SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/17/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV1903647

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: ERNESTO BONILLA ENAMORADO vs. DEFENDANT: TARGET CORPORATION	

NATURE OF PROCEEDINGS: MOTION – COMPEL; DISCOVERY FACILITATOR PROGRAM; THE DEPOSITION TESTIMONY AND DEFENDANT ADRIAN MORA'S TRIAL WITNESSES AND DEFENDANT TARGET'S PERSON MOST KNOWLEDGEABLE BY PLAINTIFF

RULING

Plaintiff Ernesto Bonilla Enamorado's ("Plaintiff") motion to compel deposition testimony is denied as to Adrienne Rhodes and Courtney Poster. It is granted in all other respects. (Code Civ. Proc., § 2025.450, subd. (a).) No later than 20 days from the date of the final order on this motion, Defendants shall present for deposition Jordan Hall and a person most knowledgeable to testify to Topic Nos. 1 and 2 of Plaintiff's March 12, 2024 notice of deposition.

BACKGROUND

This case arises out of Plaintiff's 2017 criminal charge and acquittal for shoplifting. The complaint, originally filed on September 20, 2019, alleges that Plaintiff bought a Food Saver vacuum sealer from a Target store in San Rafael in September 2017. (Complaint, ¶ 3.) A week later, he brought the Food Saver back to the store to exchange it for a smaller model. (*Id.*, ¶ 4.) Unable to find a suitable replacement, he attempted to leave the store and return to his car with the Food Saver in a shopping cart. (*Id.*, ¶ 5.) As Plaintiff tried to exit the store, Defendant Adrian Mora ("Mora"), an Asset Protection Specialist for Defendant Target Corp. ("Target"; together with Mora, "Defendants"), accused Plaintiff of shoplifting and physically assaulted him. (*Id.*, ¶¶ 6, 14.) Mora proceeded to report Plaintiff to law enforcement, allegedly making false statements to the police about what he witnessed Plaintiff doing in the store. (Complaint, ¶¶ 7-9.) In particular, Mora allegedly told the police that an unidentified customer saw Plaintiff remove a "spider wrap" antitheft device from the vacuum sealer and showed police the thing Plaintiff supposedly removed. (*Id.*, ¶ 9.) Plaintiff's complaint alleges on information and belief that none of the store's Food Saver vacuum sealers were equipped with spider wrap devices at that time. (*Ibid.*)

Plaintiff was subsequently tried for misdemeanor shoplifting and acquitted. (Complaint, ¶¶ 17, 20.) He alleges that Mora testified falsely at his trial. (*Id.*, ¶ 18.) The complaint asserts causes of action for malicious prosecution; assault; battery; intentional infliction of emotional distress; conversion; violation of Civil Code, section 52.1 (the Tom Bane Civil Rights Act); and negligent hiring, training, and supervision.

On October 9, 2023, in preparation for the trial then set for later that month, Defendants indicated at an issue conference statement that they intended to call Adrienne Rhodes, Courtney Poster, and Jordan Hall as witnesses at trial. (Bonner Dec., ¶ 8 & Ex. 3.) All three were Target employees at the time of the incident and for some time thereafter, but had not been previously identified in interrogatories asking that Defendants identify witnesses to the incident and employees on duty at Target at the time. (*Id.*, ¶¶ 4-5, 7 & Exs. 1-2.)

The October 2023 trial date was subsequently continued. From December 2023 through early February 2024, Plaintiff attempted to work with opposing counsel to secure deposition dates for Rhodes, Poster, and Hall. (Bonner Dec., ¶¶ 10-13, Exs. 4-5.) After several weeks of unsuccessful attempts to get defense counsel to propose dates, on February 2, 2024, Plaintiff's counsel noticed the depositions. (*Id.*, ¶ 14 & Ex. 6.) All were to take place in March 2024, the first being Ms. Rhodes' deposition on March 8. (*Id.*, ¶¶ 14, 16.)

On February 28, 2024, about a week before Ms. Rhodes was to be deposed, defense counsel stated that they could not be available on March 8. (Bonner Dec., ¶ 16 & Ex. 7.) On March 3, 2024, defense counsel informed plaintiff's counsel – for the first time – that Rhodes and Poster were no longer Target employees. (*Id.*, ¶ 18 & Ex. 8.) Defense counsel provided Rhodes' last known address, stated that Defendants had been unable to locate her, and suggested that Target subpoena her. (*Id.*, Ex. 8.) As to Poster, defense counsel provided a last known address, but stated that Defendants' best information suggested she no longer resided in California and so could not be compelled to attend a deposition. (*Ibid.*) Defense counsel did not answer when asked if they still intended to present Rhodes and Poster as witnesses at trial. (*Id.*, ¶ 18.)

Hall is still a Target employee today, but has transferred from the San Rafael store to one in Modesto. (Livingston Dec., ¶ 3.) Defense counsel indicated that the March 25, 2024 noticed date for his deposition would not work, but has not proposed an alternative as of the filing of this motion, despite indicating on March 3, 2024 that they would do so. (Bonner Dec., ¶¶ 18, 26.) On several days in May 2023, Plaintiff's counsel visited the Target store. (Bonner Dec., ¶ 20.) During all of these visits, the vacuum sealers of the kind at issue in this case were not protected by spider wrap devices. (*Id.*, ¶¶ 20-21 & Ex. 9.) However, the same vacuum sealers *were* protected with spider wrap on August 14, 2023, when the parties attended a court-ordered site inspection. (*Id.*, ¶ 22.) Based on this, on March 12, 2024, Plaintiff served Target with a notice of a person most knowledgeable ("PMK") deposition for April 4, 2024 at 10:00 AM, requesting that Target produce a PMK to testify regarding the placing of spider wrap devices on vacuum sealers at the San Rafael Target between May 4, 2023 and August 14, 2023 and any instructions to place spider wrap on vacuum sealers during the same time period.[1] (*Id.*, ¶¶ 22-23.) The day before the deposition was to take place, defense counsel stated that they had not been able to

[1] The notice of deposition included a third topic, but Plaintiff has not moved to compel as to that topic. (See Livingston Dec., Ex. D; Notice of Motion, p. 2.)

identify a person most knowledgeable to speak about these topics and, also, defense counsel had become unavailable. (*Id.*, ¶ 28 & Ex. 12.) As of the time this motion was filed, defense counsel had yet to propose any new date. (*Id.*, ¶ 28.) Trial in this case is imminent, set to begin on June 25, 2024. (See Oct. 11, 2023 Order.)

Plaintiff now moves to compel the depositions of Rhodes, Poster, Hall, and Target's PMK on Topic Nos. 1 and 2 of the March 12, 2024 deposition notice.

LEGAL STANDARD

"If, after service of a deposition notice, a party to the action or an . . . employee of a party, or a person designated [as a PMK] by an organization that is a party under Section 2025.230, without having served a valid objection . . . fails to appear for examination, or to proceed with it, . . . the party giving the notice may move for an order compelling the deponent's attendance and testimony[.]" (Code Civ. Proc., § 2025.450, subd. (a).) Such motion must be accompanied by a meet and confer declaration. (Code Civ. Proc., § 2025.450, subd. (b)(2).)

DISCUSSION

Rhodes & Poster

"The service of a deposition notice . . . is effective to require any deponent who is party to the action or an officer, director, managing agent, or employee of a party to attend and to testify. . . . The attendance and testimony of any other deponent . . . requires the service on the deponent of a deposition subpoena." (Code Civ. Proc., § 2025.280, subds. (a), (b).) "'Persons formerly affiliated with a party (e.g., former officers or employees) are not required to attend a deposition unless subpoenaed.'" (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1398 quoting Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) 8:518].) If a party serves its opponent's former employee with a deposition subpoena and the former employee ignores it, the court has no authority to impose sanctions on the former employer for the deponent's disobedience. (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 600.) This rule recognizes that corporate entities do not have any means of requiring a former employee to submit to a deposition. (*Ibid.*)

Rhodes and Poster no longer work for Target. (Livingston Dec., ¶ 2.) As a result, the Court cannot compel Target to produce them for deposition because Target has no power to require them to submit. To obtain their deposition testimony, Plaintiff must serve them with deposition subpoenas. (Code Civ. Proc., § 2025.280, subd. (b).) Plaintiff's argument that Target hid these witnesses and tried to surprise Plaintiff with them on the eve of trial is irrelevant. Even if this were true, this is a motion to compel, and the Court cannot compel Target to do something it has no power to do.

The Court views the circumstances surrounding the end of Rhodes' and Poster's employment by Target with some concern. As of December 18, 2023, defense counsel was "working on getting . . . dates" for these witnesses and stated they would have to be in "the last half of February." (Bonner Dec., Ex. 5.) On February 28, 2024, defense counsel said they were unavailable for Rhodes' deposition as noticed on March 8, but did not say anything about it not proceeding because she was no longer an employee. (*Id.*, Ex. 7.) Within a few days of this, defense counsel

stated that both Rhodes and Poster were no longer Target employees. (*Id.*, Ex. 8.) Defendants' opposition is conspicuously silent as to when Rhodes and Poster stopped working for Target. If Plaintiff contends that it is unfair under the circumstances for Defendants to present Rhodes and Poster at trial, he must make that argument on a future motion in limine.

The motion is denied as to Rhodes and Poster.

Hall

Plaintiff argues that Defendants tried to hide Hall (along with Rhodes and Poster) by not identifying him as a witness until shortly before the October 2023 trial was set to begin, even though earlier discovery efforts should have elicited his name. Defendants counter that they did not know that Hall had relevant information when they responded to prior discovery.

These arguments are beside the point. Plaintiff has been seeking a date for Hall's deposition since December 2023. He first spent several weeks trying to get Defendants to agree on a date, but his emails either went unanswered or were met with vague "working on it" assurances that never went anywhere. (Bonner Dec., ¶¶ 10, 12, Exs. 4-5.) After more than six weeks of this, Plaintiff finally noticed Hall's deposition for March 2024. (*Id.*, Ex. 6.) Defendants rejected the noticed date three days before the deposition was supposed to take place, but failed to suggest a different one, despite saying they would. (*Id.*, ¶ 26 & Ex. 11.) All Defendants have to offer, to this day, is that they continue to "try[] to get in touch with [Hall]." (Livingston Dec., ¶ 3.) The only explanation they offer for the difficulty is that he transferred from the San Rafael store to Modesto. (*Ibid.*)

The Court does not accept that they despite good faith efforts, Defendants have been unable to even *make contact* with Target's own *current employee* at any point during the five months that have passed since Plaintiff first indicated he would be deposed. As Hall's employer, Target has access not only to his contact information, but also the location where he works and his work schedule. If Defendants cannot reach him by phone or email, they should go to the Modesto Target when he is working, tell him he has to be deposed, and ask him for dates that work with his schedule. If Hall was actually unreachable by other means (which the Court doubts), Defendants should have done this months ago. The Court does not accept that Defendants or their attorneys have made a good faith effort to produce Hall. Target is obligated to produce their employee for deposition and has not offered any justification for dragging this out for months as trial rapidly approaches.

Accordingly, the motion is granted as to Hall.

PMK

Defense counsel explains that she had difficulty finding a PMK to testify about the topics listed in the notice because she "misread the notice" and believed it was seeking someone to testify about Target's placement of spider wrap devices on vacuum sealers in 2017. (Livingston Dec., ¶ 5.) Here is how the notice describes the topics to be covered:

1. "The placing of spider wrap devices on vacuum sealer devices in TARGET STORE #2772 after May 4, 2023 and before August 14, 2023.

2. The instructions to place spider wrap devices on vacuum sealer devices in TARGET STORE #2772 after May 4, 2023 and before August 14, 2023."

(Livingston Dec., Ex. D.) This wording could not be clearer with regard to the time period at issue. If defense counsel in fact believed in good faith that the notice was seeking testimony about spider wrap in 2017, that belief was unreasonable and indicative of a lack of care in reading the notice. Defendants may not lean on this misunderstanding to delay Plaintiff's discovery efforts.

Defendants next argue that that they "do not understand" the relevance of these topics. (Livingston Dec., ¶ 5.) The relevance of this information is clear to the Court.

Several of Plaintiff's claims rest on the idea that Mora deliberately lied to the police. Specifically, the complaint alleges that Mora falsely told police that Plaintiff was seen cutting a spider wrap off the product and even presented them with the spider wrap Plaintiff supposedly removed. (Complaint, ¶ 9.) The complaint asserts that in fact, the vacuum savers were not protected by spider wrap at the time of the incident. (*Ibid.*) As a result, whether Target had a practice of putting spider wrap on vacuum sealers in 2017 is relevant, and Defendants surely do not dispute that.

In May 2023, Plaintiff's counsel visited the San Rafael Target, presumably unannounced, and documented the fact that there were no spider wrap devices on the Food Saver vacuum sealers. (Bonner Dec., ¶ 20 & Ex. 9.) On August 14, 2023, a day Defendants knew Plaintiff's counsel would see the Food Saver vacuum sealers because it was the day set for a court-ordered site inspection, spider wrap devices were observed on the products. (*Id.*, ¶ 22.) Plaintiff is seeking discovery as to whether Target put spider wrap devices on the vacuum sealers in advance of the site inspection to deliberately give the false impression that it is Target's general practice to protect these products with spider wraps and thus that, all else equal, the vacuum sealers were likely protected by spider wraps in 2017.

Target's spider wrap policy in 2023 is not compelling evidence of its policy in 2017. But evidence does not need to be compelling to be relevant or discoverable. (See Evid. Code, § 210 [relevant evidence is that with "*any* tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"] [emphasis added]; see also Code Civ. Proc., § 2017.010 [evidence is within the scope of discovery provided it is "relevant to the subject matter involved in the pending action" and "either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence"].) Evidence that Target had to take deliberate action to cause spider wraps to be seen on the products during the site inspection would suggest that Target did not have a general practice of protecting these products with spider wraps in 2023, which in turn could suggest that, all else equal, there was no such practice in 2017 either. The topics listed in the notice fit within the broad relevance standard used for discovery purposes. (See Code Civ. Proc., § 2017.010.)

Defendants do not report making any efforts to identify a PMK witness to testify about these topics after clearing up their misunderstanding about what was being asked. In light of defense counsel's apparent difficulties in finding someone to testify as to the misunderstood versions of the topics at issue (see Livingston Dec., ¶ 3), the Court reminds them that Target is not required to identify an expert to testify as PMK. Target's statutory obligation is to designate and produce

the person who, among its agents, is "*most* qualified" to testify on its behalf as to the matters listed in the notice "to the extent of any information known or reasonably available to the deponent." (Code Civ. Proc., § 2025.230 [emphasis added].)

Accordingly, Plaintiff's motion is granted as to the PMK deposition noticed for March 12, 2024.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2024 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/17/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2100119

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: CATHY LOCKE vs. DEFENDANT: CITY OF NOVATO	

NATURE OF PROCEEDINGS: MOTION – SUMMARY JUDGMENT FILED 2/16/24 BY CITY OF NOVATO

RULING

The City of Novato's (the "City") motion for summary adjudication of the First, Second and Third Causes of Action is granted. The motion for summary judgment, and for summary adjudication of the Fourth Cause of Action, the Eighth Affirmative Defense, the Ninth Affirmative Defense, the Twelfth Affirmative Defense, the Sixteenth Affirmative Defense, the Seventeenth Affirmative Defense, the Eighteenth Affirmative Defense, the Twenty-Sixth Affirmative Defense, the Forty-Third Affirmative Defense, the Forty-Fifth Affirmative Defense, and Forty-Eighth Affirmative Defense, is denied. The motion for summary adjudication of the Second Affirmative Defense is granted as to the Third Cause of Action only.

I. Allegations in the Plaintiff's Second Amended Complaint

Plaintiff/Cross-Defendant Cathy Locke ("Locke") initiated this action against the City of Novato (the "City") on January 4, 2021. The operative complaint is Plaintiff's Second Amended Complaint, which alleges that the City has constructed and maintained a drainageway system ("CDS") in the vicinity of Locke's property at 560 Trumbull in Novato (the "Property"), which is intended to capture stormwater and other run-off and direct it through a conduit that traverses and runs under Trumbull directly onto the Property. (Second Amended Complaint ("SAC"), ¶¶2, 6.) In 2000, Locke and the City entered into a Drainageway Maintenance Agreement ("DMA") as a precondition to the City granting Locke building permits to construct improvements on the Property. The DMA required Locke to repair and maintain a drainageway and pond on the Property, but did not require her to increase the size of the drainageway and pond to accommodate future increases in drainage water from upstream properties. (*Id.*, ¶15.) The City breached its obligations under the DMA by allowing greater volumes of water and storm drainage onto the Property than the parties anticipated, causing damage to the Property. (*Id.*, ¶¶17, 18.) In the winter of 2019, the Property flooded as a result of the City's improper design and maintenance of the CDS and a massive sinkhole developed and collapsed. (*Id.*, ¶19.)

Plaintiff's First Cause of Action alleges breach of the DMA by the City. The Second Cause of Action seeks a declaration that the City has the obligation under the DMA to abate the damage and make such changes and modifications to the drainage system to accommodate the change in circumstances mandated by the increased burdens on the Property. The Third Cause of Action alleges inverse condemnation and the Fourth Cause of Action alleges private nuisance.

II. Standard

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal. App. 4th 1110, 1119.)

"On a motion for summary judgment, the initial burden is always on the moving party to make a prima facie showing that there are no triable issues of material fact." (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) A defendant moving for summary judgment or summary adjudication "has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code of Civ. Proc. § 437c(p)(2).) "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 the cause of action or a defense thereto." (Code of Civ. Proc. § 437c(p)(2).)

"When deciding whether to grant summary judgment, the court must consider all of the evidence set forth in the papers (except evidence to which the court has sustained an objection), as well as all reasonable inferences that may be drawn from that evidence, in the light most favorable to the party opposing summary judgment." (*Avivi, supra*, 159 Cal.App.4th at 467; Code of Civ. Proc. §437c(c).) The moving party's evidence must be strictly construed, while the opposing party's evidence must be liberally construed. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.) Any evidentiary doubts are resolved in favor of the opposing party. (*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1176.)

III. Evidentiary Objections

Locke's Objection Nos. 5-15 are overruled. Objection Nos. 1, 3 and 4 (relevance; not in Separate Statement) and 2 are sustained (hearsay). The Court does not consider evidence not cited in the Separate Statement. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal. App. 4th 308, 316.)

The City's Objection Nos. 1, 2, 5, and 8 to the Declaration of Cathy Locke are overruled. Objection Nos. 3 (improper legal conclusion, argumentative), 4 (foundation), 6 (foundation, speculation), and 7 with respect to what the insurer allows only (foundation), are sustained.

The City's Objection Nos. 1, 2, 6, 13, 15 and 17 to the Declaration of Jonathan Sutter are sustained (foundation/improper expert opinion). Objection Nos. 3-5, 7-12, 16, and 18-26 are overruled as Mr. Sutter describes in other paragraphs of his declaration the bases for these statements and conclusions. Objection Nos. 14 and 27-39, which are based solely on relevance, are overruled. "[W]hen considering the declarations of the parties' experts, we liberally construe the declarations for the plaintiff's experts and resolve any doubts as to the propriety of granting the motion in favor of the plaintiff." (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125-126.) Thus, "[i]n light of the rule of liberal construction, a reasoned explanation required in an expert declaration filed *in opposition* to a summary judgment motion need *not* be as detailed or extensive as that required in expert testimony presented in support of a summary judgment motion or at trial." (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 189.) "The rule that a trial court must liberally construe the evidence submitted in opposition to a summary judgment motion applies in ruling on both the admissibility of expert testimony and its sufficiency to create a triable issue of fact." (*Ibid.*)

IV. Request for Judicial Notice

The City's request for judicial notice of Novato Municipal Code 7-4.11 (Exhibit 1) and Ordinance 1329 (Exhibit 2) is granted. (Evid. Code §§ 452, 453.)

V. Discussion

A. First Cause of Action (breach of the DMA)

In her First Cause of Action, Locke alleges that the City breached the DMA by "increasing the burden imposed on Plaintiff's Property contemplated by the parties and the DMA when it was executed." (SAC, ¶27.) Locke alleges that the City breached an implied covenant "by failing to take 'responsibility to increase the size of the Drainageway and Pond to accommodate . . . increase[s] in drainage water that is channeled into the Drainageway and Pond from upstream properties.'" (*Ibid.*) Locke also alleges that the City was negligent in the performance of its duties under the DMA "by failing to design, maintain and construct the drainageway in a way that does not cause damage to Plaintiff's Property and/or by allowing the flow of water into and through the drainageway without modifying the CDS to accommodate the increased burden on Plaintiff's Property." (SAC, ¶28.)

The DMA provides in part:

> Declarants have a small impoundment or pond on the property and a creek and other drainageways on their property which cross the northerly portion of the Property hereinafter referred to as the 'Drainageway and Pond'. (Recital, ¶C.)
>
> Maintenance of Drainageway. Declarant, for themselves and all future owners of the Property, agree to maintain and repair the Drainageway and Pond at their own expense. Maintenance and repair responsibilities shall include keeping the Drainageway and Pond free and clear of debris, and repairing the existing

> Drainageway and Pond; but shall not include any responsibility to increase the size of the Drainageway and Pond to accommodate any future increase in drainage water that is channeled into the Drainageway and Pond from upstream properties. (Agreement, ¶1.)
>
> Failure to Maintain Drainageway and Pond; Rights of the City of Novato. Declarant hereby covenants and agrees as follows: (a) Failure to Maintain Drainageway and Pond. In the event that Declarant or future owners of the property fail to maintain the Drainageway and Pond the City of Novato, by and through its duly authorized officers and employees, shall have the right to enter upon the Property, and to commence and complete such work as is necessary to maintain the Drainageway and Pond . . . (b) It is understood that by the provisions hereof, the City is not required to take any affirmative action, and any action undertaken by the City shall be that which, in its sole discretion, it deems reasonable to protect the public health, safety and general welfare, and to enforce this Agreement and the City's regulations, ordinances and other laws. (Agreement, ¶3.)

(City's Undisputed Material Fact ("UMF") 29 [citing City's Compendium of Evidence, Exh. 7].)

The City argues that Locke cannot state a cause of action for breach of the DMA as a matter of law because the DMA does not impose any duty on the City to (1) limit the burden imposed on the Property from the Drainageway and Pond, (2) increase the size of the Drainageway and Pond to accommodate increased water discharge, or (3) adequately design, maintain or construct the drainageway.

The Court agrees that the DMA does not impose any such duties on the City. Summary adjudication is proper where the evidentiary record shows the defendant did not owe a duty under the contract. (See e.g., *Brown v. California Pension Administrators & Consultants, Inc.* (1996) 45 Cal.App.4th 333, 345-346.)

When interpreting a contract, courts seek to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. (Civ. Code § 1636.) The parties' intent is interpreted according to objective, rather than subjective, criteria. (*VFLA Eventco, LLC v. William Morris Endeavor Entertainment, LLC* (2024) 100 Cal.App.5th 287, 302.) When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (See Civ. Code §§ 1638, 1639; *West Pueblo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal.App.5th 1178, 1185.) The words are to be understood "in their ordinary and popular sense" (Civ. Code § 1644) and the "whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (Civ. Code § 1641).

While the DMA states that it is not Locke's duty to increase the size of the Drainageway and Pond, it does not state that any such duty belongs to the City. The parties clearly contemplated a potential for increased drainage water in the future. If they had intended to place the burden of

addressing any increase on the City, they could have clearly stated so in the DMA. They did not, manifesting the parties' intent that the City did not have this duty. This conclusion is further bolstered by the sentence in paragraph 3 that the City is not obligated to take any action with respect to maintenance of the drainageway. By its terms, the DMA does not impose the duties on the City that Locke alleges. There is also no basis upon which to find an implied duty. (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032 ["If there exists a contractual relationship between the parties . . . the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract"].)

Because the Court grants summary adjudication on the ground identified above, it does not address the City's additional argument that Locke herself breached the DMA.

B. Second Cause of Action (declaratory relief)

In her Second Cause of Action, Locke alleges that the City has the duty under the DMA to increase the size of the Drainageway and Pond to accommodate increases in drainage water. Locke seeks a declaration that the City is obligated under the terms of the DMA to abate the damage and to make changes to the drainage system to accommodate the change in circumstances mandated by the increased burden on the Property. (SAC, ¶¶32, 22.)

As the Second Cause of Action is based on the same alleged contractual duties as the First Cause of Action, the Court grants summary adjudication of the Second Cause of Action based on the reasons discussed above.

C. Third Cause of Action (inverse condemnation)

Locke's Third Cause of Action alleges that the City's design, construction and maintenance of the CDS constitutes a public use and that such use constitutes a physical invasion of the Property and has caused damage to the Property. Locke further alleges that the City's interference with the Property amounts to a taking without lawful authority and without formal exercise of the power of eminent domain, resulting in inverse condemnation of the Property. (SAC, ¶¶37-44.) "To state a cause of action for inverse condemnation, the property owner must show there was an invasion or appropriation (a 'taking' or 'damaging') of some valuable property right which the property owner possesses by a public entity and the invasion or appropriation directly and specially affected the property owner to his injury." (*City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210, 221 [citations and internal quotations omitted].)

The City argues that this cause of action is barred by the applicable three-year statute of limitations. Claims for damage to real property must be filed within three years after the cause of action accrues. (Code Civ. Proc. § 338 (j).)

1. Evidentiary Record

Locke purchased the Property in October 1999. (UMF 15.) In March 2000, Locke wrote a letter to her insurance company, Fidelity National Title Company, stating:

> I am writing to make a claim on my Title Insurance for two encroachments that have created problems on our property.
>
> The first encroachment is due to the City of Novato dumping run-off onto our property without an easement. This run-off comes from over 1000 homes that are in the city suburb that surrounds our property. The run-off water has created a pond and has destroyed our leach field and septic system. The pond is polluted from oil that is on the streets of this suburb that washes into the storm drains. The pond has become a wildlife sanctuary for many endangered birds and under State and Federal Wetlands laws cannot be removed.
>
> The second encroachment is due to the Novato Sanitary District constructing sewer lines on our property without an easement. Even though these sewer lines are on our property the City of Novato will not allow us to hook-up to the public sewer. We are currently facing fees upwards of $70,000 to install a new septic system. In addition to that it will take four to six months to have this system complete and functional. We have been cited for a health and safety violation by the County's Environmental Health Department. In the first part of February they gave us ten days to hook-up to the sewer or they will start charging us $2,500 a day . . . .

(UMF 16.) Locke testified that in 2000, stormwater created a pond and overflowed such that it flooded the driveway on the Property. (UMF 17, 18.)[1] The water went to the uphill edge of the driveway just about every year from the winter of 1999 up until 2020. (UMF 19.) Also in 2000, other people's trash and leaves came through the pond. (UMF 20.) As Locke began spending more time at the Property in 2000, she noticed a lot of flooding when it rained and she believed the property was getting more water dumped on it than it could handle. (UMF 21.)

2. Analysis

The City argues that Locke's cause of action accrued as early as 1999 or 2000 because the CDS storm drain pipes are permanently fixed and were there before Locke moved to the Property, and Locke's damages are allegedly caused by periodic, recurring rainstorms. The City further argues that Locke appreciated the harm allegedly caused by the CDS in 2000, when she stated to her title insurance company that the City was "dumping runoff" onto the Property and that the runoff water created a pond. The City also points to Locke's deposition testimony in which she

[1] Several of the City's citations to the pages of Locke's deposition testimony are off by one or two pages (e.g. UMF 22 cites to VOE 268:12-267:10 and 279:21-280:5 when it should cite to VOE 269:12-270:10 and 280:21-281:5.). However, the highlighted deposition testimony supporting the citations, albeit on different page numbers, are still included in the City's Compendium of Evidence. The Court therefore considers this testimony as it is part of the evidentiary record.

testified that the stormwater created a pond on the Property that flooded her driveway and that this had happened every year until 2020.

Locke argues that her cause of action did not accrue until February 2019 when rainfall from two storm events exceeded the capacity of the Property's drainageway, causing the Property to flood extensively and causing mud to build up along her fencing. The flooding was greater than Locke had seen since she bought the Property in 1999. Locke's expert opines that this is attributable to increased impervious surfaces, removed vegetated areas and increased compaction of soils (from development of neighboring areas) combined with high rainfall. (Locke's Additional Undisputed Material Facts ("AUMF"), 18, 19.)[2]

Locke's showing of increased flooding and resulting damage in 2019 is insufficient to avoid the bar of the statute of limitations. Locke does not present evidence that the City has engaged in any ongoing affirmative conduct (unlike the city's "ongoing periodic design, maintenance and mitigation activities" in the *Stonewall* case cited by Locke) that resulted in the increased flooding. Rather, she contends that the City essentially did the opposite. Locke alleges that the City did *not* act to make alterations to the existing CDS that she contends were necessary to accommodate an increase in discharge caused by development in neighboring areas.

Locke's argument is similar to the one rejected by the court in *Lyles v. State of California* (2007) 153 Cal.App.4th 281. In *Lyles*, the plaintiffs sought to recover damages to their property allegedly caused by an inadequate drainage system surrounding the highway and road which allowed for the flooding of the plaintiffs' property when it rained. The court held:

> Plaintiffs urge that the statute of limitations did not begin because their property suffers continuous and repeated damage that has not stabilized. (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 857–858, 132 Cal.Rptr.2d 444 (*Lee*).) According to plaintiffs, State has never modified the essential condition of the culvert and, thus, the condition continues to threaten their property. There is no merit to this point . . . .
>
> The key distinction between this case and *Lee* is that *Lee* involved alleged damage caused by the ongoing activities of the public entity related to construction of a public work of improvement. In other words, it was the deliberate and ongoing conduct of the entity in the course of construction that had caused, and would continue to cause, damage to the property. Here, in contrast, defendants are not performing ongoing activities that will, of necessity, stabilize when the activities cease. In this case, there was a single "activity"

[2] Locke also cites to the Court's ruling on the City's demurrer from August 2021, but that ruling is inapposite here. The Court in that ruling was addressing a different cause of action (nuisance) and did not discuss the statute of limitations. Further, the ruling was limited to the sufficiency of the facts alleged at the pleading stage; here, Locke must present evidence to show her claim is not time-barred.

> that occurred once in 1998. Defendants' failure to modify the culvert does not affect this point. As unmodified, the culvert is conceptually part of the original condition of the original construction activity rather than part of ongoing construction activities. These circumstances do not justify application of the "stabilization" approach to accrual of an inverse condemnation cause of action.

(*Id.* at pp. 289-290.) The Court reaches a similar conclusion here with respect to the CDS.

The City's position is further supported by *Bookout v. State of California ex rel. Dept, of Transportation* (2020) 186 Cal.App.4th 1478, in which the plaintiff alleged that when it rained, conditions on the defendants' property would cause water to back up and flood onto his property. The court found that the last improvements to the defendants' drainage system were constructed in the late 1970's and that the flooding problem was relatively consistent for several years before the plaintiff purchased his property in 2000. The court concluded that the plaintiff's claim was barred because he knew and complained about the flooding in 2002, but did not bring his claim until almost years later in 2006.

Locke's claim is untimely under a similar analysis. The CDS was in place and impacting Locke's property as of at least 2000. The pond and flooding allegedly caused by the CDS occurred in a similar fashion every year beginning in 2000, and Locke attributed this recurring event to the CDS. Well before January 4, 2018 (three years before filing her initial Complaint), Locke had suffered damage and had concluded that the CDS was the cause of her damage.

Accordingly, the Court grants the City's motion for summary adjudication of the Third Cause of Action.

D. Fourth Cause of Action (nuisance)

In her Fourth Cause of Action, Locke alleges that the City's failure to properly design, construct, and maintain suitable drainage for the residential neighborhoods served by the CDS, as well as its continuing to allow toxic and other harmful runoff onto the Property, constitutes a private nuisance under Civil Code Section 3479. Locke alleges that the City has the power and ability to abate the nuisance or mitigate the threat to the Property by modifying the CDS. (SAC, ¶¶46, 47.)

The City moves for summary adjudication of this cause of action on the ground that it is untimely. The statute of limitations for nuisance claims, where property damage is alleged, is three years. (Code Civ. Proc. § 338(b).) The City alleges that Locke alleges only a permanent nuisance, not a continuing nuisance for statute of limitations purposes, because damages were complete when the nuisance came into existence.

"If a nuisance is permanent, the plaintiff must bring one action for past, present and future damage within three years after the creation of the permanent nuisance." (*Wilshire Westwood Assocs. v. Atl. Richfield Co.* (1993) 20 Cal.App.4th 732, 744. "But where the nuisance involves a use which may be discontinued at any time, it is characterized as a continuing nuisance, and persons harmed by it may bring successive actions for damages until the nuisance is abated. The

crucial test of a continuing nuisance is whether the offensive condition can be discontinued or abated at any time." (*Ibid.* [citation omitted].)

The City relies upon *Bookout*, *supra*, to support its argument that the nuisance alleged by Locke is a solid structure and therefore time-barred. The court in *Bookout* found that a raised rail bed and culvert bed, which may have been in place for over 100 years, were a solid structure and a permanent nuisance. The court distinguished another decision (*Mangini*) on the ground that it involved hazardous waste pollution which could be discontinued at any time.

Here, Locke alleges that the nuisance is a drainage system that releases stormwater and accompanying debris onto the Property. The alleged nuisance is both a physical structure and pollution caused or permitted by that structure. Locke submits evidence that the CDS can be repaired or altered to discontinue or reduce the discharge onto the Property. (AUMF 36, 37, 41, 42.) Locke has therefore raised a triable issue of fact as to whether the alleged nuisance is abatable. Summary adjudication as to this cause of action on statute of limitations grounds is inappropriate.

E. Second Affirmative Defense

The City's Second Affirmative Defense asserts that "the complaint and each cause of action contained therein are barred by the applicable statutes of limitations . . . ." The Court grants summary adjudication of the Second Affirmative Defense as to the Third Cause of Action, and denies summary adjudication as to the Fourth Cause of Action, for the reasons discussed above. Although the Court need not decide the statute of limitations issue as to the First and Second Causes of Action because it grants summary adjudication on other grounds, it would deny the motion as to these causes of action on statute of limitations grounds. Even if the City owed the duties under the DMA alleged by Locke, the City has not presented evidence as to when Locke discovered that the City may have breached these duties by failing to repair or upgrade the CDS.

F. Eighth and Twelfth Affirmative Defenses

The City's Eighth Affirmative Defense asserts that Locke "waived the right to maintain the actions filed in this case." Waiver "means the intentional relinquishment or abandonment of a known right. Waiver requires an existing right, the waiving party's knowledge of that right, and the party's actual intention to relinquish the right. Waiver always rests upon intent. The intention may be express, based on the waiving party's words, or implied, based on conduct that is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." *Lynch v. California Coastal Commission* (2017) 3 Cal.5th 470, 475 [citations and internal quotations omitted].)

The City's Twelfth Affirmative Defense asserts that "Locke has accepted and enjoyed the benefits of the City's conditions of approval and as such, cannot avoid the burdens imposed thereby." The Twelfth Affirmative Defense is based on *Lynch*, *supra*, which addressed waiver in the land use context. The court found that the plaintiffs forfeited their right to challenge a permit when they complied with all of the preissuance permit requirements, accepted the permit, and built a structure in accordance with the permit. The court stated: "In the land use context, a landowner may not challenge a permit condition if he has acquiesced to it either by specific

agreement, or by failure to challenge the condition while accepting the benefits afforded by the permit." (*Id.* at p. 476.)

The City argues that Locke cannot challenge the conditions of Ordinance 1431, including the DMA, because she accepted the ordinance's benefits. The City has not satisfied its burden of establishing waiver. The *Lynch* decision involves a landowner's right to challenge a permit after using the permit for its benefit to construct a structure, a scenario that does not exist here. Ordinance 1431 pre-zoned the Property subject to Locke submitting a Drainage Management Plan and agreeing to a DMA, among other things. Locke is not challenging the requirement that she agree to enter into these agreements as a precondition of the zoning of her property. Rather, as she points out, she is challenging the City's subsequent conduct in connection with the DMA by alleging the City breached it. The City submits no evidence that Locke waived her right to allege breach of the DMA.[3]

G. Ninth Affirmative Defense

The City's Ninth Affirmative Defense asserts that Locke "consented to the acts complained of in the SAC, and the consent was express or implied", and therefore Locke cannot assert viable causes of action for inverse condemnation or nuisance. The City argues that Locke agreed to allow continued drainage onto her Property by the DMA, and that she also agreed in the Stream Protection Management Plan (SPMP) to provide for the filtration of sediment and contaminants in storm runoff.

The DMA provides that Locke "agree[s] to maintain and repair the Drainageway and Pond at their own expense. Maintenance and repair responsibilities shall include keeping the Drainageway and Pond free and clear of debris, and repairing the existing Drainageway and Pond; but shall not include any responsibility to increase the size of the Drainageway and Pond to accommodate any future increase in drainage water that is channeled into the Drainageway and Pond from upstream properties." (UMF 29.) The SPMP provides that Locke "shall be responsible for maintaining and implementing the following stream protection and management plan . . . The Stream Buffer Zone shall include adjacent upland habitat for sensitive species and wildlife migration, as well as, providing for filtration of sediment and contaminants in storm runoff and allow infiltration of rainfall to maintain an adequate water budget to support the riparian and wetland habitat . . . ." (UMF 37.)

The language from the DMA and the SPMP do not support the City's argument that Locke consented to an increased volume of storm water into the Drainageway from neighboring development, which Locke contends was not contemplated at the time these documents were executed. (See *Reinking v. County of Orange* (1970) 9 Cal.App.3d 1024, 1030-1031 [consent is limited to what could be reasonably anticipated at time of contracting].) At a minimum, there is

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[3] The City makes an additional argument on page 23 of its Memorandum that Locke's challenge to Ordinance 1431 is untimely. The City cites to paragraph 1 of Locke's Second Amended Complaint, which includes language Locke contends was inadvertently included, as shown by the parenthetical note in that paragraph, and has moved to remove. (See Opp. at p. 1.) As Locke has made it clear she does not seek to void the DMA, the Court does not decide this issue.

a triable issue of fact as to what the parties contemplated at the time of contracting. Summary adjudication as to this affirmative defense is denied.

H. Sixteenth, Seventeenth and Eighteenth Affirmative Defenses

The City's Sixteenth Affirmative Defense asserts that Locke's "claims are barred, in whole or part, because any and all of the City's actions, conduct, plans and/or the acts complained of in the SAC were not a substantial cause of Plaintiff's alleged damages or because there were other acts, actions, conduct, events, forces, or personal circumstances of the Plaintiff, which caused Plaintiff's damages." The Seventeenth Affirmative Defense asserts that Locke's "claims are barred, in whole or in part, because the alleged damages complained of by Plaintiff were negligently, carelessly, recklessly, and/or intentionally caused by Plaintiff's own acts or omissions. These acts or omissions were the proximate and legal cause of Plaintiff'[s] alleged damages, if any, and Plaintiff is therefore barred from recovery against the City." The Eighteenth Affirmative Defense asserts that Locke's "claims are barred, in whole or in part, because the alleged damages complained of by Plaintiff were negligently, carelessly, recklessly, and/or intentionally caused by Plaintiff's own acts or omissions. These acts or omissions were the proximate and legal cause of Plaintiff's alleged damages, if any, and comparatively reduce the percentage of any fault or liability attributable to the City, if it should be found that the City was at fault or liable."

These affirmative defenses all challenge causation. The element of causation is ordinarily a question of fact for the jury. (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278.) "This issue ordinarily may not be resolved on summary judgment." (*Id.* at p. 288.)

Locke has submitted evidence that, if the City is found to be responsible for maintaining or improving the CDS such that it does not provide for excessive discharge onto the Property, there is a triable issue of fact as to causation. (AUMF 13, 18, 23, 32 and 33.) Summary adjudication of these three affirmative defenses is therefore denied.

I. Other Affirmative Defenses

The City's Notice of Motion and Motion states that it also moves for summary adjudication of the Twenty-Sixth, Forty-Third, Forty-Fifth, and Forty-Eighth Affirmative Defenses. However, the City does not discuss or even mention any of these affirmative defenses in its Memorandum. The City's motion as to these affirmative defenses is denied because the City has failed to satisfy its burden as the moving party. (Cal. Rule of Court, 3.1113(b); *Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934.)

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2024 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/17/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2104189

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: RINALDO V. GOCHEZ, ET AL vs. DEFENDANT: DANIEL R. RUTH	

NATURE OF PROCEEDINGS: MOTION - SANCTIONS

RULING

Plaintiffs Rinaldo V. Gochez and Bruce J. Gonzales' ("Plaintiffs") motion to exclude certain of Defendant Daniel R. Ruth's ("Defendant") expert witnesses is denied.

BACKGROUND

This action arises out of car accident that occurred in downtown San Rafael in 2019. (Complaint, p. 5.) Plaintiffs allege that Defendant ran a red light and struck the car in which both plaintiffs were riding. (*Ibid.*)

On June 21, 2023, Defendant served Plaintiffs with a demand for the exchange of expert witness information pursuant to Code of Civil Procedure, section 2034.210.[1] (Bloom Dec., ¶ 10 & Ex. 1.[2]) The demand specified that expert designations were due on December 18, 2023. (*Ibid.*) The parties simultaneously exchanged expert witness information on that date. (Bloom Dec., ¶¶ 11-12.)

Plaintiffs designated Andrew Fox, Neil Ghodadra, Rajeev Kelkar, Robert W. Johnson, and Jeffrey R. Sarkisian. (Yi Dec., Ex. A, p. 3.) Fox is a neurologist, Ghodadra is a life care planner, Kelkar is an expert in accident reconstruction and the biomechanics of human injury, Johnson is an economist, and Sarkisian is an expert in vocational rehabilitation. (*Ibid.*)

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[1] All undesignated statutory references are to the Code of Civil Procedure.

[2] Both parties' presentation of exhibits leaves something to be desired. The Declaration of Siyu Yi, submitted by Defendant in opposition to the motion, attaches 12 exhibits but does not include exhibit cover pages or even any exhibit numbers on the exhibits themselves. Plaintiff's exhibits were not even attached to the corresponding declaration, but filed separately and without cover pages. Both parties are admonished to review California Rule of Court, rule 3.1110(f) and comply with it (and all other applicable rules) moving forward.

Defendant designated Thomas Peatman, William Hoddick, Hamidreza Aliabadi, and Tami Rockholt. (Yi Dec., Ex. B, p. 2.) Peatman is an orthopedic surgeon (*id.*, p. 6 [Yi Dec. in Support of Defs.' Expert Designation], ¶ 4), Hoddick is a radiologist (*id.*, p. 7, ¶ 5), Aliabadi is a neurologist (*id.*, p. 7, ¶ 6), and Rockholt is a registered nurse and an expert in medical billing (*id.*, p. 8, ¶ 7).

On January 8, 2024, Defendant served supplemental expert witness designations pursuant to Section 2034.280. (Bloom Dec., ¶ 13; Yi Dec., Ex. C.) The additional experts designated were Christopher R. Johnk, Michael Martinez, Karl Erik Volk, Maria Brady, and Benjamin J. Ewers (these five together, the "Supplemental Experts"). (Yi Dec., Ex. C.) Johnk is a mechanical engineer and an expert in accident reconstruction. (Yi Dec., Ex. C, p. 4 [Yi Dec. in Support of Defs.' Supplemental Expert Designation], ¶ 4.) Martinez is a registered nurse with a Master of Science in Nursing, Case Management. (*Id.*, p. 5, ¶ 5.) He is expected to testify about Plaintiff's medical bills and life care planning needs. (*Ibid.*) Volk is an expert in forensic accounting and consulting expected to testify regarding future economic damages, including specifically those related to life care plans. (*Id.*, pp. 5-6, ¶ 6.) Brady is an expert in vocational rehabilitation. (*Id.*, p. 6, ¶ 7.) Ewers is an expert in biomechanics and is expected to "analyze the mechanisms of Plaintiffs' body motion pre- and post-impact as to issues related to the injuries Plaintiffs allegedly sustained." (*Id.*, p. 7, ¶ 8.)

On January 10, 2024, the parties stipulated to a trial continuance, but did not agree to continue the period to designate expert witnesses. (Bloom Dec., ¶ 14.)

Plaintiff now moves for an order excluding anything relating to Johnk, Martinez, Volk, Brady, or Ewers from trial. (Notice of Motion, p. 1.)

LEGAL STANDARD

"After the setting of the initial trial date for the action, . . . [a]ny party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person . . . whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial." (Code Civ. Proc., § 2034.210, subd. (a).) Such demand must be made no later than the tenth day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date. (Code Civ. Proc., § 2034.220.) Such demand must be in writing, must state that it is being made pursuant to Chapter 18 of the Code of Civil Procedure, and must identify the party making the demand. (Code Civ. Proc., § 2034.230.) It must also specify the date for the exchange of information. (*Ibid.*) Such date must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date. (Code Civ. Proc., § 2034.230, subd. (b).)

Section 2034.260, subdivision (a) provides that "[a]ll parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand." Subject to certain exceptions, "on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: (a) List that witness as an expert under Section 2034.260. (b) Submit an expert witness declaration. (c) Produce reports and writings of expert

witnesses under Section 2034.270. (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410)." (Code Civ. Proc., § 2034.300.)

Within 20 days after the exchange of expert witness information, "any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject." (Code Civ. Proc., § 2034.280, subd. (a).) The supplemental list must be accompanied by an expert witness declaration (see Code Civ. Proc., § 2034.260) concerning the additional experts, and by any and all discoverable reports and writings the additional experts made. (Code Civ. Proc., § 2034.280, subd. (b).) The supplementing party must make the additional experts available "immediately" for deposition, and such deposition may be taken even though the discovery period has ended. (Code Civ. Proc., § subd. (c).)

DISCUSSION

Plaintiffs argue that the Supplemental Experts must be excluded at trial because, since Defendant disclosed them after the deadline to designate experts had passed, they were necessarily not properly disclosed. (See Memorandum, pp. 1-2.) This fails to contend with the fact that litigants may supplement their expert witness lists under certain circumstances, as provided by Section 2034.280. That "the parties did not agree to allow for supplemental Expert Designations" (Memorandum, p. 5) is irrelevant. A party is permitted to submit a supplemental expert witness designation under the circumstances set forth in Section 2034.280 as a matter of right.

If a party properly designates a witness as a supplemental expert witness under that statute, the party has not failed to list that witness as an expert under Section 2034.260, and a motion brought pursuant to Section 2034.300, subdivision (a) to exclude the expert as undesignated does not lie.

Plaintiffs acknowledge that the Supplemental Experts were disclosed in a supplemental expert designation served within 20 days of the initial simultaneous exchange of expert information, but simply pretend this was necessarily improper. Other than conclusory statements that the experts at issue "are not rebuttal experts" and "are not supplemental" (Memorandum, p. 1), Plaintiffs have not provided any evidence or even argument in support of the idea that Defendants' supplemental expert designation did not comply with Section 2034.280. Without any such argument, the Court has no basis to conclude that the Supplemental Experts were improperly designated.

Based on the parties' various expert designations alone, the Supplemental Experts do not appear to be supplemental in name only. As discussed above, Plaintiffs designated (among others) an expert in accident reconstruction and biomechanics, a vocational rehabilitation expert, an economist, and a life care planner. The Supplemental Experts include an expert in accident reconstruction, an expert in biomechanics, a vocational rehabilitation specialist, and two others planning to testify on medical billing matters and future damages in relation to life care planning expenses. The parallels between these two sets of experts are obvious. The only potential point of overlap between the Supplemental Experts and those Defendant initially designated is Rockholt, who is expected to testify on damages, including those relating to future medical

expenses. (Yi Dec., Ex. B, ¶ 7.) This is similar to the subjects to be covered by Volk. But Volk is expected to testify as to damages associated with life care planning in particular, a matter not listed in Rockholt's designation and plainly within the scope of Plaintiff's initial designations. In the Court's view, the Supplemental Experts were retained to testify on subjects for which Plaintiff had designated an expert, but Defendant had not. This is exactly what supplemental experts are meant to do. (Code Civ. Proc., § 2034.280, subd. (a).)

Fairfax v. Lords (2006) 138 Cal.App.4th 1019, cited by Plaintiff, is inapposite. There, the parties never engaged in a simultaneous exchange of expert information at all. Instead, on the day set for the simultaneous exchange, the defendant served a document entitled "First Designation of Expert Witnesses" that designated no experts and stated that the defendant reserved the right to designate rebuttal experts in response to the plaintiff's designation. (138 Cal.App.4th 1019, 1022.) The appellate court held that a mutual and simultaneous exchange of expert information was expressly required by statute, so a party could not simply decline to designate any experts until after learning which experts its opponent intended to offer. (138 Cal.App.4th 1019, 1026-1027.) There is no comparable situation here. The parties made simultaneous disclosures as is statutorily required, and then Defendant submitted supplemental designations, which by all indications complied with statutory requirements.

Plaintiff argues that the number of experts Defendant seeks to present is excessive and will waste judicial resources. Plaintiff can make that argument on a motion in limine. It is beyond the scope of the statutory motion presently before the Court. Even if it were not, Plaintiff has offered no argument on these points other than conclusory statements to the effect that this case is simple and Defendant has too many experts.
Accordingly, the motion is denied.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2024 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/17/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2202798

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: ALTON IRBY vs. DEFENDANT: EBRAHIM ABBASI, ET AL	

NATURE OF PROCEEDINGS: MOTION – LEAVE

RULING

John Lum Architecture Inc.'s ("JLA") Motion for Leave to Amend is GRANTED.

BACKGROUND

This case arises out of plaintiff Alton Irby's ("Plaintiff") purchase of real property perched on a hillside overlooking the San Francisco Bay. Plaintiff alleges that the property was formerly used as a church and that defendant Ebrahim Abbasi ("Abbasi") owned it and modified it in hopes of making a significant profit from the property's resale. Plaintiff alleges that during Abbasi's modification of the property, Abbasi "cut corners" resulting in defects requiring the removal and re-engineering of the roof, among other damages.

Plaintiff filed his complaint on September 2, 2022 and the First Amended Complaint ("FAC") on November 15, 2022. The FAC included causes of action for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Intentional Misrepresentation, and Negligent Misrepresentation, Negligence, and Negligent Hiring and names Abbasi, Shadow Bay, LLC, Eagle Ridge Ventures, LLC, Dance Builders Enterprises, Eric Ainsworth Construction, Inc. ("Ainsworth Construction"), JLA, and Hoytt Inspection Services, Inc. as defendants.

On February 14, 2023, JLA filed a cross-complaint against Ainsworth Construction with one cause of action, equitable indemnity. Trial is set for September 4, 2024.

JLA's Motion for Leave to File a First Amended Cross-Complaint ("FACC") is currently before the Court.

LEGAL STANDARD

Under Code of Civil Procedure section 473, subdivision (a)(1), the Court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding.

As judicial policy favors resolution of all disputed matters in the same lawsuit, courts liberally permit amendments of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) Denial is rarely justified unless opposing parties demonstrate unreasonable delay plus prejudice if the motion is granted. A mere showing of unreasonable delay by the plaintiff without any showing of resulting prejudice to defendants is an insufficient ground to justify denial of the plaintiff's motion. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.) Prejudice exists where the amendment would require delaying the trial, resulting loss of critical evidence or added costs of preparation, and an increased burden of discovery, inter alia. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488.)

Generally, arguments attacking the merits of the proposed amendments do not justify denial of the motion. Courts allow the amendment and then let the parties test the legal sufficiency in other appropriate proceedings such as a demurrer. (*See Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048, and *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760.) A party requesting leave to amend must also comply with California Rules of Court, rule 3.1324. Compliance with the Rules of Court is satisfied by including a copy of the proposed amended pleading, detailing what changes will be made from the previous pleading by stating what allegations are to be deleted or added as compared to the previous pleading including page, paragraph and line number, and attaching a declaration by plaintiff's counsel, as to: (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) why the request was not made earlier.

DISCUSSION

JLA states that at the time it filed its original cross-complaint, it did not have a copy of the contract between Ainsworth Construction and Abassi. JLA became aware of the provisions of that contract sometime after September 26, 2023, when it was produced amongst approximately 6,000 pages of responses to discovery requests. JLA argues that per the contract, Ainsworth Construction has an express duty to indemnify JLA and seeks leave to amend to add a cause of action for the same.

Ainsworth Construction counters that if the motion to amend is granted, it will need to perform additional discovery, and will likely want to engage in some relevant motion practice. Further, Ainsworth Construction argues that JLA knew or should have known about the contract at issue since at least September 26, 2023 and that they have provided an insufficient explanation of their delay in seeking leave to amend. Finally, Ainsworth Construction asserts that the motion should be denied because the amendment would be subject to demurrer or dispositive motion, and would therefore be futile.

That trial courts are to liberally permit such amendments, at any stage of the proceeding, has long been established policy in this state...resting on the fundamental policy that cases should be decided on the merits. (*Hirsa v Superior Court* (1981) 118 Cal.App.3d 486, 488-489.) Thus, the court's discretion will usually be exercised liberally to permit amendment of the pleadings. (*See Nestle v. Santa Monica, supra,* 6 Cal.3d at p. 939; *Mabie V. Hyatt* (1998) 61 Cal.App.4th 581, 596; *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.)

In this case, the Court finds that JLA was not dilatory in bringing the motion for leave to amend. Nor has opposing party met its burden to demonstrate prejudice. JLA has indicated that it willing to agree to shortened time to hear any possible motion for summary judgment before trial. It does not appear to the Court that a continuance will necessarily be needed. However, to the extent Ainsworth Construction believes that to be the case, the Court will entertain a motion for a continuance. The Court however suggests, in light of the fact that Plaintiff recently substituted in new counsel, Ainsworth Construction attempt to discuss a stipulation for a continuance prior to bringing such a motion. Finally, the Court is not convinced the amendment would be futile.

For these reasons, the Motion is GRANTED.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2024 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/17/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2301195

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: WENDELL LAIDLEY vs. DEFENDANT: LUMIO HOLDINGS, INC., ET AL	

NATURE OF PROCEEDINGS: 1) MOTION – QUASH SERVICE OF SUMMONS ON DEFENDANTS GREGORY BUTTERFIELD AND TRAVIS WILSON IS DEFERRED TO BE ADDRESSED AFTER THE MOTION TO DISMISS FOR FORUM NON CONVENIENS IS RESOLVED
2) MOTION – OTHER: AND MOTION TO DISMISS FOR FORUM NON CONVENIENS [DEFT] LUMIO HOLDINGS, INC., A DELAWARE CORPORATION

RULING

Defendants' motion to dismiss for forum non conveniens is granted. Because the Court grants this motion, it does not rule on the separate motion to quash filed by Defendants Gregory Butterfield and Travis Wilson.

Allegations in Plaintiff's Complaint

Plaintiff Wendell Laidley alleges that in September 2020, while he resided at his home in Belvedere, he began communicating with Defendant Gregory Butterfield ("Butterfield"), CEO and co-founder of Lumio, about employment opportunities. (Complaint, ¶¶1, 15, 27, 31, 42.) Butterfield introduced Plaintiff to Lumio's co-founder, Jonathan Gibbs, to discuss Plaintiff's potential position as CFO with Lumio. (*Id.*, ¶32.) On April 29, 2021, Plaintiff traveled to Lumio's headquarters in Lehi, Utah to discuss the position, and the parties continued negotiations after Plaintiff returned to California. (*Id.*, ¶33.) In May 2021, Plaintiff was hired as CFO for Smart Energy/SET, which eventually became Lumio. (*Id.*, ¶34.) Plaintiff signed his original employment agreement, while in California, on or around May 6, 2021. (*Id.*, ¶35.) Plaintiff was informed that SET was the hiring entity because Lumio, Inc. was not yet a going concern, and that Plaintiff would become Lumio's CFO once Lumio acquired SET's assets. (*Id.*, ¶36.) The employment agreement provided that Plaintiff's work site would be the company's offices in Utah, but Plaintiff worked remotely from California after he was hired and commuted back and forth between Utah and California until his family moved to Utah in July 2022. (*Id.*,

¶¶37, 38, 46.) Plaintiff thereafter worked full-time in Utah until he was terminated on August 25, 2022. (*Id.*, ¶42.)

In connection with Plaintiff's May 2021 employment agreement, Plaintiff also signed an agreement which included a non-compete provision. Both agreements contained a Utah choice of law and jurisdiction provision. (*Id.*, ¶¶68-70.)

During the second quarter of 2022, Lumio presented Plaintiff with an employment agreement to replace the May 2021 agreement, which was backdated to June 25, 2021, as well as an agreement that included a noncompete provision. The agreements contained a Utah choice of law and jurisdiction provision. (*Id.*, ¶¶75, 76, 79-81.) Before these were presented to Plaintiff, in March 2022, Defendant Travis Wilson ("Wilson") had filed a California Statement of Information naming himself as the CFO of Lumio HX, Inc. instead of Plaintiff, demonstrating that Defendants had already decided to terminate Plaintiff's employment at Lumio by that time. (*Id.*, ¶78.)

Under the 2022 employment agreement, Plaintiff was to be paid a base salary, bonus and equity grant which would vest over a three-year period. If Plaintiff was terminated without cause, his awards would be accelerated in full, but if he was terminated with cause within 12 months of "the Closing", he would forfeit his shares. (*Id.*, ¶¶83-85.) Plaintiff believed the Closing was May 6, 2021 and there would be little to no risk of forfeiture, and Defendants represented that the agreement was substantially without risk because Plaintiff was already within days of the 12 month post-hire period that would subject his equity to any risk of failure. (*Id.*, ¶¶86-89.)

In his 17-month tenure at Lumio, Plaintiff reported to Wilson that he believed the company was violating the law and local regulations regarding a number of issues including employee stock agreements, capitalization table management, Board of Director practices, employee contracts and compensation, licensure, bonds, insurance, and permits. (*Id.*, ¶95.) Defendants induced Plaintiff to move to Utah full time, which he did in July in reliance on repeated assurances that he was performing well and was part of Lumio's long term plans. (*Id.*, ¶¶101, 102.) However, Plaintiff's employment was terminated in August 2022, shortly after his family moved to Utah. Plaintiff was told he was being terminated for cause because he failed to reimburse the company for car lease payments and because of mistakes made in employee agreements. (*Id.*, ¶¶104, 105, 123, 125.) Defendants represented to Plaintiff that his vested shares were subject to forfeiture. (*Id.*, ¶¶90, 126.) Plaintiff believes that Defendant planned to push him out of his CFO role and cheat him out of his shares before they presented Plaintiff with the 2022 employment agreement and backdated it to June 25, 2021. He alleges that Wilson's filing of Lumio HX's California Statement of Information naming himself as CFO is evidence of this intent. (*Id.*, ¶127.)

Plaintiff's First Cause of Action seeks a declaration that the choice of law and noncompete provisions in the agreements are unenforceable and that Defendants were not entitled to claw back Plaintiff's vested stock. The Second Cause of Action for violation of Labor Code Section 970 alleges that Defendants persuaded Plaintiff to move from California through false representations regarding his work, and that Defendants at the time already knew or had constructive knowledge of the mistakes in the employment contracts which served as a basis for Plaintiff's termination. Further, the backdated 2022 agreement which included the equity forfeiture language was presented to Plaintiff without advising him that his job was at risk or that

he had engaged in any misconduct. The Third Cause of Action for fraud/concealment alleges that Defendants intentionally concealed material facts from Plaintiff when they presented him with the 2022 agreements. The Fourth Cause of Action for promissory fraud alleges that Defendants fraudulently induced Plaintiff to sign the 2022 agreement. The Fifth Cause of Action for fraud/misrepresentation alleges that Defendants misrepresented to Plaintiff that he was an employee in good standing at the time the 2022 agreement was presented to him, and that the agreement was in Plaintiff's interest. The Sixth Cause of Action alleges that Lumio breached the parties' employment agreement by wrongfully terminating Plaintiff for "cause" and clawing back his vested equity. The Seventh Cause of Action alleges breach of the implied covenant of good faith and fair dealing. The Eighth Cause of Action alleges that Defendants violated Labor Code Section 1102.5 by terminating Plaintiff and clawing back his equity interest after he made reports that Defendants were violating various laws and regulations. The Ninth Cause of Action alleges wrongful termination in violation of public policy. The Tenth Cause of Action alleges that Butterfield and Wilson interfered with Plaintiff's contract with Lumio when they colluded to deprive Plaintiff of his equity interest and have his employment terminated for false reasons.

Request for Judicial Notice

Plaintiff's request for judicial notice of the documents attached as Exhibits A-K to his request is granted. (Evid. Code §§ 452, 453.)

Evidentiary Objections

Plaintiff's Evidentiary Objections

Objection No. 6 is sustained as to the language "Because this amount exceeded the charge limit on Plaintiff's corporate credit card" (foundation). Objection No. 17 is sustained as to the language "Plaintiff monitored the terms of other employees' employment and would request incremental changes to his own employment agreement based on what he saw in other employees' agreements. As noted above, this resulted in numerous modifications to Plaintiff's employment agreement, ultimately culminating in the 2022 Agreement" (foundation). Objection No. 18 is sustained as to the language "he, among other things, publicly encouraged Lumio employees to 'poach' the sales and installation personnel of select competitors" (foundation/personal knowledge/speculation). Objection No. 20 is sustained (speculation). Objection No. 23 is sustained (personal knowledge/speculation/foundation). Objection No. 24 is sustained (foundation). Objection No. 28 is sustained (foundation). Objection No. 29 is sustained (foundation). Objection No. 30 is sustained (foundation). Objection No. 35 is sustained (foundation). Objection Nos. 1-5, 7-16, 19, 21, 22, 25-27, 31-34 and 36-48 are overruled. Objection Nos. 6, 17 and 18 are overruled as to language not specifically noted above.

Defendants' Evidentiary Objections

Defendants' Objection No. 1 is sustained (personal knowledge/foundation). Objection No. 2 is sustained (personal knowledge/foundation). Defendants' Objection Nos. 3 and 4 are overruled.

Motion to Dismiss for Forum Non Conveniens

I. Evidentiary Record Submitted with the Parties' Initial Submissions

A. Defendants' Corporate Structure and Background

SET, Inc. was formed in December 2020 for the purpose of acquiring and combining the assets of a number of regional solar companies. SET, Inc. was renamed Lumio, Inc. in June 2021. (Declaration of Travis Wilson ("Wilson Decl."), ¶5; Declaration of Gregory Butterfield ("Butterfield Decl."), ¶5.) From December 2020 to December 2021, Lumio, Inc. was focused primarily on preparing to acquire and combine the solar company assets. (Wilson Decl., ¶6; Butterfield Decl., ¶6.) Lumio, Inc. completed a financing transaction in December 2021 and acquired the assets of several companies including Defendants Smart Energy Today, Inc. ("Smart Energy") and Lift Energy Construction, Inc. ("Lift"). At the same time. Lumio, Inc. was reorganized into HX and Holdings. (Wilson Decl., ¶7; Butterfield Decl., ¶7.) Defendants' papers refer to these combined corporate entities as "Lumio". Since December 2021, Lumio's business has included selling and installing solar systems. Lumio's operations have been based out of its Lehi, Utah headquarters since SET, Inc was formed in December 2020. (Wilson Decl., ¶10; Butterfield Decl., ¶10.) Defendant Butterfield is Lumio's CEO and resides in Utah. (Butterfield Decl., ¶¶1, 4.) Defendant Wilson is Lumio's General Counsel and also resides in Utah. (Wilson Decl., ¶¶1, 4.)

B. The May 2021 Agreement

On September 10, 2020, Plaintiff emailed Butterfield regarding a possible job opportunity in the Salt Lake City area. (Butterfield Decl., ¶¶12, 13 and Exh. A.) Plaintiff stated among other things: "I would very much appreciate the opportunity to reconnect with you, share notes and understand from you how I might be able to learn more about promising software companies in the SLC area where there might be a need for a CFO with my background, experience and skill set. Having spent the entire 2002 winter olympics in Park City, I have always loved the area and relocating to the SLC area is something our family would be excited to pursue if I were able to identify the right opportunity." (Butterfield Decl., Exh. A.) The two exchanged several emails. Butterfield stated in an email to Plaintiff that he was rolling up six solar companies and needed a CFO located in Utah. (Butterfield Decl., ¶12 and Exh. A.) Butterfield introduced Plaintiff to his co-founder, Jonathan Gibbs, via email. (Butterfield Decl., Exh. A.) Plaintiff expressed his desire to Butterfield to move to and work in Utah. (Butterfield Decl., ¶13.)

On May 6, 2021, Plaintiff executed an employment agreement with SET, Inc. (the "May 2021 Agreement") pursuant to which Plaintiff would be employed as CFO of the company (Wilson Decl., ¶12; Butterfield Decl., ¶15; Complaint, Exh. A.) The May 2021 Agreement provided, among other things, that Plaintiff's "work location will be in the Company's offices in Utah" and that "[t]o support [Plaintiff's] relocation to Utah, the Company will reimburse [him] for household and family moving expenses up to $20,000". (Complaint, Exh. 1.) The agreement included a Utah choice of law and jurisdiction provision and incorporated a noncompete agreement. The agreement also set forth Plaintiff's base salary and bonus and equity compensation. (*Ibid.*) At this time, Plaintiff lived with his family in Belvedere, where he had lived for over 20 years. (Declaration of Wendell Laidley ("Laidley Decl."), ¶¶2, 10.) Plaintiff

identified his Belvedere home as his address on his W-4 at that time. (Declaration of Harper ("Harper Decl."), Exh. A.) Plaintiff was in California during discussions and negotiations leading up to his hire. (Laidley Decl., ¶11.)

Wilson states that when Plaintiff executed the May 2021 Agreement, Plaintiff told him he was being advised by counsel in negotiating the terms of the agreement. (Wilson Decl., ¶13.) Plaintiff states he was not advised by counsel at the time and denies telling Wilson or Butterfield he had an attorney representing him. (Laidley Decl., ¶12.)

C. The December 2021 Agreement

On December 15, 2021, in connection with the White Oak financing transaction, Defendants sent a letter to Plaintiff which stated that his "current employer Lumio, Inc. is now Lumio HX, Inc., a Delaware corporation" and which offered Plaintiff continued employment as CFO. The letter stated that it superseded any prior agreements and included a Utah choice of law and jurisdiction provision. Plaintiff signed and accepted the terms of the letter on December 21, 2021. Plaintiff also signed an agreement which included several restrictive covenants including a nonsolicitation provision. (Harper Decl., Exh. B; Butterfield Decl., ¶17.)

D. The 2022 Agreement

After SET, Inc. was renamed Lumio, Inc., Plaintiff executed a new employment agreement with Lumio, Inc. (Wilson Decl., ¶15; Butterfield Decl., ¶18.) Plaintiff alleges that he executed this agreement in the second quarter of 2022. This employment agreement (the "2022 Agreement") states that it was "made as of the 25 day of June 2021 (the 'Effective Date')", that Plaintiff would be employed as CFO of the company, and that Plaintiff's "operations shall stem from the Company's offices in Lehi, Utah." (Complaint, Exh. 3; Wilson Decl., ¶20; Butterfield Decl., ¶20.) The agreement also includes a Utah choice of law and jurisdiction provision which states: "This Agreement shall be governed and construed in accordance with the laws of the State of Utah excluding choice of law provisions. The parties hereby irrevocably and unconditionally agree to submit any legal action or proceeding relating to this Agreement to the exclusive general jurisdiction of the courts of the State of Utah located in Salt Lake County and the courts of the United States located in Utah and in any such action or proceeding, consent to jurisdiction in such court and waive any objection to the venue in such court."' The agreement sets forth Plaintiff's salary, bonus and equity compensation, and includes additional language stating in effect that Plaintiff's equity shares would be forfeited if he was terminated for cause within 12 months of the Closing.

Plaintiff also executed an agreement, with an effective date of June 25, 2021, which includes a one-year noncompete provision as well as a Utah choice of law and jurisdiction provision. (*Id.*)

Defendants state that most of the discussions between Plaintiff, Butterfield and Wilson regarding the 2022 Agreement were face-to-face in Lumio's Utah office. (Butterfield Decl., ¶19; Wilson Decl., ¶18.) Defendant Wilson states that during these negotiations, Plaintiff informed him that he was conferring with his attorney about various terms. (Wilson Decl., ¶19.) Plaintiff states he was not advised by counsel at the time and denies telling Wilson or Butterfield he had an attorney representing him. (Laidley Decl., ¶¶12, 19.)

E. Plaintiff's Location While Employed with Defendants

Plaintiff's W-4 dated May 6, 2021 shows Plaintiff's address at that time (May 2021) was in Belvedere. (Harper Decl., Exh. A.)

Defendants state that when Plaintiff was hired, they expected Plaintiff would be "in office" in Utah. (Wilson Decl., ¶29; Butterfield Decl., ¶28.) The rest of Plaintiff's team was mostly "in office" in Utah. (Wilson Decl., ¶30; Butterfield Decl., ¶29.) Plaintiff told Wilson he was moving to Utah. (Wilson Decl., ¶30.) Butterfield told Plaintiff he could take the time he needed to decide whether he wanted to move his family to Utah, and Butterfield and Gibbs agreed that Plaintiff could commute to Utah and live part time there, with Defendants paying for his commuting expenses. (Laidley Decl., ¶¶10, 19.)

Plaintiff had permanent office space in the Utah office and no Lumio office elsewhere. (Wilson Decl., ¶33; Butterfield Decl., ¶32.)

From May 2021 to December 2021, Plaintiff stayed at a hotel in Utah when he worked at the Utah office and would fly back to California on the weekends to visit family. (Wilson Decl., ¶¶34, 35; Butterfield Decl., ¶¶33, 34; Laidley Decl., ¶¶13-15.) Beginning around December 2021, Plaintiff leased a home in Park City and lived there when working out of the Utah offices. (Wilson Decl., ¶38; Butterfield Decl., ¶38; Laidley Decl., ¶¶2, 27.) Plaintiff kept his Belvedere home at this time and continued to travel back to California on occasion. (Laidley Decl., ¶¶2, 13-15, 27.) Plaintiff conducted some work from California. (*Id.*, ¶¶15, 16.)

The offer letter sent to Plaintiff in December 2021 was addressed to Plaintiff's Park City address, and Plaintiff's onboarding documents in December 2021 identified the Park City address as Plaintiff's address. (Harper Decl., Exhs. B and C.)

In July 2022, Plaintiff's wife and children moved to the Park City home. (Wilson Decl., ¶40; Butterfield Decl., ¶40.) After the move, Plaintiff only maintained a home in Utah. (Laidley Decl., ¶2.) He continued to run a separate business located in Marin County throughout his employment with Defendants. (*Id.*, ¶3.)

On November 26, 2021, Plaintiff emailed individuals at Lumio stating that effective December 1, 2021, he was claiming Utah residency and asking that his address be updated to the Park City address. (Declaration of Gaige Rogers ("Rogers Decl."), Exhs. F, G.)

Plaintiff's W2s from Lumio HX, Inc. and SET, Inc. for 2021 show Plaintiff's address to be the Park City address. (Rogers Decl., Exhs. A-C.) Plaintiff's I9, dated December 22, 2021, also shows the Park City address. (Rogers Decl., Exhs. D, E.)

From approximately May 2021 through mid-December 2021, Plaintiff had California taxes withheld from his paychecks. (Laidley Decl., ¶¶17, 18 and Exh. A.)[1] Plaintiff's paychecks from December 2021 through September 2022 used Plaintiff's Utah address and show that Utah taxes were withheld. (Harper Decl., Exh. D.)

F. Plaintiff's Termination

Plaintiff's employment was terminated for cause in August 2022. (Wilson Decl., ¶¶55-60; Butterfield Decl., ¶¶51-56.) Defendants state that the reasons for Plaintiffs' termination included unauthorized personal expenditures and Plaintiff's unauthorized and unilateral amendment of employment and equity grant documents for a number of employees, including Plaintiff. (Wilson Decl., ¶¶44, 48, 49, 55-60; Butterfield Decl., ¶¶51-56; Declaration of Cal Taylor ("Taylor Decl."), ¶¶7-11.) Plaintiff disputes Defendants' claims of wrongdoing. (Laidley Decl., ¶¶20-23, 29.)

II. Supplemental Briefing

In its Order dated February 21, 2024, the Court granted Plaintiff's request to take jurisdictional discovery and Defendants' request to take discovery on the issue of whether Plaintiff was represented by counsel. The Court continued the hearing on this matter to allow the parties to conduct discovery on the specific issues of (1) where Plaintiff primarily resided and worked from May 1, 2021 to August 25, 2022; and (2) whether Plaintiff was individually represented by legal counsel in negotiating the terms of the December 2021 Agreement and the 2022 Agreement. The parties filed their supplemental pleadings on May 10, 2024.

The additional evidence submitted by the parties does not include any evidence that Plaintiff was represented by counsel during negotiations of the agreements. The only evidence before the Court on this point is Plaintiff's statement in his original declaration that he was not represented by counsel. Accordingly, the Court finds that the exception set forth in subsection (e) of Labor Code Section 925 does not apply.

A. Plaintiff's Additional Evidence

Plaintiff states that from December 1, 2021 to June 23, 2022, he spent 103 days in California and 90 days in Utah. (Supplemental Declaration of Wendell Laidley ("Supp. Laidley Decl."), ¶¶4, 11; Declaration of Monica Haman ("Haman Decl."), Exh. 1.) During this time, his family lived in the California home and his children attended school in California, and he continued to pay for utilities there. (Supp. Laidley Decl., ¶¶5, 6, 14.) Plaintiff continued to receive medical and dental care from his providers in California, maintained his gym membership in California, and his California address was the address listed on his financial accounts. (*Id.*, ¶¶12, 13, 15.) Government correspondence regarding his US citizenship was sent to the California address and he retained his California driver's license and telephone number. (*Id.*, ¶¶16-18.) His vehicles were still registered in California and he continued to operate a business in California. (*Id.*,

[1] Plaintiff's initial declaration on this point incorrectly stated that California taxes were withheld through mid-December 2021. The parties' supplemental submissions show that California taxes were withheld only through mid-November 2021, after which Utah taxes were withheld.

¶¶19, 20.) Plaintiff filed a change of address form, hired movers, and moved his family to Utah in June 2022. (*Id.*, ¶¶7-9, 21.)

B. Defendants' Additional Evidence

In their supplemental submission, Defendants submit Plaintiff's responses to their requests for admission and requests for production of documents. Plaintiff admits: (1) he stated in a letter to the Department of Homeland Security dated October 18, 2021 that "[f]or the last five months" he had been "working in Lehi, Utah"; (2) from May 2021 to October 2021, he worked from Utah and California; (3) all paychecks from SET Inc. and Lumio HX, Inc. withheld Utah state income tax; (4) beginning with the pay period November 16, 2021 to November 30, 2021, his paystubs from SET, Inc. were addressed to his Utah address and his SET, Inc. paychecks did not withhold any California state income tax; (5) beginning with the pay period December 12, 2021 to December 25, 2021, his paystubs from Lumio HX, Inc. were addressed to his Utah address; (6) none of his paychecks from Lumio HX, Inc. withheld any California state income tax; (7) the IRS Form W-4 he completed and signed on December 21, 2021 listed his Utah address; and (8) the USCIS Form I-9 he completed and signed on December 22, 2021 listed his Utah address. Plaintiff denied a number of requests, including requests relating to his application for a Utah driver's license, on the basis that he lacked sufficient information to respond.

Defendants highlight Plaintiff's response to Request for Admission No. 21, which states: "Admit that YOU primarily resided in Utah from December 1, 2021 to the present." After asserting some objections and stating his understanding of the words "primarily resided", Plaintiff responded: "Admit." Defendants contend that Plaintiff admits in this response that he primarily resided and worked in Utah during the relevant time frame, and this admission should be dispositive of this motion. The Court does not interpret the response so broadly. The time frame in the request is from December 1, 2021 to April 22, 2024, the date of Plaintiff's responses. It is possible that Plaintiff's admission was based at least in part on the undisputed fact that he has resided in Utah for much of this time frame, i.e., July 2022 through April 22, 2024.

Defendants also rely on the limited information Plaintiff provided in his requests for production of documents. In response to these requests, Plaintiff produced a document showing his flights between California and Utah. Defendants argue that this document shows that Plaintiff's travel was not "weekly" as Plaintiff contends; rather, it shows that by December 2021, any regular flights had ceased. In his responses to requests for redacted tax forms from years 2021 and 2022 (Request Nos. 1 and 2) and credit card statements from April 1, 2021 through August 31, 2022 (Request No. 9), Plaintiff stated that the tax forms "do not exist at this time" and that he "no longer had access to his prior credit card accounts". Defendants argue these responses suggest possible spoliation of evidence, as these would be recent tax forms and it appears Plaintiff may have terminated his previous credit cards to avoid producing statements showing activity in Utah.

III. Discussion

Forum non conveniens is an equitable doctrine under which a trial court has discretion to decline to exercise jurisdiction over a transitory cause of action that it believes may be more appropriately and justly tried elsewhere. (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.)

This principle is codified in Code of Civil Procedure Section 410.30(a) which provides: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

A. Plaintiff's Declaratory Relief Cause of Action

Plaintiff argues that because he asserts a cause of action for declaratory relief regarding the applicability of Labor Code Section 925, the applicability of this section can only be raised and decided by a properly noticed motion for summary judgment or summary adjudication. This is incorrect. As there is no question the employment agreements contain forum selection clauses and Section 925 may impact whether those clauses are enforceable, the applicability of Section 925 is properly addressed by way of Defendants' motion for forum non conveniens. Further, the Court has already granted Plaintiff's request to take jurisdictional discovery to present evidence he contends supports his position.

B. The Forum Selection Clause

A motion based on a forum selection clause is a special type of forum non conveniens motion. (*Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358.) A trial court's decision to enforce a forum selection clause is reviewed for abuse of discretion. (*Verdugo v. Alliantgoup, L.P.* (2015) 237 Cal.App.4th 141, 148; *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 9.)

California favors enforcement of a forum selection clause appearing in a contract entered into freely and voluntarily by parties negotiating at arm's length. (*America Online*, 90 Cal.App.4th at p. 11.) Where the forum selection clause is mandatory, the traditional forum non conveniens analysis does not apply. (*Intershop Communications v. Superior Court (2002) 104 Cal.App.4th 191, 1*98.) Instead, a mandatory forum selection clause is presumed valid and will be enforced unless enforcement of the clause would be unreasonable under the circumstances of the case. (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 496.) A forum selection clause is unreasonable if the forum selected would be "unavailable or unable to accomplish substantial justice" or if the selected forum does not have some rational basis in light of the facts underlying the transaction. (*Id.* at p. 494; *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1679.) In contrast to a motion on traditional grounds of forum non conveniens, the burden of proof is on the party challenging enforcement of the forum selection clause. (*Intershop, 104 Cal.App.4th* at p. 198.)

The forum selection clauses in both the December 2021 Agreement and the 2022 Agreement are mandatory, as neither contains permissible language and both use the term "exclusive" when referring to the jurisdiction of Utah courts. The December 2021 Agreement states: "This letter agreement will be governed by the laws of the State of Utah. All disputes between you and the Company hereunder will be heard exclusively in the courts in the State of Utah and you hereby submit to the jurisdiction of such courts with respect to ay such dispute." The 2022 Agreement states: "This Agreement shall be governed by and construed in accordance with the laws of the State of Utah. With respect to any claim or action arising under this Agreement each party to the Agreement hereby (a) irrevocably submits to the exclusive jurisdiction of the Courts of the State

of Utah . . . ." Plaintiff does not challenge the mandatory nature of the forum selection clauses here.

C. Labor Code Section 925

Plaintiff contends that the forum selection clause, even if mandatory, is void under Labor Code Section 925, which provides in part that "[a]n employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following: (1) Require the employee to adjudicate outside of California a claim arising in California. (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California." (Labor Code § 925(a).) Further, [a]ny provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute . . . ." (Labor Code § 925(b).) This section applies only where a plaintiff primarily worked and resided in California. (See *Bromlow v. D&M Carriers, LLC*, 438 F.Supp.3d 1021, 1030 (N.D. Cal. 2020) [declining to apply Section 925 where evidence showed the plaintiff primarily worked and resided outside of California].)

The parties have submitted evidence to support their respective positions as to whether Section 925 applies here, specifically, whether Plaintiff primarily resided and worked in California during the relevant time frame. The relevant time frame is the time when Plaintiff executed the December 2021 and/or 2022 Agreements, as these agreements contained integration clauses stating that they superseded the May 2021 Agreement.[2]

After reviewing the parties' initial and supplemental submissions, the Court finds that the evidence supports the conclusion that Plaintiff primarily resided in Utah at the time he signed the relevant agreements. Plaintiff leased property in Utah beginning on December 1, 2021. Plaintiff's W-4 in December 2021 used his Park City address, and his paychecks were addressed to that address and withheld Utah taxes. Plaintiff also used the Park City address in onboarding documents in December 2021. While Plaintiff shows that he essentially split his time between California and Utah from December 1, 2021 to June 23, 2022, that he continued to use some services in California and used his California address for limited purposes, and that he kept his California phone number and California driver's license for a period of time, this evidence is insufficient to overcome the evidence that he primarily resided and worked in Utah.[3] The Court also notes that Plaintiff's contention in his discovery responses that he could not access recent tax and credit card records which would provide additional information about his residency is somewhat concerning. These records are from recent years and would appear to be accessible to Plaintiff with some effort.

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[2] Plaintiff also alleges in paragraph 75 of his Complaint that the 2022 Agreement was to "replace" the May 2021 Agreement.

[3] The fact that Plaintiff paid utilities for the California house and maintained a vehicle there is not particularly strong evidence given the undisputed fact that his family remained in the house during this time.

Because the Court concludes that Plaintiff primarily resided and worked in Utah at during the relevant time period, Section 925 does not make the forum selection clause voidable. Accordingly, the Court will enforce the forum selection clause unless Plaintiff can establish that its enforcement would be unreasonable under the circumstances.

D. Whether Enforcement of the Forum Selection Clause Would be Unreasonable

Because the forum selection clause is mandatory, it is presumed valid and will be enforced unless Plaintiff can prove that enforcing the clause is unreasonable because Utah courts are "unavailable or unable to accomplish substantial justice". (*Smith, Valentino*, 17 Cal.3d at p. 494; *Cal-State*, 12 Cal.App.4th at p. 1679.) A forum selection clause may also be unreasonable if the chosen state does not have a rational basis for jurisdiction in light of the facts underlying the transaction. (*Verdugo, 237 Cal.App.4th at p. 147; Intershop, 104 Cal.App.4th at p. 199; America Online, 90 Cal.App.4th at p. 12 & fn. 5; Cal-State, 12 Cal.App.4th at pp. 1679, 1681-1682.)* "A clause is reasonable if it has a logical connection with at least one of the parties or their transaction." (*Korman v. Princess Cruise Lines, Ltd.* (2019) 32 Cal.App.5th 206, 216.) The plaintiff bears the burden of proving the clause is unreasonable. (*Id.* at p. 218.)

"[I]f there *is* a mandatory forum selection clause, the test is simply whether application of the clause is unfair or unreasonable, and the clause is usually given effect." (*Berg v. MTC Electronic Technologies* (1998) 61 Cal.App.4th 349, 358.) "This favorable treatment is attributed to our law's devotion to the concept of one's free right to contract, and flows from the important practical effect such contractual rights have on commerce generally." (*America Online*, 90 Cal.App.4th at p. 11.)

The forum selection clause here is not unreasonable. Plaintiff is a Utah resident who was hired to work in Utah at a Utah-based company after he expressed interest in relocating to Utah. There is a logical connection with at least one of the parties or their transaction, and a rational basis for jurisdiction in Utah in light of the facts underlying the transaction.

E. Traditional Forum Non Conveniens Analysis

Even if the Court found the forum selection clause void under Section 925, it would grant Defendants' motion under the traditional forum non conveniens analysis. In this analysis, courts apply a two-step process. (*Stangvik,* 54 Cal.3d at p. 751.) In the first step, the court determines whether the alternate forum is a suitable place for trial. (*Ibid.*) If it is, the court then decides whether the private and public interests, on balance, favor retaining the action in California. (*Ibid.*; see also *Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 473.) The court retains a "'flexible power' to consider and weigh all the factors." (*Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 198.) The moving party bears the burden of proof. (*Stangvik, 54 Cal.3d* at p. 751.)

Plaintiff cites to *Epicentrix, Inc. v. Superior Court* (2023) 95 Cal.App.5th 890 for the proposition that Utah is not a suitable forum because Utah does not provide the same rights as California. *Epicentrix* does not help Plaintiff. On an initial note, as Plaintiff notes, the California Supreme Court has granted review of that case, although it can still be cited as persuasive authority. More

importantly, however, Plaintiff does not show that he would be denied a right to jury trial in a Utah forum, as in *Epicentrix*.

Plaintiff also argues that there is no guaranty Utah courts will apply California law to the California-based claims (e.g. the Labor Code claims) and Utah does not have similar legal laws protecting the alleged wrongful conduct underlying these claims. These arguments do not support a finding that Utah is not a suitable forum. Plaintiff's suggestion that Utah courts may not apply California law to California-based claims is purely speculative. Further, "[t]he fact that California law would likely provide plaintiffs with certain advantages of procedural or substantive law cannot be considered as a factor in plaintiffs' favor . . . ." (*Stangvik*, 54 Cal.3d at p. 754.) "'That the law is less favorable to the plaintiffs in the alternative forum, or that recovery would be more difficult if not impossible, is irrelevant to the determination whether the forum is suitable unless 'the alternative forum provides no remedy at all.' And a forum provides 'no remedy at all' only in 'rare circumstances,' such as where the alternative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process law.'" (*Investors Equity Life Holding Co. v. Schmidt* (2011) 195 Cal.App.4th 1519, 1530 [citation omitted], see also *Boaz v. Boyle & Co.* (1995) 40 Cal.App.4th 700, 710–711 ["'a showing that recovery would be more difficult or even impossible in a foreign forum does not demonstrate that the alternative forum is inadequate'"] [citation omitted].)

The balance of private and public interest do not favor retaining this action in California. Plaintiff is a Utah resident, and was a Utah resident when he filed his Complaint. "While a resident plaintiff's choice of California as the forum state is afforded substantial weight, a nonresident plaintiff's choice is given less deference." (*Guimei v. General Electric Co.* (2009) 172 Cal.App.4th 689, 702.) "That deference is to be weighed and balanced by the trial court along with all the other pertinent factors, including the defendant's residence or principal place of business, and has no direct bearing on the moving defendant's burden of proof." (*National Football League v. Fireman's Fund Ins. Co.* (2013) 216 Cal.App.4th 902, 929.)

"The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation." (*Stangvik, 54 Cal.3d* at p. 751.)

As the parties are all located in Utah, most if not all of the witnesses are in Utah, and Plaintiff's employment files and records are in Utah, private interests weigh in favor of having this case adjudicated in Utah. Public interests weigh in favor of a Utah forum as well, as this case involves a dispute between a Utah company and a Utah resident. While the Court acknowledges that Plaintiff began communicating with Defendants while in California and commuted back and forth to California for a time while employed with Defendants, this does not tilt the balance of public and private factors in favor of adjudicating this dispute in California.

Accordingly, the Court grants Defendants' motion to dismiss.

Motion to Quash Service of Summons

In light of the Court's decision on the motion to dismiss, the Court does not address Defendant Butterfield and Wilson's motion to quash service of the summons.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for May, 2024 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/17/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2301488

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: DAVID LUNDIE vs. DEFENDANT: COUNTY OF MARIN	

NATURE OF PROCEEDINGS: 1) MOTION – OTHER: FOR IN CAMERA INSPECTION AND PRODUCTION OF INVESTIGATORY, ETC.
2) MOTION – COMPEL; DISCOVERY FACILITATOR PROGRAM

RULING

***Pitchess* Motion to for In Camera Inspection and Production of Investigatory Peace Officer Personnel Records**

By way of this motion, Plaintiff seeks inspection and production of six categories of documents.

Category 1 – Personnel Files of Comparators: Plaintiff has established a "plausible factual foundation" for how the records are material to the subject matter of this litigation with the exception of the records regarding performance after promotion. As to those records, Plaintiff has not established how the comparators' treatment following their promotion is material to how he allegedly has been and continues to be treated as a deputy sheriff.

As to Defendant's argument the materiality of "discipline or other derogatory information…from conduct that occurred a decade before he or she was promoted," this is a matter for the court to determine during its in camera review of the records. "In determining relevance, the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure… [f]acts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit." (Evid. Code, § 1045, subd. (b)(2).) Depending on the particular individual, information from 10 or more years prior to his or her promotion may in fact be relevant.

Pursuant to Penal Code section 832.5, subdivision (c), complaints found to be frivolous, unfounded or exonerated are "deemed personnel records for purposes of…Section 1043 of the Evidence Code." In this case, even if the complaints were not used for promotional purposes, they are relevant to show the Department investigated and resolved complaints against the comparators compared to how they investigated and resolved complaints against Plaintiff.

Category 2 – Records Pertaining to Comparators' Applications for Promotion: Defendant offers no argument in opposition to this category.

Category 3 – Records and/or Information re Comparators' Accrued and Used Sick Leave: Plaintiff has established a "plausible factual foundation" for how the records are material to the subject matter of this litigation in that the records could support Plaintiff's claim that he was subjected to harsher treatment for taking sick leave than comparators who took the same amount of or more sick leave.

Category 4 – Records Relating to Complaints Regarding Decisionmakers and Alleged Bad Actors: Contrary to Defendant's argument, Plaintiff identifies the 22 individuals whose records he seeks. Plaintiff has established a "plausible factual foundation" for how the records are material to the subject matter of this litigation. In contrast to *People* v. *Collins* (2004) 115 Cal.App.4th 137, relied upon by Defendant, Plaintiff is seeking the records of the supervisors who engaged in the conduct alleged by Plaintiff. Since Plaintiff has made complaints against them, it is plausible that other employees have too.

Category 5 – Records Relating to Complaints Made by Plaintiff, Including Investigations: Defendant offers no argument in opposition to this category.

Category 6 – Records Relating to Complaints Made by Other County Employees: A motion brought pursuant to section 1043 must include "the peace or custodial officer whose records are sought…" (§ 1043, subd. (b)(1).) Plaintiff identifies no officer(s) whose records he seeks. While Plaintiff may be entitled to these records, which the court is not determining, this is not a proper request in a motion "for an order granting in camera inspection and production of investigatory and peace officer personnel records held by Defendant County of Marin pursuant to Penal Code section 832, *et seq.* and Evidence Code section 1043, *et seq.* …" (See Notice of Motion.)

The parties are ordered to appear to schedule a date and time for the in camera proceeding and to establish any needed terms and conditions.

Motion to Compel Further Responses from Defendant to Plaintiff's Request for Production of Documents, Set One, and Request for Sanctions

This motion was referred to the Discovery Facilitator Program and a facilitation session was held. The parties filed Declarations of Non-Resolution as required by Marin County Rule Civil, 2.13(H).

On May 13, a Stipulation and Order Regrading Discovery of Electronically Stored Information ("ESI") was filed.

Plaintiff seeks further production of documents in a number of categories.

Requests 19-20, 42-65, 67-68, and 79: Plaintiff states that the County has not produced any documents responsive to any of these requests. Defendant's evidence shows that its initial search for documents resulted in over 650,000 pages of responsive documents. (Berg Decl. ¶¶5-6.) Following the session with the Discovery Facilitator, Defendant conducted a new, more limited search. (Berg Decl. of Non-Resolution, ¶5.) Defendant estimates it will take 30 days to review and produce the documents. Plaintiff is ordered to produce the documents and any associated privilege log no later than June 21. Pursuant to the terms of the ESI Agreement, the parties shall then meet and confer as to additional searches to be conducted to obtain additional documents responsive to these requests. The court finds that it was not unreasonable for Defendant to try and work with Plaintiff's counsel to narrow the search rather than coming up with its own limited search terms and custodians.

Requests 73-76: Defendant claims that it has produced all responsive documents. Plaintiff states he has only received the County's Personnel-Management Regulations, MCSO's Policy Manual and various Collective Bargaining Agreements. These documents are not responsive to requests 74 and 75 and were not mentioned in Defendant's response to those requests. As to all of these requests, including requests 73 and 76, Defendant's response shows that there are further documents, as shown by Defendant's statement that it "will provide all relevant, non-privileged information in its possession, subject to an agreement between the parties regarding search terms and digital discovery." Pursuant to the terms of the ESI Agreement, the parties will shall meet and confer as to the appropriate searches to obtain the requested documents.

Requests 27 and 28: Defendant takes the position that a *Pitchess* motion is required to obtain the requested documents. Defendant has offered no argument as to why every document related to the investigation is a personnel record, nor has it cited any authority so showing. The Court agrees with Plaintiff that "it cannot be the case that [Ms. Fu's] entire investigation report and all materials prepared by her qualify as 'peace officer personnel records'..." Defendant shall produce within 10 days of the date of the hearing of this motion all documents that are not actually personnel records.

Request 40: Without addressing Plaintiff's "me-too" argument, the court finds that Plaintiff is entitled to the documents based upon Defendant's avoidable consequences defense. As explained in *State Dept. of Health Services* v. *Superior Court* (2003) 31 Cal.4th 1026:

> ...[T]he employer ordinarily should be prepared to show that it has adopted appropriate antiharassment policies and has communicated essential information about the policies and the implementing procedures to its employees. In a particular case, the trier of fact may appropriately consider whether the employer prohibited retaliation for reporting violations, whether the employer's reporting and enforcement procedures protect employee confidentiality to the extent practical, and whether the employer consistently and firmly enforced the policy. Evidence potentially relevant to the avoidable consequences defense includes anything tending to show that the employer took effective steps "to encourage victims to come forward with complaints of unwelcome sexual conduct and to respond effectively to their complaints." ... "If an employer has failed to investigate harassment complaints, or act on

> findings of harassment, or, worse still, has retaliated against complainants, future victims will have a strong argument that the policy and grievance procedure did not provide a 'reasonable avenue' for their complaints."

(*Id.* at 1045-1046, citations and brackets omitted.) The steps Defendant took or did not take to remedy other employees' complaints, regardless of what department they work(ed) in, is directly relevant to the defense. Pursuant to the terms of the ESI Agreement, the parties will shall meet and confer as to the appropriate searches to obtain the requested documents.

Plaintiff's request for sanctions is granted in the amount of $5,000. Although the Court has found that Defendant acted with substantial justification with respect to the first group of requests discussed above, it finds that the Defendant has not acted with substantial justification with respect to how it responded to and addressed the remainder of the requests.

The court finds that it is premature at this point to appoint a discovery referee given that the parties just finalized their ESI Agreement which requires them to meet and confer and in which they acknowledge that are "aware of the importance the Court places on cooperation" and they "commit to cooperation in good faith throughout the matter."

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 05/17/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV0001330

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: PATRICIA CORNELL vs. DEFENDANT: CYNTHIA TRUTNER, ET AL	

NATURE OF PROCEEDINGS: 1) MOTION – STRIKE
2) DEMURRER

RULING

The demurrer by defendants Cynthia Trutner, Bancroft & McCalister and Genevieve Moore ("Defendants") is sustained in its entirety with 30 days leave to amend. (Code Civ. Proc., § 430.10(e), (f).)

The motion to strike is moot.

Procedural Defect

The Court draws Defendants' attention to Local Rule 2.8(C)2, which requires attachment of the operative pleading as an exhibit to the demurrer.

Defendants also fail to file a separate notice of hearing on the demurrer and demurrer. At minimum, the papers filed in support of a demurrer must include:

> (a) the demurrer itself, (b) a notice of hearing on the demurrer, and (c) a memorandum in support of the demurrer. (C.R.C., Rule 3.1112(a).) Other papers, such as declarations, exhibits, appendices, or other pleadings, may also be filed. (C.R.C., Rule 3.1112(b).) These papers may be filed as separate documents or may be combined in one or more documents if the party filing a combined pleading specifies these items separately in the caption of the combined pleading. (C.R.C., Rule 3.1112(c).)

(5 Witkin, Cal. Procedure (6th ed. 2022) Pleading, §979.)

The caption of the Defendants' notice does not state that it is a notice of demurrer *and* demurrer. (See Cal. Rules of Court, rule 3.1112, subd. (c).) Notwithstanding this defect, the Court has addressed the merits asserted by Defendants below.

Inadequate Meet and Confer

Defendants have failed to adequately comply with Code of Civil Procedure sections 430.41 and 435.5. In particular, Code of Civil Procedure section 430.41 states, in pertinent part, that:

> (a) Before filing a demurrer pursuant to this chapter, the demurring party ***shall*** meet and confer ***in person*** or ***by telephone*** with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. . . .
> (3) The demurring party shall file and serve with the demurrer a declaration stating either of the following:
> (A) The means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer.
> (B) That the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith.

(Code of Civ. Proc., § 430.41 [emphasis added]; see also Code of Civ. Proc., § 435.5.)

The court finds the satisfaction of the pre-filing requirements inadequate given that the parties admittedly did not meet and confer by telephone or in person. (Declaration of Alan R. Jampol, ¶¶ 3-4.)

Notwithstanding the failure to strictly comply with the meet and confer requirements, the court's ruling is not based upon the same. (Code of Civ. Proc., §§ 430.41(a)(4) and 435.5(a)(4).)

Request for Judicial Notice

Defendants request the Court take judicial notice of the following documents filed in the action titled *In re the Patricia Cornell Trust Dated November 16, 1993, as Amended and Restated*, Marin County Superior Court, case number PRO2003455 ("Probate Action"): 1) Statement of Decision, file stamped March 16, 2022; 2) Judgment, file stamped March 16, 2022; and 3) Petition, file stamped December 29, 2020. Defendants Request for Judicial Notice of GRANTED. (Evid. Code, § 452, subd. (d).)

Allegations

This action concerns Plaintiff's mother's trust, The Patricia Cornell Trust Dated November 16, 1993, as Amended and Restated ("Trust"). Plaintiff alleges that she is a beneficiary under the Trust and her mother intended for Plaintiff to be able to reside in her home, 6 Madrona Street in San Rafael ("property"), after her death, even if the trustee elected to sell the property. Plaintiff alleges she suffered damages due to Defendants drafting of the trust, and has been locked out of the property and rendered homeless. Plaintiff alleges various violations of unspecified Probate Code sections in connection with the Probate Action. Plaintiff also alleges that she suffered trauma and sadness, lost disability benefits, lost money and seeks between $17 million and $40 million and punitive damages.

On November 3, 2023, Plaintiff filed her complaint. She has labeled the following fourteen (14) separate causes of action: 1) Legal Malpractice/Professional Negligence; 2) Violating Probate Codes; 3) Inconsistance [sic] in Accountings; 4) Conflict of Interest; 5) Damage to Ms. Cornell's Health; 6) Ms. Cornell's Loss of Home; 7) Loss of Disability Benefits; 8) Loss of Money; 9) Perjury; 10) Loss of Money; 11) Malpractice and Professional Negligence; 12) Malpractice and Professional Negligence; 13) Not Being Loyal to Settlor; and 17) [sic] Did Not Honor Subpoena to Appear at Trial Duces Tecum.

Currently before the Court is Defendants demurrer to the entire complaint on the ground it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10, subds. (e), (f).) Defendants have also filed a motion to strike the entire complaint on the ground it fails to comply with California Rules of Court, rules 2.104, 2.105, 2.108, 2.110 and 2.112.

Demurrer

The function of a demurrer is to test the legal sufficiency of the challenged pleading. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) As a general rule, in testing a pleading against a demurrer, the facts alleged in the pleading are deemed to be true, however improbable they may be. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) The court gives the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. *(Moore v. Regents of Univ. of Calif.* (1990) 51 Cal.3d 120, 125.)

In a demurrer proceeding, the defects must be apparent on the face of the pleading or via proper judicial notice. (*Donabedian v. Mercury Ins.* Co. (2004) 116 Cal.App.4th 968, 994.) The face of the complaint includes matters shown in exhibits attached to the complaint and incorporated by reference. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) "The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.)

A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 317.) "Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Sup. Ct.* (1995) 37 Cal.App.4th 1217, 1227; *Stevens v. Sup. Ct.* (1999) 75 Cal.App.4th 594, 601.)

Uncertainty

A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616; *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.) Moreover, a demurrer for uncertainty may lie if the failure to label the parties and claims renders the complaint so confusing defendant cannot tell what he or she is supposed to respond to. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139 fn. 2.)

To the extent a pleading violates California Rules of Court, rule 2.112 by failing to explain the nature of the alleged cause of action, the trial court should provide an opportunity for the pleader to amend to correct this deficiency. (*A.J. Fistes Corp., supra*, 38 Cal.App.5th at 695–96.)

The Court agrees that the Complaint is uncertain and that this uncertainty makes it impossible for the Defendants to meaningfully respond to the pleading. The Court also acknowledges that the pleading does indeed fail to comply with California Rules of Court, rule 2.112, which only adds to its uncertainty.

Failure to State a Cause of Action

Moreover, to the extent Plaintiff's claim for negligence is best construed as a claim for legal malpractice, entirely devoid of allegations of fact to support any of the elements and appears to be time-barred. The elements of a cause of action for legal malpractice are: (1) an attorney-client relationship; (2) a negligent act or omission; (3) causation; and (4) damages. (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 152). A plaintiff must show that "but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244.) Moreover, legal malpractice actions must be commenced within one year of the plaintiff's discovery of facts constituting the wrongful act or omission or four years from the date of the wrongful act or omission, whichever occurs first. (Code Civ. Proc., § 340.6, subd. (a).)

Considering the above, the general and special demurrers are SUSTAINED. Although unclear at this stage, given that it is the first challenge to the pleading, Plaintiff is granted leave to amend.

Motion to Strike

Given the Court's ruling sustaining the general and special demurrers in their entirety. The motion to strike is moot.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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