SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: March 14, 2024 TIME: 9:00 A.M.

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 courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV364698	Royal Coach Tours, Inc. v. Nick Miletak	Click on LINE 1 or scroll down for ruling.
LINE 2	20CV375017	Scott T. Urban v. Cindy F. Cheng	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 3	20CV375017	Scott T. Urban v. Cindy F. Cheng	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 4	22CV405076	Saurabh Agarwal v. Sakuu Corporation	OFF CALENDAR
LINE 5	23CV414532	Olivia Ceja Escovar v. General Motors, LLC	Click on LINE 5 or scroll down for ruling.
LINE 6	19CV360975	Sophie Shen v. Weiping Xia et al.	Click on LINE 6 or scroll down for ruling.
LINE 7	22CV401096	P. Kavanagh Construction Co, Inc. v. Larry Spitters et al.	Motion to be relieved as defendants' counsel: the motion was filed without a hearing date, and there is no amended notice of hearing in the file. Parties to appear to address the apparent notice defect.
LINE 8	20CV372317	Kateryna Pomogaibo v. Yevgeniy Babichev et al.	Click on LINE 8 or scroll down for ruling.
LINE 9	22CV403647	Kateryna Pomogaibo v. Weeklys, Inc.	Click on LINE 9 or scroll down for ruling in lines 9-10.
LINE 10	22CV403647	Kateryna Pomogaibo v. Weeklys, Inc.	Click on LINE 9 or scroll down for ruling in lines 9-10.

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Calendar Line 1
Case Name: *Royal Coach Tours, Inc. v. Nick Miletak*
Case No.: 20CV364698

I. BACKGROUND

This malicious prosecution action arises from an employee-employer dispute that was previously litigated between defendant Nick Miletak ("Miletak") and plaintiff Royal Coach Tours, Inc. ("Plaintiff" or "Royal Coach"). In the previous case, Miletak was the plaintiff and Royal Coach was the defendant.

A. Factual Allegations

Royal Coach is a corporation that provides charter bus transportation services. (Complaint, ¶ 1.) On March 5, 2015, Royal Coach and Miletak entered into an employment agreement in which Miletak agreed to participate in Royal Coach's Student Driver Trainee Program. (*Id.* at ¶ 5.) Under the program, Royal Coach would pay Student Driver Trainees to attend classroom instruction, enabling them then to apply for a commercial driver's license. (*Ibid*.) Upon completion of the program, Royal Coach had the option to hire trainees as bus drivers. (*Ibid.*)

Royal Coach offered Miletak temporary employment and an hourly wage of $10.30 for participating in the program. (Complaint, ¶¶ 5-6.) Royal Coach informed Miletak that classroom training could not begin right away because not enough participants had signed up. (*Id.* at ¶ 6.) In the interim, Miletak was given the opportunity to review course material independently and log compensable time for review. (*Ibid*.) Miletak took the opportunity. (*Ibid*.)

Once there were enough participants, Royal Coach notified Miletak to report for the program on April 20, 2015. (Complaint, ¶ 7.) He did so, but only to submit his resignation on the same day and to demand compensation for the time he had been available for work before April 20, 2015. (*Ibid*.) Royal Coach refused, paying him only for the hours of instruction time Miletak had actually logged before his resignation (11 hours). (*Ibid*.)

B. Miletak's Legal Actions

Miletak filed several different claims against Royal Coach. He filed an unpaid wage claim with the Department of Industrial Relations. The Labor Commissioner ultimately found no violations on the part of Royal Coach. (Complaint, ¶ 8A.) Miletak filed age and race discrimination claims with the U.S. Equal Employment Opportunity Commission, as well as a Notice of Claim for Unemployment Insurance Benefits. These claims were also dismissed. (*Id.* at ¶ 8B-8C.)

Finally, Miletak filed a civil complaint for damages against Royal Coach. (*Id.* at ¶ 8D; see also *Miletak vs. Royal Coach Tours* (Case No. 2015-1-CV-279978) (the "2015 civil action").) At trial in the 2015 civil action, Royal Coach filed a motion for nonsuit as to Miletak's causes of action. The court ultimately granted the motion and dismissed his action with prejudice on May 26, 2016. (*Id.* at ¶¶ 9-11.) The Court of Appeal affirmed the trial court's decision on October 16, 2019. (*Id.* at ¶ 13; see also Exh. 1.)

C. The Present Suit

Royal Coach then filed a verified complaint in this case on March 4, 2020, alleging malicious prosecution by Miletak in the four prior actions he had filed, all of which had been dismissed. (*Id.* at ¶ 14.) Plaintiff has further alleged that Miletak intended to "extort monies" from Royal Coach in exchange for a dismissal of his claims. (*Id.* at ¶ 15; see also Exh. 2.)

This case was originally set for trial on August 3, 2022. On March 2, 2022, Miletak filed a special motion to strike the complaint under Code of Civil Procedure section 425.16 (the "anti-SLAPP motion"). On May 24, 2022, this court (Judge Kirwan) denied Miletak's anti-SLAPP motion because it had been filed well beyond the statutory 60-day time limit—it was nearly two years too late. Miletak filed a notice of appeal of the court's order.

On August 3, 2022, the matter came before the court for trial, as scheduled. Two days earlier, Miletak had filed a motion for judgment on the pleadings ("JOP motion"), along with a single motion *in limine*. The trial judge (Judge Geffon) noted that because there was a pending appeal of the anti-SLAPP motion, the matter would have to be stayed pending that appeal, and so the case was continued for a further trial setting. On March 30, 2023, the Court of Appeal affirmed the denial of the anti-SLAPP motion, and the remittitur issued on June 1, 2023.

The case has now been set for trial on April 8, 2024. On January 2, 2024, Miletak filed the motion currently before the court, a JOP motion that is essentially the same as the JOP motion that he previously filed on August 1, 2022 before the case was stayed pending his appeal.

II. MOTION FOR JUDGMENT ON THE PLEADINGS

A. Legal Standard

A JOP motion is proper when the complaint does not state facts sufficient to constitute a cause of action against the defendant. (Code Civ. Proc., § 438, subd. (c)(1)(B)(2).) "The grounds for motion provided in this section shall appear on the face of the challenged pleading or from any mater of which the court is required to take judicial notice." (Code Civ. Proc., § 438, subd. (d).)

A JOP motion is the functional equivalent of a general demurrer made after the time to demur has expired and more than 30 days before trial. (See Code Civ. Proc., § 438; see also *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 548; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999 (*Cloud*); *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254 (*Shea*).) "The court accepts as true all material factual allegations, giving them a liberal construction, but does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts. [Citations.]" (*Shea, supra*, 110 Cal.App.4th at p. 1254; *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

B. Request for Judicial Notice

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the matter at issue before the court.

(*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2; see also *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569 [because judicial notice is a substitute for proof, it is always confined to those matters that are relevant to the issues at hand]; *Jordache Enterprises, Inc. v. Brobeck, Phelger & Harrison* (1998) 18 Cal.4th 739 (*Jordache*), 748, fn. 6 [a court need not take judicial notice of a matter unless it "is necessary, helpful, or relevant"].) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

Miletak has submitted two separate requests for judicial notice: the first was filed concurrently with the motion on January 2, 2024, and the second was filed with his reply on January 31, 2024.

In his first request, Miletak seeks judicial notice of the following, attached as Exhibits A, B, and C: (A) a copy of Miletak's request for judicial notice, filed in this matter on August 1, 2022 and containing a copy of the court reporter's transcript on proceedings held on April 18, 2016 in the 2015 civil action ("Transcript"); (B) a copy of Miletak's declaration, dated February 27, 2022 (previously filed in this matter on March 2, 2022); and (C) a copy of a declaration by Arkady Itkin dated February 28, 2021 (previously filed in this matter on March 2, 2022).

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

In his second request, Miletak seeks judicial notice of copies of various court records, including another excerpt of the April 18, 2016 Transcript. The court denies this request as unnecessary. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [a court need not take judicial notice of a matter unless it "is necessary, helpful, or relevant"].)

C. Analysis

The sole cause of action in Plaintiff Royal Coach's complaint is for malicious prosecution. "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's favor [citations]; (2) was brought without probable cause [citations]; and (4) was initiated with malice. [Citations.]" (*Crowley v. Katleman* (1994) 8 Cal. 4th 666, 676 (*Crowley*), quoting and citing *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.)

Miletak bases his JOP motion on the following grounds: (1) the entire action is barred by *res judicata*; (2) the claim arises from Miletak's protected activity under Code of Civil Procedure section 425.16; (3) Royal Coach failed to oppose Miletak's JOP motion filed on August 1, 2022; and (4) Royal Coach cannot establish a probability of prevailing on its claim. (Notice of Motion and Motion, p. 2:8-23.)[1]

1. Res Judicata

Miletak initially contends that Royal Coach's malicious prosecution cause of action is barred by the doctrine of res judicata. (See Miletak's Memorandum of Points and Authorities ("MPA"), pp. 6:9-9:22.) "The doctrine of res judicata precludes the relitigation of certain matters which have been resolved in a prior proceeding under certain circumstances. [Citation.] Its purpose is 'to preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation.' [Citations.]" (*Brinton v. Bankers Pension Servs.* (1999) 76 Cal.App.4th 550, 556.) The prerequisite elements, whether applied to a cause of action or an issue, are: "(1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceedings. [Citations.]" (*Ibid.*)

"The doctrine of res judicata prohibits a second suit between the same parties on the same cause of action. In this context, the term 'cause of action' is defined in terms of a primary right and a breach of the corresponding duty; the primary right and the breach together constitutes the cause of action." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 792.) A general demurrer (or JOP motion) lies where the facts alleged in the complaint or matters judicially noticed show that a plaintiff's claim is barred by res judicata or collateral estoppel. (See, generally, *id.* at p. 805 [affirming Court of Appeal's decision to affirm the trial court's sustaining of a demurrer on res judicata grounds]; see *Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 189 [affirming trial court's ruling on JOP motion].)

Miletak asserts that because Royal Coach sought an award of attorney's fees at the conclusion of the bench trial in the 2015 civil action, and the court did not award those fees at that time, Royal Coach cannot now bring a claim for malicious prosecution. Miletak points to an exchange between the court and Royal Coach's counsel (Ms. Battel):

> MS. BATTEL: Your Honor, would the Court consider, at this point, our request that was set forth in our answer for request for determination that my client should receive attorney's fees as a result?

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[1] The court notes that it appears that the parties have not met and conferred as required. (Code Civ. Proc., § 439, subd.(a) ["Before filing a motion for judgment on the pleadings pursuant to this chapter, the moving party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to the motion for judgment on the pleadings for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the motion for judgment on the pleadings."] Nevertheless, because an insufficient meet-and-confer effort is not a ground to deny a motion for judgment on the pleadings, the court has considered and addressed the merits of the motion. (Code Civ. Proc., § 439, subd. (a)(4).) The court reminds Miletak that he must comply with the Code of Civil Procedure, and specifically any meet-and-confer requirements, with respect to future proceedings.

THE COURT: What's – I didn't hear any evidence regarding a statutory or contractual basis.

MS. BATTEL: Well, not – well, it would just be based on CCP 128.5 now that the Court found that there really wasn't a basis for bringing this action. That the Court either on motion by the party or on its own motion can find as a means of sanctions to award cost and attorney's fees.

THE COURT: It sounds like a post-judgment motion.

MS. BATTEL: Okay. I can do that, your Honor.

THE COURT: All right. So I won't rule on that without prejudice.

(Transcript, p. 87:1-15)

According to Miletak, one can reasonably infer from the court's use of the term "without prejudice" in the above exchange that the court denied Royal Coach's original request for attorney's fees in the 2015 civil action, and that Royal Coach has therefore already litigated this issue. (MPA, p. 8:1-8.) In support of his theory, Miletak relies on *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749 (*Thibodeau*).

Miletak's reliance upon *Thibodeau* is misplaced. In that case, the plaintiffs initiated arbitration proceedings against the general contractor they had hired to construct a home. After inspecting the project, the arbitrator awarded the plaintiffs $2,261 for repair of the concrete driveway. Thereafter, the cracks in the concrete driveway worsened, and the plaintiffs hired a concrete expert who determined that repairing the driveway would now cost $26,194. The plaintiffs then brought contract and tort causes of action in court against the subcontractor who had constructed the driveway. The trial court ruled for the plaintiffs for the amount of the repair cost asserted by their expert, less what they had already received for concrete repair in the arbitration against the general contractor. The Court of Appeal reversed, holding that res judicata applies to arbitration proceedings and that the additional concrete damage was encompassed by, and should have been addressed in, the arbitration proceeding. (*Thibodeau, supra*, 4 Cal.App.4th at pp. 752-755.)

Here, the facts are readily distinguishable from those in *Thibodeau*. Contrary to Miletak's assertion, Royal Coach's current action is not "identical" to the claim litigated in the 2015 civil action. (See MPA, p. 9:14-20.) The Plaintiff here did not bring a malicious prosecution action in the 2015 civil action. In that action, the court dismissed Miletak's causes of action with prejudice. (See Judgment of Dismissal After Trial, filed on May 26, 2016 in the 2015 civil action, p. 3:3-5.) Even if one assumes for the sake of argument that the request for attorney's fees under Code of Civil Procedure section 128.5 at the conclusion of the trial presented the same issue or cause of action as the current claim for malicious prosecution, the court in the 2015 civil action expressly deferred the request for attorney's fees. It was never a part of the earlier case.[2]

[2] In his reply brief, Miletak argues for the first time that Royal Coach should have brought a *cross-complaint* for malicious prosecution in the earlier case. This runs afoul of the general rule that malicious prosecution claims

Further, it is well settled that "Code of Civil Procedure section 128.5 was not intended to replace suits for malicious prosecution. [Citation.] It serves a different purpose. Whereas a malicious prosecution action is intended to compensate the wronged litigant, section 128.5 was enacted to broaden the courts' power to manage their calendars and expedite litigation. [Citation.] Thus, a court's decision whether to award sanctions may be influenced by factors extrinsic to a malicious prosecution case." (*Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1195 (*Wright*), citing *Crowley*, *supra*, 8 Cal.4th 666.) Moreover, as the Supreme Court noted in *Crowley*, the remedies available under Code of Civil Procedure section 128.5 are not coextensive with those available under an action for malicious prosecution. (*Crowley*, *supra*, 8 Cal.4th at p. 688.) "Section 128.5 allows compensation only for out-of-pocket litigation costs, including attorney fees, that directly result from the objectionable conduct; the relief cannot include consequential damages. [Citation.]" (*Ibid.*) These principles hold especially true here, where Royal Coach's claim is based not solely on the earlier civil action in this court, but also on the *three other actions* filed by Miletak. The claim for attorney's fees and the claim for malicious prosecution are not co-extensive in any way.

Accordingly, the court finds Miletak's res judicata defense to be without merit.[3]

2. Anti-SLAPP Arguments

In further support of his JOP motion, Miletak argues that the anti-SLAPP statute (Code of Civil Procedure section 425.16) applies to Royal Coach's claim for malicious prosecution. (MPA, pp. 9:23-16:14.) As noted above, Miletak previously filed an anti-SLAPP motion in this action. That motion was denied, and that denial was affirmed on appeal. Miletak's prior motion was deemed untimely two years ago, and the present JOP motion making the same arguments—in addition to being an improper attempt to perform an end run around the prior ruling—is even more untimely.

Indeed, Miletak cites no authority for the proposition that anti-SLAPP arguments can even be raised in a JOP motion. The court rejects Miletak's arguments under section 425.16.

3. Remaining Issues

In further support of his JOP motion, Miletak argues that Royal Coach cannot prove that Miletak lacked probable cause in bringing the 2015 civil action. (See MPA, pp. 12:24-16:14.) It is not clear whether Miletak intends this argument to address the second prong of the anti-SLAPP analysis or whether it is intended to be a standalone argument. In any event, the argument is not reachable on a JOP motion.

Miletak argues that Royal Coach cannot prove the second element of its malicious prosecution claim: that the prior action was brought without probable cause.[4] This is not

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must be filed as a separate action, not as a cross-complaint, except in the rarest of circumstances. (See *Babb v. Superior Court* (1971) 3 Cal.3d 841; *Loomis v. Murphy* (1990) 217 Cal.App.3d 589.)

[3] Although not identified by Royal Coach, the court sees another defect in Miletak's res judicata argument: Miletak waived this defense by failing to plead it (or anything approximating it) when he filed his answer in this action on December 21, 2020. (See *Thibodeau*, *supra*, 4 Cal.App.4th at p. 758 ["res judicata (precluding the relitigation of claims) must be pleaded"]; see also *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1156.)

[4] "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal

something that can be adjudicated in a motion *on the pleadings*. "A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matter that can be judicially noticed. [Citations.]" (*Cloud, supra*, 67 Cal.App.4th at p. 999.) "Presentation of extrinsic evidence is therefore not proper on a motion for judgment on the pleadings. [Citation.]" (*Ibid.*) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) "It 'admits the truth of all material factual allegations in the complaint . . .; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (*Id.* at pp. 213-214; see *Cook v. De La Guerra* (1864) 24 Cal. 237, 239 ["[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to."].)

Here, Miletak advances extrinsic evidence to establish that he brought the 2015 civil action with probable cause. The court "cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*Woodell, supra*, 17 Cal.4th at 455.) Further, in ruling upon the JOP motion, the court is not concerned with Royal Coach's ability to prove the claims stated, but only with the legal sufficiency of the pleading. Thus, Miletak's arguments as to what Royal Coach can or cannot prove are irrelevant to this JOP motion.

Miletak also argues that he has a complete defense to the malicious prosecution claim because he acted on the advice of counsel in his 2015 civil action. (MPA, p. 5:16-24.) Again, whether Miletak can rely on the advice-of-counsel defense presents a *factual* issue unsuitable for resolution in the context of a JOP motion. (See *Roche v. Hyde* (2020) 51 Cal.App.5th 757, 827-828 [concluding that issues concerning the advice-of-counsel defense presented by the defendants "must be sorted out at trial"].)

Finally, Miletak contends that his motion should be granted as "unopposed" because he first filed the JOP motion on August 1, 2022, and Royal Coach did not file a timely opposition. (MPA, pp. 16:15-17:21.) This argument lacks merit because the JOP motion was filed two days before the case was stayed, and the motion was never re-calendared after issuance of the remittitur. (To the extent that he wished to have a hearing on that prior motion, it was Miletak's responsibility to calendar that hearing and provide notice for it.) Additionally, that motion was filed as a motion *in limine*, two days before trial, and that trial never went forward.

For all of the foregoing reasons, the court DENIES the JOP motion.

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termination in his, plaintiff's favor [citations]; (2) was brought without probable cause [citations]; and (4) was initiated with malice. [Citations.]" (*Crowley, supra*, 8 Cal.4th at p. 676.)

Calendar Lines 2-3
Case Name: *Scott T. Urban v. Cindy F. Cheng*
Case No.: 20CV375017

I. BACKGROUND

This is a negligence action brought by plaintiff Scott Urban ("Scott") against defendant Cindy Cheng ("Cheng").[5] The original and still-operative complaint, filed on December 18, 2020, states two causes of action against Cheng: (1) Negligent Representation, and (2) Negligence.

According to the complaint, Scott and his brother, Craig Urban ("Craig"), were shareholders and owners of Urban Peripherals, Inc. ("UPI"). (Complaint, ¶¶ 4-5.) Cheng, a licensed accountant, provided accounting services to the brothers and to UPI. (*Id*. at ¶¶ 2-3, 6, 9, 14 & 19.)

In 1991, UPI established a Money Purchase Pension Plan ("Plan 1") and a Profit Sharing Plan ("Plan 2"). (Complaint, ¶ 10.) Scott made contributions and payments to Plan 1 and Plan 2. (*Id*. at ¶ 12.) In addition, UPI was required to make annual contributions to Plan 1 for Scott. (*Id*. at ¶ 11.) Scott alleges that he did not receive his full interests in the plans or terminate his full interests in the plans. Craig was also a participant in the plans. (*Id*. at ¶ 13.) On September 1, 2008, UPI established a new Profit Sharing Plan ("Plan 3") without Scott's knowledge or consent. (Complaint, ¶ 10.) At that time, the assets of Plan 1 and Plan 2 were transferred to Plan 3. (*Ibid*.)

On January 2, 2019, Craig claimed that Scott had no interest in the plans and that the balances in the plans belonged primarily to him. (Complaint, ¶ 18.) Scott asked Cheng to "perform an investigation and analysis and render a professional opinion as to [his] interests in the [p]lans." (*Id*. at ¶ 19.) Craig agreed to have Cheng perform the examination and analysis, and Cheng agreed to undertake the task. (*Ibid*.)

On January 28, 2019, Cheng represented to Scott and Craig that Scott did not have any interest in the plans because he received a distribution from Plan 1 and Plan 2 in 2007. (Complaint, ¶ 21.) Cheng "made these representations . . . with no reasonable ground for believing them to be true . . ." (*Ibid.*) Scott alleges that Cheng made her analysis and opinion without reviewing account statements, contribution checks, plan documents, outstanding loans made by the plans to participants, contributions and payments made to the plans by Scott, UPI and Craig, and losses claimed by Craig. (*Id*. at ¶¶ 21-22 & 24.) Cheng allegedly had "a conflict of interest in that she was secretly representing the interests of Craig Urban only" and "she was biased against Plaintiff." (*Id*. at ¶ 25 & 31.) Craig allegedly used Cheng's "negligent and reckless opinion and representations as a basis for interfering with and denying Plaintiff's right to his interests in the [p]lans." (*Id*. at ¶ 27.)

In December 2019, Scott learned that Cheng had "rendered an opinion stating that Plaintiff was not a shareholder of UPI" and omitted his name as a shareholder and owner of

[5] To avoid confusion between the plaintiff and his brother, Craig Urban, the court refers to the brothers by their first names.

UPI from UPI's tax returns and financial documents. (Complaint, ¶ 28.) Scott never consented to Cheng's omission of him as a shareholder on UPI's tax returns and financial records. (*Id*. at ¶ 30.)

Cheng brought a demurrer to the complaint, which this court (Judge Kirwan) overruled in an order on July 15, 2021.[6] Cheng then filed an answer to the complaint on July 27, 2021. Cheng's answer lists six affirmative defenses: failure to state a claim; failure to mitigate damages; failure to join all necessary parties; damages caused by plaintiff's own conduct; unspecified estoppel; and ratification.

Much later in the case, Cheng brought a motion to dismiss the complaint for failure to join all necessary parties, which this court (the undersigned) denied on January 11, 2024.[7] The case is now set for trial on June 10, 2024. Currently before the court are two motions by Cheng: (1) a motion for summary judgment filed on December 14, 2023[8] and (2) a motion for leave to file an amended answer, seeking to add a statute of limitations defense. Scott filed an opposition to the motion for summary judgment on February 29, 2024.[9] Scott filed an opposition to the motion to amend on March 1, 2024. The court will address the motion for summary judgment first.

II. JUDICIAL NOTICE

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

In support of her motion for summary judgment, Cheng has submitted a request for judicial notice of three documents or groups of documents "under Evidence Code §§ 452 and 453." Three documents are attached to the request as Exhibits A-C. No specific basis for taking judicial notice of any particular document is identified, however.

The first document (or group of documents) is described as "[t]he files and records of *The People of the State of California v. Urban, Scott Thomas*, Santa Clara Superior Court, Case No. C1910118, including the Preliminary Examination Minutes of the hearing held on April 5, 2021, and attached hereto as Exhibit A." (Request at p. 1:16-18.) The court denies this

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[6] The court takes judicial notice of Judge Kirwan's order on its own motion pursuant to Evidence Code section 452, subdivision (d).

[7] The court also takes judicial notice of this order under section 452(d).

[8] The filing of a notice of motion by itself on October 26, 2023 did not constitute the filing of the motion. The required supporting papers were not filed until December 14 and were served by regular mail. As this still provides sufficient notice for a hearing on March 14, 2024, the court finds notice to be proper and will consider the motion. (See Code Civ. Proc., § 437c(a)(2); Cal. Rules of Court, rules 3.1112(a) & 3.1350(c).)

[9] With 25 pages of text, the opposition violates Rule 3.1113(d) of the California Rules of Court. The court has nevertheless exercised its discretion to consider the opposition.

request. While the "files and records" in a criminal matter may be court records that could theoretically be judicially noticed, Cheng has failed to demonstrate how the one-page document attached as Exhibit A, much less the complete "files and records" of that criminal case, are relevant to the central issue before the court: *i.e.*, whether Cheng may be granted summary judgment or adjudication based on the issues properly raised in her motion.

Next, Cheng asks for judicial notice of a copy of a complaint filed by Scott in federal court on December 22, 2021, "in *Urban v. Urban, et al.*, Case No. 21-CV9929, United States District Court, Northern District of California, attached hereto as Exhibit B." (Request at p. 1:19-20.) The court grants judicial notice of Exhibit B but only as to the complaint's existence and filing date, under Evidence Code section 452, subdivision (d), not as to the truth of any allegations contained therein. (See *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81 [truth of contents of court records cannot be judicially noticed].)

Finally, Cheng asks for judicial notice of a May 18, 2023 order from the federal case granting in part and denying in part "Defendants' Motions for Summary Judgment," attached to the request as Exhibit C. (Request at p. 1:21-23.) The court grants judicial notice of Exhibit C, pursuant to section 452, subdivision (d). Again, the court takes judicial notice of the order's contents and their legal effect but not the truth of any factual findings. (See *Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 437-438; *Kilroy v. State of Calif.* (2004) 119 Cal.App.4th 140, 145-148.)

III. CHENG'S MOTION FOR SUMMARY JUDGMENT

A. General Standards

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].) This principle is directly relevant here, as Cheng's operative answer does not assert any statute of limitations defense. This means that Cheng may not move for summary judgment or adjudication based on any statute of limitations. The fact that Cheng has also brought an (extremely tardy) motion for leave to file an amended answer does not retroactively change the scope of relevant issues presented in the operative pleadings. If Cheng's motion for leave to amend were granted, she could, once the pleading were filed, move for summary judgment or adjudication based on a newly added defense. As a practical matter, such a motion could not be heard before the current trial date of June 10, 2024 (see Code Civ. Proc., § 437c(a)(2)-(3)), but Cheng could still raise defenses added by an amended answer at trial.

A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c(f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.) The only "claim for damages" that can be independently summarily adjudicated under section 437c, subdivision (f)(1), is a claim for punitive damages.

The only means by which a moving party may seek summary adjudication of a legal issue that does not wholly dispose of a cause of action, affirmative defense, or issue of duty (partial summary adjudication) is through compliance with Code of Civil Procedure section 437c, subdivision (t). A party seeking summary adjudication under section 437c(t) must first submit a joint stipulation stating the issues to be adjudicated, as well as declarations from each stipulating party that the motion will further the interest of judicial economy. (Code Civ. Proc., § 473c, subd. (t)(1)(A)(i)-(ii).) The court must then approve this stipulation before the motion may be filed. No such stipulation was submitted in this case for Cheng's motion.

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (See *Atkins v. St. Cecilia Catholic School* (2023) 90 Cal.App.5th 1328, 1344-1345, citing *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . . ."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) The court has therefore not considered the "supplemental" declarations from Craig, Jonathan Do, and Cindy Cheng in support of the motion for summary judgment, or their attached exhibits.

"A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.'" (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272 [internal citations omitted].)

B. Basis for Cheng's Motion

Cheng seeks "summary judgment on Plaintiff Scott Urban's Complaint . . . or, in the alternative, for partial summary adjudication on 1) Plaintiff's first cause of action for professional negligence has no merit, 2) Plaintiff's second cause of action for negligence has no merit, 3) that there is no merit to Plaintiff's claim for damages, and/or 4) any claim relating to Scott Urban's interest in the retirement plans of Urban Peripherals, Inc. is barred by the two-year statute of limitations against accountant. (See CCP § 394(1).) Said motion will be brought pursuant to C.C.P. section 437(c) upon the ground that there is no triable issue of material fact as to the summary judgment or summary adjudication as a matter of law." (See October 26, 2023 Notice of Motion at p. 1:20-28.)

As Cheng's motion was not brought under Code of Civil Procedure section 437c, subdivision (t), "partial" summary adjudication is not available. Any motion for summary adjudication must completely dispose of a cause of action, affirmative defense, or issue of duty. Summary adjudication of a "claim for damages" other than punitive damages is not available. As the operative answer does not assert a statute of limitations defense, summary judgment or adjudication may not be sought on that ground, either.

Rule 3.1350(b) of the California Rules of Court states: "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." Cheng's separate statement does not comply with this rule, as the issues set forth in the notice of motion are not "repeated, verbatim." The statement also attempts to introduce different issues, sometimes also including *sub-issues*, that are not mentioned anywhere in the notice of motion. The court has not considered these new issues.[10] The statement is also not in the format required by Rule 3.1350(d) and (h).

Rather than deny Cheng's motion outright for failure to comply with the rules of court, the court will treat it as a motion for summary judgment, or alternatively for summary adjudication as to the first and second causes of action. The court's ability to deny summary judgment outright for failure to comply with Rule of Court 3.1350 is discretionary, not mandatory. (See *Holt v. Brock* (2022) 85 Cal.App.5th 611, 619, citing *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118.)

C. Analysis of Cheng's Motion

Cheng's motion for summary judgment is DENIED as follows.

1. Statute of Limitations

As an initial matter, Cheng's argument that she is entitled to summary judgment because "all" of Scott's claims are barred by a two-year statute of limitations fails to meet her initial burden, because it does not identify the statute relied upon. (See Memorandum at p. 17:7-18.) Moreover, as previously noted, summary judgment or adjudication cannot be granted or denied on an issue outside the pleadings, and Cheng's operative answer does not raise the statute of limitations defense. "There are two ways to properly plead a statute of limitations: (1) allege facts showing that the action is barred, and indicating that the lateness of the action is being urged as a defense and (2) plead the specific section and subdivision . . . . The failure to properly plead the statute of limitations waives the defense." (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91, emphasis added, citing *Mysel v. Gross* (1977) 70 Cal.App.3d Supp. 10, 15; see also *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691 ["It is necessary for defendant who pleads the statute of limitations to specify the applicable section, and, if such section is divided into subdivisions, to specify the particular subdivision or

[10] In her reply, Cheng attempts to raise yet another new issue, collateral estoppel. Because this is mentioned nowhere in her notice of motion, opening memorandum, or separate statement, the court declines to consider that new issue.

subdivisions thereof. If he fails to do so the plea is insufficient."].) Cheng's operative answer neither alleges facts showing that Scott's claims are time-barred nor properly cites any statute of limitations.

2. Scott's "Claim for Damages"

Cheng argues that summary judgment should be granted because there is no merit to Scott's "claim for damages," because he received a full distribution of his interest in the plans. (See Memorandum at pp. 6:21-10:7.) As noted above, the only "claim for damages" that can be summarily adjudicated is a request for punitive damages. To the extent that this argument is intended to be an argument that Scott has no evidence to support the damages element of his two causes of action, as Cheng's reply appears to suggest, the court still denies summary adjudication on this basis for failure to meet the initial burden, as follows. (See Reply at p. 9:1-25.)

To obtain summary judgment or adjudication on the basis that a plaintiff has "no evidence" to establish an essential element of a cause of action or request for punitive damages, a moving defendant must support such a motion with discovery admissions or other admissible evidence following extensive discovery showing that "plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar, supra*, 25 Cal.4th at pp. 854-855.) It is not enough for a moving defendant to show merely that a plaintiff currently "has no evidence" on a key element of plaintiff's claim. The moving defendant must also produce evidence showing plaintiff cannot reasonably obtain evidence to support that claim. (See *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891, citing *Aguilar* ["[T]he absence of evidence to support a plaintiff's claim is insufficient to meet the moving defendant's initial burden of production. The defendant must also produce evidence that the plaintiff cannot reasonably obtain evidence to support his or her claim."].) "Such evidence may consist of the deposition testimony of the plaintiff's witnesses, the plaintiff's factually devoid discovery responses, or admissions by the plaintiff in deposition or in response to requests for admission that he or she has not discovered anything that supports an essential element of the cause of action." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 110, citing *Aguilar* among others.) Demonstrating that a plaintiff does not have, and cannot get, essential evidence presupposes that the defendant thoroughly explored the plaintiff's case through discovery aimed at uncovering all the evidence that supports that case.

A party moving for summary judgment or adjudication on the basis of an opponent's lack of evidence does not satisfy its burden of proof by producing discovery responses that fail to exclude the possibility that opposing parties may possess or may reasonably obtain evidence sufficient to establish their claim. (See *Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 80-81 [court may not infer that plaintiff lacks evidence on a point defendant does not pursue in discovery]; *Gulf Ins. Co. v. Berger, Kahn, Shaffton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 134-136 ["[T]o grant summary judgment, the court must be able to infer from the record that the plaintiff could produce no other evidence on the disputed point."]; *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1441-1442 ["A motion for summary judgment is not a mechanism for rewarding limited discovery; it is a mechanism allowing the early disposition of cases where there is no reason to believe that a party will be able to prove its case."].)

None of the five declarations submitted in support of Cheng's motion (from Cheng, her attorney Jonathan Do, Nelson Yeung, Craig Urban, and Sadie Pourfathi) argue or establish that Scott currently has "no evidence" to support the damages elements of his negligence causes of action or establish that he cannot reasonably obtain evidence to support the damages elements.

To the extent that Cheng also argues that Scott "cannot assert any claim relating to Plan 003," this is not an argument on which summary judgment or adjudication can be granted. (See Memorandum at p. 10:9-14.) Neither cause of action in the complaint is based solely on issues surrounding "Plan 3," and so a "partial" summary adjudication is not available. (See Complaint at ¶¶ 32-42.) This argument also relies upon facts contained in the summary judgment order in the federal action and a supporting declaration from Nelson Yeung. (See Cheng's Separate Statement of Undisputed Material Fact ("UMF") No. 37.) The summary judgment order in the federal case cannot be judicially noticed as to the truth of its underlying facts.

Even if a partial adjudication were possible, Scott has submitted evidence with his opposition disputing UMF No. 37 and paragraph 11 of the Yeung declaration. (See Urban Declaration at ¶¶ 131-134.) The court cannot weigh the evidence on summary judgment or evaluate the credibility of declarants. (*Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 540.) "Typically in summary judgment litigation, equally conflicting evidence requires a trial to resolve the dispute." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 881.)

3. The First Cause of Action

Cheng's motion for summary adjudication as to the complaint's first cause of action is DENIED as follows.

Cheng's argument that the complaint's first cause of action fails because Scott is bound by contrary admissions he purportedly made in his federal complaint is also unpersuasive and fails to meet the initial burden to demonstrate an absence of triable issue of material fact. (See Memorandum at pp. 10:20-11:27[11] and UMFs 38-40, which are solely supported by the federal complaint offered for judicial notice.)[12] This argument is based on an apparent misunderstanding of judicial admissions. "A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. Judicial admissions may be made in a pleading . . . . Facts established by pleadings as judicial admissions are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her. A pleader cannot blow hot and cold as to the facts positively stated." (See *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 456 (*Minish*).) Whether a purported admission in a pleading is in fact an admission, or is "unequivocal," is determined by the court, not the parties.

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[11] As Urban's opposition points out, this argument misstates the year alleged in the complaint and in the federal action as 2018 rather than 2019. (See Opposition at p. 19:3-16.)

[12] These UMFs cite both Exhibits A and B to the request for judicial notice, but the references to "Exhibit A" are to a page 11 and a paragraph 39. As Exhibit A to the request is a one-page document without numbered paragraphs, the court interprets these references as referring to Exhibit B, the federal complaint.

Judicial admissions are effective and binding only in the particular case in which the pleading was filed. (See *Minish, supra*, at p. 456; 4 Witkin, *Cal. Procedure* (6th ed. 2021-2023) Pleading §465 ["A judicial admission is effective (i.e., conclusive) only in the particular case. An admission in the pleadings in one case is merely an evidentiary admission in another case."]; *Mt. Hawley Ins. Co v. Lopez* (2013) 215 Cal.App.4th 1385, 1425 fn. 21 ["'A pleading in a prior civil proceeding may be offered as an evidentiary admission against the pleader' on summary judgment. [Citations.] Such an admission is an evidentiary admission, not a judicial admission, and may be rebutted with explanatory evidence from the party against whom the admission is offered. [Citations]."].) Allegations in Scott's later-filed federal complaint simply are not judicial admissions by Scott in this lawsuit.

Cheng's related argument, also based on the federal complaint, that Scott has "admitted" that he did not rely upon any statements by Cheng is also unpersuasive and fails to meet the initial burden. (See Memorandum at p. 12:2-14 and UMFs 41-42.)[13] The allegations in the federal complaint are not binding judicial admissions in this case.

Even if it were assumed for purposes of argument that Cheng had met her initial burden as to what was "admitted" in the federal complaint, the opposing declaration from Scott, stating his own version of what happened in the federal lawsuit, would be sufficient to raise triable issues. Again, the court cannot weigh the evidence on summary judgment or evaluate the credibility of declarants, and the federal court order cannot be judicially noticed as to the truth of its factual findings.

Next, Cheng argues that any alleged false statement by her "in January 2019 was not a factor in causing the alleged harm." (See Memorandum at p. 13:24-25.)[14] This argument does not completely dispose of the first cause of action, and for that reason alone, summary adjudication must be denied for failure to meet the initial burden. (See Complaint at ¶¶ 32-35.) In addition, while Cheng's argument on this point depends upon her own declaration and the Pourfathi declaration (see UMFs 43-47), Scott submits evidence disputing these facts, including deposition testimony from Pourfathi and Cheng. (See Declaration of Pauline Reimer, Exhibits 2 & 10). This evidence raises triable issues of material fact.

Finally, Cheng's argument as to the first cause of action that the federal Employee Retirement Income Security Act ("ERISA") "imposes no duty on an outside accountant such as Cindy Cheng," and that she therefore had no duty to prepare tax returns, is also insufficient, as it fails to dispose of the first cause of action completely. (See Memorandum at pp. 14:19-16:7.) Indeed, the complaint in this action does not allege any ERISA violation. The first cause of action alleges, among other things, a negligent failure to disclose conflicts of interest and a failure to disclose Cheng's relationship and communications with Craig. Even if Cheng's argument regarding ERISA completely disposed of the first cause of action, as required (see Code Civ. Proc., § 437c(f)(1)), Scott's evidence, including his own declaration

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[13] Again, these UMFs cite a page 11 of "Cheng RJN, Exh. A." As Exhibit A is a one-page document, the court interprets this as a reference to Exhibit B to the request, the copy of the federal complaint.

[14] "California has adopted the substantial factor test for cause in fact determinations. Under that test, a defendant's conduct is a cause of a plaintiff's injury if: (1) the plaintiff would not have suffered the injury but for the defendant's conduct, or (2) the defendant's conduct was one of multiple causes sufficient to cause the alleged harm." (*Union Pacific Railroad Co. v. Ameron Pole Products LLC* (2019) 43 Cal.App.5th 974, 981, internal citations omitted.)

and deposition testimony submitted as Exhibit 10 to the Reimer declaration, would be sufficient to demonstrate the existence of triable issues of material fact.

4. The Second Cause of Action

Cheng's motion for summary adjudication as to the second cause of action is also DENIED.

The second cause of action alleges a negligent failure to include Scott as both a shareholder and owner of UPI on tax documents, as well as to communicate with Scott regarding these documents. (Complaint at ¶¶ 36-42.) Cheng argues that this cause of action cannot be sustained because Scott was never a shareholder in UPI. This argument relies on disputed facts. Cheng's evidence (paragraphs 2-4 of the declaration from Craig Urban and paragraphs 2, 3, and 6 of Cheng's declaration (see UMFs 59-67)) is met by Scott's evidence, including his declaration and Exhibits 6, 7, 9, and 10 to the declaration of Pauline Reimer (correspondence, court transcripts, and Cheng's deposition transcript). This is sufficient to demonstrate that triable issues remain on this point even if the court assumes that the initial burden has been met.

D. Objections to Evidence

Cheng has submitted objections to portions of Scott's opposing declaration with her reply. As these objections are not in the proper format, the court will not rule on them.

Objections to evidence submitted in support of or in opposition to motions for summary judgment or adjudication must comply with California Rule of Court 3.1354. Rule 3.1354 requires the filing of two documents—the evidentiary objections themselves and a separate proposed order on the objections—and both must be in one of the two approved formats set forth in the rule. Cheng's objections are not in one of the approved formats, and she has failed to submit the required proposed order. Rule 3.1354(a) states: "Unless otherwise excused by the Court on a showing of good cause, all written objections to evidence in support of or in opposition to a motion for summary judgment must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed." This includes the required proposed orders. The court is not required to rule on objections that are not fully compliant with Rule 3.1354. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) "Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c, subd. (q).)

IV. CHENG'S MOTION FOR LEAVE TO AMEND HER ANSWER

A. General Standards

Motions for leave to amend are directed to the discretion of the court. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading . . . ." (Code Civ. Proc., § 473, subd. (a)(1).) The law generally favors amendments

on the basis that cases should include all disputed matters between parties and be decided on their merits. Nevertheless, if the party seeking amendment has been dilatory and the delay has prejudiced the opposing party, the judge has discretion to deny leave to amend. (See *Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490.) Absent other prejudice, delay alone is not considered grounds for denial. Prejudice exists where the amendment would require delaying the trial, result in the loss of critical evidence, add costs of preparation, or increase the burden of discovery, etc. (See *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488; See also *Melican v. Regents of the Univ. of Calif.* (2007) 151 Cal.App.4th 168, 176.) Where some prejudice is shown, the court may still allow the amendment but can impose conditions. These can include continuing the trial date (if requested by the opposing party), limiting discovery, and ordering the party seeking the amendment to pay the costs and fees incurred by the opposing party in conducting discovery and preparing for trial on a newly added claim.

B. Discussion

As noted above, Cheng seeks leave to file an amended answer that will add a seventh affirmative defense: "Plaintiff's claims are barred by the applicable two-year statute of limitations against accountant . . . . CCP § 339." (See Exhibit A to the Declaration of Jonathan Do at p. 2:8-10.) Both the motion and the Do declaration state that there will be no prejudice from the amendment because no depositions have been taken by either party. (October 26, 2023 Memorandum at p. 3:3-4 and Do Declaration at ¶ 6.)

Scott's opposition argues that there has been "inexcusable" delay in bringing this amendment, but even if this is true—and the court would actually tend to agree—it is still not sufficient grounds for denial of the present motion. Scott also claims that the amendment will be prejudicial and will require additional discovery, but he fails to identify any specific discovery that would be necessitated by the statute of limitations affirmative defense. The court sees no basis to continue the trial in this matter because of the proposed amendment.

The opposition also argues that, if granted, leave to amend should be conditioned on requiring Cheng to produce documents she testified to having at her November 6, 2023 deposition, which testimony was inconsistent with her prior discovery responses. (See Opposition at p. 3:24-4:1; Declaration of Pauline Reimer at ¶¶ 7-10 & Exhibits 1-3.) The opposition fails to connect this requested condition to any prejudice caused by the proposed amendment.

The court GRANTS the motion for leave to file the proposed amended answer. Cheng shall file the pleading within 10 days of this order.

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Calendar Line 5
Case Name: *Olivia Ceja Escovar v. General Motors, LLC*
Case No.: 23CV414532

In this "lemon law" case, plaintiff Olivia Ceja Escovar ("Plaintiff") seeks further responses to 29 requests for production of documents (Nos. 1, 3, 7, 17, 23, 24, 25, 26, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 50, 51, 52, 53, 58, 59, 68, 76, 78, 79, 86, and 91) from defendant General Motors, LLC ("GM"). The court addresses these requests as follows:

Requests Nos. 1, 3, and 7: These requests seek documents regarding Plaintiff's 2021 Chevrolet Silverado 1500 (*i.e.*, the "subject vehicle"), and so they are the most directly relevant requests for the case. GM claims in its opposition that it has now produced all of the responsive documents that exist (Opposition at pp. 8:2-18; 10:20-11:3). Plaintiff claims in her reply that GM has not (Reply at p. 4:16). Whom to believe? The problem with Plaintiff's reply brief is that it does not specify what is still missing in GM's production. It merely contains a generic statement that appears to have been cut and pasted from another brief. The court finds these boilerplate arguments to be unpersuasive. GM's written responses already state that it will produce repair orders, the factory invoice, the warranty history report, service request activity reports, TSBs, and ISBs relating to the service vehicle. The court DENIES the motion as to these requests.

Requests Nos. 17, 23-25, and 36-42: These requests seek documents relating to GM's "internal knowledge and investigation" of "transmission defects" in Chevrolet Silverado 1500 vehicles and in any other vehicles "equipped with the 8-speed transmission like the SUBJECT VEHICLE" (including field reports, customer complaints, "ESI and emails," campaigns, recalls, warranty extensions, modifications, and "fixes"). The court finds these requests to be overbroad and speculative. If there were a *specific* defect as to which Plaintiff had some reason to believe that GM had a longstanding awareness, or as to which GM had conducted an internal investigation, then there might be some basis for targeted discovery into those documents. But here, Plaintiff has simply identified a broad and generic category of "transmission defects"—this phrase is exceedingly vague—and she has not provided any support for a good-faith belief that GM actually conducted any internal investigations. Instead, she expresses the hope that "[i]f Defendant possesses internal investigations or communications about these problems Plaintiff experienced with her own Transmission Defects, among other things, then those are surely discoverable here too." (Memorandum at p. 9:10-12.) This is sheer speculation. GM has already indicated that it has produced the TSBs and ISBs for the 2021 Chevrolet Silverado 1500, and so if there are specific issues arising out of these documents that warrant follow up, Plaintiff can certainly pursue them in discovery. But that type of proper discovery contrasts sharply with the non-targeted and overbroad discovery requests presented here. DENIED.

Requests Nos. 43-45 and 50-53: Similarly, these requests for internal analyses, reports, and presentations regarding the broad category of "transmission defects" with vehicles "equipped with the 8-speed transmission like the SUBJECT VEHICLE" are overbroad and speculative. DENIED.

Requests Nos. 58-59, and 68: These requests seek training manuals, warranty policy and procedure manuals, and "lemon law documents" regarding the handling of consumer lemon law claims. The court sees no specific relevance, or potential relevance, of these

documents to the causes of action in this case. The manner in which GM handled Plaintiff's claim is directly relevant to this case. The manner in which GM handled other consumers' claims, or the manner in which they were trained to treat such claims generally, has no discernible bearing on the resolution of the causes of action in this case. DENIED.

Requests Nos. 76, 78, and 79: These requests seek "communications" between GM and the National Highway Traffic Safety Administration (NHTSA), or between GM and other "government agencies," regarding "transmission defects" in GM vehicles. Again, these requests are overbroad and speculative—and even if they were not, they appear to be of peripheral relevance at best to the issues in this case. The case law cited by Plaintiff in support of these requests—*e.g.*, involving "well over" 100 TSBs and a class action against Ford (*Bowser v. Ford Motor Co.* (2022) 78 Cal.App.5th 587, 599) or multiple recalls by Chrysler and a NHTSA investigation (*Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, 344—is completely distinguishable from the facts of this case. DENIED.

Request No. 86: This request seeks information about GM's "financial condition and/or financial net worth" for purposes of calculating punitive damages. The court agrees with GM that this request is premature under Civil Code section 3295. DENIED.

Requests No. 91: DENIED, for the same reasons set forth above with respect to Requests Nos. 17, 23-25, and 36-42.

Request for monetary sanctions: Because the court has not granted any part of the motion, the court DENIES plaintiff's request for monetary sanctions.

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Calendar Line 6
Case Name: *Sophie Shen v. Weiping Xia et al.*
Case No.: 19CV360975

After multiple unsuccessful attempts (which plaintiff's counsel indelicately tries to pin, in part, on the court), plaintiff and judgment creditor Sophie Shen has now filed what appears to be a procedurally proper application for an order of sale of defendant and judgment debtor Weiping Xia's home. (See November 7, 2023 Order & January 30, 2024 Order.) The court GRANTS the application.

In opposition, Xia raises a number of unpersuasive and immaterial arguments. First, he argues that Shen's English-language skills "are lacking," and so the court should find her entire declaration to be untrustworthy, without foundation, and invalid. To put it as charitably as possible, the court finds this argument to be absurd. Regardless of the level of Shen's fluency in English, there is no basis for finding that she is so unable to understand the language (even with the assistance of others) that she would not know what her declaration says. Second, and relatedly, Xia claims that Shen's signatures on her December 12, 2023 and January 29, 2024 declarations are so similar as to raise questions over whether they are authentic and whether she really signed them. Again, this claim is totally uncompelling, and the court rejects it out of hand. Shen responds that these are her electronic signatures, and the court has no reason to doubt that assertion. Third, Xia points to an inconsistency in Shen's declaration (as to whether there may be other encumbrances on Xia's property) and then argues that this inconsistency renders the entire declaration void. The court rejects this argument, as well, given that the declaration does identify a known encumbrance. Finally, Xia argues that Shen's title search, submitted with her application, is outdated and untrustworthy. The court finds this to be an immaterial argument as well, as there is no requirement of a "new" or "fresh" title search, and Shen has complied with Code of Civil Procedure section 704.760 to the best of her ability.

The court grants the application and instructs Shen to prepare the final order for the sale of the home, in accordance with all of the requirements of Code of Civil Procedure sections 704.710-704.850.

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Calendar Line 8
Case Name: *Kateryna Pomogaibo v. Yevgeniy Babichev et al.*
Case No.: 20CV372317

On February 7, 2023, a motion to quash service of summons by defendants Yevgeniy Babichev and Ekaterina Berman came before the court. The court ultimately adopted its tentative ruling denying Babichev's motion but granting Berman's motion, based on the absence of a proof of service of summons as to Berman. Plaintiff Kateryna Pomogaibo now moves for reconsideration of the order as to Berman's motion, based on an error by the clerk's office, which filed her proof of service on Berman in the wrong case—in No. 20CV3723**71** instead of in this case, which is No. 20CV3723**17**. In addition, that error apparently happened all the way back in November 2022, more than 16 months ago, and more than three months before the hearing on the motion to quash. The court concludes that this constitutes a sufficient showing of "new or different facts" or "circumstances" under Code of Civil Procedure section 1008 and therefore GRANTS the motion. The court VACATES its prior order granting Berman's motion to quash.

Two threshold comments are in order regarding the unusual procedural posture of this case. First, on January 10, 2024, Babichev filed a timely peremptory challenge against the undersigned, under Code of Civil Procedure section 170.6. This case was therefore randomly reassigned from Department 10 to Department 20. Nevertheless, because the present motion is a motion for reconsideration of a prior order by the undersigned, this solitary motion has remained in Department 10—everything else in the case is now in Department 20. Second, although Pomogaibo filed the present motion on February 9, 2023, only two days after the court's original order, it has taken an incredibly long time to be heard. Through an apparent oversight or lack of follow up, or both (either from the clerk's office or from Pomogaibo herself), the motion for reconsideration was not assigned a hearing date until October 17, 2023. Then, at that hearing in October, the court found notice to be improper and instructed Pomogaibo to provide notice to Babichev and Berman with her moving papers and a new hearing date. After the court set a new hearing on February 20, 2024 at 9:00 a.m., Pomogaibo filed an ex parte request to continue the hearing yet again, based on the fact that she would be on an intercontinental flight on the morning of February 20. The court finally set the present hearing date of March 14, 2024 at 9:00 a.m. in Department 10.

Pomogaibo claims that she did not know about the clerk's office's error (transposing "17" and "71" in the case number) until February 8, 2023, the day after the hearing on the motion to quash. Berman argues, by contrast, that Pomogaibo must have known about the error by no later than February 6, 2023, the day before the hearing, because that is when Pomogaibo attempted to re-file the proof of service with the clerk's office. It is true that the electronic file does reflect an attempted re-filing of the proof of service on February 6, 2023, but that is consistent with Pomogaibo's having received the court's posted tentative ruling on that day and then trying to "fix" the situation at the eleventh hour. It does not constitute conclusive proof that Pomogaibo was also aware of the court clerk's filing error on that date. Two days later, on February 8, 2023, Pomogaibo did email sscivilinfo@scscourt.org, asking the court to fix the clerk's office error (Exhibit B to Pomogaibo's motion). Based on that latter email, the court has no reason to disbelieve Pomogaibo's claim that she learned about the error on February 8 (or the night before), rather than before the hearing, and that is why she did not mention it to the court on the morning of February 7.

Again, the court is well aware of the drawn-out history of this dispute over the most basic of process—the service of a summons and complaint. The court is also aware that the present order does nothing to counteract the perception that the wheels of justice turn agonizingly slowly, exacerbated by administrative mistakes, at the court. Finally, the court is well aware that the practical effect of this order may ultimately be negligible, given the previous determination in another case that Pomogaibo is a vexatious litigant and given the pending motion (to be heard on March 20, 2024 in Department 20) to order Pomogaibo to furnish a security to maintain this action. Nevertheless, because the court's prior order was based on the erroneous assumption that a proof of service had not been filed as to Berman, and because there is reason to believe that the true facts of the November 2022 filing of the proof of service did not come to light until shortly after the hearing, the court determines that reconsideration is in order.

The motion is GRANTED. The prior order is VACATED as to defendant Berman.

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Calendar Lines 9-10
Case Name: *Kateryna Pomogaibo v. Weeklys, Inc.*
Case No.: 22CV403647

Plaintiff Kateryna Pomogaibo has filed two motions: (1) a motion for reconsideration of the court's October 10, 2023 order setting aside defendant Weeklys, Inc.'s ("Weeklys'") default, and (2) a motion to disqualify defendant's counsel, Harpaul Nahal. The court DENIES both motions.

The motion for reconsideration is timely—in fact, it was filed only three days after the court's order. But it fails to set forth any "new or different facts, circumstances, or law," as required by Code of Civil Procedure section 1008, subdivision (a). Instead, it merely reiterates arguments that were already made in opposition to Weeklys' motion to set aside, or it attacks the court's legal analysis and reasoning. (E.g., Motion at pp. 1-2 ["Motion to reconsider should be granted due absent of evidence [sic]."]) As a result, there is no basis for reconsideration.

The motion to disqualify opposing counsel does not appear to be based on any conflict of interest, which is the most common basis for disqualification. Instead, Pomogaibo sets forth two alleged grounds: (1) Nahal "has charges for felony," and (2) Nahal "violated duty of care and loyalty to Plaintiff and refused to sign Notice and acknowledgment of receipt" of a "statement of damages." (Motion at pp. 1-2.)[15] As to the first ground, Pomogaibo attaches a printout from the State Bar of California's website that indicates that Nahal has been "charged" with a felony in a "pending" case (Exhibit 1), but there is no indication on the page that Nahal is subject to any state bar disciplinary proceedings. Although the court's "paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar" (see *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1145), the court is not aware of any authority for the proposition that an attorney must be disqualified merely because he has been charged with an unspecified felony. The court has not been made aware of any ethical complaint against Nahal, or any conviction of a crime involving moral turpitude. As a result, the present motion—to the extent that it relies on pending charges—is premature at best and completely unfounded at worst.

As for the notion that Nahal violated a "duty of care and loyalty" to Pomogaibo, the court finds no legal support for this allegation. An attorney for a party in litigation does not owe a "duty of care and loyalty" to the *opposing* party, and the fact that Nahal allegedly "refused to sign [a] [n]otice and acknowledgement of receipt" of a statement of damages that Pomogaibo sent to him is not a basis for finding the breach of any cognizable duty. If a party's dissatisfaction with the level of courtesy and quality of communication by opposing counsel were a recognized basis for disqualification, we would be left with a very limited field of attorneys who remain "qualified" to litigate cases. The court rejects this contention out of hand.

The motions are denied.

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[15] The lines on Pomogaibo's papers are unnumbered, and so the court cites only page numbers. (The pages are also unnumbered, but there are only two pages.)