TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, September 27, 2023 3:00 p.m.
Courtroom 19 –Hon. Oscar A. Pardo
3055 Cleveland Avenue, Santa Rosa

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) 521-6729**, 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.

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

TO JOIN ZOOM ONLINE:

Department 19 Hearings
MeetingID: 160-421-7577
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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. MCV- 256444, Looney v. The Palm House, LLC

Plaintiff Gary Looney, DBA Collectronics ("Plaintiff" or "Judgment Creditor"), a debt collector, filed the verified complaint in this action against borrowers The Palm House, LLC and Wayne Woodliff ("Defendant" or "Judgment Debtor"). Plaintiff requested Receiver Landon McPherson ("Receiver") be appointed to take control of Defendant's liquor license and transfer it. This matter is on calendar for the Receiver's motion to approve his final account and report and for discharge. The Motion is GRANTED.

I. Governing Law

Cal. R. Ct. ("CRC") 3.1184(a) provides that a receiver must present by noticed motion or stipulation of all parties: 1) a final account and report; 2) a request for discharge; and 3) a request for exoneration of the receiver's surety. No memorandum of points and authorities is required unless ordered by the court, notice must be given to "every person or entity known to the receiver to have a substantial, unsatisfied claim that will be affected by the order or stipulation, whether or not the person or entity is a party to the action or has appeared in it," and if any

allowance of compensation for the receiver is claimed, "it must state in detail what services have been performed by the receiver or the attorney and whether previous allowances have been made to the receiver or attorney and the amounts." CRC 3.1184(b)-(d). "A receivership terminates upon completion of the duties for which the receiver was appointed; or at any other time upon court order." Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2020) ¶ 4:940. The Receiver is entitled to seek compensation for services rendered. CRC 3.1183, 3.1184. The amount of compensation awarded to a receiver is within the sound discretion of the trial court and will not be reversed on appeal in the absence of an abuse of discretion. *Melikian v. Aquila, Ltd*. (1998) 63 Cal.App.4th 1364, 1368.

II. Factual Application

The matter was previously continued for the Receiver to provide clarity regarding the discharge of the final proceeds due to an accounting discrepancy noticed by the Court. Receiver has filed a declaration which accounts for the previously unexplained $375 raised in the Court's prior order. The proceeds were distributed to Defendant Wayne Woodliff in the amount of $60,059.81 on July 17, 2023. In order for Defendant to utilize the proceeds, the check had to be re-issued under his name, and the escrow company charged a $375 fee to which Defendant agreed. The funds being entirely accounted for, final approval and discharge is proper.

Based on the facts set forth above, the Receiver seeks an order that: approves (a) the Receiver's FAR, (b) the fees and costs of the Receiver and orders the unpaid fees and costs paid out of cash on hand, (c) the disbursement of the remaining funds have been accomplished, (d) the actions of the Receiver as being consistent with the terms of the appointing order, (e) that the Receiver is not liable in any manner for any outstanding obligations and debts of the receivership estate, known or unknown, and the Receiver is not liable to any person or entity including taxing authorities (f) the dismissal of the Receiver and orders all bonds exonerated, (g) the Court to retain jurisdiction of this matter should any future claims arise and (h) the Court to make and enter such further orders as the Court deems appropriate and just. Based on the foregoing, the relief as prayed for by the Receiver is **GRANTED**.

The Receiver 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).

2. SCV-266709, Humphreys v. Flint

Plaintiffs Kristen Humphreys ("Kristen") and Jesse Humphreys ("Jesse", together with Kristen, "Plaintiffs")[1] filed the currently operative second amended complaint (the "SAC") in this action against defendants Darlene Flint ("Flint") and Charles Belhumeur ("Belhumeur" together with Flint, "Defendants") and Does 1-50 alleging causes of action for: 1) assault and battery; 2) abuse of process; 3) malicious prosecution; 4) defamation; 5) trespass; 6) nuisance; 7) intentional interference with economic relations; 8) intentional infliction of emotional distress; 9)

[1] The Plaintiffs share a last name, and therefore first names are used for clarity when distinguishing between the Plaintiffs. No disrespect is intended.

declaratory relief; 10) quiet title; and 11) injunctive relief.

This matter is on calendar for the motion by Flint for summary judgment of the SAC or in the alternative adjudication pursuant to Cal. Code Civ. Proc. ("CCP") § 437(c). Summary judgment is DENIED. Summary adjudication is GRANTED in part and DENIED in part.

I. Evidentiary and Pleading Issues

Flint's objections on reply 2, 5, 8-10, 17-19, 27-28, 37, 40-42, 44-45, 53, and 55 are SUSTAINED. The balance of the objections are OVERRULED.

II. Underlying Facts

Plaintiffs and Defendants reside in adjoining properties. Plaintiff's Additional Undisputed Material Facts ("PAUMF") ¶ 1.

On April 17, 2020, Flint came onto Plaintiff's property. Defendant's Undisputed Material Fact ("DUMF") ¶¶ 24, 27. Flint told Plaintiff's children that their dogs, who were loose on the Plaintiffs' property, had come on to Defendants' property and chased her cats. DUMF 28-29. Plaintiffs' son stated that the dogs were on Plaintiff's property the entire time. DUMF 29. Plaintiffs' son did lose sight of the dogs for "a bit". DUMF 30. However, the dogs were not near the boundary between the parties' properties. Plaintiffs' Opposition to Defendants Undisputed Material Facts ("POUMF") ¶ 30; PAUMF ¶¶ 79-80. Flint told Plaintiffs' children that she would shoot their dogs, and repeated that threat to Jesse. PAUMF ¶¶ 14, 19. Throughout the interaction, Flint waived and swung her arms, causing Jesse to fear she may strike him. POUMF ¶ 7.

On July 7, 2020, Jesse was driving heavy equipment attempting to perform maintenance work on the easement. PAUMF ¶ 30. While attempting to proceed to the portion of the easement on Defendants' property, Jesse was confronted by Defendants. PAUMF ¶ 31-32. Belhumeur threw rocks and a rake at the vehicle. PAUMF ¶¶ 35, 38. At some point, Flint sustained an injury in the form of a laceration on her forearm. DUMF ¶ 22. Belhumeur called the police and alleged that Jesse had struck Flint with the vehicle. PAUMF ¶ 38. To the responding officers, both Defendants alleged that Jesse smelled of alcohol, and Belhumeur alleged that Jesse had struck Flint intentionally. PAUMF ¶ 38; POUMF ¶ 23. Officers concluded that Jesse had no indicators of intoxication, and that there was no evidence Flint had been struck by the vehicle intentionally. PAUMF ¶ 40.

Plaintiffs also allege Defendants actions have resulted in Plaintiffs' tenants terminating their lease. DUMF ¶ 48. When asked about it at deposition, the tenants did not testify that Defendants actions contributed to their termination of the lease. DUMF ¶ 49.

Plaintiffs allege that the easement that runs across Defendants' property which allows access to their own property is supposed to be 20 feet wide. Defendants have obstructed 8 feet of the easement with decorative rocks and plants. DUMF ¶ 58; PAUMF ¶¶ 112-113. Another benefit of the easement is access to property past the Plaintiffs' property on the road, owned by Sebastian Passanisi. DUMF ¶ 59. Plaintiffs allege Defendant's fence encroaches 3 feet onto Plaintiffs' property. DUMF ¶ 58. A survey was performed and determined that the fence which

originates on Defendant's property does extend 3 feet onto Plaintiffs' property. PAUMF ¶¶ 108-110.

Plaintiffs also allege Flint has obstructed their ability to use the easement to access their property. DUMF ¶ 33. As to Kristen, on at least three occasions, Flint physically block with her body Kristen's ability to drive down the easement, only moving after screaming obscenities and forcing Kristen to wait for a few minutes. DUMF ¶ 44.

Plaintiffs both allege that they have suffered substantial emotional distress as a result of Defendants' actions. DUMF ¶ 51. Jesse has described his feelings as "pretty bummed". DUIMF ¶ 53. Jesse has sought no psychological treatment for his symptoms. DUMF ¶ 54. However, his symptoms include an inability to sleep due to fear for the safety of his family, anxiety, and feeling the necessity of fortifying his property against possible reprisals from Defendants. POUMF ¶ 53. Kristen experiences loss of sleep, anxiety and antisocial behavior. DUMF ¶ 55; POUMF ¶¶ 101-103. Kristen has sought medical care for her inability to sleep. POUMF ¶ 101; DUMF ¶ 57.

Flint now moves for summary judgment or in the alternative summary adjudication of causes of action 1-8 and 10-11.

III. The Burdens on Summary Judgment and Adjudication

A. 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 rule that has been universally accepted by the Courts of Appeal of this state that a moving defendant cannot secure summary judgment merely by relying on a plaintiff's discovery responses which reveal an absence of evidence of liability or damage." *Union Bank v. Superior Ct.* (1995) 31 Cal.App.4th 573, 581. "In meeting its burden, the defendant must present evidence, in the form of affidavits, declarations, admissions, answers to interrogatories, depositions or matters of which judicial notice must be taken." *Gafcon, Inc. v. Ponsor & Assocs.*(2002) 98 Cal.App.4th 1388, 1401. "In addition to presenting evidence that negates an element of plaintiff's cause of action, '[t]he defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing.'" *Ibid.* Summary judgment may be proper where "[the defendant's] discovery was sufficiently comprehensive, and plaintiffs' responses so devoid of facts, as to lead to the inference that plaintiffs could not prove [his cause of action] upon a stringent review of the direct, circumstantial and inferential evidence contained in their interrogatory answers and deposition testimony." *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1440.

"(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.

B. Assault and Battery

> "The elements of a cause of action for assault are: (1) the defendant acted with intent to cause harmful or offensive contact, or threatened to touch the plaintiff in a harmful or offensive manner; (2) the plaintiff reasonably believed he was about to be touched in a harmful or offensive manner or it reasonably appeared to the plaintiff that the defendant was about to carry out the threat; (3) the plaintiff did not consent to the defendant's conduct; (4) the plaintiff was harmed; and (5) the defendant's conduct was a substantial factor in causing the plaintiff's harm. The elements of a cause of action for battery are: (1) the defendant touched the plaintiff, or caused the plaintiff to be touched, with the intent to harm or offend the plaintiff; (2) the plaintiff did not consent to the touching; (3) the plaintiff was harmed or offended by the defendant's conduct; and (4) a reasonable person in the plaintiff's position would have been offended by the touching. (*Id.* at p. 669, 151 Cal.Rptr.3d 257.)

Carlsen v. Koivumaki (2014) 227 Cal.App.4th 879, 890.

C. Abuse of Process and Malicious Prosecution

The elements of abuse of process are: 1) an ulterior motive in using the process; and 2) the use of the process in a wrongful manner. *Asia Investment Co. v. Borowski* (1982) 133 Cal.App.3d 832, 842.

> "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.'"

Spellens v. Spellens (1957) 49 Cal.2d 210, 232–233.

"(I)n order to establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]." *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871 (internal citations and quotations omitted). "(T)he tort was long ago extended to afford a remedy for the malicious prosecution **of a civil action.** *Ibid.* (emphasis added). "The tort of malicious prosecution requires the initiation of a full-blown action as well as its favorable termination for the malicious prosecution plaintiff; subsidiary procedural actions within a lawsuit such as an application for a restraining order or for a lien will not support a claim of malicious prosecution." *Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 528.

D. Defamation

The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. *Taus v. Loftus* (2007) 40 Cal.4th 683, 720, 54 Cal.Rptr.3d 775, 151 P.3d 1185. " 'The sine qua non of recovery for defamation ... is the existence of falsehood.' [Citation.] Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]" *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112, 64 Cal.Rptr.3d 467. That does not mean that statements of opinion enjoy blanket protection. (*Ibid*.) On the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18–19, 110 S.Ct. 2695, 111 L.Ed.2d 1. The critical question is not whether a statement is fact or opinion, but " 'whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.' " *McGarry, supra*, 154 Cal.App.4th at p. 113, 64 Cal.Rptr.3d 467.

To constitute an action for slander, a plaintiff must show that the defendant made a false

and unprivileged publication, orally uttered, which causes damage to plaintiff's reputation. Civ. Code, § 46. Among the bases for slander is a false statement charging a person with any crime. Civ. Code § 46 (a). "A statement that falls within one of the first four categories of California Civil Code section 46 constitutes slander per se and does not require proof of actual damages." *Duste v. Chevron Products Co.* (N.D. Cal. 2010) 738 F.Supp.2d 1027, 1041.

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645. Publication means communication to any third person who understands the defamatory meaning of the statement and the application to whom reference is made. *Vedovi v. Watson & Taylor* (1930) 104 Cal.App. 80, 83. Whether a statement is one of fact, thereby giving rise to a claim for defamation, is a question of law to be answered by the court. *Melaleuca, Inc. v. Clark, supra,* 66 Cal.App.4th at 1353. "In making such a determination, the court must place itself in the position of the hearer or reader, and determine the sense or meaning of the statement according to its natural and popular construction." *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.

E. Trespass and Necessity

"Trespass is an unlawful interference with possession of property." *Girard v. Ball* (1981) 125 Cal.App.3d 772, 788. "Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extra-hazardous activity." *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406. "The general rule is simply that damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass." *Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905. In actions for trespass, even where plaintiff cannot show actual damages, plaintiff may be entitled to nominal damages. *Allen v. McMillion* (1978) 82 Cal.App.3d 211, 219.

"[N]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose." *People v. Ray* (1999) 21 Cal.4th 464, 473 disapproved of on other grounds by *People v. Ovieda* (2019) 7 Cal.5th 1034, quoting *People v. Roberts* (1956) 47 Cal.2d 374, 377. However, the defense of necessity does not extend beyond the bounds of what is necessary to accomplish the goal of protecting person or property. See *In re Weller* (1985) 164 Cal.App.3d 44, 49 (In a criminal case, the necessity defense does not serve to justify illegal conduct where lawful conduct may have served the same purpose).

F. Nuisance

"(P)rivate nuisance is a civil wrong based on disturbance of rights in land." *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302. "First, the plaintiff must prove an interference with his use and enjoyment of his property. (*Ibid.*) Second, 'the invasion of the plaintiff's interest in the use and enjoyment of the land [must be] *substantial,* i.e., that it cause[s] the plaintiff to suffer 'substantial actual damage.' (*Ibid.*) Third, '[t]he interference with the protected interest must not only be substantial, but it must also be unreasonable' [citation], i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the

use and enjoyment of the land.' (*Ibid.*, italics omitted.)" *Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 262–263, quoting *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938. Civil Code § 3479 defines nuisance as "(a)nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." "[Nuisance] has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition." *City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 585 ("*Gypsum*"); quoting Prosser and Keeton, Law of Torts (5th ed. 1984) § 86, p. 616.

"[T]he elements of substantial damage and unreasonableness necessary to making out a claim of private nuisance are questions of fact that are determined by considering all of the circumstances of the case" according to an objective standard: Specifically, whether a person of " 'normal health and sensibilities living in the same community' " would be substantially damaged by the interference and whether an impartial reasonable person would consider the interference unreasonable." *Chase v. Wizmann* (2021) 71 Cal.App.5th 244, 253. "It is the general rule that the unreasonable, unwarrantable or unlawful use by a person of his own property so as to interfere with the rights of others is a nuisance [citation]. In fact, any unwarranted activity which causes substantial injury to the property of another or obstructs its reasonable use and enjoyment is a nuisance which may be abated. And, even a lawful use of one's property may constitute a nuisance if it is part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent the neighbor from reasonable enjoyment of his own property [citation]." *McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1180, quoting *Hutcherson v. Alexander* (1968) 264 Cal.App.2d 126, 130. "So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance." *Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 533 (internal quotations omitted). "The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct." *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 303.

G. Intentional Interference with Prospective Economic Relations

"The elements of an action for tortious interference are '(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.'" *Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1196.

"The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." (*Citation.*) For intentional interference, the plaintiff must plead and prove: " ' "(1) an economic relationship between the plaintiff and some third party, *with the probability of future economic benefit to the plaintiff*; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant

designed to disrupt the relationship. (*Citation.*) With respect to the type of intentional disruptive acts that are actionable, they must be wrongful by some independent legal measure, beyond interference." *Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn.* (2018) 19 Cal.App.5th 399, 429 (citations omitted, italics original). "Next, an intentional interference claim requires setting forth facts of " ' "(4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Ibid*.

H. Intentional Infliction of Emotional Distress

Claims of intentional infliction of emotional destress require: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Whether treated as an element of the prima facie case or as a matter of defense, it must also appear that the defendants' conduct was unprivileged. Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 internal citations and quotations omitted. To constitute a basis for emotional distress, the alleged conduct must extend beyond mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051. The conduct must be such that on hearing of the alleged conduct an average member of the community would resent the defendant and lead the community member to exclaim, "Outrageous!" *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.

"Severe emotional distress means 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004, quoting *Girard v. Ball* (1981) 125 Cal.App.3d 772, 787–788. "(T)he requisite emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397. Emotional distress damages are available for the intentional infliction of harm to a person's pets. *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1607. "It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed." *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397.

I. Quiet Title and Injunctive Relief

A cause of action for quiet title requires a plaintiff to seek determination of title to which there are adverse claims. CCP § 761.020. "An action to quiet title, however, may address adverse claims in addition to those traditionally referred to as clouds on title. As stated earlier, a quiet title action, unlike in a cancellation action, 'is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff's property .... It is not aimed at a particular piece of evidence, but at the pretensions of an individual.'" *Water for Citizens of Weed California v. Churchwell White LLP* (2023) 88 Cal.App.5th 270, 284–285, *review denied (Apr. 26, 2023)*

Injunctive relief is not a cause of action, but rather a remedy. See *McDowell v. Watson*

(1997) 59 Cal.App.4th 1155, 1159 ['Injunctive relief is a remedy and not, in itself, a cause of action…']; *Roberts v. Los Angeles County Bar Assoc.* (2013) 105 Cal.App.4th 604, 618 […an injunction is a remedy, not a cause of action.]; and *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973 [A permanent injunction is an equitable remedy, not a cause of action, and thus it is attendant to an underlying cause of action.].

IV. Analysis

Defendant Flint's request for summary judgment is DENIED on the basis that she fails to address the Declaratory Relief cause of action. Therefore, the request for summary judgment is procedurally flawed because the motion, even if granted in its entirety, would not dispose of all claims asserted against Defendant Flint.

Additionally, Defendant Flint's requests for summary adjudication only asks to adjudicate each cause of action individually, and does not purport to ask the Court to determine triable issues underlying those causes of action. Where the Court finds triable issues within a cause of action, its analysis need not proceed further based on the relief requested by Flint.

A. Assault and Battery

While the pled cause of action is for "assault and battery", Plaintiffs plead no contact caused by Defendants, nor do they provide any evidence of a "harmful or offensive touching. Therefore, there are no facts to establish battery and the analysis proceeds to the issue of assault.

Flint argues the allegation that she threatened to shoot Plaintiffs' dogs is inadequate to create a cause of action for assault. This is persuasive, as Flint has shown evidence that she did not threaten Jesse, the required element for assault.

However, in opposition, Plaintiffs have raised triable issues of material fact. Particularly, the evidence presented about Flint's physical demeanor during the confrontation on April 17, 2020, presents adequate evidence that Flint's verbal conduct alone is not the assault at issue. Rather, it is the close proximity taken, while acting (allegedly) physically erratic, and threatening the use of firearms against Plaintiffs' property, that presents an arguable assault. Whether Plaintiffs' apprehension based on this conduct was reasonable is a triable fact.

On reply, Flint attempts to parlay this argument into a showing that her actions were not intentional. This is unpersuasive. As the moving party, the burden is on Flint to show evidence that there is no triable fact. Flint has noticeably not submitted any declaration regarding her intentions on April 17, 2020. Instead, Flint merely argues that the burden is on Plaintiffs to show that she took no intentional act which caused Jesse to reasonably fear harmful or offensive touching. Flint has only shifted her burden on showing a lack of an "act", a showing rebutted by Jesse's testimony regarding Flint's physical conduct while making the verbal threats. Certainly the actions ascribed to her (again unrebutted) would cause a reasonable individual to fear for their safety. Flint approached both Jesse and Plaintiffs' son in close proximity while waiving her arms in a manner Jesse found threatening. If Flint intended to present evidence that she did not intentionally cause apprehension of harm, the time to do so was with her moving papers.

As such, summary judgment is DENIED. Summary adjudication of the first cause of action is

DENIED.

B. Abuse of Process and Malicious Prosecution

Flint avers that Plaintiffs have neither alleged nor can they prove their second and third causes of action for abuse of process and malicious prosecution respectively.

Abuse of process requires that a plaintiff show not just an improper purpose, but an act or threat outside the process. *Spellens v. Spellens* (1957) 49 Cal.2d 210, 232–233. It is "a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." *Ibid*. Flint has adequately shown that there is no extortive act exerted to show that the acts alleged are "nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Ibid*. As such, Flint has carried her burden. Plaintiffs make no argument in response, conceding the point. Plaintiffs have not met their shifted burden, and as such summary adjudication is proper.

Summary adjudication of the second cause of action is GRANTED.

The SAC also alleges a cause of action for malicious prosecution. Plaintiffs allege no prior court action or provide evidence one existed, nor do they provide any authority that malicious prosecution applies to administrative actions. Indeed, Plaintiffs do not provide any argument on this cause of action at all. Flint has shifted her burden as to this cause of action. Plaintiffs offer no evidence or authority meeting their shifted burden.

Summary adjudication of the third cause of action is GRANTED.

C. Defamation

Particularly, the July 6, 2020, incident clearly represents triable material facts for defamation. The evidence presented by Flint contrasts her assertion that no statement was made which Plaintiffs contend is false, and was not negligence per se. In coming to this conclusion, the Court takes note of SAC ¶ 53(d). Therein Plaintiffs allege a cause of action for defamation due to Defendants "Making a false criminal complaint to the Sheriff's Office against JESSE based on the allegation that JESSE hit defendant FLINT with a tractor." SAC ¶ 53(d). Defendants made a claim that Defendant Flint was a victim of felony assault performed by Plaintiff Jesse. SAC ¶ 21. Flint provides a police report attempting to prove she was struck by the tractor, and therefore the claims made to police were not false. However, the police report does not address the particular wording of the complaint and is countermanded by the provided evidence.

The SAC alleges that the defamatory statement is "(m)aking a false **criminal complaint** to the Sheriff's Office." Plaintiffs aver that Defendant Flint was never struck with the tractor, but more importantly it is clear that the criminality of such incident is equally capable of being false. The crime of felony assault requires that Plaintiff Jesse have had the intent to strike Defendant Flint, an intent the investigating officer did not find. See Flint's Exhibit H ("Police Report"), pg. 3; DUMF ¶ 23. However, the report also makes clear that both Defendants told officers that Plaintiff Jesse had alcohol on his breath. Police Report, pg. 2, ¶¶ 2 & 4. The officer found no evidence that Plaintiff Jesse exhibited signs of alcohol consumption or intoxication. Police

Report, pg. 3. These constitute potentially false statements establishing a criminal complaint, and are covered by the acts alleged in the SAC. Defendants' evidence has failed to shift their burden in showing there are no triable issues of material fact as to the cause of action for defamation.

As to Flint's sudden assertion of the litigation privilege on reply, this is ill taken as a new contention raised on reply that should have been raised in the moving papers. Contentions raised for the first time on reply are generally not permitted. *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537. Flint has clearly strategically withheld an argument which was obvious from the allegations in the SAC. It cannot serve now to allow her to meet her initial moving burden when asserted on reply. Even were it considered, Flint's assertion that it was "not a statement to law enforcement or made prior to the filing of the Complaint" (Reply, pg. 5:4-7) appears nonsensical when confronted with the evidence **submitted by Flint** showing the statements within the police report.

Summary adjudication of the fourth cause of action is DENIED.

D. Trespass

Defendant Flint raises the defense of necessity, claiming it is a complete defense to the trespass alleged. Flint does not attempt to aver that the content of the allegations of what occurred during the April 17, 2020, trespass was false. During the incident, Flint is alleged to have threatened to shoot Plaintiffs' dogs. SAC ¶ 15. Flint does not present evidence challenging this assertion. See DUMF ¶ 8. Rather, Flint avers that she was justified under the principle of necessity in order to protect her cats, which she avers were being chased by Plaintiffs' dogs. Whether the Flint's cats were being chased by Plaintiffs' dogs is immaterial to the result here. During her trespass, Flint threatened to shoot Plaintiffs' dogs. Shooting Plaintiffs' dogs is a potentially criminal act. See Penal Code § 597. Certainly, there were actions Flint could have taken short of trespass and threats to accomplish the protection of her property. Flint's response to the perceived threat to her cats is beyond the scope of what would entitle Flint to summary adjudication. The scope of Flint's response in her presented evidence does not result in a lack of triable fact as to whether Flint's alleged conduct was reasonably necessary to protect her cats.

Even had Flint shifted her burden here, Plaintiffs have provided sufficient evidence that the dogs were not on Defendants' property, even during the time they were not in direct sight of Plaintiffs and their children, to raise an issue of triable material fact as to Flint's necessity defense. Flint's argument that the trespass was necessary is not supported if Plaintiffs' dogs were not on Defendants' property.

Therefore, summary adjudication of the fifth cause of action is DENIED.

E. Nuisance

Nuisance comprises claims which do not occur on Plaintiffs' property, but interfere with the use and enjoyment of that property. See *Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 233. Flint's averment that they have not intruded onto Plaintiff's property while the alleged conduct occurred is precisely what makes the cause of action nuisance and not trespass. Plaintiffs allege a broad course of conduct which constitutes Defendants' nuisance. Here, Flint has not shifted their burden in negating an element of a nuisance claim.

Particularly, the allegation that Flint blocks the easement, preventing Plaintiffs from accessing their home, is an obvious nuisance claim. Blocking even half of a wide road that did not meaningfully impede access still constitutes a cause of action for nuisance. See *Albert v. Truck Ins. Exchange* (2018) 23 Cal.App.5th 367, 373. Here, Flint is alleged to have blocked the easement road entirely for (arguably) brief periods, a fact which Defendant appears to concede. See DUMF ¶ 44. Whether this constitutes a "substantial" interference appears to be an issue of fact. *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 303. Also among the evidence for the nuisance is that Defendants have obstructed an 8 foot wide track of the easement with decorative rocks and plants. DUMF ¶ 58. This too is adequate to state a cause of action for nuisance. See *Albert v. Truck Ins. Exchange* (2018) 23 Cal.App.5th 367, 373. The cause as stated is at least viable, and Flint offers no evidence to rebut the existence of the alleged facts. As to whether it is unreasonable, it is clear to the Court that the social utility of Flint's actions is facially outweighed by the inconvenience placed on Plaintiffs. Therefore, they have not negated an element of the cause of action. Summary adjudication is therefore inappropriate.

Summary adjudication of the sixth cause of action is DENIED.

F. Intentional Interference with Prospective Economic Relations

Flint has presented evidence that regardless of their actions, the relationship between Plaintiffs and their tenants came to its natural end, and that Flint's actions did not cause actual disruption of the economic relationship.

Simply put, Plaintiffs have presented evidence that their tenants saw getting away from Defendants as a "bonus". "(O)nly plaintiffs that can demonstrate actual disruption of their economic relationship will be able to state a claim for (intentional interference with prospective economic relations." *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1165. While it is true that Defendants' "main purpose" need not be disruption of the contract, actual disruption must be shown. The evidence presented by Plaintiffs simply does not raise a triable issue of material fact as to causation regarding "actual disruption." Plaintiff has not met their shifted burden.

Summary adjudication of the seventh cause of action is GRANTED.

G. Intentional Infliction of Emotional Distress

First, Flint has not presented any evidence intending to countermand the conduct alleged by the SAC. For the purposes of summary adjudication, the Flint has not contested that she has on multiple occasions screamed profanities as the Plaintiffs drive by, blocked access to their home, threatened to shoot Plaintiffs' dogs, trespassed, made defamatory statements to law enforcement, and assaulted Plaintiff Jesee. The outrageousness of Flint's conduct is sufficiently shown to be tendered to a trier of fact. Flint has not shifted her burden as to this element of the cause of action.

Flint's second contention is that the Plaintiffs cannot establish "severe emotional distress". On this matter, Flint shifts her burden. The evidence as presented by Flint shows distress which does not meet the "severe" level defined by the caselaw.

However, Plaintiffs produce adequate evidence to meet the shifted burden and show a triable issue of material fact as to whether or not Plaintiffs have experience severe emotional distress. Both Plaintiffs have experienced loss of sleep. PAUMF ¶¶ 101, 106. Plaintiffs have felt the need to install cameras in order to feel more secure in their property. PAUMF ¶ 97. "It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed." *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397. There is sufficient evidence for a trier of fact to determine whether there is severe emotional distress. Plaintiffs have met their shifted burden on this cayuse of action.

Summary adjudication of the eighth cause of action is DENIED.

H. Quiet Title

That Flint now at summary judgment seeks to dismiss the quiet title cause of action, which addresses both the alleged encroachment of Defendants onto the easement, and the issue of the Defendants' fence encroaching onto Plaintiff's property. The question presented by Flint is to adjudicate the entire cause of action.

Particularly focusing on the quiet title action related to the encroachment of the fence onto Plaintiffs' property, it is not persuasive to the Court that Plaintiffs have not sought judgment on the pleadings on such an issue means that Flint is entitled to summary judgment in her favor. The physical protrusion of the fence clearly represents an adverse claim, even if Defendants are not aiming to assert it. "The action even lies against any adverse interest that might by regarded by third persons as a cloud on title. *Water for Citizens of Weed California v. Churchwell White LLP* (2023) 88 Cal.App.5th 270, 282. Therefore, Plaintiffs are entitled to some form of adjudication of the quiet title action. Flint has not shifted their burden as to the tenth cause of action.

Summary adjudication of the tenth cause of action is DENIED.

I. Injunctive Relief

Injunctive relief is aimed at the halting of repeated offenses. However, it is not a cause of action, but rather a remedy. Therefore, Plaintiff has not pled a cause of action for injunctive relief.

Summary adjudication of the eleventh cause of action is GRANTED.

V. Conclusion

Based on the foregoing, the motion for summary judgment is **DENIED**. The motion for summary adjudication is **GRANTED** as to the second, third, seventh and eleventh causes of action. Summary adjudication is **DENIED** as to the first, fourth, fifth, sixth, eighth and tenth causes of action.

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-270479, Giannis Restaurant v. Rodriguez

Plaintiff Giannis Restaurant, LP ("Plaintiff") filed the complaint in this action for breach of contract (the "Complaint") of a commercial lease (the "Lease") against defendants Jaime Rodriguez ("Moving Defendant"), Mi Ranchito Partners, Inc. ("Corporate Defendant"), and Does 1-20. This matter is on calendar for the motion by Moving Defendant for leave of court to file a cross-complaint pursuant to CCP §§ 428.50. Moving Defendant wishes to file a cross-complaint for fraud (See Declaration of Amin Kazemini ["Kazemini Decl."], Exhibit A, the "Cross-Complaint"), as during discovery Plaintiff produced two seemingly conflicting copies of the underlying lease. Moving Defendant alleges that the Plaintiff has created a fraudulent copy. Plaintiff does not attach a copy of the Lease to the Complaint. Moving Defendant argues that he should be allowed to file the cross-complaint as it is compulsory.

I. Legal Authority

CCP § 428.50(c) provides: "The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action." If the proposed cross-complaint is permissive, leave of court may be granted "in the interests of justice" at any time during the course of the action. CCP § 428.10 (b). On the other hand, if the proposed cross-complaint is compulsory, leave must be granted so long as defendant is acting in good faith. CCP § 426.50. Cross-complaints are only compulsory when the cause of action existed at the time the answer was filed, and causes of action which arise from facts which occurred after the filing of the answer are always permissive, regardless of their relation to the complaint. *Crocker Nat. Bank v. Emerald* (1990) 221 Cal.App.3d 852, 864.

"'[I]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] "Thus 'the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect.'[Citation.] [¶] This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993; *see Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166-1167 [" 'the plaintiff must allege the names of the persons who made the representations, ... to whom they spoke, what they said or wrote, and when the representation was made' "]; *see also Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. "However, the requirement of specificity is relaxed when the allegations indicate that the defendant must necessarily possess full information concerning the facts of the controversy [citations] or when the facts lie more in the knowledge of the defendant." *Daniels*, at p. 1167, internal quotations and citations omitted; *see Tarmann v. State Farm Mut. Auto. Ins.* Co. (1991) 2 Cal.App.4th 153, 158.

II. Cross-Complaint is not Compulsory, but Nonetheless Proper

This matter, based on the facts, is clearly permissive, but proper. Plaintiff avers that Moving Defendant's action is a separate tort with no relation to the instant breach of contract claim. However, the claim of the proposed cross complaint is that the very contract this action is predicated upon is fraudulent. The determination of the legitimacy of the contract is clearly at the center of both actions. Plaintiff's arguments to the contrary are unpersuasive. Plaintiff makes no showing that the filing is in bad faith, only vaguely asserting that this is a delay tactic by Moving Defendant. There is no trial date currently set. This is insufficient for the Court to find the filing is in bad faith.

Plaintiff argues that Moving Defendant has failed to adequately plead the fraud cause of action asserted, and therefore the Court should not allow the Cross-Complaint. The Court is unconvinced that the Cross-Complaint is so deficient as to justify denial of leave to file. First, the proposed cross complaint is adequately specific as to the misrepresentation at issue. It is clear that the fraudulent misrepresentation is that the duplicate lease is a real and accurate representation of the agreement of the parties. Indeed, the Court notes that there is no contract attached to the Complaint, so it is not even clear which version of the Lease that Plaintiff has produced that they aver is effective and binding. As to who made the misrepresentation, the proposed cross complaint is not so deficient that the Court believes it is adequately addressed in the Opposition. Generally, even at demurrer, when facts are entirely within the control of a defendant, the specificity required for fraud claims is relaxed. *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167. Plaintiff is the party who produced the two anomalous leases in discovery. What is before the Court indicates that Plaintiff has substantially more information about the leases than Moving Defendant. At this juncture, the Court finds the proposed cross complaint is in the interests of justice despite the alleged deficiency.

Additionally, Plaintiff provides no support for the contention that having to now litigate Moving Defendant's Cross-Complaint amounts to "prejudice". *See, e.g. Carbondale Machine Co. v. Eyraud* (1928) 94 Cal.App. 356, 360 (under CCP § 473 (b), prejudice is defined as a party being less able to establish their cause of action due to the ruling); *accord. Aldrich v. San Fernando Valley Lumber Co.* (1985), 170 Cal.App.3d 725, 740 (having to litigate the merits of claims is not prejudice). Adjudication of these connected actions is clearly in the interests of justice, and Plaintiff offers no persuasive arguments to the contrary. The Cross-Complaint is sufficient for the Court to grant the permissive filing in these circumstances.

Plaintiff's argument that the proposed cross complaint does not ask for anything that could not be asserted by Moving Defendant's answer does not appear to be an accurate reflection of the version of the Cross-Complaint submitted to the Court, which requests various damages not recoverable on an answer. See Cross-Complaint ¶ 10. As such, this argument is unavailing.

III. Conclusion

Moving Defendant's motion is **GRANTED**. Moving Defendant shall file his Cross-Complaint within 30 days of notice of this order.

Moving Defendant'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).

4. SCV-270500, Canzoneri v. Kearney

Plaintiff Kokett Canzoneri ("Plaintiff") filed the complaint in this action against General Dynamics Ordnance and Tactical Systems, Inc. ("GDOTSI"), General Dynamics OTS (Niceville), Inc. ("Niceville"), Yolanda Moore ("Moore") and Erina Kearney ("Kearney") (all together "Defendants") with causes arising out of the Defendants' alleged wrongful termination of Plaintiff and other violations of employment law (the "Complaint"). This matter is on calendar for the demurrer by Kearney.

Plaintiff has filed a dismissal of Kearney and the demurrer is therefore MOOT.

A court will not exercise its power for no useful purpose. *Burr v. Board of Sup'rs of Sacramento County* (1892) 96 Cal. 210, 212-213; see also Civ. Code § 3532. Accordingly, courts should generally not act on motions which are moot, or where there is no actual controversy. *Pittenger v. Home Sav. and Loan Ass'n of Los Angeles* (1958) 166 Cal.App.2d 32, 36. An issue is moot, and a court should not address it, if there is no longer an actual controversy, the exception being where the issue is "capable of repetition, yet evading review." *Dibona v. Matthews* (1990) 220 Cal.App.3d 1329, 1339.

Kearney avers that the demurrer is not moot because Plaintiff may choose to amend her complaint to again name Kearney as a defendant. The Court does not find this as sufficiently persuasive to rule on matters which amounts to an advisory opinion as to whether Plaintiff can state a claim against Kearney. Kearney is no longer a party to the case, and any ruling on the demurrer speaks to liability to which Kearney is no longer exposed. Therefore, the matter is MOOT.

5. SCV-270523, Salsbury v. 7-Eleven, Inc.

The Proof of Service reflecting service to Plaintiff states that Plaintiff was served via mail at her last known address, and that Plaintiff's counsel has been unable to confirm that address despite numerous attempts and modalities. Counsel also contracted USA Express to obtain a more recent address, and served that address as well. However, there is no indication that any effort was made to serve Plaintiff with a copy of the motion that contained the hearing date, as the only proof of service reflects service on 7/27/2023, the motion was filed on 7/27/2023, and the Court Clerk set the hearing instant hearing date on 8/17/2023. The Court also notes that Counsel says they attempted to contact Plaintiff via mail, return service requested, but does not provide the results of that effort. APPEARANCES REQUIRED.

6. SCV-270920, Jimenez v. Pacific States Industries Incorporated

Plaintiff Valente Velasco Jimenez ("Plaintiffs") filed the complaint in this action individually and on behalf of all others similarly situated against Defendant Pacific States Industries

Incorporated ("Defendant") for wage and hour violations. This matter is on calendar for Plaintiff's unopposed motion for certification of the class and final approval of the class action settlement (the "Motion"), as well as the motion for attorney's fees and class representative enhancements. The Motions are **GRANTED**.

I. Applicable Standards

A. Fairness of Settlement

After preliminary approval, the Court determines whether a class action settlement is fair, adequate and reasonable in a final hearing, often referred to as a "fairness hearing." Cal. R. Ct. 3.769(g); *see also Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The purpose of this requirement is "the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties" and to "prevent fraud, collusion or unfairness to the class…" *Dunk,* 48 Cal.App.4th at 1800-01, citing *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-79; *see also Marcarelli v. Cabell* (1976) 58 Cal.App.3d 51, 55.

"The trial court has broad discretion to determine whether a class action settlement is fair and reasonable." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 52. "Due regard should be given to what is otherwise a private consensual agreement between the parties" and "the court's inquiry must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Dunk,* 48 Cal.App.4th at 1801 (internal citations omitted). "When the following facts are established in the record, a class action settlement is presumed to be fair: '(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" *Chavez*, 162 Cal.App.4th at 52 *quoting Dunk*, 48 Cal.App.4th at 1802.

B. Class Counsel's Fees

With respect to the request for attorneys' fees and costs, "[o]ur courts have always been cognizant of the inherent tension between the interests of class membership and counsel in settlement of class action litigation." *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 555-56. "In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain." *Apple Computer, Inc. v. Sup. Ct.* (2005) 126 Cal.App.4th 1253, 1269. For this reason the majority of courts have found, for example, that it is impermissible to have a class representative too closely associated with the class attorney. *Id*. at 1264, *citing Susman v. Lincoln American Corp.* (7th Cir.1977) 561 F.2d 86, 90–91. It has also been recognized that once a settlement agreement is reached, the interests of class counsel and defendant are no longer necessarily adverse. *See, e.g. Consumer Privacy Cases*, 175 Cal.App.4th at 555-56, *citing In re General Motors Corp. Pick–Up Truck Fuel Tank* (3rd Cir.1995) 55 F.3d 768, 819–820 ("a defendant is interested only in disposing of the total claim asserted against it; ... the allocation between the class payment and the attorneys' fees is of little or no interest to the defense.' ... [T]he divergence in financial incentives [between the class and counsel] creates the 'danger ...

that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.'")

Because of the potential for fraud, collusion or unfairness, thorough judicial review of fee applications is required in all class action settlements and the fairness of the fees must be assessed independently of determining the fairness of the substantive settlement terms. *Dunk,* 48 Cal.App.4th at 1808-09. Thus, the court has a duty, independent of any objection, to assure that the amount and mode of payment of attorneys' fees are fair and proper, and may not simply act as a rubber stamp for the parties' agreement. *See Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 128-29. "The evil feared in some settlements-unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client-can best be met by a careful ... judge, sensitive to the problem, properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee…" *Zucker v. Occidental Petroleum Corp.* (9th Cir.1999) 192 F.3d 1323, 1328-29 n. 20 (internal citation omitted).

California recognizes "[t]wo primary methods of determining a reasonable attorney fee in class action litigation…" *Laffitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 489. The percentage method "calculates the fee as a percentage share of a recovered common fund or the monetary value of plaintiffs' recovery." *Id.* By contrast, "[t]he lodestar method…calculates the fee 'by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate…Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." *Id. citing Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26; *see also Serrano v. Priest* (1977) 20 Cal.3d 25, 48. In *Laffitte,* the Court clarified that it is within the trial court's discretion to use the "percentage method" to "to calculate a fee in a common fund case, where the award serves to spread the attorney fee among all the beneficiaries of the fund…" 1 Cal.5th at 503. The Court stated that "[w]e join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." *Id.* "The choice of a fee calculation method is generally one within the discretion of the trial court, the goal under either the percentage or lodestar approach being the award of a reasonable fee to compensate counsel for their efforts." *Id*. at 504 *citing Consumer Privacy Cases,* 175 Cal.App.4th at 557-58.

II. The Complaint

The presently operative Complaint ("Complaint") alleges that Defendant failed to pay overtime compensation as required by the California Labor Code ("LC") and applicable wage orders because it alleges meal and rest break violations, that Plaintiff was deprived of rest breaks and/or was not provided timely rest breaks, and alleges on information and belief that these policies were also enforced on other employees.

The Complaint contains causes of action for: (i) failure to pay minimum wages; (ii) failure to provide meal periods or pay meal period premiums; (iii) failure to authorize and permit rest

breaks or pay rest break premiums; (iv) wage statement violations; (v) failure to pay timely wages; (vi) violations of Business & Professions Code § 17200 *et seq.*; and (vii) Private Attorney Generals Act ("PAGA") penalties. Plaintiff seeks to collect on a representative basis PAGA civil penalties for themselves and other employees and collect on a class-wide basis missed break wages, unpaid wages, waiting time penalties, and wage statement damages.

III. The Settlement

According to the Motion, Plaintiff asserted multiple causes of action for various Labor Code and Business and Professions Code violations centered around failure to allow for rest and meal periods. Defendant contends that Plaintiff is unlikely to obtain class certification and the claims presented were based on individualized damages not easily proven in representative claims. Safaei Decl. ¶ 20-21.

The Safaei Declaration establishes that Plaintiff's counsel engaged in informal discovery and investigation. Safaei Decl. ¶ 20-21. On December 20, 2022, the parties mediated the matter before Mark C. Peters, an experienced mediator with extensive wage and hour class action experience. Prior to the mediation, Defendant had provided documents responsive to the informal discovery requests, including payroll information covering the applicable statutory period. (The class is defined in the Class and PAGA Action Settlement Agreement [attached to Safaei Decl., Exhibit 1, hereinafter "Settlement Agreement"] as all current and former non-exempt hourly-paid employes who worked at least one shift in California employed by Defendant at any time from June 1, 2018 through the date the Court enters an order preliminarily approving the settlement. Settlement Agreement §§ 1.6 and 1.12.) Safaei Decl. ¶¶ 6-8.

Based on that data, Plaintiff's counsel was able to undertake a thorough analysis of potential damages for the claims alleged in the Complaint, including the number of instances and the corresponding monetary claim for each late or missed meal break, each missed rest break, and each resulting wage statement violation. Plaintiff's counsel was able to then extrapolate that information to the entire class. Plaintiff had previously estimated that the maximum possible recoverable damages were $1,988,332.90 ($53,728.00 in meal-break wages + $537,280.04 in rest-break wages + $128,116.52 for unpaid minimum wages + $753,500 in wage statement penalties + $515,708.40 in PAGA penalties). See Court's Minutes and Tentative Ruling for Preliminary Approval of Class Action Settlement, filed 5/17/2023. The estimated average damage for the core claims is therefore $2,221.60 per class member ($1,988,332.90 / 895 class members). At the mediation, the parties agreed to a $460,000 settlement. Safaei Decl. ¶ 23.

Pursuant to the Settlement Agreement, Defendant will pay $460,000 as the Gross Settlement Fund. From that amount, the following will be deducted: 1) attorneys' fees of $153,333.31 (which is approximately 1/3 of the Gross Settlement Fund) and $8,539.14 of costs and expenses; 2) an incentive award to the Plaintiff of $5,000; 3) settlement administration costs, not to exceed $16,250; and 4) $25,000 in penalties under PAGA ($18,750 paid to the California Labor and Workforce Development Agency, $6,250 to PAGA group members). If these sums are all approved by the Court, this results in a Net Settlement Fund of $251,877.55 to be distributed to the members of the class. $6,250 of the PAGA penalties will also be distributed to the PAGA group members. The Net Settlement Fund will be distributed pro rata to the members of the class who do not opt out, based on the number of workweeks worked by such individual as compared

to the total number of aggregate number of workweeks by all such individuals during the Class Period. Settlement Agreement § 1.25. This results in an average settlement payment of approximately $281.43 ($251,877.55 / 895). Defendant will pay its share of payroll taxes for settlement funds classified as wages separate from the $460,000 Gross Settlement Fund. Settlement Agreement § 3.1. The settlement is non-reversionary as any funds will be distributed to Participating Class Members. Settlement Agreement § 3.1 (a "Participating Class Member" being any Class Member who does not submit a timely opt-out, [see Settlement Agreement § 1.36). For tax purposes, one-third is allocated to unpaid wages, and two-thirds is allocated to interest and penalties classified as miscellaneous income. Settlement Agreement § 3.2.4.1. Net settlement payments will be automatically sent to members of the class unless they opt out. See generally, Settlement Agreement §8.5.

The Settlement Agreement and proposed notice to the Class (the "Proposed Notice") (Settlement Agreement, Ex. A) also set forth the procedure and timeline for providing notice to the class members (which will be sent by the administrator via first class mail), which includes a detailed explanation of the claims and defenses, terms of the settlement, opt out and objection procedures, an estimate of the individual class member's settlement payment and a description of how it was calculated, and that all participating members of the class will be paid without the need to submit a claim. The Class Members who do not opt-out of the settlement releases Defendant from "all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the operative Complaint and PAGA Notice, including claims for unpaid minimum wages; failure to provide meal premiums and/or unpaid meal period premiums; failure to authorize and permit rest breaks and/or unpaid rest break premiums; failure to provide complete wage statements; civil waiting time penalties under PAGA; failure to timely pay wages; and based on violations of Labor Code sections 204, 218.6, 222, 226, 226.3, 226.7, 227.3, 512, 516, 558, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, applicable sections of the relevant Industrial Welfare Commission Wage Order(s), including §§ 4, 11, 12, or Business and Professions Code section 17200, et seq., which are premised on the same allegations, and applicable Cal. Code Regs., tit. 8, section 11010" during the Class Period. Settlement Agreement §§ 6.2.

Additionally, aggrieved employees under the PAGA claims agree to release "all claims for PAGA penalties that were alleged in Plaintiff's PAGA Notice, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and the PAGA Notice, including PAGA claims premised on violation of Labor Code sections 203, 204, 218.6, 222, 226, 226.3, 226.7, 227.3, 512, 516, 558, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, applicable sections of the relevant Industrial Welfare Commission Wage Order(s), including §§ 4, 11, 12, and Cal. Code Regs., tit. 8, section 11010" during the PAGA period. Settlement Agreement § 6.3.

Notice to the class was distributed after the Court entered preliminary approval on May 22, 2023. ILYM, the previously appointed Claims Administrator, has entered a declaration regarding the administration of the settlement to this point in support of final approval. See generally, Declaration of Cassandra Polites ("Polites Decl."). Of the class members disclosed by Defendants pursuant to the agreement, 44 of the notices were undeliverable. Notices were issued in both English and Spanish.

IV. Final Approval

The Court first notes that the preliminary approval order calendared the instant motion for August 23, 2023. Through a calendaring error, the Court set the hearing for September 27, 2023. On August 23, 2023, the Court held its regular law and motion hearing on other matters. No class member appeared to object to the terms delineated in the Class Notice. Therefore, the Court finds the error to have not been prejudicial to the rights of class members to appear and object.

Second, the Court notes that the analysis at preliminary approval occurred using 859 class members. Plaintiff's motion for final approval now avers that there are 895 class members. While it is unclear whether this is the result of a typographical error in either the preliminary motion, a typographical error in the instant motion, or is the result of a recalculation based upon updated information. The analysis proceeds in good faith that the currently averred 895 class members remains correct.

After preliminary approval, the Court determines whether a class action settlement is fair, adequate and reasonable in a final hearing, often referred to as a "fairness hearing." Cal. R. Ct. 3.769(g); *see also Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The purpose of this requirement is "the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties" and to "prevent fraud, collusion or unfairness to the class…" *Dunk*, 48 Cal.App.4th at 1800-01, citing *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-79; *see also Marcarelli v. Cabell* (1976) 58 Cal.App.3d 51, 55.

"The trial court has broad discretion to determine whether a class action settlement is fair and reasonable." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 52. "Due regard should be given to what is otherwise a private consensual agreement between the parties" and "the court's inquiry must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Dunk*, 48 Cal.App.4th at 1801 (internal citations omitted). "When the following facts are established in the record, a class action settlement is presumed to be fair: '(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" *Chavez*, 162 Cal.App.4th at 52 *quoting Dunk*, 48 Cal.App.4th at 1802.

The first two *Chavez* factors are clearly met here, as was found at preliminary approval. Class counsel has established their expertise in this area. The Claims Administrator received no objectors, and no objectors appeared before the Court on August 23, 2023. The settlement is presumptively fair. The total settlement amount ($460,000) being ~23% of the maximum possible damages calculated ($1,988,332.90) appears reasonable based on the circumstances of the case.

Therefore, the Court finds the settlement reasonable, and meeting the requirements for final approval.

V. Final Approval of the Attorneys' Fees and Cost Award and Class Representative Enhancement.

In this case, the underlying Settlement Agreement established a gross settlement fund fixed at $460,000, without any reversion to Defendants and with all settlement proceeds, net of specified fees and costs ($251,877.55) and $6,250 in PAGA penalties, going to pay claims for class members who did not opt out of the settlement (and none did). Plaintiffs' counsel requests an award of $153,333.31, which is one third (33.33%) of the common fund.

Class Counsel Safaei (who has nearly seventeen years of experience) has provided extensive information regarding the time billed in this case and the relative rates of each individual who performed work for Plaintiff. It is the case that the percentage recovery focuses on results achieved whereas the lodestar focuses on time spent (and ordinarily a 1/3 contingency is within the range of reasonableness). The recovery here appears reasonable given the difficulties of the case, and the relatively fast recovery accomplished. Had the Court undertaken the lodestar method, $153,333.31 would still represent a reasonable request for fees. The Court generally finds that $525 per hour is among the highest hourly rates that is reasonable in this locality. Plaintiff's counsel expended 229 hours with a probable 15 prospective hours in bringing this case to its conclusion. The case was taken on contingency, and therefore a multiplier of 1.2 is likely appropriate. This would result in a lodestar of $153,720, a nearly identical figure to that reached through the percentage method. The Court finds the $153,333.31 attorney's fees request reasonable given these circumstances.

Plaintiff's counsel also seeks $8,539.14 litigation-related costs and attaches a cost report substantiating that sum. Safaei Decl. ¶ 47 & Ex. 4.

Based on the foregoing, Plaintiffs' request for attorneys' fees and costs is granted in the amount of $531,333.31 for fees and $8,539.14 in costs.

Plaintiff also seeks a service award in the amount of $5,000 for Plaintiff. "'[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.' [citation] These 'incentive awards' to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit." *See Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-95. *See also Ridgeway v. Wal-Mart Stores Inc*. (N.D. Cal. 2017) 269 F. Supp. 3d 975, 1003 (citing *Bellinghausen v. Tractor Supply Co*. (N.D. Cal. 2015) 306 F.R.D. 245, 266-67, which in turn collected cases and explained that a $5,000 incentive award is presumptively reasonable in that district and that awards typically range from $2,000–$10,000).

Plaintiff argues that this award is reasonable in light of his role as representatives of the class. In particular, Plaintiff cites his role in providing substantive information and documents to counsel and reviewing documents and the Settlement Agreement and the risks taken professionally, personally, and monetarily (for costs). Plaintiff filed a declaration generally describing his participation and establishing that he participated as class representative, but the declaration does not attempt to quantify any of the time spent on his efforts (and neither did class counsel). *See generally* Declaration of Valente Velasco Jimenez.

While the lack of specifics makes the analysis more difficult, the request is for the reasonable award of $5,000 under the factors described in *Cellphone Termination*, 186 Cal.App.4th at 1394-95. The Court finds the award reasonable.

Plaintiff's request for a personal representative enhancement award is approved in the amount of $5,000.

VI. Conclusion

Based on the foregoing:

1. The Court, for purposes of this Order, adopts all defined terms and conditions as set forth in the Settlement Agreement filed in this case.

2. The Court has jurisdiction over the subject matter of this litigation and the Class Representatives, the other members of the Class, and Defendant.

3. The Court finds that the dissemination of the Class Notice as disseminated to the Class Members, constituted the best notice practicable under the circumstances to all persons within the definition of the Class, and fully met the requirements of California law and due process under the United States Constitution.

4. The Court approves the Settlement of the above-captioned action, as set forth in the Settlement Agreement, as fair, just, reasonable, and adequate as to the Settling Parties. The Settling Parties are directed to perform in accordance with the terms set forth in the Settlement Agreement.

5. Except as otherwise provided in the Settlement Agreement, the Settling Parties are to bear their own costs and attorneys' fees.

6. The Court hereby certifies the following Class for settlement purposes only: all current and former non-exempt employees who worked at least one shift for Defendant in California facility at any time from June 1, 2018 through May 17, 2023. The Court approves the class of Aggrieved Employees under the PAGA claims for settlement purposes only as all current and former non-exempt employees who worked at least one shift for Defendant in California at any time from November 23, 2020 through May 17, 2023.

7. With respect to the Class and for purposes of approving the settlement only and for no other purpose, this Court finds and concludes that: (a) the members of the Class are ascertainable and so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the Class, and there is a well-defined community of interest among members of the Class with respect to the subject matter of the claims in this litigation; (c) the claims of Class Representative is typical of the claims of the members of the Class; (d) the Class Representative has fairly and adequately protected the interests of the members of the Class; (e) a class action is superior to other available methods for an efficient adjudication of this controversy; and (f) the counsel of record for the Class Representative, i.e., Class Counsel, are qualified to serve as counsel for the Plaintiff in his individual and representative capacity and for the Class.

8. Defendant shall fund **$460,000.00** of the total Gross Settlement Fund pursuant to the terms of the Settlement Agreement. This amount includes all costs in ¶ 10 below.

9. The Court approves the Individual Settlement Payment amounts, which shall be distributed pursuant to the terms of the Settlement Agreement.

10. Defendant shall pay (a) to Class Counsel attorneys' fees in the amount of **$153,333.31** and reimbursement of litigation costs in the amount of **$8,539.14**; (b) enhancement payment to the Class Representative Valente Velasco Jimenez in the amount of **$5,000.00**; (c) the sum of **$16,750.00** to be paid to the LWDA for PAGA Penalties; and (d) **$16,250.00** to the Claims Administrator, ILYM Group, Inc., for the costs relating to the claims administration process in this matter. The Court finds that these amounts are fair and reasonable. Defendant is directed to make such payments from the Gross Settlement Amount and in accordance with the terms of the Settlement Agreement.

11. The Court will enter final judgment in this case in accordance with the terms of the Settlement, Preliminary Approval Order, and this Order. Without affecting the finality of the Settlement or judgment, this Court shall retain exclusive and continuing jurisdiction over the action and the Parties, including all Class Members, for purposes of enforcing and interpreting this Order and the Settlement.

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), and a [proposed] judgment.

7. SCV-271556, Rodriguez v. Marty Skoff Trucking, Inc.

Plaintiff Mario Napoleon Rodriguez ("Plaintiff") filed the complaint in this action (the "Complaint") against defendants Marty Skoff Trucking, Inc. ("Defendant"), and Does 1-100. This matter is on calendar for the motions by Plaintiff to compel answers to form interrogatories ("FIs"), pursuant to Cal. Code Civ. Proc. ("CCP") §§ 2030.290(b)-(c), and monetary sanctions. Defendant has provided subsequent responses, and therefore the motion to compel appears to be MOOT, leaving the matter of sanctions. The Plaintiff's request for sanctions is GRANTED in the amount of $2,573.41.

I. Relevant Law

When a party serves responses after a motion to compel is filed, the court maintains jurisdiction within its discretion to determine whether the original answers were sufficient in order to determine whether sanctions remain appropriate. *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 410-411. Sanctions are mandatory under the CCP for discovery abuses, absent substantial justification. If a party fails serve a code complaint response to interrogatories, the court shall impose sanctions unless it finds that the party subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. CCP §2030.290(c). The purpose of monetary sanctions is to mitigate the effects of the necessity of discovery motions and responses on the prevailing

party. There is no requirement that the failure to comply with discovery be willful for the court to impose monetary sanctions. *Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 878. For the court to order sanctions against an attorney, the Court must find that the attorney advised their client to engage in discovery misconduct. *Kwan Software Engineering, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 81. Additionally, the motion must advise the attorney that joint and several liability against the attorney is sought for the sanctions. *Blumenthal v. Superior Court* (1980) 103 Cal.App.3d 317, 319.

II. Analysis

The Court notes that Defendant's opposition is untimely, however the Court exercises its discretion to consider the substance of the opposition.

The instant motion was filed on August 3, 2023. Defendant has served responses to the relevant FIs subsequent to the filing of this motion, on September 14, 2023. Plaintiff's reply concedes that further responses have been served, and therefore the substance of the motion is moot. Therefore, the Court turns its analysis to sanctions.

Plaintiff served the discovery requests at issue on April 25, 2023. Defendant's primary counsel had a health emergency and went out of the office. There is no evidence of an "extension" of time to respond as contemplated by the Discovery Act. Responses are therefore facially untimely, and objections are waived. Despite this, Plaintiff did not move to compel responses until August 3, 2023, in understanding that Defendant's counsel was short staffed. Defendant's counsel never provided a date certain for responses, continuing to aver vaguely that responses were coming "soon". Defendant's counsel was back to full staffing on June 13, 2023, and yet at the time the instant motion was filed, no responses had been provided. It is clear that Plaintiff's motion to compel was justified. Indeed, even with the motion on calendar, Defendant did not provide responses until 8 court days prior to the instant hearing. Therefore, sanctions are proper.

The issue here clearly stems from counsel, therefore joint sanctions are proper.

Plaintiff seeks $2,573.41, representing attorney work of 4 hours for the motions at $475/hour, one hour of prospective time preparing a reply, and $79.66 in costs to file the motion. Steele Declaration ¶ 15. Five hours is reasonable based on the motion and the reply. Plaintiff's request for sanctions is GRANTED. Defendant and/or their counsel is to pay $2,573.41 to Plaintiff within 30 days of this order.

III. Conclusion

For the reasons above, the Motion is moot, but sanctions are **GRANTED**. Defendant is to pay $2,573.41 to Plaintiff within 30 days of this order.

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).

8. SCV-273099, Gaye Martin, as Rep of the Est. of William Thomas Martin v. Kaiser

Plaintiffs Gaye Martin ("Plaintiff"), both individually and as successor-in-interest to decedent William Thomas Martin ("Decedent"), Tiffany Collver, the Estate of Jamie Freeman, Jaeger Freeman and Dylan Martin, filed the complaint ("Complaint") in this action against defendants Kaiser Foundation Hospitals ("KFH"), Kaiser Foundation Health Plan ("Health Plan"), The Permanente Medical Group, Inc. ("Medical Group", together with KFH and Health Plan, "Defendants"), and Does 1-50, arising out of Defendants' care of Decedent. This matter is on calendar for the petition by the Defendants to compel arbitration pursuant to Cal. Code Civ. Proc. ("CCP") § 1281.2. Defendants' petition to compel arbitration and stay proceedings is DENIED.

I. Facts and Procedure

The Decedent signed an "Enrollment Application" in April of 2004. See Woods Declaration in Support ("Woods Decl."), Exhibit D ("April 2004 Agreement"). Directly above the signature line appeared an arbitration provision. *Ibid.* The April 2004 Agreement appeared in part as depicted below.

Dependent *Relationship:*			☐ Child ☐ Student	– –	/ /	☐ M ☐ F			
Dependent *Relationship:*			☐ Child ☐ Student	– –	/ /	☐ M ☐ F			
Dependent(s') Address (if different from subscriber's): ☐ Check here if all dependents are at the address below.									
Name(s)	Address			City		State	ZIP Code		

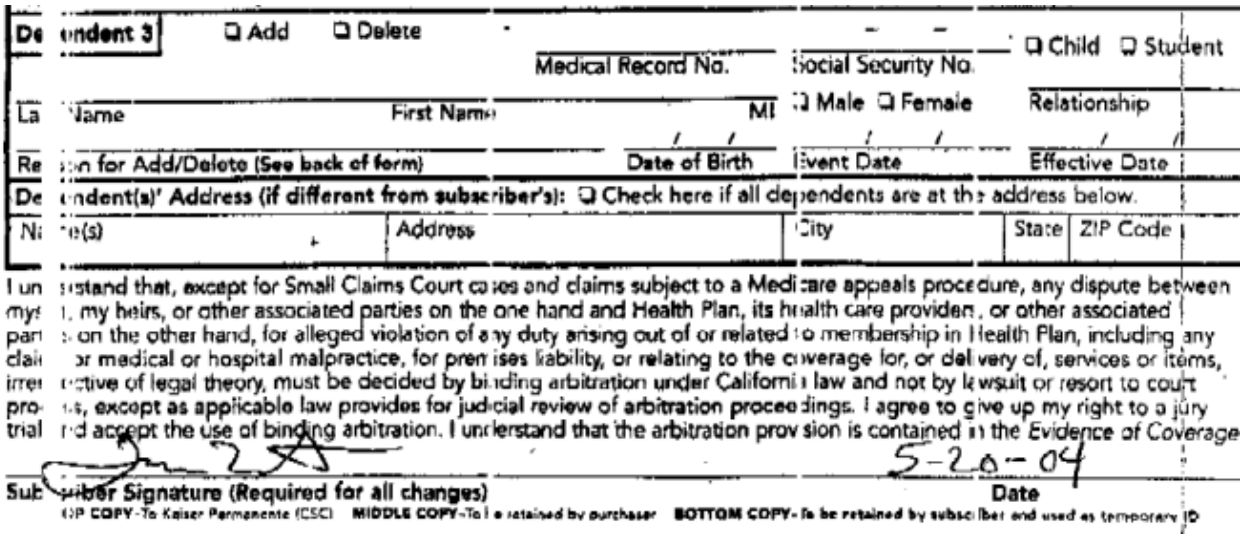
I understand that, except for Small Claims Court cases, claims subject to a Medicare appeals procedure, and if your Group must comply with ERISA regarding certain benefit-related disputes, any dispute between myself, my heirs or other associated parties on the one hand and Health Plan, its health care providers, or other associated parties on the other hand, for alleged violation of any duty arising out of or related to membership in Health Plan, including any claim for medical or hospital malpractice, for premises liability, or relating to the coverage for, or delivery of, services or items, irrespective of legal theory, must be decided by binding arbitration under California law and not by lawsuit or resort to court process, except as applicable law provides for judicial review of arbitration proceedings. I agree to give up my right to a jury trial and accept the use of binding arbitration. I understand that the arbitration provision is contained in the *Evidence of Coverage*.

X _____ 4-7-04
*Employee/Subscriber Signature EXHIBIT D at 1 *Date

thorized Kaiser Permanente representative.

Ibid.

Thereafter, in May 2004, Decedent completed an "Account Change Form", which contained similar language. Woods Decl., Ex. E ("May 2004 Agreement"). Directly above the signature line appeared an arbitration provision. *Ibid.* The May 2004 Agreement appeared in part as depicted below.



De ndent 3 ❑ Add ❑ Delete ❑ Child ❑ Student

Medical Record No. Social Security No.

La Name First Name MI ❑ Male ❑ Female Relationship

Re on for Add/Delete (See back of form) Date of Birth Event Date Effective Date

De ndent(s)' Address (if different from subscriber's): ❑ Check here if all dependents are at the address below.

Ni e(s) Address City State ZIP Code

I un stand that, except for Small Claims Court cases and claims subject to a Medicare appeals procedure, any dispute between myself, my heirs, or other associated parties on the one hand and Health Plan, its health care providers, or other associated parties on the other hand, for alleged violation of any duty arising out of or related to membership in Health Plan, including any claim for medical or hospital malpractice, for premises liability, or relating to the coverage for, or delivery of, services or items, irrespective of legal theory, must be decided by binding arbitration under California law and not by lawsuit or resort to court process, except as applicable law provides for judicial review of arbitration proceedings. I agree to give up my right to a jury trial and accept the use of binding arbitration. I understand that the arbitration provision is contained in the *Evidence of Coverage*

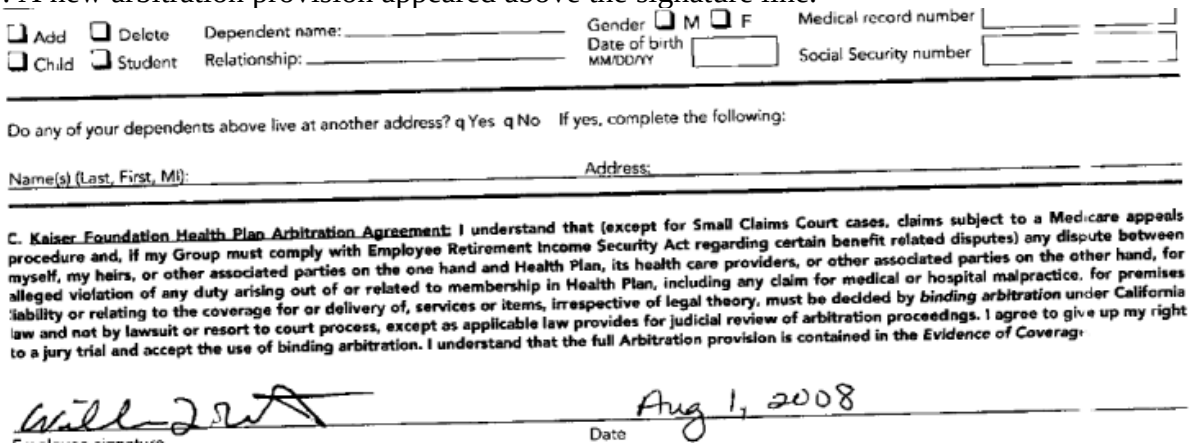
5-20-04

Subscriber Signature (Required for all changes) Date

GP COPY-To Kaiser Permanente (CSC) MIDDLE COPY-To be retained by purchaser BOTTOM COPY-To be retained by subscriber and used as temporary ID

Ibid.

On August 1, 2008, Decedent completed another "Account Change Form". Woods Decl. Exhibit F. A new arbitration provision appeared above the signature line.



❑ Add ❑ Delete Dependent name: Gender ❑ M ❑ F Medical record number

❑ Child ❑ Student Relationship: Date of birth MM/DD/YY Social Security number

Do any of your dependents above live at another address? q Yes q No If yes, complete the following:

Name(s) (Last, First, MI): Address:

C. Kaiser Foundation Health Plan Arbitration Agreement: I understand that (except for Small Claims Court cases, claims subject to a Medicare appeals procedure and, if my Group must comply with Employee Retirement Income Security Act regarding certain benefit related disputes) any dispute between myself, my heirs, or other associated parties on the one hand and Health Plan, its health care providers, or other associated parties on the other hand, for alleged violation of any duty arising out of or related to membership in Health Plan, including any claim for medical or hospital malpractice, for premises liability or relating to the coverage for or delivery of, services or items, irrespective of legal theory, must be decided by *binding arbitration* under California law and not by lawsuit or resort to court process, except as applicable law provides for judicial review of arbitration proceedings. I agree to give up my right to a jury trial and accept the use of binding arbitration. I understand that the full Arbitration provision is contained in the *Evidence of Coverage*

Aug 1, 2008

Employee signature Date

Plaintiff has also signed several "Agreements" as group officer of the health plan. Woods Decl. Ex. G. Each of these contained notices of binding arbitration on the signature page.

Decedent passed away early in 2022. Plaintiff thereafter filed this suit. Kaiser has moved to compel arbitration based on Decedent's agreement to the arbitration provisions.

II. Governing Law

A. Compelling Arbitration Generally

A party seeking to compel arbitration pursuant to CCP § 1281.2 must "plead and prove a prior demand for arbitration under the parties' arbitration agreement and a refusal to arbitrate under the agreement." *Mansouri v. Sup. Ct.* (2010) 181 Cal.App.4th 633, 640-641. "The party seeking to compel arbitration has the initial burden to plead and prove the existence of a valid

arbitration agreement that applies to the dispute." *Dennison v. Rosland Cap. LLC* (2020) 47 Cal.App.5th 204, 209; see also, *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 972; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236. "Once that burden is satisfied, the party opposing arbitration must prove any defense to the agreement's enforcement, such as unconscionability [or waiver]." *Id*; see also, *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59. "Doubts are resolved in favor of arbitration" and "[t]he court should order [the parties] to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute." *San Francisco Police Officers' Assn. v. San Francisco Police Com.* (2018) 27 Cal.App.5th 676, 683, quoting *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 204–205. "California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration." *Howard v. Goldbloom* (2018) 30 Cal.App.5th 659, 663, citing *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 890. "This strong policy has resulted in the general rule that arbitration should be upheld unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute." *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686; accord, *Rice v. Downs* (2016) 248 Cal.App.4th 175, 185. The filing of a lawsuit by a plaintiff is sufficient to show that plaintiff has refused to arbitrate claims, allowing a defendant to move for arbitration. *Hyundai Amco America, Inc. v. S3H, Inc.* (2014) 232 Cal.App.4th 572, 577.

Under California law, the policy favoring arbitration, "'does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration.'" *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704, quoting *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.

B. Health Care Plans and Arbitration

> "Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions:
>
> (a) The disclosure shall clearly state whether the plan uses binding arbitration to settle disputes, including specifically whether the plan uses binding arbitration to settle claims of medical malpractice.
> (b) The disclosure shall appear as a separate article in the agreement issued to the employer group or individual subscriber and shall be prominently displayed on the enrollment form signed by each subscriber or enrollee.
> (c) The disclosure shall clearly state whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery of service under the plan, or both, and shall be substantially expressed in the wording provided in subdivision (a) of Section 1295 of the Code of Civil Procedure.

(d) In any contract or enrollment agreement for a health care service plan, the disclosure required by this section shall be displayed immediately before the signature line provided for the representative of the group contracting with a health care service plan and immediately before the signature line provided for the individual enrolling in the health care service plan."

Health & Saf. Code, ("H&SC") § 1363.1

"(T)he word "prominent"—like its synonyms 'noticeable,' 'remarkable,' 'outstanding,' 'conspicuous,' 'salient,' and 'striking'—means 'attracting notice or attention.' (Merriam–Webster's Collegiate Dict. (11th ed.2006) p. 848, col. 2.) More specifically, 'prominent' 'applies to something commanding notice by standing out from its surroundings or background.' (*Ibid.*)" *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021, 1026 ("*Burks*").

C. Stays

Issuance of a requested stay is mandatory upon granting the petition to compel arbitration. CCP § 1281.4; see also *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 140.

III. Analysis

A. Arbitration of Claims Under Enrollment Agreement

Defendants aver that Plaintiff's claims must be referred to arbitration due to Decedent having signed the above enrollment agreements. Plaintiffs argue that none of the documents submitted have the title "enrollment agreement" and that the arbitration provisions do not comply with H&SC 1363.1. Plaintiff's assertion that the documents submitted are not titled "enrollment agreement" and therefore not bidning is purely semantic and unpersuasive. The parties need look no further than *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021, 1026 to see this argument is without merit.

Defendants argue that the arbitration provision is adequately prominent to comply with the findings in *Burks* because the provision takes more page space than the arbitration provision present in *Burks*. That Defendants have created a longer arbitration disclosure is not persuasive. Similar to the *Burks* form, each of the provisions provided by Defendants fail to display the arbitration provision prominently in one way or another.

The April 2004 form shares nearly every deficiency of the *Burks* form. The typeface is of the same size or smaller than other text on the form, it is bereft of any highlights, italics or bold intended to make the text stand out, and it lacks any heading. Defendants' argument that the amount of space taken on the form is sufficient is unpersuasive, as it is clear that this is only due to the form including additional information, and the length alone is insufficient to make the disclosure prominent. In viewing the form, the disclosure is not adequately distinct to meet the "prominent" requirement under H&SC § 1363.1 (b).

The May 2004 form is similarly deficient. While the content of the text differs, no change made addresses the lack of prominence outlined above.

The August 2008 form does contain key distinctions which merit addressing. The

arbitration provision contains a header which makes clear what the section addresses. The text is in all bold impaired to the sections of the document above. However, the typeface is smaller than most of the print on the form. Indeed, for the improvements that were included in both the utilization of the header and the bold text, the smaller font size serves to blunt these improvements significantly. Despite the changes, the arbitration provision here is insufficiently prominent to meet the requirements of H&SC § 1363.1 (b).

The forms signed by Decedent were not complaint with H&SC § 1363.1 (b). As such, they cannot be relied on to compel arbitration of Plaintiff's claims.

B. Arbitration of Plaintiff's Claims on Other Grounds

While Defendants make note that the Plaintiff here is also the "Group officer", and signed multiple "agreements" as applied to the "Group", Defendants make no effort during argument in their moving papers to purport that these disclosures are relevant to the instant claims. Defendants attempt to assert some form of substantive argument on reply. These are both improper and unpersuasive. Contentions raised for the first time on reply are generally not permitted. *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537. There is no legal authority provided that shows Plaintiff's individual claims are somehow impacted by her signature as "Group officer". While the notice included in the employer group agreement does appear adequately distinct in that regard, the requirement of H&SC § 1363.1 (b) is that such disclosures appear in the group agreement "**and shall be prominently displayed on the enrollment form signed by each subscriber or enrollee.**" The plain language of the statute makes clear that the deficiency on the enrollment form is not cured by the group agreement. Therefore, the matters considered by the Court need not proceed past the Health & Safety Code § 1363.1 analysis above.

IV. Stay.

Issuance of the requested stay is mandatory upon granting the petition. CCP § 1281.4; see also *OTO, supra*, 8 Cal.5th at 140. However, the petition being denied, there is no basis to stay the case. The request for stay is DENIED.

V. Conclusion.

Therefore, Defendants' petition to compel arbitration is **DENIED**.

Plaintiff 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).