiting time penalties under Labor Code §§201-204." (Opp., p. 15:9-11.) Plaintiff's unsupported claim fails. In light of Defendant's significant documented evidence of timely wage payments, Plaintiff fails to establish a triable issue of material fact as to the seventh cause of action.

IV. Conclusion

Defendant’s motion for summary judgment is GRANTED.

The Court will prepare the Final Order.

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Calendar Line 7
Case Name: Tyghe Mullin v. Matthew DeLorenzo
Case No.: 23CV435372

Plaintiff Tyghe Mullin complaint in this case alleges excessive force by the police. Plaintiff filed a motion on January 17, 2024. It is not entirely clear what Plaintiff is requesting by this motion. The docket entry suggests this motion is a request for the appointment of counsel. The motion itself appears to request priliveges such as blank subpoena forms, pens, envelopes, storage boxes, and an investigator. No legal authority is provided in support of these requests. To the extent Plaintiff is requesting the appointment of counsel based on indigency and incarceration, the court rules as follows:

The court has the discretionary authority to appoint counsel for indigent prisoners for civil lawsuits to afford them meaningful access to the courts. *Smith v. Ogbuehi* (2019) 38 Cal.App.5th 453, 465; Penal Code § 2601(d). Measures available to the court to ensure meaningful access include (1) deferral of the action until the prisoner is released; (2) appointment of counsel for the prisoner; (3) transfer of the prisoner to court to attend hearings or the trial; (4) utilization of depositions in lieu of personal appearances; (5) holding of trial in prison; (6) conducting status and settlement conferences and other motions by phone or video; (7) propounding of written discovery; and (8) use of closed circuit television other modern electronic media; or other "innovative, imaginative procedures." *Id*. at 467.

There is a three-step inquiry that the court should consider in determining how to exercise its discretion. The court must consider the applicant's indigency, whether his interests are actually at stake, and what other means can be used to provide meaningful access. *Apollo v. Gyaami* (2008) 167 Cal. App. 4th 1468, 1485-87. Here, it appears that Plaintiff is both incarcerated and indigent and that his interests are at stake. The Court may have other means to protect Plaintiff's access to the court, however, other than appointing counsel. For example, the Court can and will make use of remote technology to allow Plaintiff the ability to attend court while he is incarcerated. Other possible of ways to accommodate Plaintiff include staying the action until his release and/or allowing for the propounding of written discovery. It is not clear at this point that Plaintiff's ability to obtain meaningful access to the courts is being prevented from his incarcerated, indigent status.

As such, the Court denies the appointment of counsel at this time. Should it appear that the Court is unable to provide meaningful access to Plaintiff because of his incarcerated and indigent status, then the Court may reconsider its ruling. The motion is DENIED without prejudice.

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