TENTATIVE RULINGS
LAW & MOTION CALENDAR
May 3, 2023 3:00 p.m.
Courtroom 19 –Hon. Oscar A. Pardo
3055 Cleveland Avenue, Santa Rosa

PLEASE NOTE: In accordance with the Order of the Presiding Judge, a party or representative of a party may appear in Department 19 in person or remotely by Zoom, a web conferencing platform. However, appearances by Zoom are STRONGLY encouraged. Whether a party or their representative will be appearing in person or by Zoom must be part of the notification given to the Court and other parties as stated below.

CourtCall is not permitted for this calendar.

If the tentative ruling is accepted, no appearance is necessary unless otherwise indicated.

TO JOIN ZOOM ONLINE:

Department 19 Hearings
MeetingID: 857-0848-8569
Password: 410765
https://us02web.zoom.us/j/85708488569?pwd=MzAvL3o3U2g4ck5SZTN3cXEyNllOQT09

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The tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6602**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing

PLEASE NOTE: The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

1&2. SCV- 268477, Smashmallow v. Tanis Food Tec.

Plaintiff Smashmallow, LLC ("Smash", or "Plaintiff") filed the complaint (the "Complaint") in this action against defendant Tanis Food Tec B.V. ("Tanis", or "Defendant") arising out of a contractual dispute. Defendant has subsequently filed a cross-complaint (the "Cross-Complaint") against Plaintiff.

This matter is on calendar for the Plaintiff's motion to seal portions of certain filings and exhibits

made in support of Plaintiff's motion for summary judgment also on the same calendar. The parties are REQUIRED TO APPEAR ON THIS MATTER.

The Rules of Court state: "Unless confidentiality is required by law, court records are presumed to be open." Cal. R. Ct. 2.550(c). The Rules also provide: "The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." Cal. R. Ct. 2.550(d).) "(1) An order sealing the record must: (A) Specifically state the facts that support the findings; and (B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal." Cal. R. Ct. 2.550(e). "All other portions of each document or page must be included in the public file." *Ibid*. This rule recognizes and balances a litigant's right to privacy against the public's Constitutional right of public access. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1212 ["in general, the First Amendment provides a right of access to ordinary civil trials and proceedings."]. *NBC Subsidiary* provides examples of various interests that courts have acknowledged may constitute "overriding interests." *See Id*. at1222, fn. 46. Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute "overriding interests."

Smash filed this motion asking that the Court file these matters under seal pursuant to a protective order stipulated by the parties. The privacy interest asserted is that of Tanis. Smash requests that the matters be sealed "upon a showing of good cause by Tanis." Tanis has filed no documents addressing this motion, but in response to the summary judgment motion filed a Separate Statement without any request to seal, which disclosed much of the information redacted and sealed under Smash's motion. The parties are to APPEAR and address whether the issue of sealing has been waived by this disclosure by Tanis, at minimum as to the information included in the separate statements of the parties, and possibly as to the underlying documents.

Plaintiff's counsel shall submit a written order to the court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

**_____

Plaintiff Smashmallow, LLC ("Smash", or "Plaintiff") filed the complaint (the "Complaint") in this action against defendant Tanis Food Tec B.V. ("Tanis", or "Defendant") arising out of a contractual dispute. Defendant has subsequently filed a cross-complaint (the "Cross-Complaint") against Plaintiff for (1) breach of contract, (2) breach of oral contract, (3) breach of covenant of good faith and fair dealing, and (4) Violation of CA Bus. & Prof. Code §17200.

This matter is on calendar for the motion by the Smash for summary judgment or in the alternative summary adjudication pursuant to Cal. Code Civ. Proc. ("CCP") § 437(c) as to the Cross-Complaint. For the reasons set forth below, the motion for summary judgment is **DENIED**. The motion for summary adjudication as to the first and second causes of action is **DENIED**. The motion for summary adjudication as to the third and fourth causes of action is **GRANTED**.

I. Evidentiary and Pleading Issues

In Tanis's opposition to Smash's Undisputed Statement of Fact ("SUMF") Issue 1, ¶ 1, the Court notes that nothing Tanis raised as disputable actually challenges the fact presented, namely that the parties entered into a contract that Smash thereafter refers to as the "Agreement". Indeed, were there no written contract between the parties, Tanis's own Cross-Complaint would be rendered defunct. Tanis's assertion that the Agreement is not the only agreement between the parties is not relevant to determination of this UMF. The SUMF is replete with the same objections. Tanis's disputes focus on minutiae that they fail to demonstrate constitute material issues. See, e.g., Tanis's Opposition to SUMF ("TOSUMF") Issue 1, ¶ 2, ("The 'Equipment System' is not 'defined as the "equipment, parts, instrumentation and services set forth in the Contract Documents"' Rather, the Equipment System' "consists of the equipment, parts, instrumentation and services set forth in the Contract Documents"'). These types of distinctions would be better taken had Tanis elucidated any legally distinguishing issues arising from this dispute. They fail to do so.

Similarly, Tanis's blanket assertion that failures to cite accurately within the separate statement justify denial of the motion on its own is unconvincing for a variety of reasons, not the least of which is Tanis's own errors in the separate statement. See, e.g., Tanis's Undisputed Statement of Fact ¶ 18 ("Tanis Ex. L[sic], Testimony of Johan Ostermann, p. 103:16-25".)

Smash contends that Tanis's objections are without merit, as Tanis has been in possession of the relevant evidence for months and Mr. Kwasniewski filed and served a supplemental declaration on reply to place the matter properly before the Court. However, reply is not the proper place for fresh evidence not raised in the moving papers. *Jay v. Mahaffey* (2013) Cal.App.4th 1522, 1537. Tanis's Objections are all SUSTAINED. However, these only serve to obviate the facts which depend entirely on the missing evidence.

II. Underlying Facts

The parties entered into a written contract for the creation of a marshmallow production system. See SUMF ¶ 1 (all Issues); Smash's Declaration of David Kwasniewski in Support ("Smash's DIS"), Exhibit 4 (the "Agreement"). The Agreement stated that Tanis would design and produce an equipment system that provided for the continuous production of flavored marshmallow-based treats on an automated large-scale production line (the "System"). SUMF Issue 1 ¶ 2. The agreement set particular specifications for production of several flavors of marshmallows. *See*, generally, Agreement, Schedule C (Tanis0000056-Tanis0000059). Several key metrics included the ability to produce marshmallows with inclusions, producing mini-marshmallows, fully coating the marshmallows, and producing the full size marshmallows at a rate of 2,200 pounds per hour based on an 8 hour production day. *Ibid*. The Agreement included a guarantee that the System would perform for 12 months after "commissioning." See Agreement Schedule A § Guarantee (Tanis0000051). Tanis was required to bear all costs of conforming the System to the Agreement, with the exception of the unquoted part of the system dealing with inclusions.

The Parties subsequently agreed in writing on October 22, 2018, to modify the price through a revised quote (the "Revised Quote"). TUMF Issue 1, ¶ 8. The parties thereafter came to another agreement orally on March 11, 2020, for cost sharing and payments from Smash to Tanis (the "March 2020 Agreement"). TUMF Issue 2, ¶ 31.

Smash filed the instant suit alleging that Tanis failure to deliver a working System within the terms of the Agreement. Tanis thereafter filed in Cross-Complaint, alleging causes of action for: 1) breach of written contract; 2) breach of oral contract; 3) breach of the covenant of good faith and fair dealing; and 4) unfair business practices which violate California Business and Professions Code ("BPC") § 17200.

III. The Burdens on Summary Judgment and Adjudication

1. Generally

Summary adjudication "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CCP § 437c(c). A moving defendant meets its initial burden to show that one or more elements of a cause of action "cannot be established" (CCP § 437c(p)(2)) by presenting evidence that, if uncontradicted, would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851; *Kids Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879. Alternatively, a defendant may show that there is a "complete defense" to a cause of action. CCP § 437c(p)(2). To show a complete defense, a defendant must present admissible evidence of each essential element of the defense upon which it bears the burden of proof at trial. *See, e.g. Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289. A defendant cannot base its "showing" on the plaintiff's lack of evidence to disprove its claimed defense. *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 472.

A moving party does not meet its initial burden if some "reasonable inference" can be drawn from the moving party's own evidence which creates a triable issue of material fact. *See, e.g. Conn v. National Can Corp*. (1981) 124 Cal.App.3d 630, 637; *Binder v. Aetna Life Ins. Co*. (1999) 75 Cal.App.4th 832, 840. If the moving defendant does not meet its initial burden, the plaintiff has no evidentiary burden. CCP § 437c(p)(2).

If a defendant meets its initial burden to show a "complete defense," the burden shifts to the plaintiff to provide sufficient evidence to raise a triable issue of fact as to the defense asserted. CCP § 437c(p)(2). *Consumer Cause, Inc.*, 91 Cal.App.4th at 468. An issue of fact exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." *Aguilar*, 25 Cal.4th at 845.

"(T)he pleadings determine the scope of relevant issues on a summary judgment motion." *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74. "(T)he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint;* that is, a moving party need not refute liability

on some theoretical possibility not included in the pleadings." *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493 (emphasis in original). Where the deficiency is with the complaint, and not the evidence presented, the legal effect of a motion for summary judgment is the same as that of a motion for judgment on the pleadings. *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117.

2. Breach of Contract

The elements of a cause of action for breach of contract are: "'(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.'" *See Coles v. Glaser* (2016) 2 Cal.App.5th 384, 391; quoting *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614, 126 Cal.Rptr.3d 174. "It is the general rule that if an instrument is ambiguous the party pleading is required to set forth the meaning of the writing. The meaning attributed to the writing must be one to which it is reasonably acceptable, and where 'a pleaded instrument is, because of the uncertainty of the language in which it is expressed, susceptible of more than one construction as to its nature or as to the purpose intended by the parties to be attained by it, … the construction of the party pleading it should be accepted, if such construction be reasonable' in considering a pleading attacked by general demurrer." *Connell v. Zaid* (1969) 268 Cal.App.2d 788, 794–795 (internal citations omitted).

"Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions." Civ. Code, § 1698(c). To comply with the statute of frauds, a contract must be in writing if it is not capable of performance within one year by its terms. See Civ. Code § 1624 (a)(1). "The statute of frauds is treated as a rule of evidence which, if not properly raised, may be forfeited." *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 551. Whether or not performance of contract terms constitutes substantial performance is a question of fact. *Magic Carpet Ride LLC v. Rugger Investment Group, L.L.C.* (2019) 41 Cal.App.5th 357, 364.

"Before a contract modifying a written contract can be implied, the conduct of the parties according to the findings of the trial court must be inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify the written contract." *Garrison v. Edward Brown & Sons* (1944) 25 Cal.2d 473, 479. "(N)otwithstanding a provision in a written agreement that precludes oral modification, the parties may, by their words or conduct, waive contractual rights." *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78. "Waiver refers to the act, or the consequences of the act, of one side. Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only. Waiver does not require any act or conduct by the other party. Thus, [t]he *pivotal* issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right. *Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 678 (internal citations omitted). "Waiver is ordinarily a question for the trier of fact; '[h]owever, where there are no disputed facts and only one reasonable inference may be drawn, the issue can be determined as a matter of law.'" *DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265, quoting *Gill v. Rich* (2005) 128 Cal.App.4th 1254, 1264.

3. Breach of the Covenant of Good Faith and Fair Dealing

"The implied covenant of good faith and fair dealing is implied by law in every contract to prevent a contracting party from depriving the other party of the benefits of the contract." *See, e.g., Moore v. Wells Fargo Bank, N.A.*, 2019 WL 4051754, at *5; *see also, Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683–684; *Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244. The covenant requires each contracting party to refrain from doing "anything which will injure the right of the other to receive the benefits of the agreement." *Kransco v. American Empire Surplus Lines Ins.* Co. (2000) 23 Cal.4th 390, 400; *see also, Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818. The implied covenant rests upon the existence of a specific contractual obligation and "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Agosta v. Astor* (2004) 120 Cal.App.4th 596, 607; *see also, Racine & Laramie, Ltd. v. California Dept. of Parks & Rec.* (1992) 11 Cal.App.4th 1026, 1031-32.

> If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. Thus, absent those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery.

Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1395.

4. Violations of the Unfair Competition Law ("UCL")

"A UCL action is equitable in nature; damages cannot be recovered." *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144. "(I)t is axiomatic that a court should determine the adequacy of damages at law before resorting to equitable relief." *Franklin v. Gwinnett County Public Schools* (1992) 503 U.S. 60, 62. A plaintiff must establish that they lack an adequate remedy at law in order to avail themselves of the equitable relief available under the UCL. *Sonner v. Premier Nutrition Corporation* (9th Cir. 2020) 971 F.3d 834, 844. Even if plaintiffs' other claims ultimately fail, that remedies at law may exist is sufficient to preclude UCL's equitable claims. *Moss v. Infinity Insurance Company* (N.D. Cal. 2016) 197 F.Supp.3d 1191, 1203, citing *Rhynes v. Stryker Corp.* (N.D. Cal., May 31, 2011, No. 10-5619 SC) 2011 WL 2149095, at *4 ("Where the claims pleaded by a plaintiff *may* entitle her to an adequate remedy at law, equitable relief is unavailable.").

Business & Professions Code section 17200, prohibits "any unlawful, unfair or fraudulent" business practices. Bus. & Prof. Code §17200. "Since section 17200 is [written] in the disjunctive, it establishes three separate types of unfair competition" and "prohibits practices that are either 'unfair' or 'unlawful,' or 'fraudulent.'" *Pastoria v. Nationwide Ins.* (2003) 112 Cal.App.4th 1490, 1496; see also *CelTech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, (1999) 20 Cal.4th163, 180 (1999).

A party may bring a section 17200 claim only if he or she shows that he or she "suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code § 17204. To have standing, a plaintiff must sufficiently allege that (1) he has "lost 'money or property' sufficient to constitute an 'injury in fact' under Article III of the Constitution" and (2) there is a "causal connection" between the defendant's alleged UCL violation and the plaintiff's injury in fact. See, *Rubio v. Capital One Bank* (9th Cir. 2010) 613 F.3d 1195, 1203-1204. The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. *Chabner v. United Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1048. Violation of almost any federal, state, or local law may serve as the "unlawful" basis for a UCL claim. *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-839.

In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827.

Where plaintiff's UCL claim is entirely derivative of other fatally flawed causes of action, the UCL claim also fails. See, *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 277 [finding plaintiff's "UCL claim is derivative of [his] defamation cause of action, that is, it is based on the same [allegations] and likewise that cause of action stands or falls with that underlying claim."]. "A breach of contract may ... form the predicate for Section 17200 claims, *provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.*" *Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 645 (internal quotations omitted, emphasis original).

"With respect to the *unlawful* prong, virtually any state, federal or local law can serve as the predicate for an action under section 17200." *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 515 (internal quotations omitted). "'Unfair' simply means any practice whose harm to the victim outweighs its benefits." *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839. There are two applicable tests resulting from a circuit split to determine whether conduct is unfair. *Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 256. For the tether test, "the public policy which is a predicate to a consumer unfair competition action under the "unfair" prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions." *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1260–1261. For the second, the Section 5 test, "the factors that define unfairness under the section 5 test are: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th 581, 597–598.

IV. Analysis

First, Smash offers no authority allowing a Court to enter summary judgment on "equitable" bases. Smash appears to be asking the Court to, in essence, overturn the order setting aside Tanis's default, and strike their answer. None of Smash's contentions in this regard have any relevance to the merits of the Cross-Complaint. Smash provides no authority providing that "unclean hands" represents an opportunity to strike a pleading where the notice of motion does not include any reference to striking the pleading. This request is neither supported by any citation to law, nor procedurally sound.

1. First and Second Causes of Action for Breach of Contract

Tanis alleges breach of written contract as the first cause of action, and breach of oral contract for the second. Smash argues that they are entitled to summary judgment, as the System never functioned as required by the Agreement.

Smash's cited case of *Mann v. Jackson* (1956) 141 Cal.App.2d 6 is inapposite for multiple reasons. First, that matter was "tried by the court, without a jury." *Id*. at 8. This matter sits at summary judgment, and as such Smash has not demonstrated that the legal determination of the trial court in *Mann* after a finding of fact control the result here. Second, as is noted by Tanis, in *Mann*, the product "did not work", a factual finding by the court. *Id*. at 9. Here, Smash clearly claims that the deficiencies of the System were in volume and quality, not the general ability of the machine to function.

Even with that noted, Smash has presented adequate evidence to shift their burden. Smash has shown that at least as to the Agreement, and the first cause of action, that they were entitled under the contract to withhold funds if the System did not conform to the contract provisions. Smash has produced adequate evidence to carry their burden establishing that the System did not conform to the terms of the Agreement, and therefore Smash was entitled to withhold payment without breaching the terms of the Agreement. See Agreement § 22.1 (Tanis0000067). Tanis was obligated to replace all articles, materials or work which failed to conform to the Agreement at their own expense. See Agreement § 11.1 (Tanis0000063). Tanis guaranteed good technical functioning for 12 months after commissioning. See Agreement Schedule A § Guarantee (Tanis0000051). The commissioning was not complete until March of 2021. SUMF Issue 5 ¶ 7. As a result, any issues to this point and for 12 months thereafter were Tanis's responsibility, and Smash was entitled to withhold payment. Smash has shifted their burden as a result.

There is evidence before the Court here that shows the System was at least partially operable. TUMF ¶ 11-15. There is evidence that the System was capable of producing marshmallows at a rate of up to 2,000 pounds per hour. TUMF Issue 1 ¶ 20. The Agreement required that the System be capable of producing up to 2,200 pounds per hour over the course of an 8 hour production day. The System was capable of producing amounts up to 2,000 pounds per hour. See TUMF ¶ 20. The Agreement provides that amounts up to 90% of the contracted production is "within reasonable tolerance" and therefore there would be no penalty to Tanis. See Agreement Schedule C. The System was capable of producing mini-mallows, cinnamon churro marshmallows, marshmallows with inclusions, and each other flavor particularized by Smash (with the exception of Meyer Lemon, which was discontinued). TUMF Issue 1 ¶¶ 16-19. Smash has not presented any undisputed facts which indicate that Tanis failed to conform to timelines sufficient to constitute breach as a matter of law. Smash argues on reply that Tanis has presented no evidence that each flavor was produced at the required rate of 2,200 per hour. However, this strikes the Court as an issue of substantial performance and is therefore properly determined by a trier of fact. *Magic Carpet Ride LLC v. Rugger Investment Group, L.L.C.* (2019) 41 Cal.App.5th 357, 364. They also contend that Tanis's evidence is inadequate to create triable issues, but on that the Court disagrees. Similarly, issues of Smash's possible waiver of guarantees by participating in modification of the System by individuals other than Tanis employees represents a triable issue of material fact. See TUMF Issue 1 ¶ 6. Smash's contentions to the contrary

ignores the language of the contract, which requires all "work has been done by an engineer from the suppliers." See Agreement Schedule A § Guarantee (Tanis0000051). Ms. Vroom's testimony states that she filed down nozzles on the system "with TFT". See Tanis Exhibit P, pg 104:12-14. That is adequately ambiguous to create an issue as to whether the work was done by Ms. Vroom, or a Tanis engineer as required by the contract. This breach of the terms of the agreement presents a triable issue of material fact as to whether this waived Tanis's guarantees.

As such, Tanis has met their shifted burden as to the First and Second Causes of action. Summary adjudication of these causes of action is DENIED. Summary judgment is DENIED.

2. Third Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing

In reviewing the evidence presented by both parties, it is clear that were the cause of action pled sufficiently, there would be a dispute as to material facts. However, the cause of action is inadequately pled. Smash has demonstrated that Tanis has merely re-pled their breach of contract causes of action in their action for breach of the covenant of good faith and fair dealing. Where a plaintiff pleads both these causes of action on the same facts, the breach of the covenant of good faith and fair dealing is superfluous, and is properly disregarded. *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.

In response, Tanis merely argues that there are disputed issues of material fact as to this cause of action, and that whether it has been breached is normally an issue of fact not proper for summary adjudication. However, Tanis provides no legal support differentiating their pleading of this cause of action from the breaches of contract addressed above. That Tanis disputes many of the facts asserted here is inadequate, as the failure is in Tanis's attempt to plead a separate cause of action on the same facts. As such, Smash has met their shifted burden as to the Third Cause of Action and Tanis has failed to shift this burden back. Summary adjudication on the Third Cause of Action is therefore GRANTED.

3. Fourth Cause of Action for Violations of BPC § 17200

First, Smash adequately argues that Tanis provides no legal support for the contention that their UCL cause of action is based on "unlawful" activity on the part of Smash. The Cross-Complaint alleges that Smash's actions constituted unlawful activity (as specifically alleging the basis is required for UCL claims) but appears to also throw on the additional addendum that the actions were unfair. See Cross-Complaint ¶¶ 86, 87. Additionally, Tanis Cross-Complaint contains no specific references to any law, statue, or regulation on which to tether its UCL claim. If the business practice alleged to violate §17200 is of the "unlawful" variety, the complaint must allege facts showing that the practice violates the law. "[W]ithout supporting facts demonstrating the illegality of a rule or regulation, an allegation that it is in violation of a specific statute is purely conclusionary and insufficient to withstand demurrer." *People v. McKale* (1979) 25 C3d 626, 635. Here, Tanis's substantive allegations for the fourth cause of action merely state additional facts potentially pertinent to a breach of contract cause of action.

Second, to plead an "unfairness" act claim, a plaintiff need only allege prima facie unfairness. How to do that is presently unclear, at least in consumer cases, as a result of the California

Supreme Court's holding in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 C4th 163, 83 CR2d 548. However, most of the cases, if not all, are in the area of business competition where there is a consumer and a seller. Here, Tanis does not purport to claim they are a "consumer". Nor do they argue that the unfairness stems from specific constitutional, statutory or regulatory provisions. The mere assertion that the conduct was "unlawful" (which is entirely unsupported) and unfair is not sufficient to plead a cause of action under the UCL. Were this the case, UCL claims would invariably become part of every breach of contract action.

Finally, Tanis has not met any of the requirements of the tether test for showing that Smash's conduct was unfair, as they provide no basis rooted in constitutional, regulatory or statutory provisions. Additionally, Tanis has not pled standing under the Section 5 test. In this case, Tanis is the supplier of the product, and Smash is the consumer who contracted for services. The Section 5 test particularly (and to the Court's reading, all UCL claims not predicated on either competition or government enforcement) turns on the plaintiff's status as a consumer. See Cross-Complaint ¶ 2. Tanis's pleadings are deficient, and as the pleadings determine the scope of relevant issues here, Smash has shifted their burden for summary judgment.

Tanis's argument in response does nothing to address the legal insufficiency of the cause of action. Rather, Tanis attempts to argue that there are simply disputed facts as to the cause of action. As is noted above, there do appear to be disputed facts, but the pleadings determine the outer bounds of material facts. Here, Tanis has not pled facts supporting UCL claims.

Therefore, as to the Fourth cause of action, the motion for summary adjudication is **GRANTED**.

V. Conclusion

Based on the foregoing, the motion for summary judgment is **DENIED**. The motion for summary adjudication as to the first and second causes of action is **DENIED**. The motion for summary adjudication as to the third and fourth causes of action is **GRANTED**.

Plaintiff's counsel shall submit a written order to the court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

3. SCV-269293, Densmore v. Oreiley

Plaintiffs Lisa Densmore, the minor C. Densmore, the minor L. Densmore, minor plaintiffs by and through their Guardian ad litem, John Densmore, (all together "Plaintiffs"), filed the complaint in this action against San Francisco North/Petaluma Campgrounds, Inc., Kampgrounds of America, Inc., Dudley S. O'Reiley, Christopher John Wood (all together with "Defendants") and Does 1-20 with causes of action arising out of alleged negligence, personal injury, and premises liability (the "Complaint"). This matter is on calendar for the motion by Defendants to compel non-party Kelly Bradley, MFT ("Deponent") to produce documents related to a subpoena issued November 2022. The Motion is **GRANTED**. Defendants' request for sanctions is **GRANTED**. Defendants request for an order of contempt is **DENIED**.

I. The Subpoena and Responses

Defendants served a subpoena on November 17, 2022, to Deponent for records relating to the treatment of L. Densmore due to the allegation that the alleged incident necessitated years of psychotherapy for said plaintiff. The subpoena requested all records related to the treatment including session notes, insurance records and billing records. On December 22, 2022, Deponent produced only a "Summary of Treatment" and a "Statement of Services" covering the period of 09/20/19 to 12/22/20. *See* Defendants' Motion 3:3-6; Exhibit 2. The Summary was exactly that as it did not include any actual intake records or notes, therapy records, communications, insurance information, or billing records. However, the Deponent claims the Summary provided in compliance with Health & Safety Code §123130.

On January 26, 2023, Defendants sent a meet and confer letter to Deponent specifically demanding all billing records and treatment records. *See* Defendants' Motion 3:13-17; Exhibit 3. After a brief extension was granted by Defendants, Deponent produce a second set of treatment records but no billing records on February 6, 2023. *See* Defendants' Motion 3:20-21; Exhibit 4. Part of this delay was caused by having the Deponent secure and appropriate privacy release from Plaintiffs. Additionally, it also appears Defendants' counsel failed to recognize the impact and responsibilities which Health & Safety Code §123130, imposes upon healthcare providers. Deponent produced limited responses under the release provided by Plaintiffs, and Defendants found those responses incomplete.

On February 7, 2023, Defendants sent another meeting confer letter once again requesting missing treatment and billing records. Deponent obtained a more general release from Plaintiffs and produced supplementary responses. Defendants aver that these responses are still incomplete, and as a result have filed the instant motion. Defendant's contention is that despite having received the signed declaration from Deponent attesting to the completeness of the production, prior responses are inconsistent and raised doubt. For example, Defendants claim Deponent should have been on notice to preserve billing records as requested in their initial meeting confer letter of January 26, 2023. Yet, Deponent now claims she failed to retain these records as of January 27, 2023. Deponent also produce a billing summary covering 2019 through 2020, but now claimed first she generated no bills and later claimed to no longer be in possession of the underlying records. *See* Defendants' Motion 5:10-15; Exhibit 2.

The Court referred this matter to its Discovery Facilitator Program and Karin P. Beam, Esq. was then assigned. The Court is now in receipt of Ms. Beam's report of April 25, 2023, in which she indicates multiple phone conferences with counsel were arranged to resolve the present discovery issue. Ms. Beam's conclusion and recommendation was that given Deponent's history of inconsistent statements during discovery the Court should order production of all existing records at issue. This discovery issue remains unresolved and not presented before the Court.

II. Governing Law

CCP § 2025.450 states that if a party fails to attend a deposition and produce documents without serving valid objections, the party seeking the deposition may request a court order compelling attendance. This applies where a party, "without having served a valid objection under subdivision (g), fails to appear for examination, or to proceed with it, or to produce... any

document or tangible thing described in the deposition notice...." *Id*. The party moving to compel deposition attendance need only inquire as to what happened, not attempt to meet and confer. CCP §2025.450. CCP § 2025.450 expressly apply to motions to compel attendance where the party fails to appear "without having served a valid objection." An objection to defects or errors in a deposition notice must be served at least 3 days before the deposition date. CCP § 2025.410(a), (b). If a party serves a timely objection, no deposition shall be used against the objecting party if that party does not attend the deposition and the objection was valid. CCP § 2025.410(b). If a nonparty disobeys a deposition subpoena, the subpoenaing party may seek a court order compelling the nonparty to comply with the subpoena within 60 days after completion of the deposition record. (CCP §2025.480(b).) The objections or other responses to a business records subpoena are the "deposition record" for purposes of measuring the 60-day period for a motion to compel. *Unzipped Apparel, LLC v. Bader* (2007)156 Cal.App.4th 123, at 132-133; *Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1192. A nonparty opposing such motion without substantial justification may be subject to sanctions per CCP §§1987.2(a), 2020.030, 2025.480; see *Person v. Farmers Ins. Group of Cos.* (1997) 52 Cal App.4th 813, 818.

The right to discovery is generally liberally construed. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 540. Good cause should be shown on requests for production from non-parties as well as parties. *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223–224, as modified (Mar. 7, 1997) ("*Calcor Space Facility*"). "(A) party seeking to compel production of records from a nonparty must articulate specific facts justifying the discovery sought; it may not rely on mere generalities. (citation). In assessing the party's proffered justification, courts must keep in mind the more limited scope of discovery available from nonparties." *Board of Registered Nursing v. Superior Court of Orange County* (2021) 59 Cal.App.5th 1011, 1039; citing *Calcor Space Facility* at 567; *see also Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358, 366. Good cause can be met through showing specific facts of the case and the relevance of the requested information. *Associated Brewers Distributing Co. v. Superior Court of Los Angeles County* (1967) 65 Cal.2d 583, 586–587. "(T)he good cause which must be shown should be such that will satisfy an impartial tribunal that the request may be granted without abuse of the inherent rights of the adversary. There is no requirement, or necessity, for a further showing." *Greyhound Corp. v. Superior Court In and For Merced County* (1961) 56 Cal.2d 355, 388. As the right to discovery is liberally construed, so too is good cause. *Id* at 377-378.

III. Analysis

Deponent has provided two sets of supplementary records here after the provision of the original responses. However, remaining at issue is any billing records beyond the billing summaries provided with the initial responses. Deponent insists that all relevant records have been provided, and Defendant asserts that by the very nature of the records provided and Deponent's responses, further records must exist.

Deponent has provided billing summaries reflecting the co-pay due from Plaintiffs as part of the services provided. These summaries provide no information as to whether the co-pay was actually fulfilled by the Plaintiffs, Deponent's rate for services, the amount paid by insurance, or

any amounts discounted or written off. The amount paid by both the Plaintiffs and their insurer is relevant to the determination of damages in this case. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551. This means that Defendants have adequately addressed good cause, and production of any records that do exist is proper.

To address Deponent's claim that all records have been produced, it does defy expectation that Deponent has no records to produce which reflect insurance payments for the services provided. Defendants point out that Deponent has claimed that she does not create any billing records beyond the summaries already produced but has conversely claimed that she invoices Plaintiffs via email. Deponent also claims that she inputs her services into the insurance company's portal, but somehow has control over no documents responsive showing the amount billed to that insurance. It is not credible to assert that Deponent does not have control over some form of responsive documents in digital form reflecting this process. This example obviously represents a billing record within the scope of Deponent's practice with Plaintiff and is clearly within the ambit of the subpoena.

As to the other categories pursued by Defendants, these also appear relevant to the treatment provided by Deponent, but these categories of documents are not plagued by the same inconsistencies as the billing documents. To the degree these documents still exist, Deponent is ordered to produce all responsive documents not already produced.

Therefore, the Motion to Compel is **GRANTED**.

IV. Sanctions

Monetary sanctions are proper where a nonparty unsuccessfully opposes a motion to compel. See CCP § 2025.480(j); CCP § 1987.2. As to Defendant's request for sanctions, Defendant requests an attorney rate of $275 per hour for 10 hours of work, with another 7 hours expected on opposition and reply. Defendant's reply contains no facts supporting actual time expended, and monetary sanctions only represent costs which are reasonable and actual. Therefore, the Court disregards any costs beyond those for the 10 hours addressed in the moving papers. Defendant's rate is reasonable. Defendant's request for sanctions is **GRANTED** in the amount of $2,750. Deponent is to pay this amount within 30 days of this order.

V. Contempt

As to the request that the Court find that Deponent is in contempt, this is an unsupported contention.

There are three types of contempt: (1) direct contempt, which is committed in the court's immediate view and presence, and which may be treated summarily without a formal hearing; (2) hybrid contempt, which is contempt that occurs in the court's immediate presence, but which may be excused by matters occurring outside the courtroom; and (3) indirect contempt, which is not committed in the immediate presence of the court, or of the judge in chambers, and which requires the filing of an affidavit and the holding of a formal hearing. CCP §§ 1211-1218.

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit must be presented to the court or judge containing the facts constituting the contempt and, if sufficient facts are shown, the court must then issue a warrant or an order to show cause. CCP §§ 1211-1212. A contempt order made concerning matters not occurring in the court's presence is invalid if it is not supported by a proper initiating affidavit (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 532; *In re Koehler* (2010) 181 Cal.App.4th 1153, 1169) or by a proper warrant or order to show cause (*Cedars-Sinai Imaging Med. Group v. Superior Court* (200) 83 Cal.App.4th 1281, 1286.) "[T]he filing of a sufficient affidavit is a jurisdictional prerequisite to a contempt proceeding. *Koehler, supra*, at 1169. The facts that must be established by the "initiating affidavit" include: (1) the rendition of a valid order; (2) actual knowledge of the order; (3) ability to comply; and (4) willful disobedience of the order. *Anderson v. Sup. Ct.* (1998) 68 Cal.App.4th 1240, 1245; *see also Conn v. Sup. Ct.* (1987) 196 Cal.App.3d 774, 784. The initiating affidavit and warrant or OSC must be **personally served**. CCP §§ 1015-1016. Any order for indirect contempt is invalid without such service. *In re Koehler, supra*, at 1169.

In indirect contempt proceedings, the proponent of the contempt must present witnesses to prove the contempt beyond a reasonable doubt. CCP 1217.) The accused is entitled to cross-examine witnesses and to present witnesses in his or her defense. *Ibid*. Basically, the rights of the alleged contemnor are the same as those of a criminal defendant, including the right to counsel, except that there is no right to jury trial. *Ibid*.

Here, any alleged contempt is an indirect contempt because it did not occur in the Court's immediate presence. Instead, the Court has merely been *advised* of the facts. The Court has no personal knowledge of any of the facts. This must proceed as an indirect contempt proceeding, which requires an initiating affidavit that is *personally served* upon the opposing party. Until this happens, the Court does not have jurisdiction to hear the matter. While counsel for Defendants filed a declaration in support of their motion outlining the facts underlying their request for contempt, the content of the declaration did not meet all of the requirements of the required affidavit and there is no proof of service in the file showing Deponent was served personally. The request for contempt orders is **DENIED**.

VI. Conclusion

The Motion to Compel is **GRANTED**. Defendants are **GRANTED** sanctions in the amount of $2,750. Defendants' request for contempt is **DENIED**.

Plaintiffs' counsel shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

4. SCV-270407, Wiley v. Lake county Contractors, Inc.

This matter is on calendar for the motion of Defendant Lake County Contractors, Inc. ("Defendant"), for an order to transfer venue of this action to Lake County, to grant an extension of time for Defendant to respond to Plaintiff's complaint, and awarding Defendant its costs and fees totaling to $4,041.50. Defendant's motion is **GRANTED** to transfer venue from Sonoma

County to Lake County; Defendant's request for attorney's fees and costs associated with bringing said motion is also **GRANTED** in the amount $4,041.50.

This motion is made pursuant to Code of Civil Procedure ("CCP") sections 392, 395, 396, and 397. Section 397 allows the court to change the place of trial when the court designated in the complaint is not the proper court. (CCP § 397(a).) If an action is not commenced in the proper court, the court is required upon a motion to transfer the action to the proper court. (CCP § 396b(a).) "Following denial of a motion to transfer under Code of Civil Procedure section 396b, unless otherwise ordered, 30 calendar days are deemed granted defendant to move to strike, demur, or otherwise plead if the defendant has not previously filed a response. If a motion to transfer is granted, 30 calendar days are deemed granted from the date the receiving court sends notice of receipt of the case and its new case number." (Cal. Rules of Court, Rule 3.1326.)

Defendant argues that Lake County is the proper venue because it was where the contract that is the subject of this action was entered into, where moving Defendant's principal place of business is, where the real property at issue is located, and because the other defendants are not resident defendants of Sonoma County because their principal place of business is in Texas. CCP section 395(a) provides, in relevant part: "Subject to subdivision (b), if a defendant has contracted to perform an obligation in a particular county, the superior court in the county where the obligation is to be performed, where the contract in fact was entered into, or where the defendant or any defendant resides at the commencement of the action is a proper court for the trial of an action founded on that obligation, and the county where the obligation is incurred is the county where it is to be performed, unless there is a special contract in writing to the contrary."

In opposition, Plaintiff does not refute these points, but rather argues that the other defendants in this action have accepted venue and therefore Defendant can no longer request a change of venue. The cases cited provide that where there are several properly-joined defendants, in which venue depends upon the residence of a defendant, the general rule prevails in determining the "proper county for the trial of the action" and the consent of the resident defendant to the proposed transfer cannot deprive the plaintiffs of their right to have the action tried in the county of the consenting defendant's residence. (*Monogram Co. of Cal. v. Kingsley* (1951) 38 Cal.2d 28, 34.)

However, Defendants Allura USA and Elementia USA, LLC are alleged to be foreign corporations doing business generally in California, and the Motion states that their principal place of business is in Texas, not in Sonoma County. If a foreign corporation has "qualified" to do business in California, it will have filed a statement designating the county in which it maintains its principal local office. (See Corps.C. § 2105(a)(3).) In such event, the foreign corporation can be sued only in a county in which venue would be proper in an action against a California corporation, under CCP § 395.5. If the corporate defendant has not filed such statement designating a principal office in California, venue is proper in any county in the state. (*Easton v. Superior Court* (1970) 12 Cal.App.3d 243, 246.) The complaint states that under Corp. Code section 2105(a)(3), the corporate defendants may be sued in any county in the state. They have neither opposed nor joined the motion to transfer venue, but they are not "resident defendants" since their principal place of business is not in Sonoma County and the action could have just as easily been brought against them in Lake County.

CCP section 395.5 provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

Where a corporation and an individual are properly joined as defendants and action is commenced in county where corporation has its principal place of business, individual defendant may not have action moved to county of his residence, if different for trial; and in such circumstances, residence of corporation is county where it has its principal place of business. (*Hale v. Bohannon* (1952) 38 Cal.2d 458, 472.) Moving defendant and other defendants' principal place of business is not in Sonoma County.

Overall, Plaintiff's opposition does not refute the following arguments raised in the Motion that changing venue to Lake County would be convenient overall because: (1) the contract was executed there; (2) the permit for construction was issued there; (3) the real property involved is there; (4) Allura siding product was purchased there which is relevant to the product defect cause of action in Plaintiff's Complaint; (5) moving defendant's principal places of business in Lake County; and finally, (6) none of the defendants' principal places of business is in Sonoma County.

The Court does not find it persuasive that the transfer cannot be granted because any defendant accepting venue at any time defeats the motion because none of the defendants here "resides" in Sonoma County as none of them have their principal place of business in Sonoma County, so a resident defendant has not consented to action being tried in a county in which they reside.

For the foregoing reasons, Defendant's motion for transfer of venue to Lake County from Sonoma County is **GRANTED,** Defendant's request for attorney's fees and costs in the amount of $4,041.50 is also **GRANTED**. Defendant's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

5. <u>SCV-272351, Sonoma Cho, LLC v. Amagine Light & Design, Inc.</u>

The Petitioner has satisfied the requirements of CC § 8480 *et seq*., and is therefore entitled to the requested relief and attorney fees per CC § 8488(c). Accordingly, the Petition will be **GRANTED.**

Petitioner shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

****This is the end of the Tentative Rulings.*****