**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: July 6, 2023 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 for in-person hearings:** 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.

**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.

**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.

**Troubleshooting Tentative Rulings**:
If you do not see this week's tentative rulings, either they have not yet been posted, or your web browser cache (temporary internet files) is pulling up an older version. You may need to "REFRESH" your browser or "QUIT" and reopen it – or adjust your internet settings so you only see the current version of the web page. Otherwise, your browser may continue to show an older version of the web page even after the current tentative rulings have been posted.

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 19CV349792 | Division of Labor Standards Enforcement v. Capital Mailing Services, Inc. et al. | Click on LINE 1 or scroll down for ruling. |
| LINE 2 | 20CV371090 | Institute for Business & Technology, Inc. v. Fortune Companies Management Corp. et al. | Click on LINE 2 or scroll down for ruling. |
| LINE 3 | 19CV358256 | Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al. | Click on LINE 3 or scroll down for ruling in lines 3 & 5. |
| LINE 4 | 19CV358256 | Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al. | The motion as to defendant Gilroy Garlic Festival Association, Inc. has been withdrawn. |
| LINE 5 | 19CV358256 | Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al. | Click on LINE 3 or scroll down for ruling in lines 3 & 5. |
| LINE 6 | 22CV406972 | Roth Financial LLC v. Michael David Liddle | Click on LINE 6 or scroll down for ruling in lines 6-8. |
| LINE 7 | 22CV406972 | Roth Financial LLC v. Michael David Liddle | Click on LINE 6 or scroll down for ruling in lines 6-8. |
| LINE 8 | 22CV406972 | Roth Financial LLC v. Michael David Liddle | Click on LINE 6 or scroll down for ruling in lines 6-8. |
| LINE 9 | 20CV368190 | O2 Valley Corporation v. Frank Cheng, Jr. et al. | Motion to be relieved as counsel: parties to appear. |
| LINE 10 | 20CV368190 | O2 Valley Corporation v. Frank Cheng, Jr. et al. | Motion to be relieved as counsel: parties to appear. |
| LINE 11 | 20CV368190 | O2 Valley Corporation v. Frank Cheng, Jr. et al. | Motion to be relieved as counsel: parties to appear. |
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| | | | |
|---|---|---|---|
| LINE 13 | 21CV375937 | Sandra Vieno v. Elizabeth Moore et al. | Motion to dismiss: there is no amended notice of hearing in the file, as required by local rule, and the court has received no response to the motion. The court orders the parties to appear to address the propriety of notice. |
| LINE 14 | 18CV330713 | Discover Bank v. Aravind Parchuri | Motion for entry of judgment pursuant to CCP § 664.6: this motion was originally scheduled to be heard on May 11, 2023, but the court found that plaintiff had failed to show that an amended notice of hearing was properly filed and served, as required by local rule. The matter was continued to July 6, 2023. The court sees that plaintiff has now filed an amended notice of motion with the July 6 hearing date, but there is still no proof of service anywhere in the file. Accordingly, it appears that notice continues to be deficient. The court has not received any response to the motion from defendant. **The court orders the parties to appear**. |
| LINE 15 | 20CV362056 | Discover Bank v. Carolina P. Ballada | Motion for entry of judgment pursuant to CCP § 664.6: notice is proper, and the court has not received a timely opposition to the motion. The court GRANTS the motion, based on the showing in plaintiff's moving papers. Moving party to prepare the final order. |

**- oo0oo -**

**Calendar Line 1**
**Case Name**: *Division of Labor Standards Enforcement v. Capital Mailing Services et al.*
**Case No**.: 19CV349792

## I. BACKGROUND

This is a civil enforcement action brought by the Division of Labor Standards Enforcement ("DLSE"), a division of the California Department of Industrial Relations. DLSE seeks to enforce judgments for unpaid wages obtained by former employees of defendant Capital Mailing Services, Inc. ("CMS"). The other defendants are Perice Sibley ("Sibley"), who was the sole owner of CMS, and two entities named "Prosper Equity, Inc." (one a Wyoming corporation and the other a Virginia corporation). This case was consolidated with Case No. 20CV269589, a lawsuit originally filed in Placer County Superior Court and later transferred to this court on July 7, 2020.

DLSE filed the original complaint in this action on June 13, 2019. It filed a first amended complaint on December 6, 2019. It filed a second amended complaint ("SAC") on July 7, 2020, adding the Virginia version of Prosper Equity, Inc. as a defendant for the first time. On August 13, 2020, defendants CMS, Sibley, and Prosper Equity, Inc. (Virginia) filed an allegedly verified answer to the SAC.[1]

DLSE filed the operative third amended complaint ("TAC") on February 5, 2021, after a motion for leave to amend was granted by this court (Judge Kirwan). The TAC states claims for: (1) Alter Ego Liability (against CMS and Sibley); (2) Fraudulent Transfer of Property (the "Elmwood Court" property, alleged against Sibley and both Prosper Equity, Inc. corporations); (3) Fraudulent Transfer of Property (the "University Avenue" property, alleged against Sibley and both Prosper Equity, Inc. corporations); and (4) Breach of Fiduciary Duty and Illegal Distributions in violation of Corporations Code section 316 (alleged against Sibley). Any answer to the TAC was due within 20 days of service—i.e., over two years ago. (See Code Civ. Proc., § 412.20(a)(3).) None of the defendants, together or separately, have filed a timely answer to the TAC.

The TAC alleges that Defendant/Cross-Complainant Sibley is the sole director and officer of CMS and also its sole owner. (TAC at ¶ 3.) It further alleges that in February and March of 2016, Sibley drained CMS's bank accounts and transferred those funds to her other, non-CMS assets. (See TAC at ¶¶ 11-16.) This caused mass layoffs at CMS, with a large number of employees eventually obtaining judgments for unpaid wages against CMS that have been transferred to DLSE, which then filed the underlying action.

The TAC alleges that defendant Prosper Equity, Inc. from Virginia (hereafter "PEV") "holds title to real property in Santa Clara County that is subject to this action to avoid fraudulent transfers." (TAC at ¶ 5.) The TAC alleges that in December 2015, Sibley transferred real property located at 215 Elmwood Court, Los Gatos, California (Assessor Parcel No. 409-06-007) to her father, Hiram Sibley, for no consideration. It also alleges that in March 2016, Sibley transferred real property located at 461 University Avenue, Los Gatos, California (Assessor Parcel No. 529-07-097) to Hiram Sibley for no consideration. (See TAC at ¶¶ 8 and 13.) Attached to the TAC as Exhibits A and B are copies of the recorded grant

[1] The answer was verified only by attorney Mark Ellis on behalf of the three defendants.

deeds evidencing these transfers. The TAC further alleges that in January 2017, Hiram Sibley transferred the 215 Elmwood Court property and the 461 University Avenue property to either the Virginia or Wyoming version of Prosper Equity for no consideration. (TAC at ¶ 16.) Attached to the TAC as Exhibit C are copies of the recorded grant deeds for these transfers, appearing to show that both properties were transferred to the Wyoming corporation. Among other things, the TAC asks the court to void the transfers of these two properties "to Hiram Sibley and his successor entities." According to the TAC, Hiram Sibley "died in 2017." (TAC at ¶ 17.)

On April 15, 2021, DLSE filed a dismissal of its claims against Sibley "as Administrator of the Estate of Hiram A. Sibley only" (i.e., not individually). On February 17, 2023, PEV obtained separate counsel in this case. On June 5, 2023, DLSE filed a partial dismissal of the second cause of action as to "Void Transfer 3920 Stone Leigh Ct., Placer SAC, #SCV0043232."

Defendants CMS and Sibley filed a cross-complaint on January 14, 2021. The cross-complaint states seven causes of action against several cross-defendants (though only six causes of action are listed on the caption page): (1) Indemnity; (2) "Implied Contractual Indemnity" (against Eric Kozlowski and The Presort Center of Fresno LLC only); (3) Equitable Indemnity; (4) Apportionment of Fault; (5) Declaratory Relief; (6) Contribution; and (7) Conversion (against Andrew Cody, Eric Kozlowski, Salt Creek Media, Inc., Redstone Print & Mail, Inc., and the Presort Center of Fresno LLC only).

On August 31, 2021, this court (Judge Kirwan) heard three separate demurrers to portions of the cross-complaint by cross-defendants Redstone Print & Mail, Inc. ("Redstone"), Cherie Kindel ("Kindel") and Andrew Cody ("Cody"). The court sustained those three demurrers (which were essentially identical) without leave to amend as to the first, third, fourth, fifth, and sixth causes of action, as they failed to articulate any basis upon which the demurring cross-defendants were or could be jointly liable for proximately causing the injury that is alleged in the underlying action: the alleged withdrawal of CMS's funds by Sibley for her personal use in February and March of 2016, resulting in a loss of employment and unpaid wages for a large number of people. The court overruled the demurrers as to the seventh cause of action, which was unrelated to the underlying action. (See Court's August 31, 2021 Order.)

On October 5, 2021, this court (Judge Arand) heard two more demurrers to the cross-complaint by cross-defendant Bank of the West (the "Bank") and cross-defendant Eric Kozlowski ("Kozlowski"). The Bank demurred to the first, third, fourth, fifth, and sixth causes of action, and Kozlowski demurred to the first, second, third, fourth, fifth, sixth, and seventh causes of action. In an order issued on December 29, 2021 the Court sustained both demurrers without leave to amend as to the first, third, fourth, fifth, and sixth causes. The court overruled Kozlowski's demurrer to the seventh cause.

On December 21, 2022, the court (Judge Kirwan) granted two separate motions for summary judgment/adjudication by cross-defendants Redstone and Cody as to the seventh cause of action in the cross-complaint, the only remaining claim alleged against them. Judgment was entered in Redstone and Cody's favor on January 24, 2023.

Currently before the court is a motion for summary judgment/adjudication filed by DLSE on March 16, 2023 as to the TAC. Any opposition to the motion was required to be

filed and served by no later than June 22, 2023. (See Code Civ. Proc., § 437c(b)(2).) The only timely opposition to the motion was filed by PEV on June 22, 2023.

The court declines to consider the late opposition to the motion by CMS and Sibley, filed on the evening of June 26, 2023, more than four days late, without any explanation or prior leave of court. "A trial court has broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 765.) Code of Civil Procedure section 437c(b)(2) "forbids the filing of any opposition papers less than 14 days prior to the scheduled hearing, and case law has been strict in requiring good cause to be shown before late filed [opposition] papers will be accepted" in a summary judgment proceeding. (*Hobson v. Raychem Corp*. (1999) 73 Cal.App.4th 614, 625, disapproved on another point in *Colmenares v. Braemar Country Club, Inc*. (2003) 29 Cal.4th 1019, 1031, fn. 6.) The court in *Bozzi* also noted that where the moving parties "followed all the rules" they "were entitled to expect the trial court to enforce them," and that where "[opposing party] did not invoke any of the available procedures to obtain a court order permitting [them] to file late papers," it could not "find any reason to conclude [that] the trial court abused its discretion," in refusing to consider the late filing. (*Bozzi*, *supra*, at p. 165.)

The current motion was filed more than 90 days ago. CMS and Sibley had ample opportunity to seek a continuance or other relief from the court prior to June 22, 2023 but failed to do so. The fact that PEV was able to file a timely opposition to the motion belies any suggestion that it was impossible for CMS and Sibley to comply with section 437c(b)(2). Moreover, even a cursory review of the late opposition reveals that it merely repeats the same arguments contained in PEV's already repetitive, unnecessarily verbose, and oversized opposition brief.[2] Indeed, as DLSE points out in reply, Sibley's opposition does not even address summary adjudication of the fourth cause of action, the sole cause of action alleged against her alone.

## II. REQUESTS 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 form is that the matter to be noticed be relevant to a 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(b) requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter." Both sides here have submitted requests for judicial notice.

### A. DLSE's request

DLSE seeks judicial notice of 90 documents, copies of which are attached as exhibits to its multi-volume request. The claimed basis for judicial notice of each category of document is stated in the request. Judicial notice of Exhibits 1, 2 and 5, copies of annual reports for PEV, Prosper Equity, Inc. Wyoming ("PEW"), and Precious Equity, Inc. (another Virginia

[2] PEV's 20-page opposition appears to circumvent rules 2.108 and 3.1113 of the Rules of Court by purporting to have 28 numbered lines of text per page, when it actually squeezes in 33 lines of text per page.

corporation apparently controlled by the Sibleys), filed with the respective Secretaries of State, is GRANTED pursuant to Evidence Code section 452(h).

Judicial notice of Exhibit 3, a copy of a property tax bill for the 3920 Stone Leigh Ct. property is DENIED as irrelevant to the material issues before the court, based on DLSE's partial dismissal of the second cause of action on June 5, 2023.

Judicial notice of Exhibit 6, a copy of a declaration from Perice Sibley filed in a separate, federal lawsuit in November 2015 is DENIED. Deposition transcripts and declarations cannot be noticed as to the truth of their contents. (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]; *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057 [court may take judicial notice of existence of declaration but not of facts asserted in it]; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 [court may not notice the truth of declarations or affidavits filed in court proceedings]; *Garcia v. Sterling* (1985) 176 Cal App 3d 17, 22 ["Although the existence of statements contained in a deposition transcript filed as part of the court record can be judicially noticed, their truth is not subject to judicial notice."])

Judicial notice of Exhibits 4, 7, and 8, copies of discovery responses by Sibley and CMS from another lawsuit, is DENIED. Discovery responses are not court records and the decisions cited by DLSE in support of this request, relating only to judicial notice of discovery responses in the context of a demurrer or motion for judgment on the pleadings, do not provide support for taking judicial notice of such responses in the context of a motion for summary judgment. (See *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 – 605 ["The court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, *only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court*." Emphasis added].) While the declaration and discovery responses may be admissible evidence in support of a motion, judicial notice of their contents is not appropriate here.

Judicial notice of Exhibits 9-90, copies of judgments entered in favor of various CMS employees and copies of assignments of those judgments to DLSE, is GRANTED, pursuant to Evidence Code section 452(d) (court records).

**B. PEV's request**

PEV has submitted a request for judicial notice of 18 documents. Copies of the documents are not attached to the request, and the request does not adequately indicate where they may be found. This fundamental failure is fatal to the request. (See Evid. Code § 453(b); Cal. Rules of Court 3.1113(*l*) and 3.1306(c).) The request also does not specify the basis for judicial notice of each document or category of document. PEV's request for judicial notice is DENIED.

## III. DLSE'S MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

### A. General Standard

The pleadings limit the issues presented for summary judgment/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 basic principle applies to the present motion because the TAC's second and third causes of action do not state claims for violation of the Uniform Voidable Transfer Act ("UVTA") (Civil Code, §§ 3439 *et seq.*), even though the UVTA is the focus of DLSE's briefing. Also, as noted above, the operative answer is the joint answer to the SAC filed on August 13, 2020; defendants have not filed an answer to the TAC. The second affirmative defense in the answer to the SAC states: "Defendants allege that Plaintiff is estopped by its own acts and omissions from asserting the claims herein." The third affirmative defense in that answer states: "Defendants allege that Plaintiff's claims are time barred by the applicable statute(s) of limitations." These generic, boilerplate allegations do not sufficiently raise an estoppel or a statute of limitations defense, and certainly not as to the TAC. The fourth affirmative defense to the SAC states: "Defendants allege that Plaintiff's claims are barred by its own delay and inaction and by the doctrine of laches."

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) 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 of Civil Procedure ["CCP"] §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.) CCP §437c(t) makes clear that the only means by which a party may seek summary adjudication of only part of a cause of action or of an issue other than an "issue of duty" is by submitting a joint stipulation of the parties to the court, specifying the issue(s) to be adjudicated which the court must then approve before the motion can be filed.

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." (*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 ("*Yanowitz*".)

The moving party may generally not rely on additional evidence filed 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; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.)

Where a plaintiff has moved for summary judgment, it has the burden of showing there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a).) That burden can be met if the plaintiff has proved each element of the cause of action entitling it to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (Code Civ. Proc., § 437c, subd. (p)(1). (See *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965.) It is not part of a plaintiff's initial burden to disprove affirmative defenses or cross-complaints asserted by a defendant. (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co*. (2009) 170 Cal.App.4th 554, 564-565, citing Code Civ. Proc., § 437c(p)(1), among others.)

**B. The Merits**

DLSE states that it seeks summary judgment "on the grounds that there are no defenses to the action, that there are no triable issues as to any material fact, and that Plaintiff is entitled to judgment as a matter of law." (Notice of Motion at p. 2:11-12.) In the alternative, DLSE moves for summary adjudication of each of the four causes of action in the TAC on the same exact grounds. (See Notice of Motion at pp. 2:13-3:11, noting that PEV is only a defendant in the second and third causes of action.)

In addition to the request for judicial notice, DLSE's motion is supported by a declaration from counsel (Evan Adams), which authenticates 142 attached exhibits that are cited as support for DLSE's undisputed material facts ("UMFs").

DLSE's motion for summary judgment is DENIED for the failure to establish that there is no defense to all four causes of action. DLSE's alternative motion for summary adjudication is GRANTED in part and DENIED in part, as follows.

**1. First Cause of Action—Alter Ego**

While it is not a distinct cause of action, strictly speaking, a separate claim can be brought to have a person or entity declared an alter ego of another. (See *Lopez v. Escamilla* (2020) 48 Cal.App.5th 763, 765.) An action or claim to have someone declared an alter ego is not barred by statutes of limitation on substantive causes of action. (*Id.* at p. 766.)

"The essence of the alter ego doctrine is that justice be done. What the formula comes down to, once shorn of verbiage about control, instrumentality, agency, and corporate entity, is that liability is imposed to reach an equitable result. The single enterprise, or alter ego, doctrine is an equitable doctrine: A corporate identity may be disregarded—the corporate veil pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. Under the alter ego doctrine, then, when the corporate form is used to perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners." (*Cam-Carson LLC v. Carson*

*Reclamation Authority* (2022) 82 Cal.App.5th 535, 549, internal quotations and citations omitted.)

There are several factors that may be part of the analysis, including, significantly, sole ownership of all of the stock of an entity. (See *Kao v. Joy Holiday* (2020) 58 Cal.App.5th 199, 206 [sole ownership of all stock in the corporation by the members is one factor to be considered in invoking alter ego liability]; *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 417 [same]; *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 512-513 [the alter ego test encompasses a host of factors including sole ownership of all of the stock in a corporation by one individual or the members of a family].) Along those lines, many cases provide that: (1) "this long list of factors is not exhaustive"; (2) "the enumerated factors may be considered among others under the particular circumstances of the case"; and (3) "no single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine." (See *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 812, citing other cases.)

"'[T]he conditions under which the corporate entity may be disregarded vary according to the circumstances in each case and the matter is particularly within the province of the trial court. This is because the determination of whether a corporation is an alter ego of an individual is ordinarily a question of fact.' There are two requirements for disregarding the corporate entity: first, that there is a sufficient unity of interest and ownership between the corporation and the individual or organization controlling it that the separate personalities of the individual and the corporation no longer exist and, second, that treating the acts as those of the corporation alone will sanction a fraud, promote injustice, or cause an inequitable result." (*Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1071-1072, internal citations omitted.) "'Application of the alter ego doctrine does not depend upon pleading or proof of fraud.' The doctrine can be invoked when adherence to the fiction of the separate existence of the corporation would promote injustice or bring about inequitable results." (*Id*. at 1074.)

Here, DLSE has submitted admissible evidence, including but not limited to Exhibits 2, 4, 5-8, 13, 16, 17, 18, 20, 37, 38, 48, 49, and 55 to the Declaration of Evan Adams, that is more than sufficient to meet its initial burden of showing that Sibley not only owned CMS in its entirety (as the sole owner of the holding company that held CMS), but that she also controlled CMS to such a degree that CMS ceased to exist as a separate personality during the relevant time period. Most notably, while CMS was in the last stages of failing financially, Sibley withdrew hundreds of thousands of dollars from CMS's bank accounts and deposited those funds into her personal bank account on multiple occasions. As a consequence, treating CMS and Sibley as separate personalities would be plainly unjust to those former employees who have obtained judgments against CMS.

When the burden shifts to defendants, PEV is unable to raise any triable issue of material fact as to Sibley's dominance and control over CMS or the injustice to CMS's former employees that would result from treating Sibley and CMS as separate entities. The two declarations submitted with PEV's opposition, from John Kessler (a current director of PEV) and from PEV's counsel, do not address the issue of Sibley's ownership and control over CMS and are heavily reliant upon statements made on information and belief. "Declarations in support of or opposition to a motion for summary judgment or adjudication 'shall be made by any person on *personal knowledge*, shall set forth admissible evidence, and *shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or*

*declarations*.' (Code Civ. Proc., § 437c, subd. (d), italics added.) *Declarations based on information and belief are insufficient to satisfy the burden of either the moving or opposing party on a motion for summary judgment or adjudication*." (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124, emphasis added.)

PEV's opposition primarily relies upon the second, third, and fourth affirmative defenses in defendants' answer to the SAC, but none of these are sufficient to counsel against a finding that CMS is an alter ego of Sibley.

To the extent that PEV asserts that DLSE is estopped from seeking a determination that CMS is an alter ego of Sibley, that assertion is unpersuasive. To begin with, the second affirmative defense in the answer to the SAC fails to identify any particular type of estoppel as a defense. "Estoppel is an affirmative defense that cannot be proved unless specially pleaded by the defendant." (5 Witkin, *Cal. Procedure* (5th ed. 2019) Pleading § 1163; see also *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 459 [the general rule is that equitable estoppel must be specifically pleaded with sufficient accuracy to disclose the facts relied upon].)

Assuming for purposes of argument that the specific type of estoppel PEV relies upon in the opposition, collateral estoppel, is available as a defense, PEV has failed to raise any triable issue as to whether that would bar the TAC's first cause of action. Collateral estoppel precludes the relitigation of an issue only if (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. Even if the minimal requirements for application of collateral estoppel are satisfied, courts will not apply the doctrine if considerations of policy or fairness outweigh the doctrine's purposes as applied in a particular case, or if the party to be estopped had no full and fair opportunity to litigate the issue in the prior proceeding. (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82, internal citations omitted.) "The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido v. Superior Court (People)* (1990) 51 Cal.3d 335, 341.)

PEV has failed to establish that the decision it relies upon, an April 7, 2021 Minute Order of the Probate Department of the San Joaquin County Superior Court denying a petition by DLSE to file a late creditor's claim (see Opposition at pp. 8:9-9:18; see also Exhibit 11 to the Mazzola Declaration) expressly considered or made any ruling on the issue of whether CMS was the alter ego of Sibley.

Next, PEV's contends that the first cause of action is barred by the statute of limitations set forth in Code of Civil Procedure section 366.2 or Probate Code section 9100 *et seq*. Assuming for purposes of argument that these provisions could apply to the first cause of action (see *Lopez v. Escamilla*, *supra*, 48 Cal.App.5th at 766), such a defense has been waived. The third affirmative defense in the answer to the *SAC* is insufficient to allow PEV (or any other defendant) to argue that the claims in the *TAC* are time barred by any statute of limitations.[3]

[3] This waiver also applies to the motion for summary judgment filed by PEV on April 11, 2023 that is currently set for hearing on July 27, 2023. PEV is bound by its operative pleading at the time that motion was filed, which was the joint answer to the SAC.

Code of Civil Procedure section 458 states: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section _____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure . . . ." The failure to properly plead the statute of limitations waives the 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, italics 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 subdivisions thereof. If he fails to do so the plea is insufficient."])

The only answer filed by PEV in this case, the answer to the SAC filed jointly by Sibley, CMS, and PEV while they were all represented by the same counsel, does not allege facts showing that any claim alleged in the TAC is time-barred and it also does not properly identify any specific statute of limitation. Any defense based on a statute of limitations has been waived. The fact that no pleading challenge was made to the answer to the SAC is irrelevant. A party is not required to demur to an answer to preserve the objection that the answer fails to comply with section 458 of the Code of Civil Procedure. (See *Area 55, LLC v. Nicholas & Tomasevic LLP* (2021) 61 Cal.App.5th 136, 172.)

Similarly, PEV's reliance on the fourth affirmative defense in the answer to the SAC ("Laches"), also fails to raise triable issues of material fact as to the first cause of action in the TAC. "As explained by the United States Supreme Court, 'laches is a defense developed by courts of equity, its principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitations.' (*Petrella v. Metro-Goldwyn-Mayer, Inc*. (2014) 572 U.S. 663, 678. Thus, '[t]he doctrine of laches applies in equitable actions alone.' *(Blue Cross of Northern California v. Cory* (1981) 120 Cal.App.3d 723, 743-744, internal citation omitted.)" (*Blaser v. State Teachers' Retirement System* (2022) 86 Cal.App.5th 507, 539.)

"The elements of laches are (1) the failure to assert a right, (2) for some appreciable period so as to amount to unreasonable delay, (3) which results in prejudice to the adverse party. [Citations.] Laches is an equitable defense, *the existence of which is a matter commended to the discretion of the trial court*, 'and in the absence of manifest injustice or lack of substantial support in the evidence, the trial court's determination will be sustained. [Citation.]' [Citations.]" (*In re Marriage of Powers* (1990) 218 Cal.App.3d 626, 642-643, italics added.)

"The party asserting laches bears the burden of production and proof on each element of the defense. [Citation.] It is important to remember that, in determining whether laches applies, '[p]rejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. [Citation.] Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances . . . . [Citations.]' [Citation.]" (*Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th

267, 282.) "Barring an alter ego claim based solely on the plaintiff's unreasonable delay in asserting the claim allows the alleged alter ego defendant to avail itself of the defense of laches without showing that it was prejudiced by the delay. This is contrary to the settled requirements of laches and 'would, in effect, revive the discredited doctrine of 'stale claims' which our state high court long ago repudiated.'" (*Id*. at p. 286, internal citations omitted.)

Reviewing the circumstances here, and exercising its discretion, the court finds that there was no unreasonable delay by DLSE in bringing its claim for an alter ego determination, a claim first alleged in the original complaint in this action filed on June 13, 2019 and in the original complaint in the Placer County action filed on June 12, 2019. The judicially noticed judgments and assignments of judgments supporting the motion establish that after the mass layoff of CMS employees, the process of these employees' filing of claims with the Labor Commissioner, receiving judgments on those claims, and assigning those claims to the DLSE continued well into 2017, 2018, and 2019, with some assignments occurring even later. (See Exhibits 9-90 to DLSE's Request for Judicial Notice.) In these circumstances, the DLSE did not unreasonably delay by filing suit, in this county and in Placer County, in June of 2019. Even if unreasonable delay were assumed, PEV has failed to show prejudice from when the alter ego claim was first filed.

Finally, PEV repeatedly cites Sibley's self-serving testimony that Andrew Cody "operated" CMS, and that the real cause of CMS's failure was Cody, Eric Kozlowski "and others" embezzling funds from CMS, unbeknownst to her. None of this undermines a finding that CMS was an alter ego of Sibley. At best, it merely supports the finding that she supervised CMS poorly and delegated authority over CMS poorly, as well as the allegation that these cross-defendants may have committed wrongful acts against both CMS and her personally.

The court GRANTS DLSE's motion for summary adjudication as to the TAC's first cause of action.

**2. Second and Third Causes of Action—Avoidance of Fraudulent Transfers**

DLSE is bound by its pleading on summary judgment/adjudication. As noted above, the TAC does not state claims for violation of the Uniform Voidable Transfer Act ("UVTA"), Civil Code sections 3439 *et seq*. No reference to any section of the UVTA is made in the second or third causes of action or anywhere else in the entirety of the TAC. As a result, both causes of action can only be reasonably interpreted as asserting common law claims for fraudulent transfer.

The UVTA did not preempt, replace, or otherwise eliminate common law claims for fraudulent transfer. The remedies specified in the UVTA are cumulative and not the exclusive remedy for fraudulent conveyances. By its terms, the UVTA was intended to supplement, not replace, common law principles relating to fraud. Traditionally, creditors could bring fraudulent transfer cases under common law. Because the UVTA is not intended to replace such common law but merely supplement it, a creditor may bring a fraudulent transfer claim under common law. (See *Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1019; see also *PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 170 [UVTA supplements existing law and does not replace common law claim].)

Because the TAC can only be reasonably interpreted as alleging common law claims for fraudulent transfer, and because DLSE's arguments in favor of summary judgment and adjudication of these two causes of action are entirely dependent upon the inaccurate assumption that the TAC alleges claims for violation of the UVTA—including the notion that DLSE and is entitled to the benefit of certain statutory definitions and presumptions set forth in the UVTA (see DLSE's MPA at pp. 14:27-22:21)—DLSE has failed to meet its initial burden of showing that there is no defense to the *common law claims* set forth in the second or third causes of action.[4]

DLSE's motion for summary adjudication as to the TAC's second and third causes of action is DENIED for failure to meet the initial burden.[5]

### 3. Fourth Cause of Action—Breach of Fiduciary Duty; Violation of Corporations Code Section 316

The fourth cause of action alleges a violation of Corporations Code section 316 against Defendant Sibley in her capacity as a Director of CMS. Specifically, the TAC alleges that CMS "was insolvent on February 29, 2016," and that Sibley breached the statute on that date by directing CMS to pay her $212,339.56 for no consideration. The TAC characterizes this as an "improper distribution" to Sibley. It also alleges a second breach on March 4, 2016 when Sibley directed CMS staff to sell property at what was then CMS's business location, 2424 Del Monte Street, West Sacramento, California. This is described as "an improper transfer of assets . . . . By causing CMS to liquidate its assets, Sibley . . . stole an additional unknown amount from CMS." (See TAC at ¶¶ 30-34.)

Corporations Code section 316, subdivision (a) states:

> Subject to the provisions of Section 309, directors of a corporation who approve any of the following corporate actions shall be jointly and severally liable to the corporation for the benefit of all of the creditors or shareholders entitled to institute an action under subdivision (c):
>
> (1) The making of any distribution to its shareholders to the extent that it is contrary to the provisions of Sections 500 to 503, inclusive.
>
> (2) The distribution of assets to shareholders after institution of dissolution proceedings of the corporation, without paying or adequately providing for all known liabilities of the corporation, excluding any claims not filed by creditors within the time limit set by the court in a notice given to creditors under Chapters 18 (commencing with Section 1800), 19 (commencing with Section 1900) and 20 (commencing with Section 2000).
>
> (3) The making of any loan or guaranty contrary to Section 315.

(Corp. Code, § 316, subd. (a).)

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[4] Without any apparent irony, DLSE responds to PEV's collateral estoppel argument by arguing that "[t]he probate court did not address any of these elements [in the UVTA]." (Reply at p. 9:5-20.)

[5] The court declines to address the res judicata/collateral estoppel arguments raised by PEV at this time, but it anticipates considering these issues shortly, in PEV's soon-to-be-heard motion.

As the fourth cause of action does not allege the "institution of dissolution proceedings of the corporation" or the "making of a loan or guaranty," only subdivision (a)(1) applies here. The relevant question then becomes whether the February 29, 2016 payment or March 4, 2016 sales of assets were "contrary to" Corporations Code sections 500 to 503.

Corporations Code section 500 states in pertinent part:

> Neither a corporation nor any of its subsidiaries shall make any distribution to the corporation's shareholders (Section 166) unless the board of directors has determined in good faith either of the following:
>
> (1) The amount of retained earnings of the corporation immediately prior to the distribution equals or exceeds the sum of (A) the amount of the proposed distribution plus (B) the preferential dividends arrears amount.
>
> (2) Immediately after the distribution, the value of the corporation's assets would equal or exceed the sum of its total liabilities plus the preferential rights amount.

(Corp. Code, § 500, subd. (a).)

Corporations Code section 501 states: "Neither a corporation nor any of its subsidiaries shall make any distribution to the corporation's shareholders (Section 166) if the corporation or the subsidiary making the distribution is, or as a result thereof would be, likely to be unable to meet its liabilities (except those whose payment is otherwise adequately provided for) as they mature."[6]

Corporations Code section 166, expressly referenced in both of these statutes, states in pertinent part: "'Distribution to its shareholders' means the transfer of cash or property by a corporation to its shareholders without consideration, whether by way of dividend or otherwise, except a dividend in shares of the corporation, or the purchase or redemption of its shares for cash or property, including the transfer, purchase, or redemption by a subsidiary of the corporation."

DLSE argues that "CMS's employees became creditors as to Perice Sibley when she allowed them to work without pay for CMS, an insolvent company that she solely owned, emptied CMS' bank accounts on the same day that CMS shut down, but did not use CMS's funds to pay CMS's employees. Perice Sibley's action of taking CMS's funds in the amount of $212,339.56 was contrary to Corporations Code section 500, did not account for payment to CMS's employees for work that they performed, a known liability, and damaged CMS in that CMS is now liable to DLSE, as the judgment assignee of former CMS employees . . . . None of the proceeds from Perice Sibley's emptying of CMS's bank accounts, or the de facto liquidation of CMS, were used to pay CMS's employees as required by Code of Civil Procedure section 1205." (DLSE's memo. of points & authorities at 23:7-21, internal citations to UMFs omitted.)

[6] Section 502 has been repealed and section 503 is inapplicable here.

Code of Civil Procedure section 1205 states: "Upon the sale or transfer of any business or the stock in trade, in bulk, or a substantial part thereof, not in the ordinary and regular course of business or trade, unpaid wages of employees of the seller or transferor earned within ninety (90) days prior to the sale, transfer, or opening of an escrow for the sale thereof, shall constitute preferred claims and liens thereon as between creditors of the seller or transferor and must be paid first from the proceeds of the sale or transfer."

DLSE has submitted admissible evidence, including but not limited to Exhibits 2, 4, 5, 6, 7, 8, 13, 18, 19, 20, 30, 31, 32, 36, 37, 38, 55, 56, 57, 58 and 59 to the Adams Declaration, and also the judicially noticed judgments in favor of former CMS employees, that is sufficient to meet its initial burden to establish that the February 29, 2016 payments and March 4, 2016 sales of assets were violations of Corporations Code sections 316(a)(1), 500, and 501.

With the burden shifted to defendants, PEV is unable to raise any triable issues of material fact as to this claim (which is not alleged against it). PEV's opposition does not separately address the fourth cause of action. (As noted above, neither does CMS/Sibley's.)

Regarding the affirmative defenses listed in the joint answer to the SAC upon which PEV's opposition relies, these do not provide a basis for denying summary adjudication of the fourth cause of action. Assuming the defense of collateral estoppel is available based on the answer to the SAC, the April 4, 2021 Minute Order of the San Joaquin County Superior Court does not establish that the court in that proceeding considered or made any ruling regarding the alleged February 29, 2016 payments or the alleged March 4, 2016 sale of property. Any statute of limitations defense has been waived by the failure to properly asset such a defense in the joint answer to the SAC. Laches only applies to equitable claims, and the fourth cause of action alleges a statutory violation, specifically of Corporations Code section 316.

The court GRANTS DLSE's motion for summary adjudication as to the TAC's fourth cause of action.

**C. Evidentiary Objections**

PEV has not submitted any objections to DLSE's evidence.

With its reply, DLSE has submitted objections to evidence submitted by PEV which comply with Rule of Court 3.1354. Objections 1, 2, 3, 8, 9, 10, 11, 12, 13, 18, 19, 21, 22, 23, 25, 26, 29, 30, 31, and 37 to the declarations of John Kessler and Simon Mazzola are SUSTAINED. Objections 4-7, 14-17, 20, 24, 27, 28 and 32-36 are OVERRULED.

It is not necessary for the court to rule on DLSE's objections to material submitted with the untimely opposition of Defendants CMS and Sibley, as that material was not considered. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c(q).)

**- oo0oo -**

**Calendar Line 2**
**Case Name:** *Institute for Business & Technology, Inc. v. Fortune Companies Management Corp. et al.*
**Case No.:** 20CV371090

## I. FACTS

This is a commercial landlord/tenant dispute. Plaintiff Institute for Business & Technology, Inc. ("Plaintiff" or "IBT") alleges that it has been a tenant at a commercial property located at 2400 Walsh Avenue in Santa Clara, California since 2003. In August 2017, IBT was informed that the property had been sold to Defendants Fortune Realty, LLC and Mosaic Equities, LLC. IBT contends that a dispute has arisen between it and the successor landlord defendants over the interpretation of several portions of the lease relating to expenses and maintenance of the premises ("Lease").

IBT filed the original complaint on September 22, 2020, stating claims against Fortune Companies Management Corp., Fortune Realty, LLC, and Mosaic Equities, LLC ("Defendants"). Following a demurrer and motion to strike, IBT filed the operative First Amended Complaint ("FAC") on April 16, 2021, stating claims for: (1) Breach of Contract (the Lease); (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Declaratory Relief; (4) Money Had and Received; (5) Open Book Account; (6) "Mistaken Receipt"; (7) Unjust Enrichment; and (8) Accounting. A copy of the Lease is attached to the FAC as Exhibit A.

Defendants filed the present motion for summary judgment, or in the alternative summary adjudication of all of the FAC's causes of action, on February 24, 2023.

## II. EVIDENTIARY OBJECTIONS

### A. Plaintiff's Objections

The court declines to issue a ruling on IBT's evidentiary objections because they are not presented in the proper format. (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].) "A party submitting written objections to evidence must submit with the objections a proposed order. The proposed order must include places for the court to indicate whether it has sustained or overruled each objection. It must also include a place for the signature of the judge." (Cal Rules of Court, Rule 3.1354, subd. (c).)

### B. Defendants' Objections

With their reply, Defendants have submitted objections to evidence submitted by IBT, which comply with Rule of Court 3.1354.[7]

[7] The court notes that Defendants' reply papers are a day late. The standard for consideration of late-filled papers is that "[a] trial court has broad discretion to under Rule of Court 3.1300 subdivision (d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good

Objections 1, 4, and 5 (the last of which is erroneously labeled "4") to the Declaration of Peter Mikhail on the ground that it states improper legal conclusions are SUSTAINED. (See *Schaffter v. Creative Capital Leasing Group, LLC* (2008) 166 Cal.App.4th 745, 752, fn. 2 [opinions, even by a purported expert, on contract interpretation are inadmissible].) The Court need not rule on Objections 2 and 3, which are preserved, because they are not material to the disposition of the motion. (Code Civ. Proc., § 437c, subd. (q).)

## III. REQUESTS FOR JUDICIAL NOTICE

### A. Defendants' Request

In support of its motion for summary judgment, Defendants submit the following for judicial notice:

1. That "Plaintiff Institute for Business & Technology, Inc., a California corporation ('IBT'), filed the initial complaint in this lawsuit on September 22, 2020";

2. A copy of IBT's amended complaint, filed on or about April 16, 2021;

3. A copy of the Declaration of Peter Mikhail in Support of IBT's Motion for Summary Adjudication, filed on or about June 22, 2022;

4. A copy of the court's (Judge Kirwan's) prior order regarding IBT's motion for summary adjudication, dated October 25, 2022.

Judicial notice of item 1 is GRANTED pursuant to Evidence Code section 452, subdivision (h).

Judicial notice of items 3 and 4 is GRANTED pursuant to Evidence Code section 452, subdivision (d).

Judicial notice of item 2 is DENIED as unnecessary, because the court already has an obligation to consider the amended complaint, as it frames the issues for the purpose of the motion. (*Van v. Target Corp.* (2007) 155 Cal.App.4th 1375, 1382.)

### B. Plaintiff's Request

In support of its opposition, IBT submits a request for judicial notice of the Proof of Service for Defendants' Notice of Demurrer and Demurrer to Plaintiff's Complaint; Memorandum of Points and Authorities in Support Thereof, dated November 24, 2020. The request is DENIED, as the document is not "necessary, helpful, or relevant" to IBT's argument. (See *Aquila, Inc. v. Super. Ct. (City and County of San Francisco)* (2007) 148 Cal.App.4th 556, 569, [stating that "[a]lthough a court may judicially notice a variety of matters… only relevant material may be noticed… judicial notice… is always confined to those matters which are relevant to the issue at hand."])

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cause for late submission." (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 765.) The court will consider the late-filed papers but hereby places counsel on notice that they are expected to comply with the California Rules of Court and Code of Civil Procedure in the future.

## IV. LEGAL STANDARD

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a).) A motion for summary judgment must dispose of the entire action. (*Ibid*.; *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 954 ["Summary judgment is proper only if it disposes of the entire lawsuit."].) Therefore, the determination of a summary judgment or summary adjudication motion is circumscribed by the issues framed by the pleadings, "since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief . . . ." (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064.)

> 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. [Citation.] 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." [Citation.] "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." [Citation.]

(*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272 (*Madden*).)

If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.) Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Id.* at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id.* at p. 843.)

## V. ANALYSIS

### A. Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing

IBT alleges that Defendants breached the Lease and implied covenant of good faith and fair dealing by submitting erroneous, inflated invoices that included improper expenses not contractually due to Defendants (charged as "Additional Rent" under the Lease) and by refusing to comply with IBT's right to audit charges under the Lease. (FAC, ¶ 27.)

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349.) "The covenant thus cannot 'be endowed with the existence independent of its contract underpinnings.' It cannot impose substantive duties or limits on the contracting

parties beyond those incorporated in the specific terms of the agreement. (*Id.* at p. 350.) Where a breach of an actual term is alleged, a separate implied covenant claim, based on the same breach is superfluous. (*Id.* at p. 327.) A breach of implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty itself. (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 528; see also *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54.)

**1. Defendants' Initial Burden**

Defendants contend that summary adjudication of both breach claims is proper because IBT has no excuse for nonperformance. In support, Defendants rely on Paragraph 4(D) of the Lease ("Additional Rent"), which provides in relevant part:

> Within thirty (30) days after receipt of Landlord's reconciliation, Tenant shall have the right, at Tenant's sole expense, to audit, at a mutually convenient time at Landlord's Office, Landlord's records specifically limited to the foregoing expenses. Such audit must be conducted by Tenant or an independent nationally recognized accounting firm that is not being compensated by Tenant or other third party on a contingency fee basis. Tenant shall submit to Landlord a complete copy of said audit at no expense to Landlord and a written notice stating the results of said audit, and if such notice by Tenant and the respective audit reveals that Landlord has overcharged Tenant, and the audit is not challenged by Landlord, the amount overcharged shall be credited to Tenant's account within thirty (30) days after completion of Landlord's review and approval of said audit.

(Separate Statement of Undisputed Material Facts in Support of Defendants' Notice of Motion for Summary Judgment, or, in the Alternative, Summary Adjudication ("UMF" No. 13; FAC, Exh, A.)

Defendants specifically note that IBT failed to request timely audits of the 2017 and 2018 reconciliations, effectively precluding IBT from recovering the overcharged expenses (i.e., the alleged damages) for 2017 and 2018 under the express terms of the Lease. (*Id.*, UMF Nos. 29-30.) Moreover, Defendants note that IBT requested the 2019 reconciliation report but failed to provide a copy of the independent audit pursuant to Paragraph 4(D) of the Lease. (*Id.*, UMF Nos., 37-39.) IBT's noncompliance with the terms of the Lease consequently precludes receipt of damages under the 2019 reconciliation, as well. (See *id.*, UMF Nos. 38-39.)

Defendants also rely on IBT's nonperformance to rebut the allegation of a breach to the implied covenant of good faith and fair dealing. In support, Defendants cite *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, in which a plaintiff could not state a cause of action for breach of the implied covenant of good faith and fair dealing because he failed to plead excuse for his nonperformance on a contract.

As such, Defendants have satisfied their initial burden to show that IBT failed to satisfy its obligations under the Lease, shifting the burden to IBT to show a triable issue of material fact regarding breach.

### 2. Plaintiff's Response

IBT contends that its failure to provide an audit of "Additional Rent" charges is excused by Defendants' improper overcharging of "Additional Rent" unauthorized by contract. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277 (*Brown*) ["When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract."]) In support of this proposition, IBT notes that Defendants first breached the contract in 2017 by including impermissible charges under "Additional Rent," and that IBT's failure to provide audit reports did not occur until much later – after June 2020. (Defendants' UMF No. 28.) In other words, IBT argues that "Defendants breached the Lease first." (Opp. at p. 21:13.)

IBT further contends that Defendants have not established that the requirement of an audit report from a "nationally recognized accounting firm" is a "material term" of the Lease. IBT relies upon *Brown, supra,* 192 Cal.App.4th 265 in support of its argument that the audit report is not a material term of the Lease. The court in *Brown* stated that the question of whether a breach is material, so as to excuse the performance by the other party, is a question of fact. (*Id*. at p. 277.)

In determining the materiality of a failure to fully perform a promise, the following factors are to be considered: "(1) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated; (2) the extent to which the injured party may be adequately compensated in damages for lack of complete performance; (3) the extent to which the party failing to perform has already partly performed or made preparations for performance; (4) the greater or less hardship on the party failing to perform in terminating the contract; (5) the wilful, negligent, or innocent behavior of the party failing to perform; and (6) the greater or less uncertainty that the party failing to perform will perform the remainder of the contract." (*Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 229.)

In this case, both sides fail to address these factors adequately in their briefing. On the one hand, Defendants do not address whether IBT's undisputed failure to comply with the "Additional Rent" provisions of the Lease (Paragraph 4(D)) constituted a material breach of the contract. On the other hand, IBT also does not show that Defendants' alleged overcharges of "Additional Rent" constituted an antecedent, material breach of the Lease. Having reviewed Paragraph 4(D) in its entirety and in context, the court ultimately concludes that this paragraph explicitly contemplated that disputes could arise between the parties regarding "Additional Rent" amounts, and it explicitly contemplated the possibility that the tenant would argue that the landlord had "overcharged" it and thereby breached the terms of the Lease. The audit provisions of Paragraph 4(D) were therefore designed to provide a clear process for resolving such disputes over "Additional Rent," without the need for court intervention. In deliberately circumventing this process under Paragraph 4(D), IBT may well be correct that Defendants nonetheless overcharged for "Additional Rent" under the Lease, but IBT is not so firmly situated in its argument that this was a "material breach," under the *Sackett v. Spindler* factors outlined above, given that it never gave Defendants an opportunity to cure this alleged breach under the explicit process set forth in Paragraph 4(D). The court concludes that Defendants' alleged overcharging of "Additional Rent" was not *yet* a material breach, in light of the undisputed fact that IBT intentionally failed to engage properly in the contractual process of resolving the question of whether these amounts were in fact overcharges. Therefore, the court finds that IBT's own non-performance under the Lease was not excused.

In short, the court is not persuaded by IBT's "they did it first" argument. Because IBT has failed to rebut Defendants' showing that the breach of contract and breach of implied covenant of good faith and fair dealing claims cannot be established as a matter of law, the court GRANTS the motion for summary adjudication as to the first and second causes of action.

**B. Declaratory Relief**

IBT seeks a judicial declaration of the following: (1) that IBT is only required to maintain and repair – not replace – the subject property's existing buildings components; and (2) that Defendants impermissibly charged "payroll" and "general administrative" expenses under the category of "Additional Rent." (FAC, ¶¶ 38-39.)

A trial court may grant summary adjudication on a cause of action for declaratory relief when only legal issues are presented for its determination. (*City of Torrance v. Castner* (1975) 46 Cal.App.3d 76, 83, fn. 3.) As noted in the court's prior order (Judge Kirwan):

> The interpretation of the lease terms, including determining whether the terms contain ambiguities, is a question of law for the Court and the parties' claimed interpretation of the lease language is not controlling on the Court. "The interpretation of a contract is a question of law unless the interpretation turns on the credibility of extrinsic evidence." (*Sierra Vista Regional Medical Center v. Bonta* (2003) 107 Cal.App.4th 237, 245.) Generally, "It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence." (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 724.) "[A] witness is incompetent to give an opinion on the meaning of the contract language." (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 715 [because interpretation of written contract is solely a judicial function unless the interpretation turns upon the credibility of extrinsic evidence].)

"When seeking summary judgment on a claim for declaratory relief, the defendant must show that the plaintiff is not entitled to a declaration in its favor by establishing '(1) the sought-after declaration is legally incorrect; (2) [the] undisputed facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is appropriate for declaratory relief.'" (*Cates v. California Gambling Control Com.* (2007) 154 Cal.App.4th 1302, 1307-1308, citing *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.) "When summary judgment is appropriate, the court should decree only that plaintiffs are not entitled to the declarations in their favor." (*Gafcon, Inc. v. Ponsor & Associates, supra,* 98 Cal.App.4th 1388, 1402.)

**1. Duty to Repair**

**a) Defendants' Burden**

Defendants emphasize that the parties agree that the Lease was a "triple net lease" that necessarily required IBT to keep the premises and "structural elements and exterior surfaces of the Building, store fronts, roofs, downspouts, all interior improvements" among other parts "in a high standard of maintenance and repair or replacement." (Defendant's UMF Nos. 1, 12, and 17; FAC, Exh. A, § 8.)

In further support, Defendants cite *Brown v. Green* (1994) 8 Cal.4th 812 which includes an explanation of what a "net lease" is:

> A net lease presumes the landlord will receive a fixed rent, without deduction for repairs, taxes, insurance, or any other charges, other than landlords' income taxes. Accordingly, the repair clause requires [the] tenant to make all repairs, inside and out, structural and otherwise, as well as all necessary replacements of the improvements on the premises (and to comply with all legal requirements affecting these improvements during the term). A lease is not "net," as this term is used in long-term leases, if the tenant's repair obligations are less than these.

(*Brown v. Green* (1994) 8 Cal.4th 812, 827 [quoting 1 Friedman on Leases (3d ed. 1990) Repairs, § 10.8, pp. 672-673, fn. omitted].)

The Lease also stipulated that the Landlord had no responsibility or obligation "for any cost, in connection with any repair, restoration, and/or improvement to the Premises in order for this Lease to commence, or thereafter, throughout the Term of this Lease." (Defendant's UMF Nos. 1, 12, and 16; FAC, Exh. A, § 6.A.)

Defendants rely most heavily on Section 8 of the Lease (entitled "Tenant Maintenance"), which provides in relevant part:

> Tenant shall, at its sole cost and expense keep and maintain the Premises (including appurtenances) and every part thereof in a high standard of maintenance and repair, **or replacement**, and in good and sanitary condition. Tenant's maintenance and repair responsibilities herein referred to include, but are not limited to, janitorization, all windows (interior and exterior), window frames, plate glass and glazing (destroyed by accident or act of third parties), truck doors, plumbing systems (such as water and drain lines, sinks, toilets, faucets, drains, showers and water fountains), electrical systems (such as panels, conduits, outlets, lighting fixtures, lamps bulbs, tubes and ballasts), heating and air conditioning systems (such as compressors, fans, air handlers, ducts, mixing boxes, thermostats, time clocks, boilers, heaters, supply and return grills), structural elements and exterior surfaces of the Building, store fronts, roofs, downspouts, all interior improvements with the Premises including but not limited to wall coverings, window coverings, carpet, floor coverings, partitioning, ceilings, doors (both interior and exterior), including closing mechanisms, latches and locks, skylights (if any), automatic fire extinguishing systems, and elevators and all other interior improvements of any nature whatsoever, and all exterior improvements including but not limited to landscaping, sidewalks, driveways, parking lots including striping and sealing, sprinkler systems, lighting, ponds, fountains, waterways, and drains. Tenant agrees to provide carpet shields under all rolling chairs or to otherwise be responsible for wear and tear of the carpet cause by such rolling chairs if such wear and tear exceeds that caused by normal foot traffic in surrounding areas. Areas of excessive wear shall be **replaced at Tenant's sole expense** upon Lease termination. Tenant hereby waives all rights under, and benefits of, Subsection 1 of Section 1932 and Section 1941 and 1942 of the California Civil Code and under any similar law, statute or ordinance now or hereafter in effect . . . .

(Emphasis added.)

Defendants note that this language refers in two places not only to maintenance and repair, but also "replacement." In its October 25, 2022 order denying IBT's motion for summary adjudication, this court (Judge Kirwan) noted the following about Section 8:

> Section 8 clearly contemplates that, throughout the entire Lease Term, Tenant might be required to replace various features of the Premises, including the roof, as part of its maintenance responsibilities.
>
> * * *
>
> Plaintiff's own evidence (the copy of the Lease submitted as exhibit A to the Declaration of Peter Mikhail, Plaintiff's President and CEO, and the copy of the 2018 "Amendment No. 3" signed by Mikhail on behalf of Plaintiff and attached as exhibit D to the Mikhail Declaration, which confirms that Section 8 of the Lease contains express language stating that Plaintiff may have to replace features of the leased premises) demonstrates that Plaintiff has not established that it is entitled to the declaration sought in the third cause of action and that triable issues remain. Section 8 of the Lease is not "reasonably susceptible" to the interpretation urged in the third cause of action (The contention in ¶38 of the FAC that the Lease "does not obligate it to replace the Property's existing building components with new ones. Rather IBT contends that IBT is only obligated to maintain and repair the Property's existing building components.") It does not necessarily follow from this conclusion that Defendants may require Plaintiff to replace all features of the premises identified in Section 8 pursuant to that section of the lease, as it does not indicate who makes the determination that replacement rather than a repair of any particular feature of the premises is required.

(October 25, 2022 Order at pp. 12-13.)

In view of the foregoing, Defendants have met their initial burden of establishing that the undisputed facts do not support IBT's sought-after declaration that it is only required to maintain and repair – not replace – the subject property's existing building components, apart from carpets and the items explicitly enumerated in Section 5 of the Lease.

**b) Plaintiff's Response**

In response, IBT asserts that Defendants use a "high standard of maintenance and repair, or replacement" standard as an illusory definition and impermissibly extend this definition to the second sentence of Section 8 of the Lease: "Tenant's maintenance and repair responsibilities herein referred to include, but are not limited to . . ." (FAC, Exh. A, § 8). Although IBT is correct in asserting that Defendants were not original signatories to the Lease and therefore lack personal knowledge of the signatories' intentions, it is undisputed that IBT's President and CEO was an original signatory. (Plaintiff's Additional Material Facts ["AMFs"] A and F.)

IBT further contends that Defendants falsely summarize the testimony of Mikhail, and offers Mikhail's Declaration in support of their objection. But the court cannot consider evidence to which objections have been made and sustained. (Code Civ. Proc., § 437c, subd. (c).) Interpretation of the lease is a purely legal matter; it is not a matter of factual interpretation by a percipient witness.

In support of the proposition that express obligations for repair and maintenance do not include an inferred obligation to replace old building components with new ones, IBT attempt to apply the holding in *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257 ("*ASP Properties*"). In *ASP Properties*, the court held that a tenant's duty of maintenance pursuant to a commercial lease and amendment required only that maintenance of a dilapidated roof because the roof was in poor condition when the agreements were executed. (See generally, *ibid.*) The *ASP Properties* court specifically held:

> Case law supports a conclusion that, absent an express provision (or undisputed extrinsic evidence) showing a tenant has an obligation to replace a roof, a tenant's obligation to maintain or repair the premises (including a roof) does *not* include an obligation to replace an old, dilapidated roof with a new roof at tenant's expense.

(*Id*. at p. 1272 [emphasis in original].)

The instant matter is distinguishable in two respects. First, the pertinent sections of the Lease here are not completely silent on replacement, unlike in *ASP*. As noted above and in the court's prior order, Section 8 can be reasonably inferred to obligate IBT to maintain, repair, or replace part of the premises at issue. Second, IBT does not allege or cite any evidence that any part of the premises was dilapidated or in poor condition when the agreement was executed.

In addition, IBT attempts in its opposition brief to parse the language of Section 8 of the Lease by focusing on the first four sentences of Section 8 (quoted above) and noting that the words "replacement" and "replaced" appear only in the first and fourth sentences, not the second and third sentences. According to IBT, these four sentences should be read as distinct and discrete provisions, meaning that "replacement" or "replaced" should not be read into the (extremely) long list of maintenance responsibilities of the tenant set forth in the second sentence. Nevertheless, on the very same page of its Opposition (p. 9), IBT inconsistently argues that the word "replaced" in the fourth sentence should be read to modify *only* the obligations set forth in the third sentence (regarding maintenance of carpets). Even if the court were persuaded by this cherry-picked, result-oriented, and internally inconsistent reading of Section 8, it is directly contrary to Judge Kirwan's interpretation set forth in his October 22, 2022 Order. As a trial court, this court cannot review and reverse legal determinations already made by another trial court in the same case. Moreover, this court is not persuaded by IBT's strained contention that the fourth sentence modifies only the third sentence of Section 8. Rather, the court reads the fourth sentence as modifying the entire paragraph. In other words, consistent with Judge Kirwan's interpretation, the court concludes that under Section 8, all "[a]reas of excessive wear shall be replaced at Tenant's sole expense upon Lease termination." The court agrees with IBT that this sentence applies, by its express terms, to the Lease termination date (January 2024), and the court also agrees with IBT that this sentence applies, by its express terms, only to areas of "excessive wear," which, again, is consistent with the "normal wear and tear" clause of Section 5, as well as Judge Kirwan's observation that "[i]t does not necessarily follow . . . that Defendants may require Plaintiff to replace *all features* of the premises identified in Section 8." (Emphasis added.)[8]

[8] The court does not understand Defendants' position to be in refutation of the "normal wear and tear" clause of Section 5, nor does it understand Defendants' position as refuting the scope of the end-of-term obligations set forth in of Section 5.

In short, IBT has not sufficiently shown existence of a triable issue of material fact as to whether it is required under the Lease to replace certain features of the premises.

**2. Additional Rent Obligations**

**a) Defendants' Burden**

Defendants contend that its final reconciliations only charged IBT for landscaping, repair and maintenance, a Fixed Management Fee, property taxes, and insurance premiums – costs expressly permitted to keep the premises at issue "in a high standard of maintenance and repair, or replacement" pursuant to Section 30 of the Lease ("Right of Landlord to Perform"). (Defendants' UMF Nos. 17, 20, and 33-34.)

Defendants further contend that no actual controversy exists with respect to the "payroll" or "general administrative" expenses because any discrepancy was removed and resolved upon issuance of the Amended, Final Reconciliations on December 14, 2020 – i.e., before IBT filed the FAC. (Defendants' UMF Nos. 33-34.) Moreover, Defendants submit that the Landlord has not included "payroll" or "general administrative" expenses within the 2020 or 2021 reconciliations, and attest that it will not include such expenses in the future. (*Id*., UMF No. 35-36.)

**b) Plaintiffs' Response**

In its opposition, IBT expressly concedes Defendants' admission that there is no dispute with respect to "payroll" and "general administrative" expenses. (Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, or, in the Alternative, Summary Adjudication ["Opposition"], p. 19:3-6.) Accordingly, the undisputed facts indicate that IBT cannot rightfully seek a determination that Defendants impermissibly charged and continues to improperly charge payroll and general administrative expenses.

IBT's opposition also raises a new controversy regarding the "accuracy" of Defendants' amended reconciliations, which it claims are inconsistent with each other and therefore "cannot be relied upon by the court," but this new controversy is outside the scope of the issues framed by the pleadings. It does not appear anywhere in the FAC. The pleadings limit the issues presented for summary judgment/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."].) The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Accordingly, the court declines to address IBT's new argument raised in opposition.

Defendants' motion for summary adjudication as to the third cause of action is GRANTED. IBT is not entitled to the declarations it seeks in its favor.

### C. Equitable Relief Claims

IBT asserts common count claims for money had and received, open book account, and mistaken receipt, in addition to unjust enrichment and accounting claims.

> Although our case law permits the use of common counts, nevertheless the courts recognize that where the common counts follow a count wherein all of the facts on which plaintiff's demand is based are specifically pleaded [e.g., a breach of contract claim] and the common counts upon their face make it clear that they are based upon the same set of facts, the common counts are to be considered not as different causes of action, but as alternative methods of pleading the plaintiff's right to recover the money judgment he seeks.

(*Maselli v. E.H. Appleby & Co.* (1953) 117 Cal.App.2d 634, 637.)

#### 1. Defendants' Burden

Defendants contend that the common count and accounting claims are all premised on the concept of unjust enrichment. (See *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 721 [holding that an "unjust enrichment claim is grounded in equitable principles of restitution"]; see also *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136-1137 ["An accounting is an equitable proceeding where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing."] Internal citations and quotations omitted.)

Indeed, the common count claims for money had and received, open book account, and mistaken receipt are all claims that require proof that Defendants owe money to IBT. (See *Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454 ["the plaintiff must prove that the defendant received money "intended to be used for the benefit of [the plaintiff]," that the money was not used for the plaintiff's benefit, and that the defendant has not given the money to the plaintiff]; *Interstate Group Adm'rs v. Cravens* (1985) 174 Cal.App.3d 700, 708 ["A book account is described as "open" when the debtor has made some payment on the account, leaving a balance due."]; *Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 ["A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract."]); *Prakashpalan, supra*, 223 Cal.App.4th 1137 ["Some underlying misconduct on the part of the defendant must be shown to invoke the right to this equitable remedy."])

Defendants further contend that because the Lease is a valid, enforceable agreement upon which IBT primarily bases its recovery, recovery on alternative, quasi-contract or equitable theories is inappropriate. In support of this contention, Defendants cite *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.Ap.4th 1342 ("*Klein*"). The *Klein* court held that a claim for unjust enrichment is ordinarily inappropriate where the plaintiff pleads the existence of a valid express contract defining the parties' respective rights. (*Id.* at pp. 1388-1390.) The *Klein* court further held that if a plaintiff alleges the existence of a valid contract, there must be some factual pleading either denying the existence of the contract or denying its enforceability for her to pursue a restitution claim in the alternative. (*Ibid.*)

Here, IBT faces the same issue – it does not contest the contract's legitimacy or enforceability, and neither do the Defendants. (Defendants' UMF Nos. 42-43.) Therefore, Defendants have met the initial burden of showing that IBT's equitable claims are barred by *Klein*.

### 2. Plaintiff's Burden

IBT cites *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 314 ("*Sheppard*") for the proposition that quasi-contractual recovery is limited to a service contract. But the *Sheppard* opinion, when properly read in context, held that "'[a] *quantum meruit* or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. [Citation.]'" (*Ibid.* [emphasis added]; see also *E. J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal.App.4th 1123, 1127 ["'Quantum meruit refers to the well-established principle that "the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered."]) In other words, the law may imply a contract or a promise when there is no express contract or promise. Here, the situation is different, where there is a written lease defining the parties' respective rights and obligations. Moreover, as Defendants note in their reply brief, the *Sheppard* court explicitly held that "it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation." (*Sheppard, supra*, 191 Cal.App.4th at 314.)

Accordingly, IBT has not raised a triable issue of material fact to defeat the motion for summary adjudication regarding the equitable relief claims. Therefore, the motion for summary adjudication as to the fourth through eighth causes of action – money had and received, open book account, mistaken receipt unjust enrichment, and accounting – is GRANTED.

## VI. CONCLUSION

The court has determined that summary adjudication as to all eight causes of action in favor of Defendants is appropriate. Thus, the court GRANTS Defendants' motion for summary judgment.

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**Calendar Lines 3 & 5**
**Case Name:** *Wendy Towner et al. v. Gilroy Garlic Festival Association, Inc. et al.*
**Case No.:** 19CV358256

Plaintiffs move to compel the PMQ depositions of defendants First Alarm Security & Patrol, Inc. ("First Alarm") and the City of Gilroy (the "City").[9] No PMQ depositions of these entities have been taken to date. Upon the filing of the motions, plaintiffs narrowed the scope of the deposition topics to the following: (1) acts of violence at the Gilroy Garlic Festival prior to 2019; (2) specific acts of violence at the Gilroy Garlic Festival prior to 2019; (3) specific acts of violence that led to a policy banning gang colors, weapons, and other items from the Gilroy Garlic Festival prior to 2019; (4) erection, maintenance, and monitoring of the perimeter fence at the festival, including discovery of breaches of the fence; and (5) coordination and communication between the defendants regarding security measures at the festival. The court GRANTS plaintiffs' motions IN PART, as follows.

**First Alarm**: First Alarm argues that because plaintiffs already took the depositions of five prior employees of First Alarm, the present motion is "a second bite at the apple" and a "fishing expedition." This argument is singularly unpersuasive. Plaintiffs are entitled to a PMQ deposition of First Alarm, even if First Alarm no longer exists as the entity it was in 2019. In addition, the court is not convinced that there was an insufficient meet-and-confer effort by plaintiffs before filing the motion, even if it is quite apparent to the court that the quality of communications between the parties has been subpar at best. First Alarm states that it has "agreed to produce a PMQ deponent in the next few weeks," even though it contends that it does not "hav[e] a legal obligation to do so." The court disagrees with the latter statement and accordingly orders First Alarm to produce its witness, as well as any responsive and still-to-be-produced documents that may be in its possession, custody, or control by no later than July 27, 2023.

**The City**: The City argues that plaintiffs' deposition topics are vague and ambiguous—in fact, the City claims that the deposition notices are "wholly unintelligible, difficult to comprehend, confusing and subject to multiple interpretations." Having reviewed the deposition topics, as narrowed, the court concludes that they are sufficiently intelligible, applying common-sense principles of interpretation, and that the City's argument is without merit. The court does agree with the City, however, that the timeframe of these requests appears to be overbroad, seeking information from 2004 to 2019, without any explanation as to why this 15-year period is appropriate. Given the absence of any discussion by either side about the relevance of this timeframe, and the absence of any discussion regarding the burden entailed by producing a witness to address this timeframe, the court is inclined to (and will, absent further explanation at the hearing) narrow the timeframe to 10 years ago (*i.e.*, from 2013 to 2019). Although it is also unclear to the court whether this narrowed timeframe needs to apply to First Alarm, as well (because, again, none of the parties address it, and the court has no idea how long First Alarm has been involved with the festival), the court would apply the same timeframe limitation to First Alarm's PMQ deposition.

In addition, the City notes that Topic No. 8 (from the first PMQ notice) seeks information about "violence that occurred at the 1993 Gilroy Garlic Festival," which is now

[9] Plaintiffs also moved to compel a PMQ deposition from defendant Gilroy Garlic Festival Association; that motion has since been withdrawn.

nearly 30 years ago. Unfortunately, neither side explains the significance of this 1993 date. To the extent that this request refers to a *specific incident* that occurred in 1993, then it may well be appropriate for the City to be required to designate a PMQ witness regarding that specific incident; on the other hand, to the extent that this is a request for information about a random date in the distant past, then the court finds that the timeframe is too remote (and the probative value is therefore too low) to outweigh the undue burden of making the City prepare a witness as to this topic. The court orders the City to designate a witness about "violence that occurred at the 1993 Gilroy Garlic Festival" to the extent that it is apparent that this request refers to a specific, known incident.

Applying the same logic, the court finds that Topics Nos. 9-11 seek information about a specific incident in 2000 that apparently led to the prohibition of gang colors and insignia at the festival. Even though this was approximately 23 years ago, the court finds that it is appropriate for the City to designate a PMQ witness about whatever specific incident occurred in 2000 that led to this prohibition, to the extent that the City would be expected to know about it.

In short, the court grants plaintiffs' motion in part, further narrowing the scope of the deposition topics to the 2013-2019 timeframe, as well as to particular incidents that may have occurred in 1993 and 2000. The court orders the City to produce its witness, as well as any responsive and still-to-be-produced documents in its possession, by no later than July 31, 2023.

**Sanctions**: The court finds that both sides acted with and without substantial justification. Plaintiffs' original deposition topics were extremely wide-ranging and undoubtedly overbroad and burdensome; on the other hand, defendants' refusal to try harder to schedule PMQ depositions in a timely manner was also unreasonable. The court denies the requests for monetary sanctions.

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**Calendar Lines 6-8**
**Case Name:** *Roth Financial LLC v. Michael David Liddle*
**Case No.:** 22CV406972

Before the court are three motions to compel further discovery responses, filed by defendant Michael David Liddle ("Liddle") against plaintiff Roth Financial LLC ("Roth"). Having reviewed the discovery requests and responses, the parties' briefing, and the meet-and-confer correspondence between the parties, the court GRANTS all three motions. In addition, the court GRANTS IN PART Liddle's request for monetary sanctions in the amount of $2,400 (*i.e.*, $800 per motion) against Roth and its counsel.

**Form Interrogatories (Nos. 3.3, 12.1, 12.2, 12.3, 12.4, 12.6, 13.1, 13.2, 14.1, 14.2, 50.1, 50.2)**: All of Roth's answers to these interrogatories are facially inadequate. The answers to Nos. 3.3, 14.1, 14.2, and 50.2 are woefully incomplete, and the answers to Nos. 12.1, 12.2, 12.3, 12.4, 12.6, 13.1, 13.2, and 50.1 are entirely missing. Roth must supplement its responses to all of these interrogatories, providing complete answers to all parts of each form interrogatory, by no later than the close of business on August 4, 2023.

**Special Interrogatories (Nos. 1-14)**: Roth has failed to provide any substantive answers to these interrogatories. The claim that Liddle "already has, or has access to, all of the information and/or documents" is not a proper basis for evading these interrogatories. Roth must supplement its responses to all of these interrogatories, providing complete answers, by no later than the close of business on August 4, 2023.

**Document Requests (Nos. 1-8)**: Roth's responses to these document requests consist solely of objections, with no indication that it intends to comply with any of the requests. This is improper on its face, as the court finds the document requests to be directed toward discoverable information. Roth must supplement its responses to all of these document requests by no later than the close of business on August 4, 2023. In addition, the court finds that Roth has unduly delayed the production of any responsive documents in this case, even though these document requests were served in December 2022, and it orders that Roth produce all responsive documents by no later than September 5, 2023.

The court finds that Roth and its counsel have acted without substantial justification in failing to respond to discovery and in delaying discovery. At the same time, the court finds that the amount requested in Liddle's reply briefs ($11,935.50) is excessive for motions as basic and simple as these, even though the amount is supported by declaration. The amount contained in Liddle's opening briefs ($2,500) is closer to the court's expectation for these types of motions. Ultimately, the court awards monetary sanctions in the amount of $2,400 ($800 per motion) against Roth and its counsel.

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