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

## Department 20, Honorable Socrates Peter Manoukian, Presiding

**Courtroom Clerk: Hientrang Tranthien**

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2320

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**"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life." —Common Wisdom.**

**As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)**

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**PLEASE NOTE THAT DEPARTMENT 20 USES A TENTATIVE RULING PROCEDURE AS FOLLOWS:**

Law & Motion matters are heard every Tuesday and Thursday at 9:00 a.m. Tentative rulings will be accessible on after 2:00 p.m. on the court date preceding the scheduled hearing at:

**https: /wvvw.scscourt.org/online services/tentatives/tentative rulings_Dept20.shtml**

Tentative rulings will become Orders of the Court unless contested. See California Rules of Court, rules 3.1308(a)(l) and 3.1312.

To arrange an appearance to contest a tentative ruling, notify the Court at Prince 408) 808.6856 before 4:00 PM on the court dates before the hearing. You may make your notification to the Court by leaving a message when prompted to do so at the end of the recorded greeting. When you leave your message, state only the case number, case name, the name of the attorney, telephone number, and a brief statement as to the portion of the tentative ruling to which objection is taken. Messages should be brief and notify the portion of the ruling to which objection is taken. Please try to keep the message under 30 seconds.

You must also notify opposing counsel. You do not need to call or leave a message if you are not contesting the tentative ruling.

## DATE: Tuesday, 11 May 2021

## TIME: 9:00 A.M.

**This Department prefers that litigants use Zoom for Law and Motion and for Case Management Calendars. CourtCall is also acceptable.**

Join Zoom Meeting

https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09

Meeting ID: 961 4442 7712

Password: 017350

Join by phone:

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All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." If your client is with you, please inform the Court how your client would prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers.

**VIRTUAL ACCESS INTO THE COURTHOUSE WITH THE "ZOOM" VIRTUAL PLATFORM.**
**PLEASE READ THIS PAGE IN ITS ENTIRETY AS SOME OF THE PROTOCOLS HAVE CHANGED.**

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.)

## SOCIAL DISTANCING PROTOCOLS

In light of COVID-19-related health concerns and due to the Order of the Public Health Department, Department 20 has resumed Law & Motion calendars but with safe-distancing protocols. Please check this tentative rulings page before making any appearance. Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

**Appearances**.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d).

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 7(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

**Entry into the Courthouse.**

As for matters which require personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. It will help if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party

If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

The Santa Clara County Superior Court has established listen-only telephone Lines to allow remote access to public court proceedings. To listen to a public court proceeding in Department 20, you may dial 888-251-2909. When prompted, enter the access code number 4362730 when prompted, followed by the pound or hashtag (#) sign.

**Court Reporters.**

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom.

Counsel should meet and confer on the use of a court reporter. Occasionally each side will retain a court reporter which leaves this Court in a conundrum as to which reporter will be the official reporter for the purposes of the hearing.

**Protocols during the Hearings.**

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds will be of great assistance to minimize feedback.

If you appear in person, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. ***California Rules of Court***, rule 3.1304(c).

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

**Troubleshooting Tentative Rulings.**

If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

**Tentative Rulings Are Continued Below. Full Orders Are On The Following Pages.**

| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 18CV327605 | Georgina Mendoza v. Doe 3, Owner, et al. | Plaintiff's request for judicial notice is GRANTED.<br>The demurrer to the TAC on the grounds of uncertainty and Plaintiff lacks capacity to sue is OVERRULED.<br>The demurrer to the first, second, third, fourth, fifth, sixth, and seventh causes of action in the TAC is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.<br>SEE ATTACHED TENTATIVE RULING. |
| LINE 2 | 18CV334214 | Bryant Park Plaza, Inc., v. Lyncon Construction, Inc. | Motion of Defendant Valley Forge Insurance Company for judgment on the pleadings on the first amended complaint. The motion seems to have been brought on the plaintiff's third cause of action. The motion is not opposed.<br>Moving Party contends that plaintiff's Complaint against Valley Forge Improperly Attempts to transform third-party liability coverage into first-party property coverage and that the third cause of action is fatally uncertain.<br>On 25 March 2021 plaintiffs dismissed the third cause of action against defendant Valley Forge Insurance Company.<br>Is the motion MOOT? The parties are invited to use the tentative ruling protocol if they wish to advise the Court at the matter is moot or they wish to appear on the merits. |
| LINE 3 | 20CV369308 | Veronica, Wu et al. v. China Science & Merchants Investment etc. | The demurrer to the first and second causes of action on the ground of uncertainty is OVERRULED.<br>The demurrer to the first, second, third, and fourth causes of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.<br>The demurrer to the fifth, sixth, seventh, and eighth causes of action on the ground that they fail to state a valid claim is OVERRULED.<br>The motion to quash service of process on behalf of defendant CSC Group is DENIED.<br>The motion to quash service of process on behalf of thirteen defendants is DENIED.<br>SEE ATTACHED TENTATIVE RULING. |
| LINE 4 | 20CV369308 | Veronica, Wu et al. v. China Science & Merchants Investment etc. | SEE LINE #4. |
| LINE 5 | 20CV369308 | Veronica, Wu et al. v. China Science & Merchants Investment etc. | SEE LINE #4. |
| LINE 6 | 18CV334547 | Jonathan Del Arroz v. San Francisco Science Fiction Conventions, Inc., et al. v. Alexander Villalobos, Jr. | Defendant SFSFC's motion for summary judgment is DENIED.<br>SEE ATTACHED TENTATIVE RULING. |

| LINE # | CASE # | CASE TITLE | RULING |
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| LINE 7 | 20CV373485 | Hunter Bouchard v. Doe Defendants 1-10 | The application of plaintiff for early discovery and related order is GRANTED.<br>Plaintiff has attempted to notify the anonymous defendant of the request. He has also made a prima facie showing of a claim for defamation and perhaps other intentional torts. (***Krinsky v. Doe 6*** (2008) 159 Cal.App.4th 1154 at 1171-72; ***see also ZL Technologies, Inc. v. Doe*** (2017) 13 Cal.App.5th 603, 612-617; ***Glassdoor, Inc. v. Superior Court*** (2017) 9 Cal.App.5th 623, 634-635.<br>This Court is prepared to sign the order submitted by plaintiff |
| LINE 8 | 20CV364411 | Portfolio Recovery Associates, LLC v. Clement Cano | The motion of plaintiff to deem the requests for admissions to be admitted is GRANTED.<br>SEE ATTACHED TENTATIVE RULING. |
| LINE 9 | 17CV306134 | Carlos De Leon v. Dunn-Edwards Corporation et al. | NO TENTATIVE RULING.<br>The parties are to use the Tentative Ruling Protocol to advise this Court if they wish to appear and argue on the merits or submit the matter on the papers. |
| LINE 10 | 20CV362228 | Little Seahorses, LLC v. Ian Campbell, et al. | Motion Of Plaintiff Little Seahorses, LLC for default judgment. The motion is not opposed. The motion is GRANTED. Counsel for plaintiff to prepare the formal order. |
| LINE 11 | 20CV359408 | Anil Bhatnager v. City of Milpitas et al. | Motion of Defendant City of Milpitas to consolidate the sanction with action 20CV370265 is unopposed. The motion is not opposed. The motion is GRANTED. (Labor code, section 3853.) The matters will proceed under case numbers 20 CV 359408. Both matters will be set for a Case Management Conference on 20 September 2021 at 10:00 AM in Department 20. The Case Management Conference in action 20CV370265 currently set on 25 May 2021 at 10:00 AM in Department 20 is VACATED.<br>Counsel for moving party to prepare the formal order. |
| LINE 12 | 2010-1-CV-176281 | Woodside Park Homeowners Association of San José v. A. Rios | Motion of plaintiff/judgment creditor for post judgment attorney's fees.<br>The underlying action was an enforcement action pursuant to the HOA's CC&Rs brought by the HOA against the defendant, a property owner. The HOA claims $3,782.50 and costs in the amount of $492.95. No opposition to the motion was filed. As to the specific cost items disputed by any party seeking attorneys fees, it is this Court's obligation to review the supporting documents and the basis for plaintiffs' challenges. "T]rial courts have a duty to determine whether a cost is reasonable in need and amount. However, absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty. (***Ross v. Superior Court*** (1977) 19 Cal.3d 899, 913; ***Thon v. Thompson*** (1994) 29 Cal.App.4th 1546, 1548-1549.)<br>The claimed fees seem reasonable, necessary and not excessive. The request is GRANTED as prayed for. Counsel for the moving party to prepare the formal order.<br>SEE ATTACHED TENTATIVE RULING. |

| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 13 | 2013-1-CV-250320 | The Best Service Company, Inc. v. Alexander Villalobos, Jr. | Pursuant to ***Code of Civil Procedure***, § 703.0580(B), the claimant has the burden of tracing exempt funds. Here, the judgment debtor has not met this burden. The judgment debtor has not provided any reason as to why these funds should be exempt. There is no income and expense declaration filed. There is no explanation as to why these funds held by this Sheriff for the County of Los Angeles should not be provided to the creditor. The claim of exemption is DENIED.<br>Counsel for moving party to prepare an appropriate order for signature by this Court. |
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**Calendar Line 1**


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

## DEPARTMENT 20

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*(For Clerk's Use Only)*

**CASE NO.: 18CV327605** **Georgina Mendoza v. Defendant Doe One etc.**
**DATE: 11 May 2021** **TIME: 9:00 am** **LINE NUMBER: 1**

**This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 10 May 2021. Please specify the issue to be contested when calling the Court and Counsel.**

**Demurrer to the Third Amended Complaint by**
**Defendants MV Transportation Inc. and Valley Transit Authority.**

**I. Statement of Facts.**

Plaintiff Georgina Mendoza ("Plaintiff") filed this complaint on 3 May 2018.[1]

Plaintiff is an employee driver for defendant MV Transportation, Inc. ("MVT"). (Third Amended Complaint ["TAC"] at ¶¶ 10, 59.) Defendant Valley Transit Authority ("VTA") is a public entity and the registered owner, lessor, and bailor of uninsured leased vehicles to defendant MVT and other private entities. (Id. at ¶ 3.) Defendants VTA and MVT (collectively, "Defendants") entered into a lease-bailment agreement involving a fleet of uninsured vehicles to transport disabled patients in Santa Clara County under the ADA. (Id. at ¶ 11.) Defendant MVT leased these vehicles from VTA and thus maintained possession and actual control of the vehicles. (Id. at ¶ 4.)

On 6 May 2016, Plaintiff, while driving a 2010 Toyota Prius, suffered a violent rear-end crash resulting in severe and permanent injuries to her. (TAC at ¶¶ 9, 58.) Plaintiff alleges her injuries occurred during the course and scope of her employment with defendant MVT. (Id. at ¶¶ 10.) Plaintiff further alleges that her injuries and damages were proximately caused by Defendants' negligent failure to require and obtain uninsured motorist ("UM") coverage in its fleet of leased vehicles. (Ibid.) The driver who collided with Plaintiff has not yet been identified.

On 20 January 2021, Plaintiff filed the operative TAC against Defendants alleging causes of action for:

(1) Negligent Failure to Provide UM Coverage [VTA's Negligent Failure to Require MVT to Obtain UM Coverage];

(2) Negligent Failure to Provide UM Coverage [MVT's Negligent Failure to Procure UM Coverage];

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Ca. St. Civil Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

(3) VTA and MVT's Negligent Failure to Provide UM Coverage Under Lease/Bailment/Fiduciary Relationship, and Breach of Fiduciary Duty;

(4) Negligent Entrustment of Uninsured Vehicle by VTA Registered Owner to MVT Administrator/Operator of Vehicle;

(5) VTA's Permissive Use of Uninsured Vehicle to MVT Administrator/Operator of Vehicle

(6) Vicarious Liability of VTA Registered Owner for Acts of MVT Agent, Administrator/Operator of Vehicle;

(7) Motor Vehicle.

Currently before the court is Defendants' demurrer to the TAC. Plaintiff filed written opposition and a request for judicial notice. Defendants filed reply papers.

A trial setting conference is also set for 11 May 2021.

## II. Defendants' Demurrer.

### A. Demurrers in General.

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See ***Williams v. Beechnut Nutrition Corp.*** (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (***Code of Civil Procedure***, § 430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (***Ankeny v. Lockheed Missiles and Space Co.*** (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (***Yolo County Dept. of Social Services v. Municipal Court*** (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (***Committee on Children's Television, Inc. v. General Foods Corp.*** (1983) 35 Cal.3d 197, 213.) "It 'admits the truth of all material factual allegations in the complaint . . .; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (***Id.*** at pp. 213-214; see ***Cook v. De La Guerra*** (1864) 24 Cal. 237, 239: "[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.")

### B. "Meet & Confer."

In opposition, Plaintiff argues Defendants did not meet and confer on issues regarding the demurrer before filing the motion.

Before filing a demurrer, a demurring party must "meet and confer in person or by telephone" with the opposing party to determine "whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (***Code of Civil Procedure***, § 430.41, subd. (a).) This conference should occur at least five days before the deadline to file. (***Code of Civil Procedure***, § 430.41, subd. (a)(2).)

When filing the demurrer, the demurring party must include a declaration stating either "the means by which the demurring party met and conferred with [the other party] and that the party did not reach an agreement resolving the objections raised in the demurrer" or "[the other party] failed to respond to the meet and confer request of the demurring party or otherwise failed to meet in good faith." (**Code of Civil Procedure**, § 430.41, subd. (a)(3).) A court's determination that the meet and confer process was insufficient is not a ground to sustain or overrule a demurrer. (***Code of Civil Procedure***, § 430.41, subd. (a)(4).)

Here, defense counsel submits a declaration in support of the demurrer. While the declaration refers to the parties' meet and confer efforts with respect to the second amended complaint, counsel fails to address any such efforts prior to filing the demurrer to the operative TAC. Instead, the declaration states the parties were unable to reach an agreement to resolve objections raised in the demurrer. (See D'Argenio Decl. at ¶ 7.)

By this statement, the Court may infer that the parties met and conferred before filing the demurrer. The declaration refers also to an ex parte hearing on 16 March 2021 where both sides were present and defense counsel summarized arguments contained in the present demurrer. (Ibid.) Even so, the declaration is inadequate as it does not address the means by which the parties met and conferred as required by statute.

Nevertheless, because a deficient meet and confer process is not a ground to sustain or overrule a demurrer, the Court will consider the merits of the motion. Defense counsel is admonished to properly comply with court rules and procedures with respect to future filings.

**C. Request for Judicial Notice.**

In opposition, Plaintiff requests judicial notice of the following: (1) the California Supreme Court decision in ***Baugh v. Rogers*** (1944) 24 Cal.2d 200 (Ex. A); (2) California Vehicle Code sections 17150, 17151, 17152, 17153, and 17154 (Ex. B); and (3) Plaintiff's TAC (Ex. C.).

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (***Poseidon Development, Inc. v. Woodland Lane Estates, LLC*** (2007) 152 Cal.App.4th 1106, 1117.)

The court must take judicial notice of Exhibits A and B under Evidence Code section 451, subdivision (a) as they constitute decisional and statutory law in California. (See ***Black v. Dept. of Mental Health*** (2000) 83 Cal.App.4th 739, 745 [court must take judicial notice of the decisional and statutory law of California and the United States].) The court may take judicial notice of Exhibit C as the TAC constitutes a record of the superior court under Evidence Code section 452, subdivision (d). (See ***Stepan v. Garcia*** (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) Furthermore, the exhibits appear relevant to issues raised in opposition to the demurrer. (See ***Gbur v. Cohen*** (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Accordingly, the request for judicial notice is GRANTED.

**III. Analysis.**

**A. Grounds for Demurrer.**

Defendants demur to each cause of action in the TAC on the following grounds: (1) uncertainty; (2) lack of capacity to sue; and (3) failure to state a valid claim. (***Code of Civil Procedure***, § 430.10, subds. (b), (e), (f).)

**B. Uncertainty/Lack of Capacity to Sue.**

According to the Notice of Motion (and Amended Notice of Motion), Defendants demur to each cause of action in the TAC in part on the grounds of uncertainty and that Plaintiff does not have the legal capacity to sue. (***Code of Civil Procedure***, § 430.10, subds. (b), (f).)

The memorandum of points and authorities however do not address the demurrer on these grounds with legal arguments or citations to supporting authorities. (See ***Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.*** (2011) 197 Cal.App.4th 927, 934 [courts are not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide"]; see also ***Chavez v. Netflix, Inc.*** (2008) 162 Cal.App.4th 43, 52 [where appellant's motion was supported by deficient memorandum, trial court was justified in denying the motion on procedural grounds].)

Consequently, the demurrer to each cause of action on these grounds is OVERRULED.

**C. Failure to State a Cause of Action.**

1. <u>First, Second, and Third Causes of Action – Negligent Failure to Provide UM Coverage.</u>

The first, second, and third causes of action are claims sounding in negligent for Defendants' failure to provide UM Coverage.

To state a cause of action for negligence, a plaintiff must plead that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's injuries. (***Wiener v. Southcoast Childcare Centers, Inc.*** (2004) 32 Cal.4th 1138, 1145.

Defendants argue the first, second, and third causes of action are subject to demurrer as Plaintiff fails to allege the elements of duty and causation to support negligence.

*a. Duty.*

"As a general rule, each person has a duty to use ordinary care and 'is liable for injuries caused by his failure to exercise reasonable care in the circumstances…' [Citations.] Whether a given case falls within an exception to this general rule, or whether a duty of care exists in a given circumstance, 'is a question of law to be determined on a case-by-case basis.' [Citation.]" (***Parsons v. Crown Disposal Co.*** (1997) 15 Cal.4th 456, 472.)

"[A] demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff." (***Osornio v. Weingarten*** (2004) 124 Cal.App.4th 304, 316.)

"A duty may be contractual, statutory or common law." (***Krawitz v. Rusch*** (1989) 209 Cal.App.3d 957, 963.)

Plaintiff alleges defendant VTA had a duty to require defendant MVT to procure UM Coverage for the fleet of vehicles that VTA owned and leased to defendant MVT to provide paratransit taxi services to disabled patients in Santa Clara County under the ADA. (TAC at ¶ 20.)

Plaintiff also alleges defendant MVT had a duty to procure UM Coverage in the fleet of vehicles it leased from defendant VTA to provide paratransit taxi services to disabled patients in Santa Clara County under the ADA. (TAC at ¶ 26.)

Defendants persuasively argue there is no such duty alleged arising from a contract or by statutory law. Nor is there is a fiduciary duty as Plaintiff was not a third party beneficiary to any contract for paratransit services entered into between Defendants. Finally, with respect to the common law, Plaintiff in opposition argues a common law duty arises from Vehicle Code sections 17150-1754 (see RJN at Ex. B). This contention however is not persuasive as Plaintiff's duty allegations are not connected to any sections of the Vehicle Code. As a consequence, there is no duty alleged to support the negligence claims.

*b. Causation.*

Even if there is a duty, Defendants argue Plaintiff cannot establish the element of causation to support her negligence claims.

"In a negligence action the plaintiff must show the defendant's act or omission (breach of duty) was a cause of the plaintiff's injury. The element of causation generally consists of two components. The plaintiff must show (1) the defendant's act or omission was a cause in fact of the plaintiff's injury, and (2) the defendant should be held responsible for negligently causing the plaintiff's injury. The second component is a normative or evaluative one that asks whether the defendant should owe the plaintiff a legal duty of reasonable care under the circumstances of the case." (***Vasquez v. Residential Investments, Inc.*** (2004) 118 Cal.App.4th 269, 288.)

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

"In order for a plaintiff to satisfy the causation element of a negligence cause of action, he or she must show the defendant's act or omission was a substantial factor in bringing about the plaintiff's harm." (***Leyva v.***

***Garcia*** (2018) 20 Cal.App.5th 1095, 1104.) "In other words, [the] plaintiff must show some substantial link or nexus between omission and injury." (***Saelzler v. Advanced Group 400*** (2001) 25 Cal.4th 763, 778.)

Plaintiff alleges her injuries and damages were caused by Defendants' failure to provide UM Coverage. (TAC at ¶¶ 8, 10, 22, 29, 38.) But, as the moving papers point out, Plaintiff suffered injuries and damages as a result of her collision with the unidentified driver at the time of the incident. (Id. at ¶¶ 5, 9.) In other words, Defendants' alleged failure to provide UM Coverage had no causal connection to Plaintiff's injuries from the accident. Nor does the opposition provide any substantive argument addressing this point.

Accordingly, the demurrer to the first, second, and third causes of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim. (See ***City of Stockton v. Superior Court*** (2007) 42 Cal.4th 730, 747 [if the plaintiff has not had an opportunity to amend the pleading in response to a motion challenging the sufficiency of the allegations, leave to amend is liberally allowed as a matter of fairness].)

2. Fourth Cause of Action – Negligent Entrustment.

The fourth cause of action is a claim for negligent entrustment against defendant VTA.

The elements of a cause of action for negligent entrustment are: (1) the driver negligently operated a vehicle; (2) the defendant owned that vehicle; (3) the defendant knew, or should have known, the driver was unfit or incompetent for driving; (4) defendant permitted that driver to use the vehicle; and (5) a substantial factor in causing harm to the plaintiff was that unfitness or incompetence. (***Jeld-Wen, Inc. v. Super. Ct.*** (2005) 131 Cal.App.4th 53, 863-864.)

The negligent entrustment allegations are set forth in paragraph 42 of the TAC and provide:

> Plaintiff alleges that VTA, registered owner of the uninsured leased vehicles, placed and entrusted said vehicles without UM Coverage in the possession and control of MVT and VTA knew or should have known that MVT was an incompetent and unfit administrator , unfit to operate and manage said fleet of vehicles without procuring UM Coverage. Therefore, Plaintiff alleges defendant negligently entrusted said vehicles to defendant MVT and is liable for the resulting injury and damages sustained by Plaintiff by driving an uninsured vehicle without UM Coverage.

Defendants persuasively argue there is no claim stated for negligent entrustment as the negligent driver is the unidentified defendant who committed the collision, not Plaintiff. According to this pleading, neither defendant entrusted anything to the unknown third party driver. Plaintiff effectively concedes these points as she fails to address them in her opposition.

Consequently, the demurrer to the fourth cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

3. Fifth Cause of Action – Permissive Use of Uninsured Vehicle.

The fifth cause of action is a claim for permissive use of an uninsured vehicle.

"By statute, California has long provided for liability of the owner of a vehicle to third persons for damages sustained by them as the result of negligent operation of the owner's vehicle by a driver who has the owner's consent to drive." (***Hartford Acci & Indem. Co. v. Abdullah*** (1979) 94 Cal.App.3d 81, 87-88.)

***Vehicle Code***, § 17150 provides:

> "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."

"The legislative intent in enacting the statute imposing vicarious liability upon owners was to protect innocent third parties from careless use of automobiles in situations where it is impossible to collect damages from the negligent operator." (***Burton v. Gardner Motors, Inc.*** (1981) 117 Cal.App.3d 426, 430.)

The permissive use allegations are set forth in paragraph 47 of the TAC as follows:

> Plaintiff alleges that MVT was negligent in the administration and operation of said leased [vehicles] and negligently failed to procure UM Coverage. Further Plaintiff alleges that VTA was the registered owner of said vehicle at the time of the accident resulting in injury and damages to Plaintiff and VTA knew or should have known of MVT's negligent administration, operation of said vehicles by failing to procure UM Coverage for the safety of its employee-drivers and disabled passengers under the ADA.

Defendants persuasively argue there is no claim stated for permissive use as Plaintiff fails to allege she was the negligent driver. Stated another way, Plaintiff did not operate her vehicle, owned by Defendants, in a negligent or wrongful manner that caused her to suffer injuries. Again, Plaintiff appears to concede these points as she fails to address them in her opposition.

Accordingly, the demurrer to the fifth cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

4. Sixth Cause of Action – Vicarious Liability.

The sixth cause of action is a claim for vicarious liability.

Vicarious liability means the act or omission of one person is imputed by operation of law to another, without regard to fault. (***Chee v. Amanda Goldt Property Management*** (2006) 143 Cal.App.4th 1360, 1375.) "For example, vicarious liability for torts is imposed by operation of law upon employers for acts of their employees within the course and scope of employment, or upon principals for the acts of their agents." (***Ibid.***) "[W]here no underlying cause of action exists, no vicarious liability can exist either." (***Dyer v. Northbrook Property & Casualty Ins. Co.*** (1989) 210 Cal.App.3d 1540, 1553.)

The vicarious liability allegations are set forth in paragraph 53 of the TAC and provide:

> Plaintiff alleges that defendant VTA, registered owner of said uninsured vehicle, is vicariously liable for the negligent acts of MVT, VTA's agent, administrator, operator of the uninsured vehicle for failure to procure UM Coverage resulting in injuries and damages to Plaintiff.

Defendants argue there was no employer-employee relationship or agency relationship to support a claim for vicarious liability. Defendants also contend the unknown third party driver was not an employee or agent of Defendants. Plaintiff appears to concede these arguments as she fails to address them in opposition. Furthermore, there would seem to be no claim for vicarious liability as there is no negligence on the part of defendant MVT to provide UM Coverage for reasons stated above.

Consequently, the demurrer to the sixth cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

5. Seventh Cause of Action – Motor Vehicle.

The seventh cause of action is a claim for motor vehicle. This cause of action incorporates the prior allegations of the TAC which did not survive demurrer for reasons stated above.

Therefore, the demurrer to the seventh cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.[2]

## IV. Tentative Ruling.

The tentative ruling was duly posted.

## V. Case Management.

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[2] As the demurrer was sustained on these grounds, the court declines to address the argument based on the Worker's Compensation Exclusivity Rule.

The matter is also set for trial setting today. Given the ruling on today's demurrers, this Court is inclined to CONTINUE the Trial Setting Conference for four months.

**VI. Conclusion and Order.**

Plaintiff's request for judicial notice is GRANTED.

The demurrer to the TAC on the grounds of uncertainty and Plaintiff lacks capacity to sue is OVERRULED.

The demurrer to the first, second, third, fourth, fifth, sixth, and seventh causes of action in the TAC is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

_____ _____

**DATED:**

**HON. SOCRATES PETER MANOUKIAN**
***Judge of the Superior Court***
***County of Santa Clara***

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**Calendar Line 4**


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

**DEPARTMENT 20**

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*(For Clerk's Use Only)*

**CASE NO.: 20CV369308** **Veronica Wu et al. v. China Science & Merchants Investment etc.**
**DATE: 11 May 2021** **TIME: 9:00 am** **LINE NUMBERS: 3, 4, 5**

**This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 10 May 2021. Please specify the issue to be contested when calling the Court and Counsel.**

**Orders on:**

**(1) Demurrer to the First Amended Complaint by Defendant Hone Capital LLC;**

**(2) Motion to Quash Service of Process on Behalf of China Science & Merchants Investment Management Group Co., Ltd. by Defendant Hone Capital LLC; and**

**(3) Motion to Quash Service of Process on Thirteen Defendants by Defendant Hone Capital LLC.**

## I. Statement of Facts.

Plaintiffs Veronica Wu ("Wu") and Purvi Gandhi ("Gandhi") (collectively, "Plaintiffs") filed this complaint on 11 August 2020.[3]

Defendant China Science & Merchants Investment Management Group Co., Ltd. ("CSC Group") is a Chinese limited entity with its principal place of business in China. (First Amended Complaint ["FAC"] at ¶ 3.) Defendant CSC Group owns defendant Hone Capital LLC ("Hone Capital") through a subsidiary, and retains ultimate control, management, and discretion with respect to Hone Capital. (Ibid.) Hone Capital maintains its principal place of business in Palo Alto, California. (Id. at ¶ 4.) CSC Group is also the ultimate parent entity to the other entity defendants. (Id. at ¶ 3.)

Plaintiff Wu was employed by Hone Capital as the Managing Partner and plaintiff Gandhi as a partner and Chief Financial Officer. (FAC at ¶¶ 1-2.) Plaintiffs were jointly employed by defendant CSC Group. (Ibid.)

Defendant Li Li ("Li") was employed as the Co-President and Corporate Counsel to CSC Group. (FAC at ¶ 7.) She also represents herself as legal counsel for defendant Hone Capital. (Ibid.)

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[3] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Ca. St. Civil Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

Beginning in April 2015, it was CSC Group's desire to invest up to $1 billion in the U.S. venture capital industry. (FAC at ¶ 26.) Thus, plaintiff Wu relocated to the San Francisco Bay Area to launch CSC Group's U.S. business there. (Ibid.) In doing so, she set up an initial $100 million fund named CSC Upshot Ventures I, LP ("CSC Upshot") in which CSC Group would have a legal commitment to fund the full $100 million of its commitment. (Id. at ¶ 29.) As Co-President of CSC Group, plaintiff Wu was responsible for CSC Group's international business development and operations with a focus on Silicon Valley. (Id. at ¶ 33.)

Within nine months after arriving in the United States and setting up US operations, plaintiff Wu met plaintiff Gandhi and recruited her to join Hone Capital in April 2016. (FAC at ¶ 35.) During the course of their work, Plaintiffs developed strong partnerships with Silicon Valley insiders to gain privileged access to top-quality deals, including deals with renowned companies such as Guardant Health, Transferwise, and more. (Id. at ¶ 42.) Plaintiffs made CSC Group one of the most active investors in Silicon Valley. (Ibid.)

Despite Plaintiffs' success and contributions, the issue regarding incentive allocation to Plaintiffs for investments they made on behalf of CSC Group persisted. (FAC at ¶ 46.) And, despite continued assurances and promises to Plaintiffs, defendant CSC Group failed to set up the promised fund structure for investments made outside a singular, particular fund, the CSC Upshot Fund, and instead directed Plaintiffs to make direct investments on its behalf outside any fund structure. (Id. at ¶ 47.) Without a fund structure, Plaintiffs would not receive their bargained for carry as originally envisioned. (Ibid.)

To resolve the compensation issue stemming from CSC Group's failure to properly set up funds, the parties agreed to compensate Plaintiffs by August 2016 using the following incentive payment structure:

- 4% of the net profit stemming from direct investments, on a deal-by-deal basis;
- 40% of fund carry where CSC Group commits more than 50% of fund capital; and
- 50% of fund carry where CSC Group commits less than 50% of fund capital. (FAC at ¶ 49.)

This incentive payment agreement was memorialized in an 26 August 2016 writing (the "Agreement") and signed by defendant Xiangshuang Shan ("Shan"), Chairman/Co-President/CEO of CSC Group, on behalf of CSC Group. (FAC at ¶¶ 5, 50.) With an agreement in place, Plaintiffs worked tirelessly to make CSC Group's U.S. business and its entire investment portfolio a success, including the CSC Upshot Fund. (Id. at ¶ 52.)

Defendant CSC Group has repeatedly confirmed the existence and enforceability of the Agreement, both orally and in writing. (FAC at ¶ 92.)

Despite CSC Group's repeated assurances, designed to induce Plaintiffs into continuing to provide services and to manage CSC Group's investments, CSC Group never paid them their 4% net profit compensation. (FAC at ¶ 93.) Instead, CSC Group continued to falsely promise payment. (Ibid.) These alleged promises continued for four years as a ploy to keep Plaintiffs as managers of CSC Group's assets. (Ibid.)

Following many demands and refusals to pay, Plaintiffs retained counsel and demanded payment of all sums due under the contract and pursuant to California Labor Code and advised they would file suit if those sums were not paid. (FAC at ¶ 96.) Rather than paying the sums, defendants terminated plaintiff Wu's employment on 3 August 2020. (Ibid.)

Thereafter, defendant CSC Group falsely alleged, for the first time, that the parties had no agreement, that Plaintiffs had engaged in self-dealing, and apparently breached fiduciary duties to CSC Group. (FAC at ¶ 97.) As a consequence, plaintiff Gandhi resigned from CSC Group on 7 August 2020. (Ibid.)

On 29 October 2020, Plaintiffs filed the operative FAC against defendants alleging causes of action for:

(1) Fraud

(2) Breach of Contract

(3) Breach of Implied Covenant of Good Faith and Fair Dealing

(4) Common Count – Goods and Services Rendered/Quantum Meruit

(5) Failure to Pay Wages (Labor Code §§ 201-203, 218, et seq.)

(6) Retaliation in Violation of Labor Code § 1102.5

(7) Wrongful Termination in Violation of Public Policy

(8) Violation of Business and Professions Code § 17200, et seq.

Currently before the court are the following motions by defendant Hone Capital: (1) demurrer to the FAC; (2) motion to quash service of process on behalf defendant CSC Group; (3) motion to quash service of process on behalf of thirteen defendants. Plaintiffs filed written opposition to the demurrer and motion to quash service on behalf of defendant CSC Group. No opposition was filed to the motion to quash on behalf of the thirteen defendants.[4] Defendant Hone Capital filed reply papers.

A further case management conference is also set for 11 May 2021.

## II. Demurrer.

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See ***Williams v. Beechnut Nutrition Corp.*** (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (***Code of Civil Procedure***, § 430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (***Ankeny v. Lockheed Missiles and Space Co.*** (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (***Yolo County Dept. of Social Services v. Municipal Court*** (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (***Committee on Children's Television, Inc. v. General Foods Corp.*** (1983) 35 Cal.3d 197, 213.) "It 'admits the truth of all material factual allegations in the complaint . . .; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (***Id.*** at pp. 213-214; see ***Cook v. De La Guerra*** (1864) 24 Cal. 237, 239: "[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.")

## III. Analysis.

### D. Grounds for Demurrer.

Defendant Hone Capital demurs to the first and second causes of action on the ground of uncertainty. (**Code of Civil Procedure**, § 430.10, subd. (f).) Defendant Hone Capital demurs to the first through eighth causes of action on the ground that they fail to state a valid claim. (***Code of Civil Procedure***, § 430.10, subd. (e).)

### E. Uncertainty.

According to the Notice of Motion, defendant Hone Capital demurs to the first and second causes of action in part on the ground of uncertainty. The memorandum of points and authorities however do not address the demurrer for uncertainty with legal arguments or citations to supporting authorities. (See ***Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.*** (2011) 197 Cal.App.4th 927, 934 [courts are not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide"]; see also ***Chavez v. Netflix, Inc.*** (2008) 162 Cal.App.4th 43, 52 [where appellant's motion was supported by deficient memorandum, trial court was justified in denying the motion on procedural grounds].)

Consequently, the demurrer to the first and second causes of action on the ground of uncertainty is OVERRULED.

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[4] Defendant Hone Capital filed a notice of non-opposition on 4 May 2021.

**F. Failure to State a Cause of Action.**

6. First Cause of Action – Fraud.

"The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (***Robinson Helicopter Co., Inc. v. Dana Corp.*** (2004) 34 Cal.4th 979, 990.)

"Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (***West v. JPMorgan Chase Bank, N.A.*** (2013) 214 Cal.App.4th 780, 793 (***West***), citation and quotation marks omitted.)

Courts enforce the specificity requirement in consideration of its two purposes. (***West,*** *supra,* 214 Cal.App.4th at p. 793.) The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them. (***Ibid.***) The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud. (***Ibid.***)

Hone Capital argues the fraud claim has not been pled with specificity as there are no misrepresentations or false promises alleged by this defendant. The misrepresentations are contained in paragraph 100 of the FAC and alleged in general terms as to all defendants. Thus, it is not clear which misrepresentation, if any, was made by defendant Hone Capital. This is particularly troublesome in a case with approximately fourteen defendants comprising both individuals and corporate entities.

In opposition, Plaintiffs refer the court to alleged misrepresentations by defendant Li and argue such statements were made in her role as legal counsel for Hone Capital. But, the fraud claim does not indicate whether she made such misrepresentations on behalf of Hone Capital or in her role as Co-President and counsel for CSC Group. Thus, the fraud claim has not been pled with the required specificity.

Accordingly, the demurrer to the first cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim. (See ***City of Stockton v. Super. Ct.*** (2007) 42 Cal.4th 730, 747 [if the plaintiff has not had an opportunity to amend the pleading in response to a motion challenging the sufficiency of the allegations, leave to amend is liberally allowed as a matter of fairness].)

7. Second Cause of Action – Breach of Contract.

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

"If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (***Harris v. Rudin, Richman & Appel*** (1999) 74 Cal.App.4th 299, 307.)

Defendant Hone Capital argues the breach of contract claim is defective as Plaintiffs fail to allege the terms of the Agreement or attach a copy to the pleading. Plaintiffs concede as much in opposition but nevertheless urge the court to reject this argument as a plaintiff may plead the legal effect of the contract. (See ***Construction Protective Services, Inc. v. TIG Specialty Ins. Co.*** (2002) 29 Cal.4th 189, 198-199 ["In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language."].) "In order to plead a contract by its legal effect, plaintiff must 'allege the substance of its relevant terms. This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions.' [Citation.]" (***McKell v. Washington Mutual, Inc.*** (2006) 142 Cal.App.4th 1457, 1489.) While Plaintiffs refer to a correct statement of law, the opposition fails to articulate whether Plaintiffs have pled the legal effect of the Agreement to support the breach of contract claim. As a consequence, the demurrer is sustainable on this ground.

In addition, as the moving papers point out, there is no contract alleged between Plaintiffs and defendant Hone Capital. Rather, the alleged Agreement is between Plaintiffs and defendant Shan on behalf of CSC Group. (See FAC at ¶ 50.) In opposition, Plaintiffs argue they entered into the Agreement with defendants, including Hone Capital, citing paragraph 111 of the FAC. But, when a plaintiff alleges facts in general or conclusionary terms that are inconsistent with more specific allegations in the pleading, the specific allegations control. (***Gentry v. eBay, Inc.*** (2002) 99 Cal.App.4th 816, 827.)

Accordingly, the demurrer to the second cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

8. Third Cause of Action – Breach of the Implied Covenant of Good Faith and Fair Dealing.

As the court sustained the demurrer to the breach of contract claim, there is no underlying contract to support a cause of action for breach of the implied covenant of good faith and fair dealing. (See ***Racine & Laramie, Ltd. v. Department of Parks & Recreation*** (1992) 11 Cal.App.4th 1026, 1031 ["The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation."].)

Consequently, the demurrer to the third cause of action for breach of the implied covenant of good faith and fair dealing is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

9. Fourth Cause of Action – Common Count – Goods and Services Rendered/Quantum Meruit.

As the court sustained the demurrer to the breach of contract claim and the fourth cause of action for common counts is based on the same allegations, this claim also fails. (See ***McBride v. Boughton*** (2004) 123 Cal.App.4th 379, 394 ["When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable."].)

Accordingly, the demurrer to the fourth cause of action for common count is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

10. Fifth Cause of Action – Failure to Pay Wages.

The fifth cause of action is a claim for failure to pay wages under Labor Code sections 201-203 and 218. Defendant Hone Capital argues the claim fails as it is dependent on the parties' Agreement which did not survive demurrer in the prior causes of action. Defendant Hone Capital however fails to demonstrate that the existence of the parties' Agreement is a necessary element to state a claim for unpaid wages. Indeed, Plaintiffs allege they were employees of defendants, that they were owed carry and other payments, and defendants willfully failed to pay them wages that were due to them. (See FAC at ¶¶ 1, 2, 125-132.) Such allegations are sufficient to state a claim for unpaid wages and overcome a challenge on demurrer.

Accordingly, the demurrer to the fifth cause of action on the ground that it fails to state a claim is OVERRULED.

11. Sixth Cause of Action – Retaliation in Violation of ***Labor Code***, § 1102.5.

The sixth cause of action is a claim by plaintiff Wu against defendants CSC Group and Hone Capital for retaliation in violation of ***Labor Code***, § 1102.5.

***Labor Code***, § 1102.5 is a whistleblower statute, the purpose of which is to encourage workplace whistle-blowers to report unlawful acts without fearing retaliation. (***Soukup v. Law Offices of Herbert Hafif*** (2006) 39 Cal.4th 260, 287.) In order to establish a prima facie case of retaliation, a plaintiff must show that he or she engaged in protected activity, that he or she was thereafter subjected to an adverse employment action by the employer, and there was a causal link between the two. (***Id.*** at pp. 287-288.)

***Labor Code***, § 1102.5, subdivision (b) provides:

> "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or

noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties."

The sixth cause of action is based in part on defendants' alleged retaliation for plaintiff Wu reporting her employers' failure to pay her wages. (See FAC at ¶ 136.) Defendant Hone Capital argues there is no claim stated under subdivision (b) because (1) there is no claim for failure to pay wages; (2) no factual allegation to support the element of "disclosing information"; and (3) plaintiff Wu cannot have a retaliation claim against Hone Capital as she was the CEO of the company. As stated above, the court has overruled the demurrer with respect to the claim for failure to pay wages. As to the remaining arguments, the court does not find them to be persuasive or supported by citation to legal authorities.

Consequently, the demurrer to the sixth cause of action on the ground that it fails to state a claim is OVERRULED. Having overruled the demurrer on this ground, the court declines to address defendant Hone Capital's argument with respect to ***Labor Code***, § 1102.5, subdivision (c).

12. Seventh Cause of Action – Wrongful Termination in Violation of Public Policy.

The seventh cause of action is a claim by plaintiff Wu against defendants CSC Group and Hone Capital for wrongful termination in violation of public policy.

The elements of wrongful termination in violation of public policy are: (1) an employer-employee relationship; (2) a termination or other adverse employment action; (3) the termination violated a public policy; and (4) the termination caused the plaintiff's damages. (***Holmes v. General Dynamics Corp.*** (1993) 17 Cal.App.4th 1418, 1426, fn. 8 (***Holmes***).)

To recover in tort for wrongful discharge in violation of public policy, the plaintiff must show the policy at issue is substantial, fundamental, and grounded in a statutory or constitutional provision. (***Holmes,*** *supra,* 17 Cal.App.4th at p. 1426.)

Defendant Hone Capital argues there is no underlying public policy alleged to support a claim for wrongful termination. But, as stated above, the sixth cause of action for retaliation under Labor Code section 1102.5 has survived the pleading challenge on demurrer and thus provides a public policy in support of the wrongful termination claim.

Accordingly, the demurrer to the seventh cause of action on the ground that it fails to state a claim is OVERRULED.

13. Eighth Cause of Action – Violation of ***Business and Professions Code***, § 17200, et seq.

The eighth cause of action is brought pursuant to ***Business and Professions Code***, § 17200, commonly referred to as the unfair competition law ("UCL"). "The UCL does not proscribe specific acts, but broadly prohibits 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising....' (***Business & Professions Code***, § 17200.) 'The scope of the UCL is quite broad. [Citations.] Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition.' [Citation.]" (***Durell v. Sharp Healthcare*** (2010) 183 Cal.App.4th 1350, 1359.)

Defendant Hone Capital argues Plaintiffs fail to allege any unlawful, unfair or fraudulent conduct to support a claim under the UCL. As stated above, the fifth and sixth causes of action under the ***Labor Code*** for failure to pay wages and retaliation have survived the pleading challenge on demurrer. Those claims, incorporated into the eighth cause of action, are sufficient to support relief under the UCL.

Therefore, the demurrer to the eighth cause of action on the ground that it fails to state a claim is OVERRULED.

## IV. Hone Capital's Motion to Quash Service of Process on Behalf of CSC Group.

Defendant Hone Capital moves to quash service of process on behalf of defendant CSC Group as the purported service was invalid.

## V. Analysis.

### A. Legal Standard.

"Service of process is the means by which a court having jurisdiction over the subject matter asserts jurisdiction over the party and brings home to him reasonable notice of the action. [Citation.] It is an indispensable element of due process of law. [Citation.]" (***Kappel v. Bartlett*** (1988) 200 Cal.App.3d 1457, 1464.)

"A motion to quash service challenges only the lack of jurisdiction over the person and, when ruling on such a motion, the trial court is not permitted to determine the merits of the complaint." (***McClatchy v. Coblentz*** (2016) 247 Cal.App.4th 368, 375.)

"When a motion to quash is properly brought, the burden of proof is placed upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. [Citation.] This may be done through presentation of declarations, with opposing declarations received in response." (***Aquila, Inc. v. Superior Court*** (2007) 148 Cal.App.4th 556, 568.) Where there is a conflict in the declarations, resolution of the conflict by the trial court will not be disturbed on appeal where the ruling is supported by substantial evidence. (***Ibid.***)

A defendant may file a motion to quash service "on or before the last day of his or her time to plead or within any further time that court may for good cause allow" on the ground of "lack of jurisdiction of the court over him or her." (***Code of Civil Procedure*****,** § 418.10, subd. (a)(1).)

### B. Defendant Hone Capital is Not a Proper Party to Bring the Motion to Quash.

By this motion, defendant Hone Capital is attempting to quash service of process on behalf of another defendant, CSC Group. This is problematic as defendant Hone Capital, by filing a demurrer, has now made a general appearance in this action. (See ***Global Financial Distributors Inc. v. Superior Court*** (2019) 35 Cal.App.5th 179, 193 [filing a demurrer is a general appearance].)

To the extent that service on CSC Group was improper, it is up to that defendant to specially appear and contest the court's lack of personal jurisdiction by motion to quash. (See ***Sch. Dist. v. Superior Court*** (1997) and, 1131 ["When a nonresident defendant questions the trial court's in personam jurisdiction, the issue is tested by a special appearance in the form of a motion to quash service of summons."].)

No such motion has been filed by defendant CSC Group. Nor is the court persuaded by defendant Hone Capital's citation to a federal district case in its reply papers that it has standing to bring a motion to quash on behalf of another defendant. (See ***Qualified Patients Assn. v. City of Anaheim*** (2010) 187 Cal.App.4th 734, 764 [the decisions of lower federal courts are not binding precedent].)

Accordingly, the motion to quash service of summons on behalf of defendant CSC Group is DENIED. Having denied the motion on this ground, the court declines to address the merits.

## VI. Hone Capital's Motion to Quash Service of Process on Behalf of Thirteen Defendants.

Defendant Hone Capital also moves to quash service of process on behalf of thirteen individual and corporate defendants in the case as the purported service was invalid.

While the motion to quash is unopposed, the court notes that the proof of service submitted in support of the motion directs service to Plaintiffs' former counsel. According to court records, Plaintiffs obtained new counsel (separate counsel for each plaintiff) on 22 March 2021 and 24 March 2021. In fact, defendant Hone Capital's notice of non-opposition was served on new counsel. But, there is no showing that the original moving papers were served on Plaintiffs' new counsel.

Even if service was proper, this motion to quash suffers from the same defect as the other motion for reasons stated above.

Consequently, the motion to quash service of summons on behalf of thirteen defendants is DENIED.

**VII. Tentative Ruling.**

**VIII. Case Management.**

This Court will set a further case management conference for 16 November 2021 at 10:00 AM in this Department. The parties should meet and confer prior to the CMC and formulate a plan for ADR.

**IX. Conclusion and Order.**

The demurrer to the first and second causes of action on the ground of uncertainty is OVERRULED.

The demurrer to the first, second, third, and fourth causes of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

The demurrer to the fifth, sixth, seventh, and eighth causes of action on the ground that they fail to state a valid claim is OVERRULED.

The motion to quash service of process on behalf of defendant CSC Group is DENIED.

The motion to quash service of process on behalf of thirteen defendants is DENIED.

_____ _____

**DATED:**

**HON. SOCRATES PETER MANOUKIAN**
*Judge of the Superior Court*
*County of Santa Clara*

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**Calendar Line 6**

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

**DEPARTMENT 20**

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*(For Clerk's Use Only)*

**CASE NO.: 18CV334547 Jonathan Del Arroz v. San Francisco Science Fiction Conventions, Inc., et al.**
**DATE: 11 May 2021 TIME: 9:00 am LINE NUMBER: 6**

**This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 10 May 2021. Please specify the issue to be contested when calling the Court and Counsel.**

**Order on Defendant's Motion for Summary Judgment.**

## I. Statement of Facts.

Plaintiff Jonathan Del Arroz ("Plaintiff") is a professional science fiction writer who has written or edited several bestselling works of science fiction. (Complaint, ¶1.) As a professional science fiction writer, Plaintiff received income from name recognition obtained through self-promotion including, among other things, attending science fiction conventions. (Complaint, ¶4.) It has been tradition since approximately 1939 for there to be an annual "world science fiction" convention known as "WorldCon" in the science fiction community. (Complaint, ¶5.) The location of WorldCon changes from year to year. (*Id.*) Fans in the city where WorldCon is to be held traditionally form a business entity to organize WorldCon, sell tickets, and enter into contracts necessary for WorldCon to provide goods and services that fans expect. (*Id.*) WorldCon is the most prestigious science fiction convention because, among other reasons, awards for the year's best science fiction and fantasy writing, known as the "Hugo Awards," are given at WorldCon as selected by vote of the fans who buy tickets to WorldCon. (Complaint, ¶6.)

Defendant San Francisco Science Fictions Conventions, Inc. ("SFSFC") was selected to organize the 76th World Science Fiction Convention ("WorldCon76") which was to be held in San Jose in August 2018. (Complaint, ¶8.) Tickets to WorldCon76 were characterized as "memberships" by defendant SFSFC. (Complaint, ¶10.) For $230, defendant SFSFC sold an "Attending Membership" which entitled the member to admission and attendance at WorldCon76. (*Id.*) Defendant SFSFC also sold a "supporting membership" for $50 which included electronic copies of all publications, nomination and voting rights for the 2018 Hugo Awards, and voting rights in site selection for the 2020 World Science Fiction Convention and 2019 North American Science Fiction Convention. (*Id.*)

In 2017, Plaintiff purchased an attending membership to WorldCon76. (Complaint, ¶11.) On 2 January 2018, Plaintiff received an email from a WorldCon76 representative stating, "At this time we are converting your membership to WorldCon76 to a supporting membership as you will not be permitted to attend the convention. On your personal blog you have made it clear that you are both expecting and planning on engendering a hostile environment which we do not allow. If you are found on the premises of the convention center or any of the official convention hotels you will be removed. Your payment of $50 covers the cost of your supporting membership in its

entirety, and you have no balance owing. As a supporting member your nomination and voting rights for the Hugo Awards and site selection are maintained. If you prefer a full refund that can be arranged." (Complaint, ¶12.)

Plaintiff had stated that he expected to be harassed at the convention site based on his announced political views, namely that he is a Republican, a Trump supporter, and a believer in limited government, and that he intended to wear a body cam to document such harassment and protect himself from baseless charges that he had been the aggressor in such encounters. (Complaint, ¶13.)

Thereafter, defendant SFSFC's official and authorized social media posted on Facebook the following statement about the alleged reason that Plaintiff had been barred from WorldCon76: "Worldcon76 has chosen to reduce [Plaintiff's] membership from attending to supporting. He will not be allowed to attend the convention in person. [Plaintiff's] supporting membership preserves his rights to participate in the Hugo Awards nomination and voting process. He was informed of our decision-via email. We have taken this step because he has made it clear that he fully intends to break our code of conduct. We take that seriously. Worldcon76 strives to be an inclusive place in fandom, as difficult as that can be, and racist and bullying behavior is not acceptable at our WorldCon. This expulsion is one step toward eliminating such behavior and was not taken lightly. The senior staff and board are in agreement about the decision and it is final." (Complaint, ¶21.)

In February 2018, defendant SFSFC published a "Progress Report" to the public stating in relevant part: "Finally, you may have heard that we chose to bar someone from attending the convention based on their publicly posted plans to float our Code of Conduct and anti-harassment policies. This is true. We stand up for our principles – and for the right of all members to enjoy the convention - and our Code of Conduct reflects the core values of WorldCon76." (Complaint, ¶26.)

On 16 April 2018[5], Plaintiff filed a complaint in San Joaquin County Superior Court against defendant SFSFC and others asserting causes of action for:

(1) Violation of Civil Code Section 51 (Unruh Act)

(2) Violation of Civil Code Section 51.5

(3) Violation of Civil Code Section 51.7

(4) Violation of Civil Code Section 52.1

(5) Defamation [against SFSFC]

Pursuant to a stipulation and order filed 3 July 2018, Plaintiff's action was transferred to Santa Clara County Superior Court.

On 11 October 2018, defendant SFSFC filed a demurrer to the first four causes of action of Plaintiff's complaint.

On 9 November 2018, defendant SFSFC filed a special motion to strike (anti-SLAPP) the fifth cause of action of Plaintiff's complaint.

On 18 March 2019, the court (Hon. Pierce) sustained, without leave to amend, defendant SFSFC's demurrer to the first four causes of action of Plaintiff's complaint. On that same date, the court denied defendant SFSFC's special motion to strike the fifth cause of action of Plaintiff's complaint.

On 16 April 2019, defendant SFSFC filed an answer to Plaintiff's complaint.

On 19 February 2021, defendant SFSFC filed the motion now before the court, a motion for summary judgment of Plaintiff's sole remaining claim for defamation.

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[5] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).

## II. Standards for Summary Judgment Motions.

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

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (***Aguilar,*** *supra,* 25 Cal.4th at p. 850; see ***Evidence Code*****,** § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (***Aguilar,*** *supra,* at p. 851.) A defendant moving for summary judgment may satisfy its initial burden either by producing evidence of a complete defense or by showing the plaintiff's inability to establish a required element of the case. (***Code of Civil Procedure*****,** § 437c, subd. (p)(2); ***Aguilar,*** *supra,* at p. 853.)

If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (**Code of Civil Procedure,** § 437c, subd. (p)(2); see ***Aguilar,*** *supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (***Aguilar,*** *supra,* at p. 850, fn. omitted.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (***Id.*** at p. 856.)

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

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (***California Bank & Trust v. Lawlor*** (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

## III. Analysis.

### A. Defendant SFSFC's motion for summary judgment is DENIED.

Plaintiff's fifth cause of action is premised on defendant SFSFC's statement on social media banning Plaintiff from attending WorldCon76. (See Complaint, ¶¶21, 64, and 65.)

> Worldcon76 has chosen to reduce [Plaintiff's] membership from attending to supporting. He will not be allowed to attend the convention in person. [Plaintiff's] supporting membership preserves his rights to participate in the Hugo Awards nomination and voting process. He was informed of our decision-via email. We have taken this step because he has made it clear that he fully intends to break our code of conduct. We take that seriously. Worldcon76 strives to be an inclusive place in fandom, as difficult as that can be, and racist and bullying behavior is not acceptable at our WorldCon. This expulsion is one step toward eliminating such behavior and was not taken lightly. The senior staff and board are in agreement about the decision and it is final.

Plaintiff contends the statement was false in three ways: (1) Plaintiff never stated any intent to violate any code of conduct; (2) Plaintiff is not a racist; and (3) Plaintiff is not a bully.

"Defamation is effected by either of the following: (a) Libel; (b) Slander." (Civ. Code, §44.) "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, §45.) "A libel which is defamatory of the plaintiff

without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code." (Civ. Code, §45a.)

**1. Non-actionable opinion.**

In moving for summary judgment, defendant SFSFC argues initially that the purportedly defamatory statement(s) are non-actionable opinion. "In defining libel and slander, Civil Code sections 45 and 46 both refer to a 'false … publication….' This statutory definition can be meaningfully applied only to statements that are capable of being proved as false or true." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 444 – 445.) "A publication ' "must contain a false statement of fact" to give rise to liability for defamation.' [Citations omitted.] Even if they are objectively unjustified or made in bad faith, publications which are statements of opinion rather than fact cannot form the basis for a libel action." (*Campanelli v. Regents of the University of California* (1996) 44 Cal.App.4th 572, 578 (*Campanelli*).) "The critical determination of whether an allegedly defamatory statement constitutes fact or opinion is a question of law for the court…[but] [i]f the court concludes the statement could reasonably be construed as either fact or opinion, the issue should be resolved by a jury." (*Campanelli*, *supra*, 44 Cal.App.4th at p. 578; citations omitted.)

> In drawing the distinction between opinion and fact " 'California courts have developed a "totality of the circumstances" test ….' [Citation.] The court must put itself in the place of an ' " 'average reader' " ' and decide the ' " 'natural and probable effect' " ' of the statement. [Citations.] The words themselves must be examined to see if they have a defamatory meaning, or if the ' " 'sense and meaning … fairly presumed to have been conveyed to those who read it' " ' have a defamatory meaning. [Citations.] Statements ' "cautiously phrased in terms of apparency" ' are more likely to be opinions. [Citations.] [P] In addition to the language, the context of a statement must be examined. [Citation.] The court must 'look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.' [Citation.]" (*Hofmann Co. v. E.I. Du Pont de Nemours & Co.* (1988) 202 Cal. App. 3d 390, 398 [248 Cal. Rptr. 384].)

(*Id.*)

Both sides cite *Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248 (*Overhill*) to support their position on the issue of whether charging someone as being "racist" can be actionable defamation. In *Overhill*, former employees of plaintiff, a frozen food products manufacturer, and a community activist protested after the employees were terminated. The defendants "protest efforts included issuing a press release, carrying signs, and handing out leaflets, flyers, and handbills which stated, inter alia, that Overhill had used a 'supposed discrepancy' in Social Security numbers as a pretext for employment terminations which were both racist and a targeted attack on older and more senior employees." (*Overhill*, *supra*, 190 Cal.App.4th at pp. 1251-1252.) Defendants filed a special motion to strike which the trial court denied finding the claims arose out of protected conduct, but plaintiff Overhill had carried its burden of proving a probability of prevailing.

On appeal, defendants' primary contention was that none of their alleged statements were actionable as defamation because none declared or implied a provably false assertion of fact under the totality of the circumstances. The *Overhill* court rejected this argument and held, "the statements reflected in defendants' written press release, leaflets and flyers accused Overhill of more than harboring racist attitudes; they accused Overhill of engaging in a mass employment termination based upon racist and ageist motivations. Such a contention is clearly a 'provable fact'; indeed an employer's motivation for terminating employment is a fact plaintiffs attempt to prove routinely in wrongful termination cases." (*Id.* at p. 1252.)

The *Overhill* court explained:

> Statements of opinion which imply a false assertion of fact are actionable. (*Milkovich*, *supra*, 497 U.S. at pp. 18–19.) In *Milkovich* the United States Supreme Court rejected the respondents' argument that statements of opinion are never actionable, explaining: "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead[s] to the conclusion that

> Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact."
>
> …***the question is not strictly whether the published statement is fact or opinion. Rather, the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.***

(*Overhill*, *supra*, 190 Cal.App.4th at p. 1260; emphasis added. See also *Moyer v. Amador Valley J. Union High Sch. Dist.* (1990) 225 Cal.App.3d 720, 724.)

> The term "racist" is of course an exceptionally negative, insulting, and highly charged word—it is hard to imagine being called much worse. It is, however, also a word that lacks precise meaning, so its application to a particular situation or individual is problematic; …
>
> We agree that general statements charging a person with being racist, unfair, or unjust—without more—such as contained in the signs carried by protestors, constitute mere name calling and do not contain a provably false assertion of fact. Similarly, references to general discriminatory treatment, such as that contained in the handbill and flyer here, without more, do not constitute provably false assertions of fact. …
>
> However, defendants did not merely accuse Overhill of being "racist" in some abstract sense. The press release contains language which expressly accuses it of engaging in racist firings and declaims upon the disparate impact the firings have had on "immigrant women." Similarly, after discussing Overhill's termination of one-fourth of Overhill's workforce, the leaflets explicitly assert that the discrepancy in Social Security numbers was merely a "pretext" to eliminate certain workers, and refer to Overhill's conduct as "racist and discriminatory abuse against Latina women immigrants." Moreover, in almost every instance, defendants' characterization of Overhill as "racist" is supported by a specific reference to its decision to terminate the employment of a large group of Latino immigrant workers. The assertion of racism, when viewed in that specific factual context, is not merely a hyperbolic characterization of Overhill's black corporate heart—it represents an accusation of concrete, wrongful conduct.

(*Id.* at pp. 1261-1262.)

The court finds *Overhill* to be instructive.[6] In looking at the statement by defendant SFSFC at issue, it does not engage in baseless name-calling nor does it simply charge Plaintiff with being racist in some abstract sense. Instead, the average reader would understand Plaintiff has been banned from attendance at WorldCon76 "because [Plaintiff] has made it clear that he fully intends to break our code of conduct" by engaging in "racist and bullying behavior."

Like in *Overhill*, defendant SFSFC's statement accuses Plaintiff of engaging in some actual, concrete, wrongful conduct which led defendant SFSFC to believe Plaintiff would further engage in "racist and bullying behavior." Whether Plaintiff had done so in the past or was likely to do so in the future must be based on some factual underpinning. As explained in *Overhill*, "if those [underlying] facts are either incorrect or incomplete, or if [defendant's] assessment of them is erroneous, the statement may still imply a false assertion of fact." At the very least, this court is of the opinion that a reasonable fact finder could conclude defendant SFSFC's statement declares or implies a provably false assertion of fact.

**2. Privilege.**

As an alternative basis for summary judgment, defendant SFSFC contends its statement was privileged. "If the privilege arises, it is a complete defense." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723, fn. 7.) Defendant SFSFC relies on Civil Code section 47, subdivision (c) which states, in relevant part:

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[6] Defendant SFSFC's citation to *Kimura v. Superior Court* (1991) 281 Cal.Rptr. 691 is improper. California Rules of Court, rule 8.1115 precludes citation or reliance upon an unpublished decision. The request for judicial notice in support of defendant's motion for summary judgment, exhibits 1 – 12, is GRANTED. (Evid. Code, §452, subd. (d).)

> A privileged publication or broadcast is one made … In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

"This privilege protects good faith, well-intended communications serving significant interests." (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 493.)

Defendant SFSFC contends its statement was privileged because it was between "interested" parties with a mutual interest in the subject of WorldCon and for the safety of members/ attendees, in particular. Of relevance, defendant SFSFC proffers evidence that it received complaints from people in the science fiction community, including members who planned to attend WorldCon76, who had observed Plaintiff's behavior and were afraid of confronting such harassing and disruptive conduct at the convention.[7] Due to the ongoing controversy surrounding harassment in the science fiction community and the significant concerns raised by Plaintiff's activities, the Committee deemed it necessary to make a statement regarding its decision.[8]

In opposition, Plaintiff proffers evidence which raises a triable issue of material fact with regard to whether the privileged publication was made "to a person interested therein" and/or whether defendant SFSFC lost the privilege by abusing it in sending it to a much wider audience than "interested persons." Specifically, Plaintiff proffers evidence that WorldCon76's social media included a website and Facebook page.[9] The readers of WorldCon76's social media page included people [who] had never heard of [Plaintiff] or who had no concerns about [Plaintiff].[10]

"[T]he privilege … may be lost if the defendant abuses the privilege by excessive publication or the inclusion of immaterial matters which have no bearing upon the interest sought to be protected." (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 847.) "The question of whether a privileged occasion was abused is for the determination of the jury unless the facts permit but one conclusion." (*Frisk v. Merrihew* (1974) 42 Cal.App.3d 319, 326.)

**3. Public figure – actual malice.**

Defendant SFSFC continues with its motion for summary judgment by arguing that Plaintiff is a public figure or limited purpose public figure and, consequently, must establish actual malice in order to prevail on a claim for defamation.

> "If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence … , that the libelous statement was made with '"actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256 [208 Cal. Rptr. 137, 690 P.2d 610], citation omitted; accord, *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. 323, 344–345 [public figures may prevail in a libel action only if they prove that the defendant's defamatory statements were made with actual knowledge of falsehood or reckless disregard for the truth]; see *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84 [55 Cal. Rptr. 3d 600].) "The rationale for such differential treatment is, first, that the public figure has greater access to the media and

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[7] See Defendant's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Defendant's UMF"), Issue No. 2, Fact No. 38. To the extent the court relied on any evidence submitted by defendant SFSFC in ruling on this motion for summary judgment, Plaintiff's objection(s) thereto are OVERRULED. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

[8] See Defendant's UMF, Issue No. 2, Fact No. 40.

[9] See Plaintiff's Separate Statement of Disputed Material Facts, Fact No. 19.

[10] See Plaintiff's Separate Statement of Disputed Material Facts, Fact No. 20.

> therefore greater opportunity to rebut defamatory statements, and second, that those who have become public figures have done so voluntarily and therefore 'invite attention and comment.'" (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 398 [106 Cal. Rptr. 2d 126, 21 P.3d 797].)

(*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1260.)

"A threshold determination in a defamation action is whether the plaintiff is a 'public figure.' The courts have 'defined two classes of public figures. The first is the 'all purpose' public figure who has 'achiev[ed] such *pervasive fame or notoriety* that he becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who '*voluntarily injects himself* or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his [or her] reputation only to the extent that the allegedly defamatory communication relates to his [or her] role in a public controversy.'" (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 113-114, emphasis added, internal citations omitted.) Whether a plaintiff in a defamation action is a public figure is a question of law for the court. (*Reader's Digest*, *supra*, 37 Cal.3d at p. 252.)

Defendant SFSFC invites this court to apply the definition of a "general purpose public figure" used by the United States District Court in *Harris v. Tomczak* (E.D.Cal. 1982) 94 F.R.D. 687, 700-701 where the court wrote:

> it is this court's opinion that a general purpose public figure in the context of a defamation suit may be defined as a person whose name is immediately recognized by a large percentage of the relevant population, whose activities are followed by that group with interest, and whose opinions or conduct by virtue of these facts, can reasonably be expected to be known and considered by that group in the course of their own individual decision-making. The relevant population in considering the breadth of name recognition is to be measured by the audience reached by the alleged defamation. The fame or notoriety achieved by a public figure must have preexisted the allegedly defamatory statements which give rise to the litigation. This definition is to be strictly construed and doubts are to be resolved in favor of a person being either a limited purpose public figure or a private person.

This court declines to use a federal trial court's definition of a general purpose public figure. "A written trial court ruling has no precedential value." (*Santa Ana Hospital Med. Ctr. v. Belshe* (1997) 56 Cal.App.4th 819, 831.) The California Supreme Court has already defined an "all purpose public figure" as "one who has achieved such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." (*Reader's Digest*, *supra*, 37 Cal.3d at p. 253; punctuation omitted.) This court does not find Plaintiff to be an all purpose public figure on the evidence presented.[11]

> Characterizing a plaintiff as a limited purpose public figure requires the presence of certain elements. (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577 [27 Cal. Rptr. 3d 863] (*Ampex*).) First, there must be a public controversy about a topic that concerns a substantial number of people. In other words, the issue was publicly debated. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 25 [53 Cal. Rptr. 3d 752] (*Gilbert*).) Second, the plaintiff must have voluntarily acted to influence resolution of the issue of public interest. To satisfy this element, the plaintiff need only attempt to thrust himself or herself into the public eye. (*Ampex*, *supra*, 128 Cal.App.4th at p. 1577.) Once the plaintiff places himself or herself in the spotlight on a topic of public interest, his or her private words and acts relating to that topic become fair game. (*Gilbert*, *supra*, 147 Cal.App.4th at p. 25.) However, the alleged defamation must be germane to the plaintiff's participation in the public controversy. (*Ampex*, *supra*, 128 Cal.App.4th at p. 1577.)

(*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 484 (*Grenier*).)

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[11] See Defendant's UMF, Issue No. 3, Fact Nos. 41 – 47, 49 – 53, 55 – 61, and 65 – 69.

In *Grenier*, the adult stepson of plaintiff, a pastor of a nondenominational church, and another church attendee began making comments online characterizing plaintiff as abusive and of bad character. Plaintiff and his wife filed a defamation action against the defendants who responded by filing a special motion to strike. The trial court found the statements at issue to be a matter of public interest and subject to a special motion to strike, but determined plaintiffs had met their burden of demonstrating a probability of prevailing and, therefore, denied the special motion to strike. "The trial court further concluded that Bob was a 'limited purpose public figure' and thus, to prevail on their defamation claims, Bob and Gayle had to prove that Alex and Tim acted with malice." (*Grenier*, *supra*, 234 Cal.App.4th at p. 479.) The appellate court affirmed the trial court's denial of the special motion to strike, but on the issue of whether plaintiff pastor Bob was a limited purpose public figure, the *Grenier* court held the trial court erred.

> Bob characterizes the statements at issue as relating to allegations that he "abused his children, sexually molested his children, committed tax fraud, is a 'self-confessed' felony child abuser, and stole money from his church." Therefore, Bob argues, Alex and Tim were required to produce evidence that Bob affirmatively thrust himself into the public regarding the specific topics of child abuse, child molestation, tax evasion and stealing. According to Bob, he has not interjected himself into the public regarding any public controversy or dispute surrounding these topics or anything similar.
>
> Bob relies on the *Gallagher* court's discussion of membership in the clergy and public figure status. In *Gallagher*, a parish priest assisted an elderly member of the parish with her financial affairs and thereafter became the primary beneficiary and successor trustee of the parishioner's living trust. With respect to the controversy that arose from this situation, the court stated, "We have found no case which has held simply being a member of the clergy makes one an all-purpose public figure for purposes of a defamation action. We hold it does not." (*Gallagher*, *supra*, 123 Cal.App.4th at p. 1273.) The court noted that Gallagher was "no Jerry Falwell, Jesse Jackson, or Louis Farrakhan." (*Ibid*., fn. omitted.) There was no evidence that Gallagher had ever sought or received notoriety or public attention by reason of his position or achievements. (*Ibid*.) The court further concluded that Gallagher was not a limited purpose public figure because he did not thrust himself into the public controversy over who should be the successor trustee and beneficiary under the parishioner's trust. (*Ibid*.)
>
> Bob, however, unlike Father Gallagher, has sought public attention as a pastor. Through his book, his radio program and his Web site, Bob promotes himself both within and outside of California as a spiritual leader guiding others on Christian morals in accordance with the Scripture. He has also been active in promoting local and regional church activities.
>
> Nevertheless, although Bob thrust himself into the public eye as an expert on the Bible and its teachings, that alone did not cause him to become a limited purpose public figure in the context of this case. Bob's self-promotion as a spiritual leader guiding others on Christian morals did not open him up to public comment on private conduct that could be generally characterized as the antithesis of the morals he espouses, such as child abuse and theft. To hold that a member of the clergy can become a limited purpose public figure on any issue relating to morality simply because of his or her profession would be equivalent to holding that being a member of the clergy makes one an all-purpose public figure. Such an interpretation of the limited purpose public figure doctrine is too broad. Rather, *the plaintiff must have voluntarily acted to influence the resolution of a* ***discrete*** *public controversy*. The subject of morality is too general and amorphous to qualify as such a controversy. Bob did not thrust himself into a public controversy or dispute regarding child abuse, child molestation, tax evasion or theft. Accordingly, contrary to the trial court's finding, Bob is not a limited purpose public figure for purposes of his defamation claims.

(*Grenier*, *supra*, 234 Cal.App.4th at pp. 484-485.)

Without citation to any admissible evidence or even to its separate statement, defendant SFSFC contends there is an "ongoing controversy in the science fiction community regarding the political character of various works

of science fiction and the creators of those works." (See page 21, lines 8 – 10 of Defendants' MPA in Support of Motion for Summary Judgment.) Defendant SFSFC suggests Plaintiff injected himself into that particular controversy by offering evidence that: (1) In April 2017, [Plaintiff] published an article for The Federalist entitled "Forcing Political Correctness on Employees is Killing Marvel Comics," which made him somewhat of a cultural authority in the comic industry; (2) In September 2017, Plaintiff was interviewed by PJ Media, in relation to his April 2017 Federalist article. The interview was about industry professionals attempting to harm a conservative comic reviewer, Richard C. Meyer's, career by banning him from conventions[12]; and (3) Plaintiff has been interviewed by PJ Media multiple times. He has been interviewed by media channels "a lot." He solicits media channels to be interviewed.[13]

Based on this vague description and limited evidence[14], the court can, at best, discern the controversy to be one concerning the boycott and/or exclusion of individuals in the comic industry based on their political affiliation. "Once the plaintiff places himself or herself in the spotlight on a topic of public interest, his or her private words and acts ***relating to that topic*** become fair game. … the alleged defamation must be germane to the plaintiff's participation in the public controversy." (*Grenier*, *supra*, 234 Cal.App.4th at p. 484; emphasis added.)

The court is not persuaded that Plaintiff, by thrusting himself into the public eye with regard to a particular controversy (political boycott/ exclusion/ cancel culture), Plaintiff has become a limited purpose public figure with regard to the defamation at issue in this case. Defendant SFSFC apparently suggests that because Plaintiff is, in defendant SFSFC's assessment, a bad actor or behaves bad with regard to the topic of political boycott/ exclusion/ cancel culture and every topic he discusses, then his private words and acts are fair game in this case because the defamation relates to his bad acting/ bad behavior. If this were to be the case, then Plaintiff would essentially be an all purpose public figure and there would be no meaning to the term "limited purpose" and no need for there to be a nexus to a discrete matter of public controversy.

Defendant SFSFC has itself framed the public controversy as one concerning "the political character of various works of science fiction and the creators of those works." However, defendant has not sufficiently demonstrated that the alleged defamation is related/germane to this discrete matter of public controversy. Consequently, the court does not find Plaintiff to be a limited purpose public figure. The court need not determine whether Plaintiff can establish that defendant SFSFC made the subject statement with actual malice.

**4. Truth.**

"In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1382.) " 'California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citation.] 'Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citation.]" (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 154.)

As a separate basis for summary judgment, defendant SFSFC contends its statement about Plaintiff is true. As noted above, the gist of defendant SFSFC's statement is that Plaintiff has been banned from attendance at WorldCon76 "because [Plaintiff] has made it clear that he fully intends to break our code of conduct" by engaging in "racist and bullying behavior." Defendant SFSFC proffers evidence that its code of conduct prohibited harassing behavior and proffers evidence that Plaintiff had previously engaged in harassing behavior online and Plaintiff threatened to wear a body camera into a convention space to film anticipated "hijinx."[15]

While defendant SFSFC's argument and evidence addresses the charge that Plaintiff intended to engage in bullying behavior, defendant SFSFC does not address what the court considers to be the primary "sting" of the

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[12] The request for judicial notice in support of defendant's motion for summary judgment, exhibits 13, is GRANTED for its existence, not for the truth of any matters asserted therein. (Evid. Code, §452, subd. (h).)

[13] See Defendant's UMF, Issue No. 3, Fact Nos. 50, 52, and 55.

[14] Including reference to Defendants' UMF, Issue No. 3, Fact Nos. 48 – 55 and 70.

[15] See Defendant's UMF, Issue No. 5, Fact Nos. 10, 12, 28, 31, 33 – 37.

statement, i.e., that Plaintiff intended to engage in racist behavior. The court does not consider this to be a slight or minor inaccuracy which can be left unjustified.

Consequently, the court is of the opinion that defendant SFSFC has not met its burden of proving the truth, or substantial truth, of the alleged defamatory statement.

**5. Libel per se/ Libel per quod.**

> There are generally two types of libel recognized in California—libel per se and libel per quod. "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." (§ 45a; see also *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 547–548 [343 P.2d 36] (*MacLeod*).)
>
> The distinction has been described as follows: "If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then (under section 45a and the cases, such as *MacLeod*, which have construed it) there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then (under the same authorities) the libel cannot be libel per se but will be libel per quod." (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 386–387 [226 Cal. Rptr. 354] (*Barnes-Hind*).)

(*Bartholomew v. YouTube, LLC* (2017) 17 Cal.App.5th 1217, 1226-1227 [225 Cal.Rptr.3d 917].)

As a final basis for summary judgment, defendant SFSFC contends the purportedly defamatory statement is libel per quod and, therefore, Plaintiff must prove that he has suffered special damages which he cannot do. Defendant SFSFC cites two examples of libel per se (accusation of crime or being unfit to practice trade, business, or profession) and argues that since neither of those situations exist here, then the alleged defamatory statement must necessarily be libel per quod. The court does not agree with defendant SFSFC's logic. No extrinsic aid is necessary to perceive an accusation of being racist as tending to injure the subject's reputation.[16] Consequently, the court need not address whether Plaintiff can or cannot establish that he has suffered special damages.

For all the reasons stated above, defendant SFSFC's motion for summary judgment is DENIED.

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

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (***Aguilar,*** *supra,* 25 Cal.4th at p. 850; see ***Evidence Code*****,** § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (***Aguilar,*** *supra,* at p. 851.) A defendant moving for summary judgment may satisfy its initial burden either by producing evidence of a complete defense or by showing the plaintiff's inability to establish a required element of the case. (***Code of Civil Procedure*****,** § 437c, subd. (p)(2); ***Aguilar,*** *supra,* at p. 853.)

If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (**Code of Civil Procedure,** §

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[16] Plaintiff's request for judicial notice is DENIED as unnecessary. (See *Duarte v. Pacific Specialty Insurance Company* (2017) 13 Cal.App.5th 45, 51, fn. 6—denying request where judicial notice is not necessary, helpful or relevant.)

437c, subd. (p)(2); see ***Aguilar,*** *supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (***Aguilar,*** *supra,* at p. 850, fn. omitted.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (***Id.*** at p. 856.)

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

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (***California Bank & Trust v. Lawlor*** (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

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If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (**Code of Civil Procedure,** § 437c, subd. (p)(2); see ***Aguilar,*** *supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (***Aguilar,*** *supra,* at p. 850, fn. omitted.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (***Id.*** at p. 856.)

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## IV. Tentative Ruling.

The tentative ruling was duly posted.

## V. Case Management.

The matter is set for a mandatory settlement conference on 9 June 2021 and the four-day estimated jury trial on 14 June 2021. Should the parties contest the tentative ruling and wish to appear at the hearing, the Court would appreciate an update on the status of the matter and any settlement negotiations.

**VI. Order.**

Defendant SFSFC's motion for summary judgment is DENIED.

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| **DATED:** | **HON. SOCRATES PETER MANOUKIAN**<br>***Judge of the Superior Court***<br>***County of Santa Clara*** |

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**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**
**DEPARTMENT 20**

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*(For Clerk's Use Only)*

**CASE NO.: 20CV364411** **Portfolio Recovery Associates, LLC v. Clement Cano**
**DATE: 11 May 2021** **TIME: 9:00 am** **LINE NUMBER: 8**

**This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 10 May 2021. Please specify the issue to be contested when calling the Court and Counsel.**

**Order on Motion of Plaintiff to**
**Deem Requests for Admissions to be Admitted.**

**I. Statement of Facts.**

Plaintiff filed this complaint on 4 September 2020.[17]

Plaintiff is a limited liability company engaged in purchasing that's and is in compliance with ***Civil Code***, § 88 .50, et seq.

The complaint pleads causes of actions for Account Stated and Open Book Account. Plaintiff seeks to recover $5895.73.

Defendant *in propria persona* answered the complaint on 18 August 2020.

**II. Motion To Deem Requests for Admissions to be Admitted.**

On 14 September 2020, plaintiff served upon defendant its set of requests for admissions. Responses would have been due on or about 2 December 2020. On or about 3 December 2020, plaintiff sent a follow-up letter to defendant without result.

This current motion was filed on the 18 March 2021. No opposition papers have been filed.

Plaintiff submits this motion without an appearance.[18]

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[17] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Ca. St. Civil Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

[18] (***Rules of Court***, rule 3.1304(c): "A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless the court orders otherwise. The court must rule on the motion as if the

## III. Analysis.

### A. Service of Requests for Admissions.

The rules and procedures governing requests for admissions is set forth in ***Code of Civil Procedure***, § 2033.010 et seq. The primary purpose of RFAs is to set at rest triable issues so that they will not have to be tried, and the trial may be expedited. (***Orange County Water District. v. The Arnold Eng. Co.*** (2018) 31 Cal App.5th 96, 115). RFAs may be served at any time during the lawsuit with a few exceptions including: (1) the first 10 days after service of summons or defendant's appearance in the action (whichever is first); and (2) cutoff on discovery before trial (***Code of Civil Procedure***, § 2033.20). RFAs may be served on any other party to the action (***Code of Civil Procedure***, 2033.010). Instead of responding to the RFAs, the party whom was served may promptly move for a protective order (***Code of Civil Procedure***, § 2033.080).

### B. Responses to Requests for Admissions.

The time limit for responding to Requests for Admissions ("RFAs") is 30 days from the date the RFAs were served. (***Code of Civil Procedure***, § 2033.250). The Court has the power to extend or shorten the time allowed for response. *Id*. Additionally, the parties may agree to extend the time allowed to respond to some or all of the RFAs, but it must be confirmed in writing. (***Code of Civil Procedure***, § 2033.260.) The response to the RFAS must contain either an answer or an objection to the particular RFA (***Code of Civil Procedure***, § 2033.210(b).) If there is no objection to a particular RFA, the response must be one of the following: (1) an admission; (2) a denial; or (3) a statement claiming an inability to admit or deny. (***Code of Civil Procedure***, § 2033.220(b).)

### C. Waiver of Privilege if not Timely.

Failure to timely respond to RFAs results in a waiver of all objections to the requests, including claims of privilege or work product protection (***Code of Civil Procedure***, § 2033.280(a).) The court may relieve a party who fails to file a timely response before ordering the matters to be "deemed admitted" if the court finds: (1) the party failed to serve timely responses due to mistake, inadvertence or excusable neglect; and (2) the party has subsequently served a response with is substantially compliant. (***Code of Civil Procedure***, § 2033.280(a).)

Relief may even be granted by the court if no responses were served. (***Wilcox v. Birtwhistle*** (1999) 21 Cal.App.4th 973, 983). Once the court orders the RFAs "deemed admitted" the party in default may file a motion to withdraw the deemed admission (***Code of Civil Procedure***, § 2033.300).

### D. Motion to Deem RFAs to Be Admitted.

***Code of Civil Procedure***, § 2033.280(a) provides that if a party to whom requests for admissions have been directed fails to serve a timely response, that party thereby waives any objection to the requests, including one based on privilege or on the protection for work product under ***Code of Civil Procedure***, § 2018.010 et seq.

***Code of Civil Procedure***, § 2033.280(b) provides that the requesting party may move for an order that the truth of any facts specified in the requests be deemed admitted. The Court shall make this order unless it finds that the party to whom the requests for admission have been direct and has served, before the hearing on the motion, a proposed response to the request for admissions that is in substantial compliance with ***Code of Civil Procedure***, §§ Sections 2033.210, 2033.220, and 2033.230. (***Code of Civil Procedure***, § 2033.280(c).)

Failing to timely respond to RFAs does not result in automatic admissions. The propounder of the RFAs must move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted. (***Code of Civil Procedure***, § 2033.280(b).) There is no time limit on a motion to

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party had appeared. . . . ."; ***Code of Civil Procedure***, § 1005.5: "A motion upon all the grounds stated in the written notice thereof is deemed to have been made and to be pending before the court for all purposes, upon the due service and filing of the notice of motion, but this shall not deprive a party of a hearing of the motion to which he is otherwise entitled."); ***Ensher v. Ensher*** (1964) 225 Cal.App.2d 318, 325-326; see ***Cromwell v. Cummings*** (1998) 65 Cal.App.4th Supp. 10, 13.)

have matters deemed admitted, however if the motion is delayed too long, the responding party may object or seek a protective order. (***Brigante v. Huang*** (1993) 20 Cal.App.4th 1569, 1584).

There are no specific timing restrictions in ***Code of Civil Procedure***, § 2033.280(b) for the bringing of a motion deeming matters admitted, unlike the 45-day limitation for compelling further responses under ***Code of Civil Procedure***, § 2033.290.

Generally a party must make a reasonable and good faith attempt at an informal resolution of any discovery dispute before bringing a motion to compel responses. However, this provision does not apply if the propounding party has received no responses whatsoever to the discovery requests. (***Leach v. Superior Court of Shasta County*** (1980) 111 Cal.App.3d 902, 905-906.

**E. Effect of Serving Responses.**

The Court shall grant the motion unless it finds that the party to whom the requests for admissions have been directed has served, before the hearing on the motion, a proposed response in substantial compliance with ***Code of Civil Procedure***, § 2033.220. (See ***Code of Civil Procedure***, § 2033.280(c); ***St. Mary v. Superior Court (Schellenberger)*** (2014) 223 Cal.App.4th 762, 778; see Weil & Brown, California Practice Guide, ***Civil Procedure before Trial***, § 8:1374 (2019).)

As of this date, defendant has not served any responses.

**F. Conclusion.**

The motion is GRANTED.

**IV. Tentative Ruling.**

The tentative ruling in this matter was duly posted.

**V. Case Management.**

The matter is calendared for a court trial on 26 July 2021.

**VI. Conclusion and Order.**

The motion of plaintiff to deem the requests for admissions to be admitted is GRANTED.

**DATED:**

**HON. SOCRATES PETER MANOUKIAN**
*Judge of the Superior Court*
*County of Santa Clara*

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