SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 03/20/2025

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties email or call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of their decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).)

Note: In order to minimize the risk of miscommunication, parties are to provide an **EMAIL NOTIFICATION TO THE DEPARTMENT OF THE REQUEST TO ARGUE AND SPECIFICATION OF ISSUES TO BE ARGUED**. Dept. 39's email address is: dept39@contracosta.courts.ca.gov. Warning: this email address is not to be used for any communication with the department except as expressly and specifically authorized by the court. Any emails received in contravention of this order will be disregarded by the court and may subject the offending party to sanctions.

Submission of Orders After Hearing in Department 39 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

Courtroom Clerk's Calendar

1. 9:00 AM CASE NUMBER: MSC21-00648
CASE NAME: SCHAFFER VS HERNANDEZ, ET AL.
***FURTHER CASE MANAGEMENT CONFERENCE**
FILED BY:
****TENTATIVE RULING:****

Continued to May 21, 2025, 8:30 a.m.

2. 9:00 AM CASE NUMBER: C23-03169
CASE NAME: ADAM DRAGISCH VS. TRALEE, INC.
***FURTHER CASE MANAGEMENT CONFERENCE**
FILED BY:
****TENTATIVE RULING:****
Continued to July 16, 2025, 8:30 a.m.

Law & Motion

3. 9:00 AM CASE NUMBER: C22-00633
CASE NAME: TOM JONG VS. JOHN MUIR HEALTH
***HEARING ON MOTION IN RE: SUMMARY JUDGMENT**
FILED BY:
****TENTATIVE RULING:****

Defendant Jefferey A. Poage, M.D.'s motion for summary judgment is **denied.**

Plaintiffs sued Poage for various claims related to the death of their daughter, Ailee, who died during a pediatric liver surgery at John Muir Health. The only remaining claim as to Poage is cause of action three for fraud.

Allegations

Plaintiffs allege that Poage is the chief anesthesiologist at John Muir and is alleged to have convinced Plaintiffs to use that facility for Ailee's surgery. (FAC ¶¶43-47.)

Plaintiffs allege that Poage promised the Plaintiffs "that he would perform the anesthesia and that he would be involved directly in the surgery", but Poage "believed that he was unqualified and never genuinely intended to be the anesthesiologist on the day of surgery." (FAC ¶45.) Poage allowed inexperienced anesthesiologists to attend the surgery. (FAC ¶46.) During in the surgery, a "member of the Nursing Staff at JMH sought out chief anesthesiologist, Jeffrey Poage and begged him to come to the OR to save Ailee. He refused." (FAC ¶47.)

Plaintiffs met with Poage on October 28, 2019 for a pre-surgery conference. (FAC ¶196.) Poage took Plaintiffs on a tour of Pediatric Intensive Care Unit and touted its excellence. Poage touted his qualifications and stated he would be the anesthesiologist on Ailee's surgery, but Poage never intended to work on Ailee's case and was not qualified to do so. (FAC ¶¶197- 200.) Poage made the following misrepresentations: "We will have our best team there" and "I will be there. I will take good care of Ailee. Don't worry." (FAC ¶201.) Poage discussed preforming on epidural on Ailee, stating "It's not necessary, it's not standard procedure, but I want to do that for her just to be sure. She won't feel a thing. She'll be very comfortable. Don't worry." (FAC ¶202.)

Plaintiffs allege that defendants' representations were false and defendants knew they were false. (FAC ¶389.) Plaintiffs relied on these representations and had some or all of the true facts been know, Ailee would not been turned over to defendants for surgery at John Muir. (FAC ¶¶390-391.)

Defendants argue that Plaintiffs have not alleged all elements for fraud because there is no allegation that Ailee did not receive the epidural and no allegations that Poage had a duty to participate in the surgery. Plaintiffs alleged that Poage told them he would participate in the surgery despite have no intention to do so, which is a sufficient misrepresentation.

Defendants also argue that a tour of the facility does not constitute a misrepresentation. But Plaintiff alleged specific statements by Poage, including "We will have our best team there" when that

was not true. (See, FAC ¶¶162-172.)

Fraud

"The elements of fraud that will give rise to a tort action for deceit are: ' "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." '[Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.)

In general, a party expressing their opinion is not always actionable as a false statement. Sales talk or puffery is not usually actionable as a false representations, but claims regarding a product's safety are often actionable. (See, e.g. *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111.) "[I]t is well settled that an opinion may be actionable when it is made by a party who ' "possess[es] superior knowledge." ' [Citation.]… '[W]hen one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false.' [Citations.]" *(Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 892; see also *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408.) "Equally well recognized is that there may be liability for an opinion where it is 'expressed in a manner implying a factual basis which does not exist.' [Citation.]" *(Jolley, supra,* 213 Cal.App.4th at 893.)

"The causation aspect of actions for damages for fraud and deceit involves three distinct elements: (1) actual reliance, (2) damage resulting from such reliance, and (3) right to rely or justifiable reliance." (*Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 513.) To prove actual reliance, a plaintiff must " ' "establish a complete causal relationship' between the alleged misrepresentations and the harm claimed to have resulted therefrom.' " [Citations.]" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864.)

" 'Besides actual reliance, [a] plaintiff must also show "justifiable" reliance, i.e., circumstances were such to make it *reasonable* for [the] plaintiff to accept [the] defendant's statements without an independent inquiry or investigation.' [Citation.] The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience. [Citation.] ' "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." [Citations.]' [Citations.]" (*OCM Principal Opportunities Fund, supra,* 157 Cal.App.4th at 864-865.)

" 'Assuming … a claimant's reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to *unrelated causes*.' [Citation.]" (*Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 365.) "Causation requires proof that the defendant's conduct was a ' "substantial factor" ' in bringing about the harm to the plaintiff. [Citations.] Tortious conduct is ' "not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent," ' unless the defendant's conduct operates with another force and ' "each of itself is sufficient to bring about harm . . . ." ' [Citations.]" (*Williams v.*

Wraxall (1995) 33 Cal.App.4th 120, 132.) "Evidence of causation must rise to the level of a reasonable probability based upon competent testimony. [Citations.]" (*Williams, supra,* 33 Cal.App.4th at 133.)

Analysis

Poage argues that Plaintiffs did not rely on Poage's statement that he would be the anesthesiologist for Ailee's surgery. Plaintiffs allege that Poage "We will have our best team there" and "I will be there. I will take good care of Ailee. Don't worry." (FAC ¶ 201.)

Poage's statement that "we will have our best team there" can be considered actionable opinion and not just puffery. It is a statement related to the safety of the surgery and having the best team there. In addition, Poage is an anesthesiologist and has superior knowledge regarding the experience and qualification of the surgery team, especially the anesthesiologists. Moreover, there is evidence that the team was not just not "the best," but that they were not qualified.

Poage argues that the statements attributed to him were true and do not amount to misrepresentation. Among the statements made by Poage, Plaintiffs claim that "Dr. Poage spent a lot of time reassuring us...we had the best people there. We have all the – everything that we need. We'll take special care of Ailee. I will be there personally. We will make sure that, you know, she gets extra treatment." And that Poage said Ailee would receive an epidural. (Tom Jong Deposition, page 173:1-174:1.) Poage then provides evidence that Ailee received an epidural. (Poage ex. H at JHM 8-9.) Poage also testified at his deposition that he initially intended to do Ailee's surgery. Although Poage further explained that Poage, Dimla and Lee were the three anesthesiologists that were being considered for the surgery and two out of the three would be there. (Poage depo. 25:21-26:11.). Poage states that Dimla and Lee had participated in liver resection surgeries during their training, but no further information is provided. (Poage depo. 47:15-22.) But how many liver resections they participated in is unknown and their level of participation is also unknown. Thus, Poage does not, however, provide evidence that they had the best people.

There are also triable issues of material fact here. Poage told Kalamas, an anesthesiologist at John Muir, that he not going to do the surgery, which creates a triable issue of fact as to whether Poage's statement to Plaintiffs that he would be there was true. (Kalams dec. ¶8.)

There is also a triable issue about whether there were qualified anesthesiologists for Ailee's surgery at John Muir which goes to whether Poage's statement that John Muir had the "best" people was true. Kalamas explains that at UCSF Benoiff only the most highly trained, Board-certified pediatric anesthesiologists with extensive pediatric resection/transplant experience would do pediatric liver cases. (Kalamas dec. ¶6.)Kalamas also states that she knew no one at John Muir, including Poage, had extensive experienced working on pediatric liver resections. (Kalamas dec. ¶7.) Uejima also explains why experienced anesthesiologists are vital to pediatric liver resection surgeries. (Uejima dec. ¶¶6-16.) Uejima declares that the anesthesiologists who cared for Ailee "did not have adequate training or experience in managing patients undergoing this complex procedure." (Uejima dec. ¶26.) Uejima also states that most children's hospitals have dedicated pediatric anesthesia liver teams and that Dimla or Lee did not have enough experience to be on such a team. (Uejima dec. ¶26.)

Poage argues that there was no reliance about his statement that he would attend the surgery because Plaintiffs were told that other anesthesiologists would do the surgery a day or two before surgery. (Ex. H: JMH 5, 10; see Tom Jong depo. 262:11-15; Tru-Co Jong. Depo. 91:22-92:7.) Poage's statements that he would be there and they would have the best team there were made on October 28. Then, one or two days before surgery, when Ailee was already admitted to John Muir hospital, Poage told Plaintiffs that Drs. Lee and Dimla would be the anesthesiologists. (Poage depo. 94:14-18.) Ailee had become sick and was admitted to John Muir on November 3. (Tom Jong dec. 76.) It is unclear if Ailee was discharged before her surgery, but at this point Plaintiffs had committed to surgery at John Muir and a jury could find that it was too difficult for Plaintiffs to change to another hospital one or two days before the surgery.

Next Poage argues that there is no evidence that had Poage participated in the surgery the outcome would have been different and thus, no causal relationship between Poage's statement and Ailee's death. Poage does not present expert testimony or any evidence to show that Plaintiffs cannot prove that Ailee's outcome would have been different had Poage attended the surgery. Further, Poage has not shown that having more experienced pediatric liver anesthesiologists would not have changed the outcome. Poage has the initial burden here and he has not met it.

In any event, there is a triable issue of material fact as Plaintiffs' expert pediatric anesthesiologist, Uejima, declares that "[b]ut for the deviations below the standard of care, there was no indication that Ailee Jong would not have survived the surgery". (Uejima dec. ¶25.) The Court's reliance on Uejima's opinion goes to the causation issue. The Court is aware that Plaintiffs do not have a medical malpractice claim at this stage in the case. There is evidence that shows the anesthesiologist in Ailee's surgery used the adult protocol of the mass blood transfusion rather than a pediatric protocol, which can result in a pediatric patient being given too much blood or incorrect ratios of blood-platelets. (Uejima dec. ¶¶19-21.)

Finally, Poage argues that Plaintiffs never discussed whether Ailee's surgery should happen at John Muir with Poage. The evidence shows that Poage spent time discussing the surgery with Plaintiffs and reassuring them. (Poage depo. 22:1-14; Tom Jong dec. ¶¶53-71 (in ex. 1).) In addition, there was a discussion about with Poage and Hui and the Plaintiffs about various hospitals, including UC Benioff Children's Hospital and Lucile Packard Children's Hospital. (Poage depo. 20:19-21:7.) The fact that Plaintiffs never specifically asked Poage if Ailee should have her surgery at another hospital does not negate the fact that Poage made statements that convinced Plaintiffs to have Ailee's surgery at John Muir.

Poage argues that Plaintiffs were told that John Muir had never done a pediatric liver resection before (Poage depo. 21:15-21), but Plaintiff Tom Jong said he was never told that. (Tom Jong dec. ¶9 (in ex. 3.) Further, Poage's evidence does not show that Poage or anyone else explained to Plaintiffs why such information was significant and what it could mean.

Poage also argues that Truc-Co Jong's testimony should negate Plaintiffs' fraud claim. At her deposition, Truc-Co was asked if she was "aware of any statement that Dr. Poage made to you or your husband, in October or November 2019, which you believe was untrue?" And she answered "I don't

know." (Truc-Co depo. 149:12-17.) That answer is insufficient to show that the Plaintiffs have no claim for fraud. "I don't know" is not the same as a "no" answer.

Objections

The court rules on Plaintiffs' objection to evidence as follows: the objection to the statement by Lee in Ailee's medical records that the anesthesia plan and risk was discussed is sustained.

Poage argues that Plaintiffs' opposition was filed late because it was not filed 20 days before the hearing. The deadline to file an opposition or reply changed on January 1, 2025. This motion was filed in 2024 and the Court will apply the timeline for oppositions and replies that was effective in 2024. The opposition was filed more than 15 days before the hearing, which is compliant with the deadline to file an opposition in 2024.

4. 9:00 AM CASE NUMBER: C22-00633
CASE NAME: TOM JONG VS. JOHN MUIR HEALTH
***HEARING ON MOTION IN RE: SUMMARY JUDGMENT**
FILED BY:
****TENTATIVE RULING:****

Defendants Jay Michael S. Balagtas, M.D. and Thomas Hui, M.D.'s motion for summary judgment is **granted** as to both defendants.

Plaintiffs sued Balagtas and Hui for various claims related to the death of their daughter, Ailee, who died during a pediatric liver surgery at John Muir Health. The only remaining claim as to Balagtas and Hui is cause of action three for fraud. Defendants seek summary judgment as to both Balagtas and Hui or alternatively, summary adjudication as to Balagtas and summary adjudication as to Hui. Defendants argue that there is no claim for fraud against Balagtas and Hui and in any event, the statute of limitations has run.

Allegations

Doctor Balagtas was Ailee's oncologist at Stanford. (FAC ¶48.) Balagtas correctly diagnosed Ailee and recommended liver surgery with Doctor Hui. Balagtas misled and deceived Plaintiffs into thinking that they should have Ailee's surgery at John Muir. (FAC ¶¶48-53.) Hui is a pediatric surgeon and was Ailee's surgeon. (FAC ¶¶ 54-55.) Hui had previously performed successful liver resections, but had never performed one at John Muir. Balagtas and Hui deceived Plaintiffs with the intention of inducing Plaintiffs to have Ailee's surgery at John Muir. (FAC ¶161.)

Plaintiffs allege that they met with Balagtas and Hui on August 9, 2019. (FAC ¶178.) Balagtas made the following statements: "Ailee will receive great care", "Yes, we can treat her here", and "Her treatment will require aggressive chemo and surgery and we can do all of it here". (FAC ¶179.) Balagtas also said that "At Stanford you would have access to clinical trials. But the treatment for hepatoblastoma is very well established and documented and has a high success rate so I would go with that, an established treatment plan. We can do that here." (FAC ¶180.) Hui concurred with

Balagtas by nodding. (FAC ¶181.)

Hui also made the following statements: "Her treatment requires both chemo and surgery. We can do it here. I will do the surgery" and "I've done lots of these surgeries. Never had any problems". (FAC ¶¶182-183.)

On August 13, 2019, both doctors "expressly confirmed that the treatment and surgery could be done at JMH (given the [biopsy] results)." (FAC ¶188.) Hui said "[Surgery is] not bad, I can do it. It's not a problem". (FAC ¶189.)

On October 21, 2019, Balagtas met with Plaintiffs and told them that they could have the surgery done either at John Muir or Stanford. When discussing the difference, "Dr. Balagtas said 'Umm, not much. It's basically same'. He also said 'Dr. Hui can do the surgery at both places'." (FAC ¶190.) Balagtas, said that "Stanford does this a lot but they can get very busy there some times" and "We can do it here too. We have everything here (JMH)". (FAC ¶192.) He said that Stanford can get really busy and it can be hectic, but John Muir was not very busy. Balagtas said "Ailee would get very good care and attention in this PICU." (FAC ¶193.)

On October 24, Plaintiffs asked "Balagtas if John Muir was genuinely the best place for Ailee's surgery. He asked if he would have his kids do the same surgery here. Dr. Balagtas said 'Yes'." (FAC ¶195.)

On November 1, 2019, Plaintiffs asked about the relationship between Stanford and John Muir. "Balagtas responded claiming that 'The pediatric program at JMH is like a "satellite office" and we're with Stanford. You will be getting Stanford Care'. This was untrue." (FAC ¶205.)

Plaintiffs allege that defendants' representations were false and defendants knew they were false. (FAC ¶389.) Plaintiffs relied on these representations and had some or all of the true facts been know, Ailee would not been turned over to defendants for surgery at John Muir. (FAC ¶¶390-391.)

Fraud

"The elements of fraud that will give rise to a tort action for deceit are: ' "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." '[Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.)

Balagtas and Hui are alleged to have made various statements regarding the connection between John Muir Health and Stanford, including: Balagtas stating that "At Stanford you would have access to clinical trials. But the treatment for hepatoblastoma is very well established and documented and has a high success rate so I would go with that, an established treatment plan. We can do that here." (FAC ¶180.) Hui concurred with Balagtas by nodding. (FAC ¶181.) On October 21, 2019, Balagtas told Plaintiffs that they could have the surgery done either at John Muir or Stanford. When discussing the difference, "Dr. Balagtas said 'Umm, not much. It's basically same'. He also said 'Dr. Hui can do the surgery at both places'." (FAC ¶190.) Balagtas, said that "Stanford does this a lot

but they can get very busy there some times" and "We can do it here too. We have everything here (JMH)". (FAC ¶192.) He said that Stanford can get really busy and it can be hectic, but John Muir was not very busy. Balagtas said "Ailee would get very good care and attention in this PICU." (FAC ¶193.) On November 1, 2019, Plaintiffs asked about the relationship between Stanford and John Muir. "Balagtas responded claiming that the pediatric program at JMH is like a satellite office and we're with Stanford. You will be getting Stanford Care." (FAC ¶205.)

Both Balagtas and Hui are Stanford doctors and thus, their statements that they would provide Stanford level of care are not false. Furthermore, the statements that John Muir is like Stanford were not false, at least as far as Balagtas and Hui are concerned. The facts here do not know show that Balagtas and Hui made knowingly false statements about the Stanford-John Muir connection. The Court finds that Balagtas and Hui have shifted the burden on these statements.

Balagtas and Hui are also alleged to have made statement that Ailee will receive good care at John Muir and that the surgery can be done at John Muir. Balagtas stated that "Ailee will receive great care", "Yes, we can treat her here", and "Her treatment will require aggressive chemo and surgery and we can do all of it here". (FAC ¶179.) Hui said that: "We can do it here. I will do the surgery" and "I've done lots of these surgeries. Never had any problems". (FAC ¶¶182-183.) Hui said "[Surgery is] not bad, I can do it. It's not a problem". (FAC ¶189.) On August 13, 2019, both doctors "expressly confirmed that the treatment and surgery could be done at JMH". (FAC ¶188.) On October 24, Plaintiffs asked "Balagtas if John Muir was genuinely the best place for Ailee's surgery. He asked if he would have his kids do the same surgery here. Dr. Balagtas said 'Yes'." (FAC ¶195.)

Both Balagtas and Hui declare that they thought the surgery could happen at John Muir. (Hui dec. ¶¶15, 17; Balagtas dec. ¶20.) In September 2019, Hui sent an internal email stating that Hui had a concern about anesthesia and post-op considerations. (Plaintiffs' ex. 69.) Hui explains that he did not have concerns, but wanted to make sure everyone was on board with the surgery. (Hui dec. ¶17; Hui depo. 65:4-68:1, 74:1-14.) There was a surgery planning meeting held in October and after that meeting Hui felt that Ailee's surgery could be done safely at John Muir. (Hui dec. ¶13.) The Court finds that Balagtas and Hui have shifted the burden on the statements that the surgery could happen at John Muir.

Plaintiffs have not shown a triable issue of material fact because Plaintiffs have not provided evidence that Balagtas or Hui thought the surgery could not be done at John Muir. The only evidence Plaintiffs have provided that might show a concern is Hui's September email, but Hui provided an explanation for that email. And there was a surgery team meeting in October, after the September email, where Hui felt confident in having the surgery at John Muir. Here, unlike with Poage, there is no evidence that Kalamas or Greely ever told Hui or Balagtas that there were concerns about the anesthesiology team.

Plaintiffs also allege that Dr. Hui told Plaintiffs that there was very little chance of death and that he has done this "lots of times" with no problems. He told Plaintiffs that in the dozens of cases he has done "No one has died". As to these statements Hui declares that they are true. (Hui dec. ¶11.) Up until Ailee's surgery, none of his patients had died during surgery. Plaintiffs have not provided

evidence that Hui's statements were false.

When Plaintiffs asked Dr. Hui if their daughter could die, he told them "Not to worry that it was going to be fine." Assuming that this statement was made, this is not a factual representation that can support a fraud claim.

Plaintiffs also point to the fact that Hui did not tell Plaintiffs that he had only ever performed liver resections at UCSF Benioff Children's Hospital Oakland and did not tell Plaintiffs that this would be John Muir's first pediatric liver resection. Hui declares that he did tell Plaintiffs that this would be the first pediatric liver resection at John Muir while Plaintiffs declare they were not told this. (Hui ¶16; Tom Jong dec. ¶79.) This conflict in facts is not material, however, because Plaintiffs have not shown that Hui had a duty to disclose this information.

In addition to these statements, Plaintiffs try to include additional facts for a fraudulent concealment claim. Plaintiffs argue that the defendants should have disclosed the following: (1) John Muir was not even a Level 2 Trauma Center for children Ailee Jong's age. (2) Stanford Children's Hospital and UCSF Benioff had the highest (Level 1) designation. (3) CCS (State of California, California Children's Services) required that Ailee Jong be transferred to a Tertiary hospital from JMH. (4) John Muir's own Scope of Services policy required that Ailee Jong be referred to a higher-level medical facility. And (5) Hui he helped draft the very surgery privileges which excluded Ailee's surgery from happening at John Muir.

The Court has not found these statements in the FAC and as such, Plaintiffs cannot raise them for the first time as the basis of the fraud claim in opposing this motion. In addition, the facts here do not show that Balagtas and Hui had a duty to disclose these facts to Plaintiffs. While there appears to be evidence that John Muir was not a Level 2 Trauma Center for pediatrics (Poage depo. 42:25-435), the remaining facts are not supported by admissible evidence.

Plaintiffs also argue that Hui did not tell Plaintiffs that he was not allowed to perform pediatric liver resection surgery at Lucile Packard, as only the Stanford pediatric liver transplant team performed liver resections there. The evidence shows that Su, Hui's co-surgeon, stated that at Stanford the liver transplant teams handle liver resections. That testimony does not show that Hui was not permitted to do a liver resection at Stanford. Further, assuming Plaintiffs' evidence supported their position here there is no reliance or causation shown because Plaintiffs are not objecting to the choice of Hui as their surgeon and they did not try to have Ailee's surgery at Stanford only to be rejected.

Overall the Court finds that Plaintiffs cannot bring a claim for fraud against either Hui or Balagtas.

Evidence

Defendants' requests for judicial notice are denied. There is no need to take judicial notice of any of these documents as they are all filed in this case. That being said, the Court will consider the declarations filed in support of Plaintiffs' motion for leave to amend, the complaint and first amended

complaint filed in this case.

As an initial matter, the Court notes that Plaintiffs' objections to evidence are not numbered consecutively making it difficult for the Court to quickly rule on each objection. (See, CRC 3.1354(b).) Defendants have objected to multiple items in one objection, which also makes it difficult to tell what exactly is being objected to and has the effect of combining issues in a way that makes it more difficult to rule on the objections.

The Court rules on Plaintiffs' objections to evidence as follows:

Balagtas Declaration:

1. Paragraph 5: Overruled.
2. Paragraph 9: Overruled.
3. Paragraph 12: Overruled.
4. Paragraph 12: Overruled.
5. Paragraph 20: Overruled.
6. Paragraph 21: sustained.
7. Paragraph 23: Sustained.
8. Paragraph 24: Overruled. It doesn't matter if it is true, but rather that it was said.
9. Paragraph 10: Overruled.

Chan Declaration:

1. Paragraph 5.18 (all objections): Overruled. Admitted to show the basis of Chan's opinions, but not admitted to show the facts stated therein. (*People v. Sanchez* (2016) 63 Cal.4th 665.)
2. Paragraph 6.4 (all objections): Overruled. Admitted to show the basis of Chan's opinions, but not admitted to show the facts stated therein. (*People v. Sanchez* (2016) 63 Cal.4th 665.)
3. Paragraph 6.7 (first objection): Overruled. Admitted to show the basis of Chan's opinions, but not admitted to show the facts stated therein. (*People v. Sanchez* (2016) 63 Cal.4th 665.) Chan may state that based upon the evidence he reviewed, he did not find any evidence of intentional misrepresentations of fact.
4. Paragraph 6.7 (remaining objections): Overruled. Admitted to show the basis of Chan's opinions, but not admitted to show the facts stated therein. (*People v. Sanchez* (2016) 63 Cal.4th 665.)
5. Paragraph 6.2: Overruled. Chan may provide his opinion that the team was qualified.
6. Paragraph 6.5: Overruled.
7. Paragraph 6.6: Overruled.
8. Paragraph 6.8: Overruled. The objection here goes to the characterization of fact 63 and the proper method to challenge a fact is to respond to that fact in the response to Defendants' separate statement of material facts.
9. Paragraph 6.4: Overruled. See item 2.
10. Paragraph 6.7. Overruled. See item 3.

Hui Declaration

1. Paragraph 5: Overruled.
2. Paragraph 13: Overruled.
3. Paragraph 13: Overruled.
4. Paragraph 14: Overruled.
5. Paragraph 15: Sustained. It is not clear that Hui has expertise in deciding what factors are important when determining whether a pediatric liver resection should be preformed for the first time at a medical center.
6. Paragraph 15: Overruled.

The Court rules on Defendants' objections to evidence as follows:

1. Sustained.
2. The Court considers this objection to exhibits 8-16 and does not include exhibits 17-26 in its ruling. Overruled. Plaintiffs' counsel has sufficiently authenticated these transcripts. Furthermore, there is no argument that they are not correct copies of the transcripts. Finally, as to Hui, Su and Tom Jong Defendants have provided the necessary authentication.
3. Overruled as to exhibits 17, 25, 26, 27 and 28. Otherwise sustained.
4. Overruled as to 40. Sustained as to 41 because there is no declaration from a custodian of records.
5. Overruled.
6. Overruled.
7. Sustained.
8. Overruled as to 46-48, which involve Hui and Balagtas. Otherwise sustained. The CCS documents might be admissible, but there is insufficient information to find them admissible at this stage. Similarly, printouts from government websites might be admissible, but additional information is needed.
9. Sustained.
10. Overruled as to Balagtas. Otherwise sustained.
11. Overruled as to 63 and 64. Documents are official communications from government agencies. Otherwise the objection is sustained.
12. Sustained.
13. Overruled.
14. Sustained.
15. Overruled. Defendants' expert relied on Ailee's medical records and they are therefore admissible here.

16 to 32. Overruled. Tom Jong may state that he was not told something, but that does not make the underlying fact admissible.

31. Sustained as to the third sentence. Otherwise overruled.

32 to 39. Overruled.

40. Sustained as to paragraphs 71-74. No indication that Hui or Balagtas spoke or attended the tour. Otherwise overruled.
41. Sustained as to paragraphs 47-48. No indication that Hui or Balagtas spoke or attended the tour. Otherwise overruled.

42 to 57. Overruled. Truc-Co Jong may state that she was not told something, but that does not make the underlying fact admissible.

58. Sustained as to the third sentence. Otherwise overruled.
59 to 67. Overruled.
68. Overruled.
69. Overruled.
70. Overruled. Appears to be a repeat of objection 69.
71. Overruled.
72. Overruled.
73. Overruled.
74. Overruled.
75. See ruling on item 2.
76. Overruled.

5. 9:00 AM CASE NUMBER: C22-00633
CASE NAME: TOM JONG VS. JOHN MUIR HEALTH
***HEARING ON MOTION IN RE: SUMMARY JUDGMENT**
FILED BY:
****TENTATIVE RULING:****

Defendant John Muir Health's motion for summary judgment is **denied.**

Plaintiffs sued John Muir Health for various claims related to the death of their daughter, Ailee, who died during a pediatric liver surgery at John Muir. The only remaining claim as to John Muir is cause of action three for fraud.

Plaintiffs allege that John Muir deliberately deceived Plaintiffs into allowing Ailee to have major surgery at John Muir when John Muir and each defendant knew that John Muir was unqualified to handle the procedure. (FAC ¶10.) Plaintiffs allege that John Muir had a partnership with Stanford and that the defendant doctors and others worked to convince Plaintiffs that John Muir was as good as Stanford. Poage is alleged to have been a medical director of pediatric surgical services and a salesman for John Muir. (FAC ¶¶43-44.) Balagtas and Hui worked to convince Plaintiffs to have the surgery at John Muir and that John Muir was as good as Stanford. (FAC ¶¶48-57.) Plaintiffs allege that all defendants were agents of each other and ratified each other's conduct. (FAC ¶93.)

Agency

" 'An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.' (Civ. Code, § 2295.) 'An agency is either actual or ostensible.' (*Id.*, § 2298.) ' "A hospital is liable for a physician's malpractice when the physician is actually employed by or is the ostensible agent of the hospital." ' [Citation.]" (*Franklin v. Santa Barbara Cottage Hospital* (2022) 82 Cal.App.5th 395, 403.)

" 'An agency is actual when the agent is really employed by the principal.' (Civ. Code, § 2299.) For an actual agency to exist, ' "[t]he principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control." [Citation.] In the absence of the essential characteristic of the right of control, there is no true agency and, therefore, no "imputation" of the [alleged agent's] negligence to the [alleged principal]. [Citations.]' [Citations]" (*Franklin, supra,* 82 Cal.App.5th at 403-404; see also, *Gordon v. ARC Manufacturing, Inc.* (2019) 43

Cal.App.5th 705, 718.)

Hui, Balagtas and Poage are not employees of John Muir. (Hui Depo. 83:14-18; Poage Dep. 31:20-32:6; Balagtas Dec. ¶5.) John Muir has met its initial burden of showing that the defendant doctors were not actual agents of John Muir. Plaintiffs' evidence does not create a triable issue of material fact on this issue. The evidence shows that the defendant doctors were involved in the Stanford-John Muir partnership, but none of the evidence shows that the defendant doctors were given the authority to bind John Muir. Thus, the Court finds that the defendant doctors were not actual agents of John Muir. The more complicated question is whether the defendant doctors were ostensible agents of John Muir.

" 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' (Civ. Code, § 2300.) 'A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.' (Civ. Code, § 2334.) 'Before recovery can be had against the principal for the acts of an ostensible agent, three requirements must be met: The person dealing with an agent must do so with a reasonable belief in the agent's authority, such belief must be generated by some act or neglect by the principal sought to be charged[,] and the person relying on the agent's apparent authority must not be negligent in holding that belief.' (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 403–404.)" (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038.)

"In the physician-hospital-patient context, ostensible agency is a factual issue '[u]nless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician' or received actual notice of the absence of any agency relationship. [Citation.]" (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1039.)

"[T]he required elements of ostensible agency: '(1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) reliance on that apparent agency relationship by the plaintiff.' [Citation.]… California law has 'inferred ostensible agency from the mere fact that the plaintiff sought treatment at the hospital without being informed that the doctors were independent contractors.' [Citation.] 'Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' [Citation.]" (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 882 (discussing (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1453); see also *Markow, supra,* 3 Cal.App.5th at 1039.) " 'A physician is not an agent of a hospital merely because he or she is on the medical staff of the hospital.' [Citation.]" (*Franklin v. Santa Barbara Cottage Hospital* (2022) 82 Cal.App.5th 395, 407.)

In *Mejia*, the court found there was ostensible agency because the hospital did not give the patient any notice that its staff physicians were independent contractors, and the patient had no reason to know they were not agents of the hospital. (*Mejia, supra*, 99 Cal.App.4th at p. 1450.)

In *Markow*, the court found there was no ostensible agency. There, the physician had been the patient's chosen personal doctor for four and a half years and the patient signed 25 forms notifying him that his physician was an independent contractor, not an agent or employee of the hospital over that time period. (*Markow, supra,* 3 Cal.App.5th at 1033-1034.) There was evidence that the physician was

the hospital's director of its pain clinic, used the hospital's name and logo on his business cards, wore a hospital badge, and treated patients in a building displaying the hospital's name and logo, but the court found these facts were "negated" by the actual notice the hospital gave the patient that his doctor was an independent contractor, not the hospital's agent or employee. (*Markow, supra,* 3 Cal.App.5th 1041–1042.)

In *Wicks* the patient was admitted to the emergency department and signed an admission form about one hour later that notified him that the staff physicians were not employees or agents of the hospital. The patient was alert, oriented and cooperative when he signed the forms. Furthermore, the court found that "[h]ospitals providing emergency care to members of the public who do not have an appointment or any relationship with the staff physicians have no practical means to give such notice before a patient is admitted." (*Wicks, supra,* 49 Cal.App.5th 866, 884-85.)

In *Magallanes de Valle v. Doctors Medical Center of Modesto* (2022) 80 Cal.App.5th 914 there was no ostensible agency where the patient selected and established care with a physician and received care from that physician at the physician's employer's facility. Later, the patient elected to have a hysterectomy with the physician and the physician and physician's employer scheduled surgery at the defendant's facility. The court found that the patient should have known that her physician was not an agent of the defendant. (*Id*. at 923-924.)

On November 3, 2019, Tom Jong signed a conditions of admission form, which stated in part that "All physicians and surgeons providing services to me, including… anesthesiologist and others, are not employees or agents of the hospital." (John Muir's ex. 9 at page 1197 and Tom Jong Depo. 257:22-258:11; 282:17-23.) Balagtas' business card shows both John Muir and Stanford and provides lists a physical address and an email address for Balagtas at John Muir. (Plaintiffs' ex. 58.) In looking for someone to treat Ailee, Plaintiffs looked on Stanford's website and chose Balagtas. (Tom Jong depo. 78:19-24; 284:4-19; Tom John decl. ¶8 (ex. 1).) Although it is less clear how much Plaintiffs specifically chose Hui, the evidence shows that Plaintiffs were interested in having a Stanford doctor, such as Hui, perform the surgery. (Tom Jong decl. ¶¶6-7, 11-12, 24-45 (Plaintiffs' ex. 1).) The evidence does not show that Plaintiffs specifically chose Poage and instead it appears that Poage was provided by John Muir. Furthermore, in the videos, Hui and Balagtas are identified as Stanford doctors while Poage is identified as a John Muir doctor. (Plaintiffs' Exhibits 46-48.)

As to Hui and Balagtas, John Muir's evidence shows that Plaintiffs should have known that they were not agents or employees of John Muir and Plaintiffs have not shown a triable issue of material fact on this issue. Plaintiffs chose Balagtas specifically and wanted Hui, a Stanford doctor, to do the surgery. Both Balagtas and Hui held themselves out as Stanford doctors. Those facts, along with the conditions of admission notice ,show that Plaintiffs should have known that Hui and Balagtas were not agents or employees of John Muir.

As to Poage, however, the Court finds that there is a triable issue of material fact as to whether Poage was an ostensible agent of John Muir. Poage was more closely associated with John Muir and was identified as a John Muir doctor. In fact, Poage himself says that he was "staff at John Muir". (Poage depo. 11:1-3.) In addition, Plaintiffs did not choose Poage, but instead chose John Muir and Poage was assigned to Ailee's care from time to time. Finally, the statements made by Poage that are actionable were made in October and the notice form was signed on November 3. Thus, at the time the statements were made Plaintiffs had not been given the conditions of admission notice. Given all these facts, the

Court finds there is a triable issue of fact as to whether Poage was an ostensible agent of John Muir.

Elements of Fraud

John Muir argues that Plaintiffs' fraud claim fails because there is no evidence of scienter and no evidence of causation. Because the Court finds that Hui and Balagtas were not ostensible agents of John Muir, but Poage was an ostensible agent of John Muir the Court has limited this section to a discussion of the statements made by Poage.

"The elements of fraud that will give rise to a tort action for deceit are: ' "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." '[Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) "The causation aspect of actions for damages for fraud and deceit involves three distinct elements: (1) actual reliance, (2) damage resulting from such reliance, and (3) right to rely or justifiable reliance." (*Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 513.)

John Muir argues that Plaintiffs cannot show causation here because it is impossible to say whether Plaintiffs would have suffered the same damages (death of Ailee) had the surgery been performed at a different facility. Chan, John Muir's expert surgeon, says it is pure speculation to say that the outcome of surgery would have been different if performed at another facility. (Chan dec. ¶6.9.) Chan found that the anesthesiologists were qualified. (Chan dec. ¶6.2, 6.9.) Chan noted that "Drs. Dimla and Lee were fellowship trained pediatric anesthesiologists from reputable programs. … Both Drs. Dimla and Lee had participated in pediatric liver surgeries before decedent's case." (Chan dec. ¶ 5.22.) John Muir has shifted the burden on causation by providing expert opinion that it is impossible to say whether the outcome of surgery would have been different.

Plaintiffs present a triable issue of material fact on causation by providing their own expert, Uejima. Uejima is a pediatric anesthesiologist. He declares that "[b]ut for the deviations below the standard of care, there was no indication that Ailee Jong would not have survived the surgery". (Uejima dec. ¶25.) The Court's reliance on Uejima's opinion goes to the causation issue. The Court is aware that Plaintiffs do not have a medical malpractice claim at this stage in the case. There is evidence that shows the anesthesiologist in Ailee's surgery used the adult protocol of the mass blood transfusion rather than a pediatric protocol, which can result in a pediatric patient being given too much blood or incorrect ratios of blood-platelets. (Uejima dec. ¶¶19-21.)

John Muir argues that the fact is that the physicians performing the surgery of Ailee Jong felt that the surgery could be performed safely at John Muir and all of the providers, including Hui, Su, Poage and Balagtas met to discuss whether Ailee's surgery could be done safely at John Muir and the entire surgery team felt that it could be done safely. In support of this fact, John Muir relies on the depositions of Hui and Poage. Hui testified that he felt confident in the surgery, but only Poage testified that John Muir was a level 2 trauma center. (Hui 59:15-61:15; Poage 42:6-24.) This evidence does not show that Poage believed this statement was true. In any event there are triable issues of material fact as to whether Poage made misrepresentations to Plaintiffs.

Poage told Kalamas, an anesthesiologist at John Muir, that he was not going to do the surgery, which creates a triable issue of fact as to whether Poage's statement to Plaintiffs that he would be there

was true. (Kalams dec. ¶8.)

There is also a triable issue about whether there were qualified anesthesiologists for Ailee's surgery at John Muir which goes to whether Poage's statement that John Muir had the "best" people was true. Kalamas explains that at UCSF Benoiff only the most highly trained, Board-certified pediatric anesthesiologists with extensive pediatric resection/transplant experience would do pediatric liver cases. (Kalamas dec. ¶6.) Kalamas also states that she knew no one at John Muir, including Poage, had extensive experienced working on pediatric liver resections. (Kalamas dec. ¶7.) Uejima also explains why experienced anesthesiologists are vital to pediatric liver resection surgeries. (Uejima dec. ¶¶6-16.) Uejima declares that the anesthesiologists who cared for Ailee "did not have adequate training or experience in managing patients undergoing this complex procedure." (Uejima dec. ¶26.) Uejima also states that most children's hospitals have dedicated pediatric anesthesia liver teams and that Dimla and Lee lacked enough experience to be on such a team. (Uejima dec. ¶26.)

John Muir also argues that the videos are not misrepresentations that Stanford and John Muir were one in the same. As explained above, the statements made by Hui and Balagtas are not attributed to John Muir because there was no ostensible agency. Furthermore, none of the videos were provided in the moving papers. And finally, Poage appeared in two videos (Plaintiffs' ex. 48), but his short appearance in the videos does not negate the finding that there is a triable issue as to Poage's statements to the Plaintiffs.

John Muir also argues that they cannot be liable for fraudulent concealment. The Court need not reach this issue since there is a triable issue as to Poage's misrepresentations and this motion must be denied.

Statute of Limitations

John Muir argues that the real claim here sounds in professional negligence and is thus, barred by the one-year statute of limitations in the Medical Injury Compensation Reform Act of 1975 ("MICRA"). The Court previously considered this issue at the pleading stages. As to the statements by Poage the Court continues to find that the fraud claim based upon those statements is not covered under MICRA and thus, the one year statute of limitations does not bar the claim.

Evidence

Defendants' requests for judicial notice are denied. There is no need to take judicial notice of any of these documents as they are all filed in this case. That being said, the Court will consider the declarations filed in support of Plaintiffs' motion for leave to amend and the complaint and first amended complaint filed in this case.

As an initial matter, the Court notes that Plaintiffs' objections to evidence are not numbered consecutively making it difficult for the Court to quickly rule on each objection. (See, CRC 3.1354(b).) Defendants have objected to multiple items in one objection, which also makes it difficult to tell what exactly is being objected to and has the effect of combining issues in a way that makes it more difficult to rule on the objections.

The Court rules on Plaintiffs' objections to evidence as follows:

Balagtas Declaration:

1. Paragraph 5: Overruled.
2. Paragraph 12: Overruled.
3. Paragraph 12: Overruled.
4. Paragraph 20: Overruled.
5. Paragraph 24: Overruled. It doesn't matter if it is true, but rather that it was said.

Chan Declaration:

1. Paragraph 6.5: Overruled. Admitted to show the basis of Chan's opinions, but not admitted to show the facts stated therein. (*People v. Sanchez* (2016) 63 Cal.4th 665.)
2. Paragraph 6.4: Overruled.
3. Paragraph 6.7. Overruled.

The Court rules on Defendants' objections to evidence as follows:

1. Sustained. It appears that John Muir was involved in the *Kalamas v. John Muir Health* case, but that is not enough to show that deposition transcripts in another case are admissible here. In order to introduce former testimony, a party must meet the requirements of Evidence Code 1290, et seq. Although practically it may make sense for the parties to stipulate to allow former testimony from this case, no such stipulation has been provided.
2. The Court considers this objection to exhibits 8-16 and does not include exhibits 17-26 in its ruling. Overruled. Plaintiffs' counsel has sufficiently authenticated these transcripts. Furthermore, there is no argument that they are not correct copies of the transcripts. Finally, as to Hui, Poage and Tom Jong Defendants have provided the necessary authentication.
3. Overruled.
4. Overruled as to 40. Sustained as to 41 because there is no declaration from a custodian of records.
5. Overruled.
6. Overruled.
7. Overruled.
8. Overruled as to 46, 47, 48 and 55. Otherwise sustained. Otherwise sustained. The CCS documents might be admissible, but there is insufficient information to find them admissible at this stage. Similarly, printouts from government websites might be admissible, but additional information is needed.
9. Sustained.
10. Overruled.
11. Overruled as to 63, 64 and 65. Otherwise sustained. As to the admissible documents, the first two are official communications from government agencies and the final document is one of John Muir's own documents.
12. Overruled. John Muir has not explained why its own discovery responses are inadmissible.
13. Overruled.
14. Sustained.
15. Overruled. These are John Muir's medical records and there is no suggestion that they are not accurate copies. Furthermore, Defendants' expert relied on Ailee's medical records and they are therefore admissible here.

16 to 32. Overruled. Tom Jong may state that he was not told something, but that does not make the underlying fact admissible.
31. Sustained as to the third sentence. Otherwise overruled.
32. to 39. Overruled.
40. Overruled.
41. Overruled.
42 to 57. Overruled. Truc-Co Jong may state that she was not told something, but that does not make the underlying fact admissible.
58. Sustained as to the third sentence. Otherwise overruled.
59 to 67. Overruled.
68. Overruled.
69. Overruled.
70. Overruled. Appears to be a repeat of objection 69.
71. Overruled.
72. Overruled.
73. Overruled.
74. Overruled.
75. See ruling on item 2.
76. Overruled.

6. 9:00 AM CASE NUMBER: C22-02125
CASE NAME: SAVANNAH THOMPSON VS. JOHN MUIR HEALTH
***HEARING ON MOTION IN RE: SEAL DOCUMENTS ISO OPPOSITION**
FILED BY: JOHN MUIR HEALTH
****TENTATIVE RULING:****

Defendant moves that the Court order sealed certain documents it submitted with its opposition to plaintiff's motion for class certification. Specifically, the documents in question are (1) Exhibits A-E to the declaration of Lisa Sander; (2) specified portions of Exhibit 2 to the Declaration of Jay T. Ramsey; and (3) portions of the opposition brief that describe portions of Plaintiff's deposition transcript in Exhibit 2 to the Ramsey declaration. Redacted versions of the documents in question have been submitted for the public file. To grant the motion, the court must not only make certain findings but must "[s]pecifically state the facts that support the findings[.]" (CRC 2.550(e)(1)(A).) Pursuant to California Rule of Court 2.550(d), the Court finds as follows:

As to Exhibit A to the Sander declaration, moving party states that the documents already have been publicly disclosed. Accordingly, the overriding interest in confidentiality will not be prejudiced by failing to seal the document. The motion is denied as to Exhibit A to the Sander Declaration. As to the other documents

(1) There exists an overriding interest that overcomes the right of public access to the record, because the information to be sealed is confidential medical information, which could possibly be connected to the patients, even without identifying information. As to the portions of the plaintiff's deposition, they consist of names of other people not directly involved in the case, and their right of privacy overcomes the right of public access.
(2) The overriding interest supports sealing the record, because the information is relevant to the pending motion, this is the only way to keep the information confidential while considering it in

conjunction with the motion;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed, because it would be publicly disclosed;

(4) The proposed sealing is narrowly tailored, because redactions have been made to include only the particular information as to which the disclosure would be of private information;

(5) No less restrictive means exist to achieve the overriding interest, because the information is relevant to the motion and absent this order would be available to the public.

7. 9:00 AM CASE NUMBER: C22-02419
CASE NAME: ZUBER LAWLER LLP, A CALIFORNIA LIMITED LIABILITY PARTNERSHIP VS. ENLAN HE
***HEARING ON MOTION IN RE: TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT**
FILED BY: HE, ENLAN
****TENTATIVE RULING:****

Defendant Enlan Le's Motion to Set Aside Default and Default Judgment, pursuant to CCP section 473(b) and/or CCP section 473.5, is **continued** to April 3, 2025 at 9:00 a.m.

CCP section 473(b), which provides for relief from default, states, "[a]pplication for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted." Similarly, CCP section 473.5(b) states, "[t]he party shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action."

Defendant's motion was not accompanied by a proposed responsive pleading. However, apart from this procedural deficiency, it appears the motion has merit. Defendant has explained that she changed her address and did not learn of the filing of the first amended complaint, or the request for entry of default, until a case management conference in September 2024. Defendant moved promptly for relief upon learning of the default. Plaintiff takes issue with the reasonableness of defendant's conduct, in particular, her failure to change her address with the court. But in ruling on motions brought under discretionary provision of CCP section 473, the general policy favors granting relief so the case can proceed on the merits. (See *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) Where, has here, relief is sought promptly and there is no prejudice to the other side, even a weak showing will suffice. (*Ibid*). The court is inclined to find that defendant has made the required showing here particularly since the plaintiff does not claim prejudice.

Nevertheless, if defendant would like the court to consider her motion, she is required to lodge a proposed responsive pleading to the first amended complaint no later than March 27, 2025.

Defendant should call the clerk's attention to this order when submitting her proposed responsive pleading.

8. 9:00 AM CASE NUMBER: C23-00889
CASE NAME: DENNIS MERREL VS. RENAISSANCE EQUITY INC,
***HEARING ON MOTION IN RE: FOR LEAVE OF COURT TO CONDUCT FINANCIAL DISCOVERY**

FILED BY: MERREL, DENNIS
TENTATIVE RULING:

Plaintiffs move for leave to take discovery of financial condition, which is relevant to punitive damages, pursuant to Civil Code section 3275(c). To grant the motion, the court must find that the plaintiff has established a substantial probability of prevailing on the punitive damages claim. This means that it is "very likely" that the plaintiff will prevail. (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 120.) Plaintiffs allege in very strong terms that the premises they rented from defendant were unsafe, unsanitary, and violated numerous requirements of applicable codes, including knowingly exposing plaintiffs to toxic mold. The conditions are documented by the Declaration of Kevin Kearney, a licensed contractor. No information, however, is submitted concerning the activities of the defendants, or whether they are guilty of malice, oppression or fraud. "Malice" in this context means intentional injury or despicable conduct that is carried on by the defendant with a willful and conscious disregard for the rights or safety of others. (Civil Code § 3294(c)(1).) "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civil Code § 3294(c)(2).) While malice and oppression may be inferred from a defendant's conduct, the only evidence here is the condition of the property, which by itself is not sufficient for plaintiffs to meet their burden on this motion.

Motion Denied.

9. 9:00 AM CASE NUMBER: C23-03169
CASE NAME: ADAM DRAGISCH VS. TRALEE, INC.
HEARING ON PETITION IN RE: COMPEL ARBITRATION
FILED BY: TRALEE, INC.
TENTATIVE RULING:

Defendants, Tralee, Inc. dba Antioch Auto Center and Antioch Chrysler Jeep Dodge, Inc. [Defendants] bring this Petition to compel arbitration of all individual claims, including individual PAGA claims, against Defendants and to stay the action until the arbitration is complete [Petition]. The Petition is opposed by Plaintiff Adam Dragisich [Plaintiff].

For the following reasons, the Petition is **granted**.

Background

Plaintiff's claims arise from his employment by Defendants. On or about September 8, 2022, as part of the "Applicant Statement and Agreement," Plaintiff electronically executed an agreement to arbitrate employment-related claims with Defendants, and on September 9, 2022, he signed the same document by hand in ink certifying that it was previously submitted online and the information is correct. (Hafstad Dec., ¶ 6; Petition, Ex. A.) On September 15, 2022, Plaintiff also executed by hand in ink, in connection with his employment, the "Service Salesperson Compensation Plan," which also

included a binding arbitration agreement. (Hafstad Dec., ¶ 7; Petition, Ex. B.)

The Applicant Statement and Agreement and Service Salesperson Compensation Plan [jointly, Employment Agreements] includes provisions providing for arbitration of all claims, pursuant to the Federal Arbitration Act [FAA] and the California Arbitration Act [CAA], including rights to discovery.

Particularly, the Application Statement and Agreement provides:

> 4. I understand that this agreement requires me to pursue all claims l bring against the Company (and any third-party beneficiaries) through binding arbitration … includ[ing] any and all claims which arise out of the employment context … whether they be … claims pursuant to the California Private Attorneys General Act ('PAGA") unless prohibited by controlling law, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum …
>
> 9. l agree that the arbitrator only has the authority to hear and adjudicate my individual claims and that the arbitrator does not have the authority to make the arbitration proceeding a class. representative or collective action. or to award relief to a group of employees in one proceeding. including claims brought pursuant to PAGA. … By signing below, you expressly waive the right to bring a class. collective, representative or PAGA claim (unless prohibited by controlling law) seeking any relief on behalf of others.
>
> 12. If any term or provision, or portion of this agreement, is declared void or unenforceable, it shall be severed and the remainder of this agreement shall be enforceable. Notwithstanding the same, the prohibition on the arbitrator hearing class claims and/or collective claims shall not be severable.

The Service Salesperson Compensation Plan contains similar provisions under the title Binding Arbitration Agreement that require arbitration of claims and prohibit the arbitrator from joining individual claims. The Compensation Agreement also includes a "right to defeat" representative actions as lawsuits or arbitration, stating within the arbitration provision that: "the Company has the right to defeat any attempt by me to file or join other employees in a class, collective, representative, or joint action lawsuit or arbitration (collectively 'class claims')." It does not include a severability clause.

Each of the Employment Agreements provides that the FAA shall control interpretation of the provision, and that the arbitration shall be conducted pursuant to the FAA the CAA, including rights to discovery.

Plaintiff's complaint brings claims for damages arising from his employment, both in an individual and representative capacity, including Private Attorney General Act [PAGA] claims.

Standard

Defendants filed a petition to compel arbitration, which functions as a motion and is heard in the

manner of a motion under California procedure. (Code Civ. Proc. § 1290.2; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414.) The court is compelled to order the parties to arbitration on the motion or petition of one of the parties where the employer and the employee are subject to a mandatory and binding arbitration agreement. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 98; Code Civ. Proc. § 1290 [a court may be petitioned to compel arbitration].)

Whether the arbitration agreement is governed by the FAA or the CAA, the threshold issue of whether a valid and enforceable agreement to arbitrate exists is determined under California law and procedures. (*Rosenthal, supra,* 14 Cal.4th at 413; Code Civ. Proc. §§ 1281, 1281.2, 1290.2.) The motion to compel arbitration only has to set forth the terms of the arbitration agreement between the parties or include a complete copy of the agreement. (Cal. R. Ct. 3.1330; *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165 [explaining moving party's initial burden].)

Once the existence of an arbitration agreement is established, the burden is on the party opposing arbitration to prove a defense to its enforcement. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126; *Alvarez v. Altamed Health Services Corp.* (2021) 60 Cal.App.5th 572, 580.) If a written arbitration agreement exists, it will be enforced unless there are grounds for its revocation. (*OTO, supra,* 8 Cal.5th at 125; Code Civ. Proc. § 1281.) Unconscionability is a basis for finding an arbitration agreement unenforceable without contravening the FAA. (Civ. Code § 1670.5(a); *OTO, supra,* 8 Cal.5th at 125.) The court as the trier of fact weighs the evidence in reaching a final determination regarding the validity and enforceability of the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

The burden of proof of unconscionability is on Plaintiff as the party resisting arbitration. (*Rosenthal, supra,* 14 Cal.4th at 413; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) Both procedural and substantive unconscionability must be proven to render a contract unenforceable, based on a sliding scale such that the greater the procedural unconscionability, the lesser the required showing of substantive unconscionability, and vice versa. (*Armendariz*, *supra*, 24 Cal. 4th at 114; *OTO, supra,* 8 Cal.5th at 125.)

"'[A]n employee's right to bring a PAGA action is unwaivable.'" (*Westmoreland v. Kindercare Education LLC* (2023) 90 Cal.App.5th 967, 981.) PAGA claims may be split into individual and representative elements under the Federal Arbitration Act, and individual PAGA claims may be compelled into arbitration. (*Leeper v. Shipt, Inc.* (2024) 107 Cal.App.5th 1001, 1005; *Westmoreland*, *supra*, 90 Cal.App.5th at 981-982.)

The Court may stay the action pending completion of the arbitration pursuant to Code of Civil Procedure section 1281.4. "The purpose of the statutory stay is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved." (*Heritage Provider Network, Inc. v. Superior Court* (2008) 158 Cal.App.4th 1146, 1152, internal citations and quotes omitted.)

Analysis

Existence of a Valid Agreement to Arbitrate and Severability

As discussed above, Defendants, as the moving party, have the burden to first establish the existence of a valid agreement to arbitrate. Defendants presented facts and documents to demonstrate that Plaintiff agreed to arbitrate his claims, namely via valid execution of the Employment Agreements.

Plaintiff does not dispute that he executed the Employment Agreements or that the Employment Agreements apply to his claims in this action. Plaintiff argues that the arbitration provisions impermissibly waive representative PAGA claims. First, there is language in the Application Statement that provides that such waiver does not apply to PAGA, if it is not allowed by law. Additionally, the Compensation Agreement includes a right to defeat a representative claim, but Defendants are not seeking to enforce such provision via this Petition.

The language in the Application Statement that relates to waiver makes clear that it does not apply to claims where it is prohibited by law. (Petition, Ex. A at § 9.) Further, the language provides that all other claims shall be subject to individual arbitration. (Petition, Ex. A at § 4.)

Defendants presented the signed Employment Agreements under which they seek to compel arbitration. Plaintiff has not disputed or disproved Defendant's evidence of the executed arbitration agreements. Thus, Defendants have met their initial burden to demonstrate a valid agreement to arbitrate Plaintiff's individual claims arising from his employment with Defendants, including the individual claims in the Complaint.

Unconscionability

Plaintiff argues that the arbitration provisions in the Employment Agreements do not meet the standards under *Armendariz*, *supra*, but does not discuss the standard set forth in such precedent. As Defendant explains, *Armendariz* held that a contract may be found unenforceable if it is determined to be both procedurally and substantively unconscionable. (*Armendariz*, *supra*, 24 Cal.4th at 114.)

Plaintiff does not elaborate an argument based on unconscionability, and does not include analysis of the facts with respect to the *Armendariz* factors enumerated, or present analysis including application of the *Armendariz* holding in other precedent. Plaintiff plainly argues that "[t]he arbitration agreements do not satisfy the requirements under *Armendariz*," and lists a handful of matters that relate to procedural unconscionability, including issues pertaining to initiating arbitration and conducting discovery. However, this is insufficient to meet the Armendariz standards, as any concerns are generally addressed by the terms that incorporate the provisions of CAA. Further, Plaintiff has not discussed matters of substantive unconscionability, or provided legal analysis of the facts in terms of the two prongs of unconscionability and the severity of the issues raised.

As such, Plaintiff has not met his burden to raise a defense to enforcement of the provision.

Severability

As discussed above, the Application Statement provides that the waiver of representative PAGA claims

does not apply where it is prohibited by law. Further, the Compensation Agreement includes a "right to defeat" representative actions, but this provision does not contain waiver language and Defendants have not sought to enforce this contract-based "right" in this Petition.

To the extent there is a waiver provision in the Application Statement, case law supports the severability of the waiver, particularly when read with the severability clause in the agreement that allows any unenforceable term, provision, or portion of the agreement to be severed. (Petition, Ex. A at § 12; *Westmoreland*, *supra*, 90 Cal.App.5th at 981-982.) While Plaintiff cites *Westmoreland v Kindercare*, he but does not address the rulings recognition that claims may be split, and waivers may be severed.

Stay

Defendants seek to stay the case during pendency of arbitration under Code of Civ. Pro. § 1281.4 of CAA. Plaintiff does not oppose this request. The Complaint includes only one cause of action for PAGA claims, including individual claims, which are ordered to arbitration hereunder, and representative claims, which are not arbitrable. A stay will protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved. As such, the Court grants Defendants' request to stay the action pending completion of arbitration.

10. 9:00 AM CASE NUMBER: C24-00136
CASE NAME: RONALD WEBSTER VS. IHSS IN HOME SUPPORT SERVICES
***HEARING ON MOTION IN RE: SET ASIDE DEFAULT**
FILED BY: BROOKS, GREGORY
****TENTATIVE RULING:****
Before the Court is Defendant Contra Costa County In-Home Supportive Services Public Authority and the Individual Defendants' Motions to Set Aside Default. The Court **grants both motions**.

Procedural Background

Plaintiff filed his original Complaint against "IHSS In-Home Supportive Services" and several individual County employees on January 24, 2024. Plaintiff then filed a First Amended Complaint approximately nine months later on October 16, 2024. Around December 20, 2024, someone dropped off the First Amended Complaint and an Amended Summons for all named defendants with Stacey Boyd, Deputy Clerk at Contra Costa County Clerk of the Board, located at 1025 Escobar Street, 1st Floor, Martinez, CA. (Sarah Ely Decl., ¶ 2.) Per an Amended Proof of Service of Summons, one of the parties served was "In Home Supportive Services."

Contra Costa County In-Home Supportive Services Public Authority ("IHSSPA") is a public entity separate from Contra Costa County. IHSSPA was established by the Contra Costa County Board of Supervisors pursuant to Welfare and Institutions Code section 12301.6 to provide for the delivery of In-Home Supportive Services pursuant to the IHSS program. The County Board of Supervisors also happens to be the Board of Supervisors for IHSSPA. (Sarah Ely Decl., ¶ 2.)

The Amended Summons and First Amended Complaint were directed to the County Risk Management Department, which promptly contacted its third-party claims administrator, George Hills, requesting it handle the claim against IHSSPA. (Sarah Ely Decl., ¶ 3.) Unfortunately, a misunderstanding ensued.

The assigned claims administrator at George Hills, Charles Torretta, based on correspondence he received, believed that County Risk Management had assigned counsel for IHSSPA, while County Risk Management reasonably relied on George Hills to retain counsel to defend IHSSPA. However, neither retained defense counsel for IHSSPA, and no response was filed to the First Amended Complaint. (Sarah Ely Decl., ¶¶ 3-6, 9; Charles Torretta Decl., ¶¶ 1-5.)

Plaintiff filed a Request for Entry of Default on January 24, 2025, only three days after the deadline for Defendant IHSSPA to file a responsive pleading. The Court Clerk entered default on January 24, 2025. Plaintiff did not make any effort to contact IHSSPA or the Clerk of the County Board of Supervisors to advise of his intent to seek entry of default if a response was not filed soon, and the Request for Entry of Default and Entry of Default were not sent to IHSSPA or the County. (Sarah Ely Decl., ¶ 7; Martin J. Ambacher Decl., ¶ 7, Exh. D.)

Upon finding that default had been entered against IHSSPA and that no counsel had been retained to defend the lawsuit against IHSSPA, the County Risk Management Department and George Hills promptly retained counsel on February 3, 2025. (Sarah Ely Decl., ¶¶ 8-9; Charles Torretta Decl., ¶¶ 7-8.) Defense counsel for IHSSPA quickly reached out to Plaintiff to request a stipulation to set aside the entry of default, but Plaintiff has yet to respond. Thus, this motion to set aside entry of default was diligently prepared and timely filed along with the proposed pleadings on February 10, 2025. (Martin J. Ambacher Decl., ¶¶ 4-5, Exhs. A and B.)

Legal Standard for CCP § 473

It has long been established that "[the policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary." (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854-855.) Thus, '"the provisions of section 473 … are to be liberally construed and sound policy favors the determination of actions on their merits." [Citation.]' [Citation.] '[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default.'" (*Shapell SoCal Rental Properties, LLC v. Chico's FAS, Inc.* (2022) 85 Cal.App.5th 198, 212.) "'Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations "very slight evidence will be required to justify a court in setting aside the default." [Citations.]'" (*Fasuyi v. Permatex, Inc*. (2008) 167 Cal.App.4th 681, 695.)

Defendant moves to set aside the default judgment pursuant to California Code of Civil Procedure section 473 (b). "The statue includes a discretionary provision, which applies permissively, and a mandatory provision, which applies as of right." (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 25.) "Although this bifurcation is not demarcated in any internal subtitling, it is plainly evidence in the textual structure of the statute." (*Ibid.*)

Discretionary Provision

The 'discretionary' provision is set forth at the beginning of the statute:

> The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.

> Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.

While it is true that the "statute's 'broad remedial provisions' are to be 'liberally applied to carry out the policy of permitted trial on the merits,' the party seeking relief "bears the burden of proof in establishing a right to relief." (*Hopkins v. Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1410 citations omitted.) "The burden is a 'double one: the moving party must show a satisfactory excuse for his default, and he must show diligence in making the motion after discovery of the default.'" (*Ibid.* internal quotations omitted.) The party must identify the specific facts which "demonstrate 'that due to *some mistake*, either of fact or law, of himself or of his counsel, or through *some inadvertence*, surprise or neglect which may properly be considered excusable, the judgment or order from which he seeks relief should be reversed." (*Ibid.*)

"Under the traditional *discretionary* provisions of section 473, a party seeking relief on the basis of its attorney's neglect must show that the neglect was *excusable.*" (*Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1487.) An entirely different standard exists under the mandatory relief provisions in section 473. "These *require* the court to grant relief if the attorney admits neglect, even if the neglect was *inexcusable*." (*Ibid.*)

Mandatory Provision Attorney Fault

The 'mandatory' provision that relates to times when an attorney admits fault in causing the default is provided for in the later portion of the statute:

> Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

In accordance with the mandatory provision of section 473 subdivision (b), the court is required to set aside a default/default judgment "whenever an application for relief … is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect." (Cal. Code Civ. Proc. § 473 (b).) The statute, "does not provide for any exception to this requirement," even if the client claims that the attorney abandoned them. (*Las Vegas Land & Development Co., LLC v. Wilkie Way, LLC* (2013) 219 Cal.App.4th 1086, 1092; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) ¶5294a [noting "when the client is unable to obtain an affidavit because the attorney has abandoned the client, mandatory relief is unavailable."].) In "the case of any attorney's abandonment of a client, the injured client's remedy is to bring a motion for *discretionary* relief under section 473 … [or] bring an action against its attorney." (*Id.* at 1093.)

"[T]he court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect vacate any … resulting default [or default judgment] …

entered against his or her client….” (Code Civ. Proc. § 473, subd. (b).)

Analysis

Contra Costa County In-Home Supportive Services Public Authority

Mistake

A mistake permitting setting aside of a default takes two forms, mistake of fact or mistake of law. "A mistake of fact is when a person understands the facts to be other than they are; a mistake of law is when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts." (*Baratti v. Baratti* (1952) 109 Cal.App.2d 917, 921.)

In *Fasuyi*, the Court of Appeal found that the defendant, who had promptly forwarded the service of process to his insurance brokers, who in turn forwarded the claim to the insurance claim representatives with the expectation that the insurer would retain counsel and appear on the defendant’s behalf, had demonstrated grounds for reversal based on mistake, inadvertence, and excusable neglect. (*Fasuyi v. Permatex, Inc*. (2008) 167 Cal.App.4th 681, 694.) The *Fasuyi* Court of Appeal emphasized in reversing the trial court’s denial of the motion to set aside the entry of default:

> Once that service was accomplished, the legal department immediately did what any good department would, forwarding the summons and complaint to its insurance broker for appropriate handling. The broker also did what any good broker should, and immediately forwarded the complaint on to the appropriate insurers, received back the requested confirmation, and believed that the matter would be tended to. Sadly, it was not. That is the record here. No lack of cooperation from the defense side. Indeed, the converse. No deception. No duplicitousness. No stonewalling. No evasion. And no disregard of any warning. In fact, no warning. (Id. at pp. 700-701.)

Here, there was a mistake of fact because the County Risk Management Department mistakenly believed that George Hills had retained counsel to defend IHSSPA’s interests, who would prepare, serve, and file a response to the First Amended Complaint. Mr. Torretta, the George Hills claims administrator, mistakenly believed that the defense of IHSSPA was being handled by County Counsel. (Charles Torretta Decl., ¶¶5-8.) This misunderstanding was largely due to Mr. Torretta’s lack of experience in handling claims for IHSSPA and was unfamiliar with its status as a separate entity from the County; and communications from the County that he mistakenly understood indicated that County Counsel was handling the defense. (Sarah Ely Decl., ¶¶ 2-9; Charles Torretta Decl., ¶¶ 5-8.) Defendant Contra Costa County In-Home Supportive Services Public Authority has shown with ample authority that the mistake of not retaining counsel retained to defend the lawsuit against IHSSPA, is the kind of mistake contemplated and covered by the discretionary portion of the statute. The County Risk Management Department and George Hills promptly retained counsel on February 3, 2025, after realizing the mistake and this motion to set aside entry of default and the proposed pleadings were promptly filed on February 10, 2025. (Martin J. Ambacher Decl., ¶¶ 4-5, Exhs. A and B.)

The Court grants relief from default as to Defendant Contra Costa County In-Home Supportive Services Public Authority.

Individual Defendants

Improper Service Makes a Judgment Void

"A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery." (Code Civ. Proc., § 415.10.) "[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void." (*Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426, 1444 [internal citation omitted].) As noted in the proof of service filed by Plaintiff, no Individual Defendant was served personally; instead, each and every summons was dropped off with Stacey Boyd, a deputy clerk with the County's Clerk of the Board. Such service is improper for the Individual Defendants.

Service on the Clerk for the Board of Contra Costa County Was Not Authorized

"A summons may be served on a person not otherwise specified in this article by delivering a copy of the summons and of the complaint to such person or to a person authorized by him to receive service of process." (Code Civ. Proc., § 416.90.) "The Judicial Council comment regarding this section explains, 'Service is made by delivering, in a manner specified in Section 413.10, a copy of the summons and of the complaint to such person personally or to his agent. [¶] If process is delivered to an agent of defendant, such agent must be one who is authorized by law or by appointment to receive service of process.'" (*Crane v. Dolihite* (2021) 70 Cal.App.5th 772, 785.) When a defendant challenges jurisdiction "the burden is on the plaintiff to prove the existence of jurisdiction by proving, inter alia, the facts requisite to an effective service." (*Dill*, 24 Cal.App.4th at 1439-1440.) Because Ms. Boyd and the Clerk of the Board are not authorized agents for service for the Individual Defendants, service on the Clerk cannot constitute personal service and the default should be vacated. (See Stacey Boyd Decl., ¶ 4.)

Conclusion

Both Defendant Contra Costa County In-Home Supportive Services Public Authority and the Individual Defendants' Motions to Set Aside are granted.

11. 9:00 AM CASE NUMBER: C24-00136
CASE NAME: RONALD WEBSTER VS. IHSS IN HOME SUPPORT SERVICES
***HEARING ON MOTION IN RE: SET ASIDE DEFAULT OF IHSS PUBLIC AUTHORITY**
FILED BY: IHSS IN HOME SUPPORT SERVICES
****TENTATIVE RULING:****
See Line 10.

12. 9:00 AM CASE NUMBER: C24-01959
CASE NAME: COURTNEY OLIVER VS. ECWC PARTNERS, INC.
***HEARING ON MOTION IN RE: TO COMPEL ARBITRATION**
FILED BY: ECWC PARTNERS, INC.
****TENTATIVE RULING:****

Defendants' motion to compel arbitration is **denied**. The agreements are unenforceable

based on unconscionability and pursuant to provisions in the California Labor Code, as discussed below.

Background

Plaintiffs Courtney Oliver, Katherine Flores, and Sophia Bermudez, are former hourly-paid, non-exempt employees of defendants, ECWC Partners, Inc., CCSAC, Inc., CANN Distributors, Inc., Strategic Innovations Group, Inc., and NUG Inc. Oliver worked for defendants from approximately August 2022 to March 2024, Flores from approximately August 2023 to May 2024, and Bermudez from October 2023 to May 2024.

Upon employment with defendants, plaintiffs each signed an arbitration agreement containing the same terms. Among those terms is the provision that the parties "mutually consent to the resolution by final, binding and non-appealable arbitration of all claims or controversies (claims) that Employer may have against Employee or that Employee may have against Employer or against its [affiliated parties]." (Declaration of Adam Peterson in Support of Motion to Compel Arbitration, hereinafter "Peterson Decl.," Ex. A, ¶1.) The "claims covered" describes an extremely broad array of claims. The arbitration procedures are stated to be governed by AAA rules related to resolution of employment disputes. (*Id*. at ¶3.)

Plaintiffs filed this putative class action on July 25, 2024, alleging nine causes of action including: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; (7) failure to indemnify employees for expenditures; (8) failure to produce requested employment records; and (9) unfair business practices.

In response, defendants move to compel arbitration. In support of the motion, they provide a declaration by Adam Peterson, the President of NUG, Inc. He attaches the arbitration agreements allegedly signed by each of the named plaintiffs. Plaintiffs oppose the motion, arguing the FAA has not been shown to apply here, that California law bars arbitration of the subject claims, and that the agreements are not enforceable based on unconscionability. Defendants' reply brief argues the FAA applies, that the agreements are not unconscionable, and that the California Labor Code does not prohibit enforcement of the agreement here.

Standard

"A petition to compel arbitration should be granted if the court determines that an agreement to arbitrate the controversy exists. (Code Civ. Proc., § 1281.2.) The moving parties bear the burden of proving the existence of the arbitration agreement by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; *Alvarez v. Altamed Health Services Corp.* (2021) 60 Cal.App.5th 572, 580.) Once the existence of an arbitration agreement is established, the burden is on the party opposing arbitration to prove its defense. (*Alvarez, supra,* 60 Cal.App.5th at 580.) If a written arbitration agreement exists, it will be enforced unless there are grounds for its revocation. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125; Code Civ. Proc. § 1281].)

Analysis

A. Existence of Agreement

A written agreement to submit to arbitration an existing controversy or a controversy

thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract. (Code Civ. Proc., § 1281.) The party seeking arbitration bears the burden of proving the existence of an arbitration agreement. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC, hereinafter "Pinnacle,"* (2012) 55 Cal.4th 223, 236.)

In California, contract formation requires free and mutual consent communicated to each other. (Civ. Code, § 1565.) Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties. (*Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 788.)

Here, defendants provide signed copies of the Arbitration Agreement for each of the named plaintiffs. (Exhibits A-C to Peterson Decl.) While the agreements include most of the defendants, ECWC Partners Inc. is not included. There is no evidence to indicate ECWC Partners is related to the other defendants. Still, plaintiffs do not raise this issue or provide any evidence to contradict that they signed the Arbitration Agreements. Instead they argue the agreements are not enforceable. For purposes of this discussion, defendants have met their burden to show the existence of an agreement.

B. Enforceability

1. Delegation

Plaintiffs argue the agreements here do not include a "clear and unmistakable" delegation of threshold arbitrability questions. (*Wilson-Davis v. SSP America, Inc*. (2021) 62 Cal.App.5th 1080, 1090 [discussing requirements of delegation clause].) The agreement here states, "[t]he arbitrator shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the Arbitration Agreement itself, including but not limited to any claim that all or any part of this Arbitration Agreement is void or voidable."

However, plaintiffs point out that the following paragraphs conflict with such an unconditional delegation, as set forth in the opposition (p. 11-12). They cite a case in which the arbitration agreement also "point[ed] in two directions on the question whether a court or an arbitrator is to decide the enforceability." (*Jack v. Ring LLC* (2023) 91 Cal.App.5th 1186, 1199.) As a result of that uncertainty, the court determined "there is no clear and unmistakable delegation of the issue exclusively to arbitration."(*Id*. at 1202.) Defendants do not respond to this argument and do not discuss the delegation provisions. Accordingly, the Court treats this as a concession that the delegation provision does not deprive the Court of authority to decide the issues before it.

2. Unconscionability

Plaintiffs contend the arbitration agreements are unconscionable and therefore unenforceable. They bear the burden of proving unconscionability. (*Pinnacle, supra,* 55 Cal.4th at 236.) To briefly recapitulate the principles of unconscionability, the doctrine has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071, citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-114.)

While both procedural and substantive unconscionability must be present in order to declare a contract term unconscionable, they need not be present in the same degree. (*Sanchez v. Valencia*

Holding Co. LLC (2015) 61 Cal.4th 899, 910.) "'[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Id.,* quoting *Armendariz* at 114.)

a) Procedural Unconscionability

Plaintiffs argue the arbitration agreement is procedurally unconscionable. Defendants do not provide any response to this issue, likely because there is little to be argued on this point.

The procedural unconscionability analysis is laid out in *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111. The analysis begins with an inquiry into whether the contract is one of adhesion. (*Id*. at pp. 126-127, citations omitted.) An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power on a take-it-or-leave-it basis. (*Ibid*.) Arbitration contracts imposed as a condition of employment are typically adhesive. (*Ibid*.) The pertinent question, then, is whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required. (*Ibid*.) Oppression occurs where a contract involves lack of negotiation and meaningful choice, and surprise occurs where the allegedly unconscionable provision is hidden within a prolix printed form. (*Ibid*.)

The agreements in this case were presented to plaintiffs "upon employment." (Peterson Decl., ¶4.) The agreements, as in *O.T.O., LLC*, are contracts of adhesion and, as in that case, suffer from some degree of procedural unconscionability, requiring the Court to also consider substantive unconscionability.

b) Substantive Unconscionability

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create overly harsh or one-sided results. (*Armendariz, supra*, 24 Cal. 4th at p. 114.) A contract term is not substantively unconscionable when it merely gives one side a greater benefit. (*Pinnacle, supra*, 55 Cal.4th at 246.) "Not all one-sided contract provisions are unconscionable; hence the various intensifiers in our formulations: '*overly* harsh,' '*unduly* oppressive,' '*unreasonably* favorable.'" (*Sanchez, supra,* 61 Cal.4th at 911, emphasis in original.) To be substantively unconscionable, the agreement must be something more than a mere "bad bargain." (*Id.*)

In evaluating substantive unconscionability, courts often look to whether an arbitration agreement meets certain minimum levels of fairness. At a minimum, a mandatory employment arbitration agreement must (1) provide for neutral arbitrators, (2) provide for more than minimal discovery, (3) require a written award that permits limited judicial review, (4) provide for all of the types of relief that would otherwise be available in court, and (5) require the employer to pay the arbitrator's fees and all costs unique to arbitration. Elimination of or interference with any of these basic provisions makes an arbitration agreement substantively unconscionable. (*Armendariz,* 24 Cal.4th at 102-103.)

Plaintiffs' bases for substantive unconscionability include the provisions that (1) waive the bond requirement in injunctive actions by defendants; (2) bar judicial review of arbitration awards; (3) waive the right to a jury as to any dispute, even those not covered by the agreement; (4) limit discovery rights; (5) mandate confidentiality such that plaintiffs' ability to prosecute claims is hindered; (6) require non-arbitrable claims to be arbitrated; (7) require the employees to pay attorney fee award where they unsuccessfully challenge the agreement.

As part of their argument, plaintiffs ask this Court to construe the terms of a "Confidential and Proprietary Information Agreement" in connection with the arbitration agreements because they

were also produced "[a]mong the personnel file documents." (Declaration of Edward E. Kim in Support of Opposition, ¶¶1-3.) Plaintiff's evidence is somewhat lacking in this regard (only Exhibit C shows an NDA signed on the same date as the plaintiff's arbitration agreement), but defendants do not dispute the NDAs were signed on the same dates as the arbitration agreements. *Alberto v. Cambrian Homecare* (2023) 91 Cal.App.5th 482, discussed by both parties, relied on a confidentiality agreement signed by plaintiff on the same date as an arbitration agreement. The court there found that the agreements were part of the same transaction and therefore any unconscionability in the confidentiality agreement affected whether the arbitration agreement was also unconscionable. (*Id.* at 491.)

The following explanation from the *Alberto* court applies in this case as well:

> Here, we have no difficulty concluding that the Arbitration Agreement and the Confidentiality Agreement should be read together. They were executed on the same day. They were both separate aspects of a single primary transaction—[plaintiff]'s hiring. They both governed, ultimately, the same issue—how to resolve disputes arising between [plaintiff] and [defendant] arising from [plaintiff]'s employment. Failing to read them together artificially segments the parties' contractual relationship. Treating them separately fails to account for the overall dispute resolution process the parties agreed upon.

(*Alberto v. Cambrian Homecare* (2023) 91 Cal.App.5th 482, 490-491.)

i. Injunctive Actions / Bond Waiver

The NDA plaintiffs signed, at § 6, reserves the rights of the employer to enforce the NDA by "injunction, specific performance or other equitable relief, without bond and without prejudice to any other rights and remedies […]." The provision mirrors a similar provision at issue in *Alberto,* which affirmed the ruling that such bond waivers "exceed the legitimate 'margin of safety' for the employer and are not mutual." (*Alberto, supra*, 91 Cal.App.5th at 492.) The term is non-mutual and contributes to the unconscionability of the arbitration agreement.

ii. Judicial Review

Plaintiffs argue that the prohibition of judicial review also makes the agreement substantively unconscionable. In the second paragraph of the preamble, the agreement states "parties agree to submit their dispute to final, binding and non-appealable arbitration for all disputes arising out of Employee's relationship with Employer […]" Similar phrasing is repeated in the first and seventh numbered paragraphs. In the third paragraph of the preamble, it states that "parties understand that they are waiving their rights to sue for legal redress in a court of law before a judge and/or jury and to file an appeal."

Plaintiffs cite to the *Armendariz* decision, which discusses the requirements of a valid arbitration agreement. With respect to judicial review, that case makes clear that the arbitration agreement must provide for a "written award" in order to allow judicial review. *Armendariz* does not require that an arbitration award be appealable. In any event, here there is a requirement for a "written award" in paragraph 7 ("[t]he arbitrator shall issue a written decision that shall specify the legal and factual reasons for the decision"). (Peterson Decl., Ex. A.) Also in that paragraph, the agreement provides for entry by a "court having jurisdiction." The lack of judicial review is not a basis for the agreement's unconscionability.

iii. Jury Waiver

Plaintiffs argue that the provision waiving the right to a jury "[i]n the event that a court rules that this Arbitration Agreement is unenforceable" is unconscionable. They cite *Grafton Partners L.P. v. Sup.Ct.* (2005) 36 Cal.4th 944, 956. Defendants wholly fail to respond to this argument, signaling concession that the argument has merit. While jury waivers are allowed pursuant to an enforceable arbitration agreement, the agreements here apply where the agreement is *not* enforceable. This provision, especially in combination with the provision noting that a failed challenge to the agreement risks incurring attorneys' fees (discussed below), operates as an unduly coercive deterrent for employees considering an attempt to vindicate their rights.

iv. Discovery

The assessment of whether a discovery clause is unconscionable should focus on general factors at the time of formation, irrespective of subsequent developments. (*Ramirez v. Charter Communications, Inc*. (2024) 16 Cal.5th 478, 506.) Those factors include the types of claims covered by the agreement, the amount of discovery allowed, the degree to which that amount may differ from the amount available in conventional litigation, any asymmetries between the parties with regard to discovery, and the arbitrator's authority to order additional discovery. (*Ibid*.) While defendants argue an arbitrator has authority to order additional discovery, advertising the one-deposition limit on the face of the agreement would operate to deter arbitration, especially where an employee suspected that sufficient evidence on a claim would require more than one deposition.

v. Cost and Fee Provisions

As mentioned above, plaintiffs raise the fee provisions of paragraph 8 in the agreements, which require parties to bear their own costs (which could easily exceed what would be required for a court action), and bear the fees and costs of the other side if awarded by the arbitrator. Such an award would not be permitted under existing case authority. In *Ramirez*, the court stated:

> Read together, the statutes and Armendariz make clear that an arbitration agreement imposed as a condition of employment cannot require an employee to pay attorney fees to the employer in the arbitration of a statutory claim, unless the arbitrator finds that the action was frivolous, unreasonable, or groundless when brought, or that the employee continued to litigate after it clearly became so.

(*Ramirez, supra*, 16 Cal.5th at 508.)

"[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Id.* at 541, citing *Armendariz* at 110-111.) Here, the agreements impose arbitration costs/fees which plaintiffs would not be required to bear through court action.

c) Severance Would Not Cure Unconscionable Provisions

In *Ramirez,* the California Supreme Court summarized the law on severance. (*Ramirez, supra*, 16 Cal.5th at 516-517.) It reiterated that there is no bright-line rule requiring a court to refuse enforcement if a contract has more than one unconscionable term, but also noted that "the greater the number of unconscionable provisions a contract contains the less likely it is that severance will be the appropriate remedy." (*Id*. at 516.) Courts cannot rewrite agreements and impose terms to which neither party has agreed, but even where an unconscionable agreement can be cured through severance, an additional inquiry is required into whether it should be cured given that "severing multiple unconscionable provisions from an agreement and enforcing the remainder could create an

incentive for an employer to draft a one-sided arbitration agreement in the hope employees would not challenge the unlawful provisions […].” (*Id*. at 517, internal citations omitted.)

Here, there are multiple unconscionable provisions, some of which are described herein. More importantly, the agreement is unduly coercive because it poses the risk of incurring attorneys' fees, being limited to only one deposition, and surrendering the right to a jury if the agreement is *successfully* challenged. Severance here would not cure this problematic scheme.

3. Labor Code Statutes and Arbitration

The arbitration agreements are also not enforceable because the Labor Code exempts from mandatory arbitration claims like those in the present matter, regardless of any private agreement otherwise.

Plaintiffs, in their opposition, contend they cannot be compelled to arbitrate their employment claims as a result of section 229 of the California Labor Code, which provides that “[a]ctions to enforce the provisions of this article […] may be maintained without regard to the existence of any private agreement to arbitrate.” Most of plaintiffs' causes of action are brought pursuant to the same article as section 229 (contrary to the Reply's assertion that “most” are not within the relevant article, 7:26-28.) Plaintiffs also cite Labor Code section 432.6(a), which prohibits requiring employees to agree to arbitration as a condition of employment. As to the latter, plaintiffs do not set forth any evidence that the agreements were a condition of employment.

As to section 229, however, this provision in the Labor Code provides a separate and independent basis to deny the motion.

Defendants argue in their reply brief that the Federal Arbitration Act (FAA) applies to the subject arbitration agreements, thereby preempting Labor Code §229.

Although federal law may preempt state law, courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it. (*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 211.) In their moving papers, defendants do not argue that the FAA applies, or provide any evidence with respect to interstate commerce. The reply argues defendants “own and operate businesses that involve the growth and sale of cannabis products.”

Plaintiffs object to the argument (mislabeling it “evidence”) and respond with “Objections.” They correctly cite authorities that stand for the “general rule of motion practice, which applies here, [] that new evidence is not permitted with reply papers." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537.) Where evidence on reply fills in gaps raised by the opposition, the evidence may be properly considered. (*Id*. at 1538.) Here, however, no evidence was filed with the reply. The reply only offers unsupported and vague arguments about the nature of defendants' “businesses” (which may or may not have been the same as those named in this lawsuit).

Defendants also contend the language of section 229 excludes class actions. (Reply, 7:23-24.) This argument is not supported by any citation to authority aside from the language of the statute itself. The relevant language states: “[a]ctions to enforce the provisions of this article for the collection of due and unpaid wages claimed *by an individual* may be maintained without regard to the existence of any private agreement to arbitrate.” (Lab. Code, § 229, emphasis added.) A putative class action is a collective action involving individual claims. The Court is aware of no authority that would sever wage claims “by an individual” from claims that the same individual could raise as a class member (as opposed to the ability to bring a PAGA claim in one's representative capacity, for instance).

13. 9:00 AM CASE NUMBER: C25-00277
CASE NAME: EMMIE REED VS. US BANK TRUST, NATIONAL ASSOCIATION
***HEARING ON MOTION IN RE: FOR CONSOLIDATION OF CASES**
FILED BY: REED, EMMIE
****TENTATIVE RULING:****

Before the Court is a motion for consolidation of cases filed by plaintiff Emmie Reed. For the reasons set forth, the motion is **denied**.

Background

Plaintiff Emmie Reed filed a complaint against defendant U.S. Bank Trust, N.A., not in its individual capacity but as owner trustee for the RCF2 Acquisition Trust and Selene Finance ("Selene" or "Defendants") alleging generally that Defendants wrongfully foreclosed on a deed of trust against real property located on Turnstone Circle in Pittsburg, presumably a residence formerly owned by Plaintiff. Plaintiff moves for consolidation of this action with an unlawful detainer case filed by Selene in February 2024, PS24-0225 ("UD Action"). Defendants oppose the motion.

Legal Standards for Consolidation

Code of Civil Procedure section 1048 provides, "When actions involving a common question or law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." (Code Civ. Proc. § 1048(a).) Rule 3.350 sets forth the procedural requirements for the motion, including a requirement that the actions to be consolidated be identified and the motion identify the parties and their counsel who have appeared.

The decision to consolidate is left to the discretion of the trial court. (*Todd Steinberg v. Dalkon Shield Claimants Trust* (1996) 48 Cal.App.4th 976, 978-979 ["Code of Civil Procedure section 1048 grants discretion to the trial courts to consolidate actions involving common questions of law or fact. The trial court's decision will not be disturbed on appeal absent a clear showing of abuse of discretion."]; *National Electric Supply Co. v. Mt. Diablo Unified School District* (1960) 187 Cal. App. 2d 418, 421 [no abuse of discretion in severing issues of complaint and cross-complaint].)

Defendants' Request for Judicial Notice

Defendants request that the Court take judicial notice of a series of recorded documents recorded in the Recorder's Office for the County of Contra Costa. (Defs. RJN Exhs. A-I.) The documents include a deed of trust recorded August 31, 2006 and a trustee's deed upon sale recorded October 19, 2023. The Court **denies** the request for judicial notice of these documents as they are irrelevant to the determination of the motion.

Procedural Notes on Motion and Opposition

The motion identifies the UD Action which she seeks to consolidate with this case but does not fully comply with the procedural requirements of Rule 3.350 cited above. The lack of compliance is

immaterial to the Court's ruling.

The opposition was served on Plaintiff Reed by mail rather than by overnight mail or other means set forth in Code of Civil Procedure section 1005(b). Nevertheless, the opposition was served 12 court days, and 16 calendar days, in advance of the hearing which was well in advance of the opposition deadline. Based on the early service, and the reasons for the Court's ruling set forth below, the Court does not find the improper service prejudicial or material. The Court, however, expects compliance with the procedural statutes and rules by both sides in the future.

Analysis

Plaintiff Reed cites the case *Martin-Bragg v. Moore* (2013) 219 Cal.App.4th 367 in support of her motion to consolidate. That case holds that "[T]he trial court has the power to consolidate an unlawful detainer proceeding with a simultaneously pending action in which title to the property is in issue. That is because a successful claim of title by the tenant would defeat the landlord's right to possession. [Citation omitted.] When an unlawful detainer proceeding and an unlimited action concerning title to the property are simultaneously pending, the trial court in which the unlimited action is pending may stay the unlawful detainer action until the issue of title is resolved in the unlimited action, or it may consolidate the actions. [Citation omitted.]" (*Martin-Bragg v. Moore, supra,* 219 Cal.App.4th at 385.)

In opposition to the motion, Defendants cite authorities holding that a court in an unlawful detainer action only addresses a "limited scope" of title issues. (*Cheney v. Trauzettel* (1937) 9 Cal.2d 158, 159 ["The trial court properly held that in the summary proceeding in unlawful detainer the right to possession alone was involved, and the broad question of title could not be raised and litigated by cross-complaint or affirmative defense. [Citation omitted.] It is true that where the purchaser at a trustee's sale proceeds under section 1161a of the Code of Civil Procedure he must prove his acquisition of title by purchase at the sale; but it is only to this limited extent, as provided by the statute, that the title may be litigated in such a proceeding. [Citations omitted.]"]; *Old National Financial Services, Inc. v. Seibert* (1987) 194 Cal.App.3d 460, 465 ["As a general rule, in unlawful detainer proceedings, only claims bearing directly upon the right to possession are involved. [Citation omitted.] However, where title is acquired through proceedings described in Code of Civil Procedure section 1161a [foreclosure], courts must make a limited inquiry into the basis of the plaintiff's title. [Citation omitted.]"].) Based on the "limited scope" rule, a judgment in an unlawful detainer may also have a limited preclusive effect. (*See, e.g., Struiksma v. Ocwen Loan Servicing, LLC* (2021) 66 Cal.App.5th 546, 554-555.) Therefore, Defendants argue there are no issues in common between the UD Action and the claims made in Plaintiff's complaint in this unlimited civil case.

More important, Defendants also contend that the UD Action is essentially completed, and that judgment has been entered. The Court has reviewed the register of actions in the UD Action. The register of actions shows (1) an order granting summary judgment for Selene was entered on February 18, 2025; (2) a judgment for possession was entered on March 10, 2025; and (3) a notice of appeal was filed by Emmie Reed on February 24, 2025. Based on the status of the UD Action, consolidation of the UD Action with this case is not appropriate. A determination of the merits of the UD Action has already been made in that case, and Reed has appealed the determination to the Court of Appeal, which generally limits the trial court's jurisdiction over the action. (*See* Code Civ. Proc. § 916.)

14. 9:00 AM CASE NUMBER: L24-02130
CASE NAME: MIDLAND CREDIT MANAGEMENT INC. VS. LORAINE RICO
HEARING IN RE: MOTION FOR RECONSIDERATION OF MOTION TO SET ASIDE JUDGMENT
FILED BY:
TENTATIVE RULING:

Defendant moves to reconsider the Court's previous denial of her motion to set aside the default judgment, which was denied because the motion was not properly served. In her motion to reconsider, she shows adequate service.

She states that she was not served with the complaint, but that it was served on someone who was not authorized to accept service on her behalf. The plaintiff's proof of service attests to service on her personally. Defendant's statement to the contrary is not attested to under penalty of perjury and does not provide sufficient detail to overcome the proof of service submitted by plaintiff.

Defendant also asserts that the case is barred by an arbitration provision in the contract, which precludes this action. Assuming that this is a binding arbitration agreement, defendant was required to respond to the complaint and move to compel arbitration. It is not a ground for failing to respond to the complaint.

Motion denied.

15. 9:00 AM CASE NUMBER: MS5031
CASE NAME: PETITION OF: PARAQUAT CASES
HEARING IN RE: VERIFIED APPLICATION OF ADAM L. STOLTZ TO APPEAR PRO HAC VICE ON BEHALF OF PLAINTIFFS
FILED BY: PARAQUAT CASES
TENTATIVE RULING:
Granted.

16. 9:00 AM CASE NUMBER: MSC10-02872
CASE NAME: GROTH V. GILAD ET AL
***HEARING ON MOTION IN RE: FOR ATTORNEYS FEES AND COSTS**
FILED BY:
TENTATIVE RULING:

Hearing required to schedule further briefing.

This motion for attorney's fees was first heard by Judge Treat on February 29, 2024. He denied the motion without prejudice, directing the parties to (1) engage in a meaningful meet-and-confer and/or mediation; and (2) to develop a more credible allocation of time and billing between the time spent on the promissory note issue (to which the fee clause applied) and the other issues in the case (to which there is no claim for fees).

On September 19, 2024, Judge Treat heard a renewed motion for attorney's fees, and found the same two failings in the moving and opposing papers. While imploring the parties to find a

suitable mediator, he was not precise about the form in which the further material to be submitted in the event mediation was not successful. As a result, Groth has submitted a Supplemental declaration of counsel, which primarily argues that the full amount of fees should be awarded, while the other parties have submitted objections to Groth's attorney's declaration because it raises "new" issues.

While mediation might be in all parties' best interest, it is apparent that they will not be able to agree on parameters of a mediation, or even a mediator.

Plaintiff Groth is entitled to attorney's fees as the prevailing party in the litigation to enforce the promissory note at issue. Where a party is successful on some claims and not others, the attorney fee may be limited to that on the compensable claim. (*Akins v. Enterprise* (2000) 79 Cal.App.4th 1127.) Nonetheless, "[a]pportionment is not required where the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and non-compensable units." (*Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672, 687. See also *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 417, 424.) In his supplemental declaration, Groth argues that the matter of the validity of the note and the other issues in the case are "inextricably intertwined," and that Judge Craddick had previously so found. Therefore, he did not make a substantial effort to break out the fees attributable to the note claim. The difficulty here is that Judge Treat, in hearing the fee motion (for the most recent time) directed the parties to make a more substantial and credible effort to separate out the note-related fees. Neither party has done so. Given the prior direction by Judge Treat, there should be no concern that doing so could be considered a waiver of Groth's claim for all (or nearly all) of his attorney's fees.

The Court will hold a brief hearing for the sole purpose of scheduling further briefing, i.e., allowing defendants to schedule a more substantive brief in response to Groth's supplemental declaration, and to allow Groth to file a reply, with a further hearing held shortly after.

17. 9:00 AM CASE NUMBER: MSC19-02703
CASE NAME: WU VS. WEST CONTRA COSTA USD
***HEARING ON MOTION IN RE: TO BE RELIEVED AS COUNSEL**
FILED BY: WU, JIAYANG
****TENTATIVE RULING:****
The motion is granted. Counsel is directed to serve the order relieving counsel in compliance with CRC 3.1362(d). Counsel is not formally relieved until the order is served on the client and proof of service is filed with the court.

18. 9:00 AM CASE NUMBER: MSC21-01751
CASE NAME: JOSE BELTRAN VS. MONUMENT CONSTRUCTION INC
***HEARING ON MOTION IN RE: FINAL APPROVAL**
FILED BY:
****TENTATIVE RULING:****
The court previously considered the parties' motion for final approval, issuing a tentative rule on February 19, 2025. The tentative ruling found that the settlement was fair, reasonable, and adequate, except that the representative fee would be reduced from $10,000 to $5,000, and subject to resolution of the Court's concerns about the "escalator clause." The tentative ruling is incorporated

into this tentative ruling. At the hearing, the Court continued the matter for submission of supplemental declarations concerning these issues.

The settlement agreement includes an escalator provision (Par. 8), to be triggered in the event that the number of covered employees or work weeks turns out to be materially higher than now estimated. In granting preliminary approval, the Court cautioned the parties that in the event the clause would result in a significant modification of the settlement (such as cutting back the covered period), it would be prudent to seek further approval from the Court. In this instance, the clause was triggered, and the parties applied it without seeking further approval. The original estimate of class size was 540, but the Settlement Administrator's declaration states that 700 people were sent notice. (Nava Dec., Par. 7.) While the escalator clause is based on Pay Periods, not class members, the increase in class members resulted in a similar increase in pay periods.

Plaintiff has submitted a supplemental declaration of Madely Nava, the Case Manager at Apex class action, LLC. She explains that the escalator clause was invoked, and the class period was shortened to end on September 8, 2024, instead of October 23, 2024 (the date of preliminary approval). The 45-day reduction in the class period resulted in a small reduction of the number of class members, and a small increase in the amount paid to each remaining class members (from $793.91 to $796.18, i.e., $2.27 each). She states that there were only two individuals who were completely excluded from the class period, who would have received $56.79 and $18.07, respectively. Presumably, there are some class members, whose employment was more heavily weighted toward the now-excluded portions of the class period, whose payments were reduced by a small amount. Those two individuals are not members of the class, and are not bound by the result in this case. In the abstract, the court remains concerned about the extent to which this fulfills counsel's duty to the entire class, but the effect of the escalator clause in this case is de minimus.

As to the representative plaintiff payment, counsel has submitted a declaration attesting that Mr. Beltran spent over 20 hours working on the case, and that he gave a broader release. Based on the hours spent, and the other factors considered in the tentative ruling, the payment will remain at $5,000.

The motion for final approval is granted. Counsel are directed to follow the Court's instructions for obtaining a judgment as set forth in the previous tentative ruling.

19. 9:00 AM CASE NUMBER: MSC22-00460
CASE NAME: NATURA MANAGEMENT,LLC VS. AGRA TECH, INC., A CALIFORNIA CORPORATION
HEARING ON SUMMARY MOTION
FILED BY: ZWART SYSTEMS, INC.
TENTATIVE RULING:

Before the Court is Cross-Defendant Zwart Systems, Inc.'s motion for summary judgment or in the alternative summary adjudication. The motion relates to Cross-Complainant Agra Tech, Inc.'s Second Amended Cross-Complaint and the causes of action against Zwart for (5) negligence, (6) implied

indemnity, (8) equitable indemnity, (10) comparative indemnity, (12) contribution, (13) declaratory relief, (19) negligence (tort of another), (20) intentional interference with prospective economic advantage, (21) intentional interference with contractual relations, (22) negligent interference with prospective economic advantage, and (23) violation of California Business & Professions Code § 17200.

After Zwart's motion was filed but before the hearing, Agra Tech dismissed causes of action 20, 21, 22, and 23 as to Cross-Defendant Zwart. As a consequence only the indemnity and negligence claims remain alleged against Zwart.

As a threshold issue, the Court did not consider Cross-Defendant Natura Management's opposition to Zwart's motion for summary judgment. There is no statutory provision that authorizes a Cross-Defendant to oppose another Cross-Defendant's motion for summary judgment against a Cross-Complaint.

For the following reasons, the motion for summary judgment is **granted**.

Brief Factual and Procedural Background

This is a complex construction-defect case concerning a greenhouse complex for growing marijuana. Plaintiff Natura is the owner the complex, and the customer of the various builder or supplier defendants in the case. One of those defendants is Cross-Complainant Agra Tech. Agra Tech purchased some of the equipment it provided from a then-Canadian business, Zwart (now relocated to Ohio). Zwart was at the time the exclusive North American distributor for a Dutch firm, Codema, which actually manufactured and provided the irrigation related equipment and services in relation to Natura's greenhouse.

Agra Tech denies liability as against Natura. By its Cross-Complaint, Agra Tech seeks indemnification from its seller, Zwart, for any liability it may turn out to have to Natura. Subsequent to a prior motion to dismiss for *forum non conveniens*, Agra Tech amended its Cross-Complaint to expressly allege that Agra Tech is "not alleging that any of the products which Zwart provided from Codema Systems were designed or manufactured improperly or contained any defect." (SAXC ¶ 15.) This allegation was sufficient to defeat a second motion to dismiss for *forum non conveniens*, as the Court concluded that enforcement of a Rotterdam choice-of-forum clause would be manifestly unreasonable under the circumstances of the case.

Legal Standard

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . Although he remains free to do so, the defendant need not himself conclusively negate any such element . . . ." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 853.) "The defendant has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence: The defendant must show that the plaintiff does not possess needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff cannot reasonably obtain needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion. (Code Civ.

Proc., § 437c, subd. (h).)" (*Id*. at p. 854, fn. omitted.)

Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar*, *supra*, 25 Cal.4th at p. 849; Code Civ. Proc., § 437c, subd. (p)(2).) If the plaintiff does not make this showing, summary judgment in favor of the defendant is appropriate. If the plaintiff makes such a showing, summary judgment should be denied.

Analysis

Zwart moves for summary judgment against Agra Tech's claims on the grounds that Agra Tech cannot establish causation, an essential element for each of Agra Tech's claims for negligence, negligence (tort of another), indemnity, contribution, and declaratory relief. Specifically, that Agra Tech must prove Zwart caused some damage to Natura that Natura now seeks to recover from Agra Tech. Zwart argues that the timeline of events makes this showing impossible. Specifically, that the damages Natura seeks from Agra Tech and for which Agra Tech seeks indemnification from Zwart occurred in August 2020 (when Natura's first harvest failed) (or no later than October 8, 2020, by which Natura had ejected Agra Tech from the project and the greenhouse). Zwart contends that the irrigation system provided and installed by Zwart was in operation no sooner than May 2021.

In opposition, Agra Tech argues that Natura's claimed damages extend beyond the first harvest, that Zwart's alleged delays caused at least some of the alleged damages caused by Natura, and that parts of Zwart's system were used in the first harvest.

The first step of the summary judgment analysis is both defined and limited by the pleadings, which "set the boundaries of the issues to be resolved at summary judgment." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250 (*Conroy*).)

Here, Natura's First Amended Complaint alleges that "the first harvests under the Agra Tech system suffered substantial failure. As a direct result of the lack of control of humidity levels, Natura crop sustained significant molding issues rendering the crop, and the contracts they were to supply, worthless." (FAC at ¶ 41.) The First Amended Complaint further alleges that it "put Agra Tech and the Individual Defendants on notice of its intent to initiate an informal dispute resolution process" on November 2, 2020. (*Id*. at ¶ 42.) The First Amended Complaint does not reference any subsequent harvests.

Agra Tech's attempt to recharacterize Natura's damages as continuing beyond the first harvests is not supported by a plain reading of the First Amended Complaint. Furthermore, Natura's responses to Agra Tech's discovery requests are not admissible against Zwart to alter this conclusion (see Evidentiary Objections, below).

Similarly, Agra Tech's argument regarding Zwart's alleged delayed performance is not found in Natura's First Amended Complaint. (At most, the First Amended Complaint alleges that Agra Tech itself delayed in ordering equipment in the first instance (see FAC at ¶ 21 ["Agra Tech had failed to order automation equipment"]).) Additionally, Agra Tech's Cross-Complaint is silent with respect to any Zwart delay; instead, the allegations of the Cross-Complaint are limited to the "design, assembly, manufacture, installation, integration and repair of component products and services." (See SAXC at ¶¶ 14, 79, 80, 85, 96, 143, 144, 146.) Neither pleading supports a theory of liability wherein Zwart was somehow responsible for Agra Tech's delay that Natura seeks to recover for. "The [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings." (*County of Santa Clara v. Atlantic Richfield Co.* (2006)

137 Cal.App.4th 292, 332-333.) Zwart has the burden on summary judgment of negating only those "theories of liability as alleged in the complaint" and is not obliged to "refute liability on some theoretical possibility not included in the pleadings[.]" (*Id*. at p. 332.) Here, the only theory advanced by Agra Tech against Zwart in the pleadings is that Zwart bears some responsibility for the liability Agra Tech faces on Natura's Complaint.

To defeat Zwart's motion for summary judgment, then, Agra Tech must point to a dispute of material fact as to whether Zwart equipment was used in connection with the first harvest.

Zwart submitted undisputed evidence that its table and irrigation systems were up and running no earlier than May 12, 2021. (See van Geest Decl. at ¶ 8, Ex. 5.) Furthermore, Agra Tech admitted in its discovery responses that "the irrigation system for the greenhouse became operative in approximately July of 2021." (Agra Tech response to Request for Admission 1, 3, and 5.) Agra Tech has not adduced any admissible evidence that Zwart's irrigation system was operational and in use prior to that date. Instead, Agra Tech contends, relying on an email from Doug Smith dated November 9, 2020, that Zwart's "rail system" (a component of Zwart's automated moving table system), was used for the first harvest. However, the conclusion that the rail system was Zwart's is not supported by the email, which reads in part: "We did complete our first harvest by the way. We utilized all installed rail systems and the automation of a ton of young people." (Sullivan Decl. ¶ 12, Ex. X [ZWA_000721-723] (starting on page 58 of 226).) The email does not create a genuine dispute of material fact with respect to whether Zwart components were used in connection with the first harvest. Furthermore, as Cross-Defendant notes, Agra Tech expressly disclaimed design or manufacture defect of "any of the products which Zwart provided from Codema Systems[.]" (SAXC ¶ 15.) Even if it were not speculative to conclude that the referenced rail system was Zwart's, the disclaimer in the Cross-Complaint does not leave room for a theory of liability against a component part of Zwart's system.

Similarly, Agra Tech's reliance on another email dated October 11, 2020 fails to create a genuine dispute of material fact with respect to Zwart components being in use for the first harvest. That email reads in part: "I'm getting nervous about the submersible pump situation and timing … I recently had one quit on me last week, and that one was planned out and needed for the next bay." (Pound Decl. ¶ 15, Ex. U; ZWA_000978-681 (starting on page 71 of 86).) The conclusion that the failed pump in question is Zwart's is not supported by the quoted portion or the larger context. Furthermore, the larger context merely discusses shipping dates and is not evidence that Zwart equipment was used in the first harvest.

The undisputed evidence is that Zwart's table and irrigation systems were operational after the first harvest, which is the sole basis for damages alleged in Natura's First Amended Complaint for which Agra Tech seeks indemnification. Zwart has met its initial burden and Agra Tech has not adduced any evidence in support of a genuine dispute of material fact that would preclude summary judgment. As a consequence, Zwart is entitled to summary judgment against Agra Tech's Cross-Complaint.

Evidentiary Objections

The Court rules only on those objections material to the Court's ruling on the motion for summary judgment. (Code Civ. Proc. § 437c(q).) Those objections are as follows:

Amended Declaration of Patrick J. Sullivan, Esq. dated January 17, 2025

1. Objection No. 11. **Sustained**. Lack of foundation, lack of personal knowledge, assumes facts not in evidence, improper opinion.

2. Objection No. 12. **Overruled**. The Court notes that under *Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal.App.5th 323 an attorney's sworn statement that documents were obtained through discovery may be sufficient to authenticate such documents. Patrick J. Sullivan declares that Zwart produced the email in question in response to discovery requests. (Sullivan Decl. at ¶ 12.)
3. Objection No. 15. **Sustained**. Natura's discovery responses cannot be used against Zwart. "[T]he propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory *only against the responding party*." (CCP § 2030.410 [italics added].)
4. Objection No. 16 – 23, 26, 29. **Sustained**. (CCP § 2030.410.)

Declaration of Adam Pound:

1. Objection No. 16. **Overruled**.

20. 9:00 AM CASE NUMBER: N23-1870
CASE NAME: PETITION OF:QUALITY LOAN SERVICE CORP.
***HEARING ON MOTION IN RE: CLAIM FOR UNDISTIBUTED SURPLUS PROCEEDS AFTER TRUSTEES SALE**
FILED BY: FRANKLIN, JEREMY
****TENTATIVE RULING:****

Granted. The current motion remedies the problems found by the Court in the previous submissions.

Law & Motion
Add On

21. 9:00 AM CASE NUMBER: C22-02818
CASE NAME: THE COUNTY OF CONTRA COSTA VS. MONSANTO COMPANY
HEARING IN RE: TO APPEAR PRO HAC VICE AS TO DANIEL P. MENSHER FOR PLTFS
FILED BY:
****TENTATIVE RULING:****
Granted.

22. 9:00 AM CASE NUMBER: C22-02818
CASE NAME: THE COUNTY OF CONTRA COSTA VS. MONSANTO COMPANY
***HEARING ON MOTION IN RE: FOR JENNIFER S. WAGNER TO APPEAR AS COUNSEL PRO HAC VICE**
FILED BY:
****TENTATIVE RULING:****
Granted.