SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 09-19-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	24CV433281 Hearing: Order of Examination	Fundamental Capital, LLC. vs Peter Cournoyer et al	All parties are to appear in Department 16 at 9:00 AM, either in person or via TEAMS. If all parties appear, the Court will administer the oath and the examination will take place off line.
LINE 2	2013-1-CV-256373 Hearing: Order of Examination	S. Santana vs A. Zepeda, et al	On 9/17/24, Plaintiff and Defendant Mrs. Zepeda appeared and the matter for her and for Mr. Zepeda was continued to 12/10/24 at 9 am.
LINE 3	20CV368334 Motion: Strike	Anthony Canciamilla et al vs Rumit Kotak	See Tentative Ruling. Court will prepare the final order.
LINE 4	20CV368334 Hearing: Demurrer	Anthony Canciamilla et al vs Rumit Kotak	See Tentative Ruling. Court will prepare the final order.
LINE 5	21CV388454 Hearing: Demurrer	Marica Hill et al vs David Velasquez et al	Continued pending settlement.
LINE 6	21CV377246 Motion: Summary Judgment/Adjudication	Akbar Matani et al vs Stephen Lam et al	See Tentative Ruling. Court will prepare the final order.
LINE 7	21CV385112 Hearing: Relief from Waiver	Quintara Biosciences, Inc. vs Gangyou Wang et al	See Tentative Ruling. Plaintiff shall submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 8	21CV385112 Motion: Compel	Quintara Biosciences, Inc. vs Gangyou Wang et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 9	23CV415067 Motion: Compel	Nicole Mendoza vs BMW of North America, LLC	Off calendar. Case settled.
LINE 10	23CV415067 Hearing: 2nd Mtn to Overrule Preamble	Nicole Mendoza vs BMW of North America, LLC	Off calendar. Case settled.
LINE 11	21CV390702 Motion: Withdraw as attorney	Paul Medina vs Jimmy Herrera, Jr	Notice appearing proper and good cause appearing, the unopposed motion is GRANTED. Mr. Flemate shall submit the final order.
LINE 12	22CV405929 Motion: Withdraw as attorney	Tropos Technologies, Inc. vs SoCal Custom Cars, LLC	Notice appearing proper and good cause appearing, the unopposed motion is GRANTED. Moving counsel shall submit the final order.
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Lines 3 and 4
Case Name: *Anthony Canciamilla, et al. v. Rumit Kotak, et al.*
Case No.: 20CV368334

This is an action for trespass, private nuisance, and negligence, among other things.

Now before the Court is: (1) Anthony Canciamilla ("A. Canciamilla") and Maria Canciamilla's ("M. Canciamilla") (collectively, "Cross-Defendants"), demurrer to Rumit Kotak's ("Kotak" or "Cross-Complainant") First Amended Cross-Complaint ("FACC"); and (2) Cross-Defendants' Motion to Strike Portions of Kotak's FACC.

I. Background

A. Factual

Kotak is the owner and in possession of real property located at 1323 Hillcrest Drive in San Jose, California ("Kotak Property") (FACC, ¶ 7.) Cross-Defendants are the owners of and in possession of real property located at 1315 Hillcrest Drive in San Jose, California. ("Canciamilla Property") (FACC, ¶ 8.) Kotak's property and Cross-Defendants' property adjoin each other. (FACC, ¶¶ 7, 9.)

Cross-Defendants purchased their property in or around May 2011, and they were given documentation on what "Covenants, Conditions, Restrictions, and Easements" ("CCREs") were attached to the subdivision. (FACC, ¶¶ 11-12.) Cross-Defendants performed "an extensive remodel" after the purchase of their property which included "significantly reducing the front landscaping and replacing it with concrete and other hardscape materials." (FACC, ¶ 13.)

In or about May 2018, Kotak purchased his property with plans to remodel it so that he could accommodate his aging mother, and update the pool area and landscaping for his children. (FACC, ¶ 8.) As part of Kotak's property purchase, he was given a title report and CCRE documentation as well. (FACC, ¶ 10; Exh. A – Title Report; Exh. B – CCREs.)

Thereafter, Kotak began the demolition process on his property in preparation for construction and remodeling, which would occur once permits were issued by the City of San Jose ("the City"). (See FACC, ¶¶ 20.) Kotak's construction plans were submitted to the City around August 2018, and a month later, Kotak received notice from a City representative that the project would require a "Certificate of Geologic Hazard Clearance." (FACC, ¶ 22.) This certificate was issued to Kotak on June 5, 2020. (FACC, ¶ 22.) At this point, Kotak reasonably believed he had complied with all City requirements to proceed with his renovation project. (FACC, ¶ 23.) During the remodel, Kotak discovered the existing drainage system on his property was not working properly, causing water to pool onto the front yard and flow under Kotak's house (FACC, ¶ 24, 26.) To prevent water from collecting under Kotak's house, the planned construction included the installment of a new drainage system. (FACC, ¶¶ 24-26.) Kotak worked with the City to obtain any necessary permits for the project, including those for drainage. (FACC, ¶ 34.)

While Kotak continued with his drainage construction plans, he was approached "many times" by Cross-Defendant A. Canciamilla in an "aggressive and hostile" manner. (FACC, ¶¶

38-39.) On another occasion, Cross-Defendant M. Canciamilla similarly yelled at Kotak while construction staff were laying concrete on Kotak's property. (FACC, ¶ 40.) Kotak also found A. Canciamilla looking "into his yard and into [his children's] room" while Kotak's children were at play. (FACC, ¶ 44.) Over the course of construction, Cross-Defendants' interactions with Kotak and his family became increasingly hostile. (FACC, ¶¶ 48-58.) Cross-Defendants exhibited racial animus[1] and regularly yelled racial epithets at Kotak, and in the presence of his family. (FACC, ¶¶ 48-58). On multiple occasions, Cross-Defendants shoved objects into a fence that was located on Kotak's property. (FACC, ¶¶ 60-62.) Finally, on January 7, 2023, Cross-Defendants partially damaged Kotak's fence by shoving a "pointed stake" through it. (FACC, ¶¶ 61-63.) Although Kotak called the San Jose Police Department to report each instance of alleged vandalism, he did not ask the police to contact Cross-Defendants about these incidents. (FACC, ¶¶ 60-63.)

B. Procedural

On July 15, 2020, Cross-Defendants filed their initial complaint against Kotak. On November 21, 2022, Plaintiffs sought leave of Court to amend their complaint. On July 3, 2023, Cross-Defendants filed a verified amended complaint alleging the following causes of action: (1) trespass, (2) private nuisance, (3) negligence, (4) injunctive relief, (5) abandonment of easement, (6) declaratory relief; and (7) quiet title. On September 8, 2023, Cross-Complainant/Defendant filed a cross-complaint. On January 26, 2024, Cross-Complainant Kotak filed an FACC against Cross-Defendants for (1) trespass, (2) stalking, and (3) intentional infliction of emotional distress ("IIED").

On both June 7, 2024, and June 27, 2024, Cross-Defendants filed nearly identical demurrers to and motions to strike portions of Cross-Complainant's FACC now before the Court. The Court will consider the motions initially filed on June 7, 2024. Cross-Complainant only opposes the demurrer to his FACC. Cross-Defendants filed a reply on September 12, 2024.

II. Requests for Judicial Notice ("RFJN")

A. Cross-Defendants' RFJN

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

In support of their motion, Cross-Defendants requests judicial notice of the following:

1) Civil Harassment Restraining Orders, filed by Rumit Kotak on January 23, 2023 in the action entitled *Kotak v. Canciamilla*, Case No. 23CH011358 in Santa Clara County Superior Court. (Exh. 1.)

[1] Kotak and his wife are immigrants from India and Nepal, respectively. (FACC, ¶¶ 49-50.)

2) Notice of Related Case, filed by Rumit Kotak on January 23, 2023, in the action entitled *Kotak v. Canciamilla*, Case No. 23CH011358 in Santa Clara County Superior Court. (Exh. 2.)

(See RFJN in Support of Cross-Defendant's Demurrer to FACC ("Dem.MPA"), p. 1-2; Exhs. 1-2).

The Court may take judicial notice of item numbers one and two as records of the superior court under Evidence Code section 452, subdivision (d). (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 (*Stepan*) [the court may take judicial notice of its own file].) In addition, the items appear relevant to issues raised in the motion. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301(*Gbur*) [judicial notice is confined to those matters which are relevant to the issue at hand].)

This Court takes judicial notice of the fact that the court records were entered by the court and for the date on which they were entered. The Court does not judicial notice of the truth of hearsay statements contained in a trial court order. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 (*Lockley*).)

Accordingly, Cross-Defendants' request for judicial notice is GRANTED.

B. Cross-Complainant's RFJN

In support of the motion, Cross-Complainants request judicial notice of the following:

(1) "Stipulated Non-CLETS Conduct Order in the matter of *Kotak v. Canciamilla*, Santa Clara County Superior Court, Case Number 23CH011358."

(Kotak RFJN in Support of Opposition to Demurrer to FACC, p. 2; Exh. A.)

The Court may take judicial notice of item number one as a record of the superior court under Evidence Code section 452, subdivision (d). (See *Stepan, supra,* 43 Cal.App.3d at p. 500 [the court may take judicial notice of its own file].) In addition, the items appear relevant to issues raised in the motion. (See *Gbur, supra,* 93 Cal.App.3d at p. 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

This Court takes judicial notice of the fact that the court records were entered by the court and for the date on which they were entered. The Court does not judicial notice of the truth of hearsay statements contained in a trial court order. (*Lockley, supra,* 91 Cal.App.4th at p. 882.)

Accordingly, Kotak's request for judicial notice of item number one is GRANTED.

III. Merits of Cross-Defendants' Demurrer

A. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure] section 430.30, to the pleading on

any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action[,]" (Code Civ. Proc., § 430.10, subd. (e).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688 (*Piccinini*), citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. Defects with the Notice of Demurrer

In opposition, Kotak objects that Cross-Defendants' notice of demurrer is procedurally defective in that "it states the demurrer to the First Amended Complaint, but then does not address the first cause of action for trespass." (Opposition to Cross-Defendants' Demurrer to FACC (Opp."), p. 2:24-26.) He further notes, Cross-Defendants' "demurrer itself" only addresses the second and third causes of action. (*Ibid.*) Although it appears Cross-Defendants served a notice of demurrer to Kotak, they did not file it with the Court. In any event, Kotak caught the error, is aware of the claims and true grounds for Cross-Defendants' demurrer and was able to provide the Court with substantive briefing in opposition to the demurrer. Therefore, the Court will excuse the defective notice of demurrer.

C. Kotak's Pending Civil Harassment Action

Cross-Defendants demur to the second (stalking) and third (IIED) causes of action under Code of Civil Procedure section 430.10, subdivision (c), contending that these claims are all premised on the same "primary right" as the pending civil harassment action filed by Kotak in docket number 23CH011358. (See Cross-Defendants' RFJN, pp. 1-2; Exh. 1.) Specifically, Cross-Defendants contend the claims for stalking, IIED, and civil harassment are all premised on a "primary right to be free from distressing or intrusive conduct" and Kotak alleges the same conduct to support each of these claims (Dem.MPA, p. 12:3-5.) Notably, as pointed out by Cross-Defendants, Kotak's "Notice of Related Case" filed on January 23, 2023, admits that the instant action involves the same parties, same claims, same events, and same questions of law and fact. (Dem.MPA, p. 12:5-7, citing Kotak's Notice of Related Case, filed January 23, 2023 [admitting that the instant action involves the same parties, same claims, the same events, and the same questions of law or fact as the civil harassment case].)

A party may demur on the ground that "[t]here is another action pending between the same parties on the same cause of action." (Code Civ. Proc., § 430.10, subd. (c).) Courts will often refer to a demurrer on this ground as a "plea in abatement." (E.g., *Conservatorship of Pacheco* (1990) 224 Cal.App.3d 171, 176 (*Pacheco*).) A plea in abatement requests that a court

suspend or stay a lawsuit based on the pendency of another lawsuit. (See *Childs v. Eltinge* (1973) 29 Cal.App.3d 843, 855–856.) With this context in mind, a court will sustain a demurrer when the demurring party shows: "(1) [t]hat both suits are predicated upon the same cause of action; (2) that both suits are pending in the same jurisdiction; and (3) that both suits are contested by the same parties." (*Pacheco, supra,* 224 Cal.App.3d at p. 176, internal quotation marks omitted, quoting *Colvig v. RKO General, Inc*. (1965) 232 Cal.App.2d 56, 70.) The statutory plea in abatement requires "absolute identity" of the parties, (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 788), and identical causes of action in both suits. (*Bush v. Superior Court* (1992) 10 Cal. App. 4th 1374, 1384.)

A demurrer on the ground that there is another action pending between the same parties is not judicially favored. (*Pacheco, supra,* 224 Cal.App.3d at p. 176.) "Because of its disfavored status the statutory language has been strictly interpreted to defeat pleas in abatement." (*Ibid*.)

Kotak's previously filed "Request for Civil Harassment Restraining Order" in case number 23CH011358 involves nearly identical factual allegations to the present action (See Cross-Defendants' RFJN; Exh. 1). But, there are material differences: 1) Cross-Defendant M. Canciamilla, is not a party to the civil harassment case, only Cross-Defendant A. Canciamilla is and 2) the civil harassment matter involves a request for a restraining order, not a tort complaint. Further, as noted by Kotak, in opposition, a "Stipulated Non-CLETS Conduct Order" has been filed in docket number 23CH011358. (Opp., p. 3:12-15.) It states: "This Stipulation and Order is a negotiated resolution of the Restraining Order issues…" (See Kotak's RFJN; Exh. A - Stipulated Non-CLETS Conduct Order; Opp., pp. 3-4.) Thus, it appears Kotak's previously filed request for a restraining order against Cross-Defendant A. Canciamilla has been resolved with a subsequent Stipulation and Order filed by this Court and is no longer "pending" under Code of Civil Procedure section 430.10, subdivision (c). Given the strictly interpreted statutory language in Code of Civil Procedure section 430.10, subdivision (c), the above-listed differences and the fact that the civil restraining order case is no longer pending are sufficient to overrule the demurrer. (See *Pacheco, supra*, 224 Cal.App.3d at p. 176."].) Consequently, the criteria for a demurrer on the ground of another action pending are not satisfied. Cross-Defendants, in both their demurrer and reply, fail to acknowledge or address the narrow scope of plea in abatements under section 430.10, subdivision (c). (See Reply in Support of Cross-Defendants' Dem.MPA, p. 9:7-28.)

Accordingly, this Court OVERRULES Cross-Defendants' demurrer under Code of Civil Procedure section 430.10, subdivision (c).

D. Second Cause of Action (Stalking) – Failure to State a Claim

In the second cause of action for stalking, in violation of Civil Code section 1708.7, Kotak alleges that Cross-Defendants "erected a ladder in which they used to look into Cross-Complainant's yard and house for multiple weeks" and "[w]hen Cross-Complainant and/or his family are outside their home, Cross-Defendants watch them and make derogatory statements" (FACC, ¶¶ 85-86.) Kotak further alleges that "[t]he abusive and racist statements combined with the weeks long surveillance constitutes a pattern of conduct the intent of which was to follow, alarm, place under surveillance, or harass the Cross-Complainant and his family and invitees." (FACC, ¶ 87.) Kotak concludes that as a result of Cross-Defendants' actions he is

"placed in reasonable fear for the safety of the family and pets due to the credible threats made by Cross-Defendants" and suffered "substantial emotional distress." (FACC, ¶¶ 88-91.)

Civil Code section 1708.7 provides a person may be liable for stalking by (1) engaging "in a pattern of conduct" with the intent to "follow, alarm, or harass the plaintiff" (2) which caused plaintiff to reasonably fear for "his or her safety"; and (3) either (a) the defendant "made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety," "the plaintiff clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct," or (b) the defendant "violated a restraining order." (Civ. Code, § 1708.7, subd. (a).)

A "pattern of conduct" means "conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. A "credible threat" means "a verbal or written threat . . . or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety or his or her immediate family." (Civ. Code, § 1708.7, subd. (b)(2).) "'Harass' means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person." (Civ. Code, § 1708.7, subd. (b)(4).)

As a preliminary matter, this Court agrees with Kotak that his second cause of action for stalking is attributed to both Cross-Defendants in the FACC. (See FACC, ¶¶ 41, 42, 46, 48, 56, 84-86, 90-92, 96-97, 101; see also Opp., p. 4:23-28.) As noted above, this Court must treat a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini, supra,* 226 Cal.App.4th at p. 688.) The allegations in the FACC are clearly alleged against both Canciamillas.

The FACC does not plead all of the requisite elements to state a claim for stalking. Specifically, the FACC does not allege that Kotak "clearly and definitively demanded" that the Canciamillas "cease and abate" their alleged "pattern of conduct" and that the Canciamillas subsequently persisted in their pattern of conduct. Although the FACC alleges that "the conduct of Cross-Defendants is continuing and ongoing," the FACC is silent on whether Kotak asked the Cross-Defendants to stop. (FACC, ¶ 69.) Instead, for example, paragraph 40 of the FACC states: "[M. Canciamilla] hostilely yelled at Kotak about the impropriety of people parking in front of her house," but Kotak responded by apologizing rather than asking Cross-Defendant to stop her hostile interaction. (See FACC, ¶ 40.) Although the allegations provide examples of Cross-Defendants' hostile conduct, namely, their use of racially charged language toward Kotak, and their continuous monitoring of Kotak's property, the FACC does not allege Kotak told them to leave him, or his family, alone.

In opposition, Kotak argues that "even after being told to cease his activities via the civil harassment case, [Cross-Defendant A. Canciamilla] continued with his behavior." (Opp., p. 5:10-15). But, Kotak does not plead this allegation in the FACC. Additionally, it appears Kotak misunderstands the "cease and abate" element for stalking per Civil Code section 1708.7, subdivision (a). Given that the FACC allegations involve Cross-Defendants' alleged harassment that occurred sometime between 2020 and January 2023, Kotak must demonstrate

he told Cross-Defendants to stop such conduct at the time in which they occurred. (FACC, ¶¶ 45-61, 63.) As noted above, the FACC does not include any "cease and abate" language communicated by Kotak. Alternatively, the FACC does not allege Cross-Defendants violated any type of restraining order or that such an order was filed by this Court during the relevant timeframes noted in the FACC.

Notably, the judicially noticed "Stipulated NON-CLETS CONDUCT Order," was filed by the Court on June 16, 2023, in response to Kotak's request for a restraining order in docket number 23CH011358. (See Kotak's RFJN; Exh. A - Stipulated Non-CLETS Conduct Order.) However, the FACC, which was filed on January 26, 2024, does not allege that the Conduct Order was violated by Cross-Defendants since its enforcement back in June 2023. Consequently, Kotak has not pled that Cross-Defendants were asked to "cease and abate" their harassing conduct or that they violated a restraining order during the applicable time period.

"'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . [Citations.]'" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*).) While Kotak does not indicate how he could amend his FACC to meet the concerns raised by this demurrer, it is not clear on the face of the FACC that it cannot be cured. Thus, the Court will grant leave to amend.

Based on the foregoing, the demurrer to the second cause of action on the ground of failure to state sufficient facts is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

E. Third Cause of Action (IIED) – Failure to State a Claim

Cross-Defendants demur to Kotak's third cause of action for intentional infliction of emotional distress ("IIED"), which is based, in part, on allegations that Cross-Defendant A. Canciamillla yelled racial epithets and other insults at Kotak, expressed his desire "to kill" Kotak's pets, damaged Kotak's fence, took pictures of Kotak's property, and blocked access to Kotak's mailbox by parking a car in front of it. (FACC, ¶¶ 44, 51-59.) On one occasion, Cross-Defendant M. Canciamilla also yelled at Kotak in a hostile manner during construction. (FACC, ¶ 40.) Cross-Defendants argue the allegations in the FACC are insufficient because Kotak alleges neither outrageous conduct nor severe emotional distress. (Dem.MPA, p. 10:9-14.) Specifically, Cross-Defendants contend "mere insults or indignities" are insufficient to allege outrageous conduct and Kotak does not allege he has experienced any physical manifestations of distress, but was merely annoyed by Cross-Defendants' conduct. (Dem.MPA, p. 11:3-6.)

In order to state an IIED claim, "[a] plaintiff must allege that (1) the defendant engaged in extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, severe emotional distress to the plaintiff; (2) the plaintiff actually suffered severe or extreme emotional distress; and (3) the outrageous conduct was the actual and proximate cause of the emotional distress." (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 744-45.)

With respect to the first element, Kotak contends, in opposition that, not only did Cross-Defendants verbally harass him and his family on multiple occasions, but they also prevented Kotak from completing construction on his property by attempting to "terminate the

subdivision's CC&R's," and by submitting "anonymous tips" to "Code Enforcement." (FACC, ¶¶ 37, 64-65; see also Opp., p. 6.) Kotak concludes that Cross-Defendants' conduct went beyond mere insults especially because the insults were racially charged. (Opp., p. 6:14-16.) In reply, Cross-Defendants argue that "petitioning the subdivision to…remove a drainage easement" and the anonymous reports regarding Kotak's municipal code violations are insufficient to demonstrate "outrageous conduct." (Reply, p. 7:9-20.)

"To be outrageous, conduct must be 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.]" Conduct, including verbal harassment, that amounts to mere insult, indignity, annoyance, or even a threat is not outrageous conduct in the absence of other aggravating circumstances. (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1128 (*Yurick*) "'The plaintiff cannot recover merely because of hurt feelings.' [Citation.]" (*Ibid.*) "In evaluating whether the defendant's conduct was outrageous, it is not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494-496 internal punctuation omitted.)

But "'[b]ehavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress.' [Citation.]" (*Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 147 (*Smith*), disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.)

In *Smith*, an African American plaintiff attended a company presentation about a new product where the presenter made three racially-based comments directed at the plaintiff. (*Smith*, *supra*, 64 Cal.App.5th at pp. 148-149.) The trial court sustained defendant's demurrer to plaintiff's claim for intentional infliction of emotional distress without leave to amend. (*Ibid*.) The appellate court reversed concluding plaintiff had sufficiently alleged a claim for intentional infliction of emotional distress:

> [Plaintiff] Smith alleges that [defendant] Pumarol made three offensive comments to him in front of about 50 of his colleagues, including three of his supervisors. According to [plaintiff] Smith, after [defendant] Pumarol made the first comment, everyone except for African American employees laughed, yet [defendant] Pumarol made two more comments that [plaintiff] Smith found offensive. [Defendant] Pumarol allegedly said that he would not want [plaintiff] Smith's ' "Banana Hands" ' on his car and that he could not see [plaintiff] Smith, which [plaintiff] Smith construed as an unwelcome, racist comment about his dark complexion.
>
> On these facts, a reasonable jury could find that [defendant] Pumarol ' "act[ed] intentionally or unreasonably with the recognition that [his] acts [were] likely to result in illness through mental distress." ' (*Agarwal v. Johnson* (1979) 25

Cal.3d 932, 946 *(Agarwal).* The jury could thus reasonably find that [defendant] Pumarol's conduct was extreme and outrageous.

(*Smith*, *supra*, 64 Cal.App.5th at pp. 148-149.)

Here, Kotak alleges, in opposition, Cross-Defendants conduct amounted to more than just hurtful insults, annoyance or irritation, and inconvenience, because their comments were racially charged. (Opp., p. 6:12-16.) As pointed out above, "[M]ere insulting language, without more, ordinarily would not constitute extreme outrage" unless it is combined with "aggravated circumstances," (*Yurick, supra,* 209 Cal.App.3d at p. 1128), which this Court has outlined above. (See *Agarwal, supra,* 25 Cal.3d at p. 946.)

The insults here were just as blatant as the insults in *Smith*, especially because they were directed at Kotak. Specifically, Kotak alleges that while he returned home from work, Cross-Defendant A. Canciamilla yelled the following statement to him: "Hey you fucking asshole, you fucking piece of shit, filthy pig, go back to where you came from. You don't fucking belong here." (FACC, ¶ 51.) On another occasion, A. Canciamilla yelled similar epithets at Kotak, in the presence of his daughter: "Fucking piece of shit, fucking filthy pig, fucking terrorist." (FACC, ¶ 53.) With respect to aggravating circumstances, Kotak and Cross-Defendants are also adjoining neighbors, which potentially places Cross-Defendants "in a position to damage plaintiff's interests." (*Agarwal, supra,* 25 Cal.3d at p. 946.) Cross-Defendants allegedly attempted to do just that by petitioning to change or amend the CC&Rs and impede Kotak's construction process. (FACC, ¶¶ 64-65.)

Here, Kotak has alleged sufficient facts to establish that the language used by Cross-Defendant A. Canciamilla was overt, racially charged, and directed at Kotak, and is combined with some aggravating circumstances: 1) Cross-Defendants are Kotak's neighbors; 2) Kotak and his wife are immigrants from India and Nepal, respectively; and 3) Cross-Defendants were in a position to damage Kotak's interest by petitioning to change the planned easements. (FACC, ¶¶ 48-55, 64.)

However, turning to the allegations of emotional distress, Kotak alleges he suffered "emotional distress in the form of fright, anxiety, worry, shock, and humiliation." (FACC, ¶ 98.) As Cross-Defendants articulate, this conclusory allegation is insufficient. "Severe emotional distress means [ ] emotional distress of such substantial quantity or enduring quality that no reasonable [person] in a civilized society should be expected to endure it." (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397.) "The complaint must plead specific facts that establish severe emotional distress resulting from defendant's conduct." (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1114 (*Michaelian*).)

Other than the conclusory allegation quoted above, there are no factual allegations of severe emotional distress in the FACC. As noted in Cross-Defendants' reply, Kotak does not allege any facts with respect to what he experienced following his heated altercation with Cross-Defendants when his home was being remodeled or the severity and duration of what he experienced. (Reply, p. 8:5-13.) Thus, Kotak's conclusory allegations of emotional distress are insufficient. (See *Michaelian, supra,* 50 Cal.App.4th at p. 1114; see also *Bogard v. Employers Casualty Co.* (1985) 164 Cal.App.3d 602, 617 [employees failed to allege facts which indicate the nature or extent of any mental suffering incurred as a result of the employers' alleged outrageous conduct]; see also *Ferretti v. Pfizer Inc.* (N.D. Cal. 2012) 855 F.Supp.2d 1017,

1029 [district court dismissed IIED claim where plaintiff did not allege facts to support her conclusory allegation that she suffered severe emotional distress].)

Again, Kotak does not indicate how he would amend his FACC to meet the concerns raised by this demurrer, but it is not clear on the face of the FACC that it cannot be cured. (*Goodman, supra,* 18 Cal.3d at p. 349.) Thus, the Court will grant leave to amend. Based on the foregoing, the demurrer to the third cause of action for IIED on the ground of failure to state sufficient facts is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

IV. Motion to Strike

A. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (Code Civ. Proc., § 436, subd. (a).) A court may also strike out all or any part of a pleading not filed in conformity with the laws of the State of California. (Code Civ. Proc., § 436, subd. (b).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).)

Irrelevant matter includes "immaterial allegations." (Code Civ. Proc., § 431.10, subd. (c).) "An immaterial allegation in a pleading is any of the following: (1) An allegation that is not essential to the statement of a claim or defense; (2) An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense; (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (Code Civ. Proc., § 431.10, subd. (b).)

"In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to the motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "In ruling on a motion to strike, courts do not read allegations in isolation." (*Ibid.*)

B. Punitive and/or Exemplary Damages Allegations

Cross-Defendants move to strike the following punitive and exemplary damages allegations of the FACC, arguing they are not supported by factual allegations establishing malice or oppression:

(1) **Page 16, Line 18, ¶ 3:** as to Plaintiff's prayer for exemplary and punitive damages: "Exemplary and punitive damages in an amount to be proven at trial."

"In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. 'Malice' is defined in the statute as conduct 'intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' 'Oppression' means despicable

conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.' " (*Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63, internal citations omitted.)

"In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants' conduct may adequately plead the evil motive requisite to recovery of punitive damages." (*Monge v. Super. Ct.* (1986) 176 Cal.App.3d 503, 510.)

"Where nonintentional torts involve conduct performed without intent to harm, punitive damages may be assessed 'when the conduct constitutes conscious disregard of the rights or safety of others.' [Citations.] ' "[A] conscious disregard of the safety of others may [thus] constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.' " [Citations.] Consequently, to establish malice, 'it is not sufficient to show only that the defendant's conduct was negligent, grossly negligent or even reckless.' [Citation.]" (*Bell v. Sharp Cabrillo Hosp.* (1989) 212 Cal.App.3d 1034, 1044.)

"When a defendant must produce evidence in defense of an exemplary damage claim; fairness demands that he receive adequate notice of the kind of conduct charged against him." (*G.D. Searle & Co. v. Super. Ct.* (1975) 49 Cal.App.3d 22, 29.)

At paragraphs 82, 94, and 101 of the FACC, Plaintiff alleges, in part, that Cross-Defendants "Cross-Defendants' actions were intentional, intended to cause harm to Cross-Complainant, his family members and invitees, and are despicable, malicious and in conscious disregard for the rights of Cross-Complainant, his family members and invitees." Cross-Defendants moves to strike the prayer for exemplary and punitive damages because the above allegations in support of the prayer for relief involve a "neighbor dispute" and are insufficient to warrant punitive damages. (Str.MPA, p. 4:8-10.) Cross-Defendants additionally argue that Kotak's allegations that they deliberately "wedged items into a shared fence and "shouted at Cross-Complainant" fall short of both criminal conduct and criminal behavior. (Str.MPA, p. 5:13-18; FACC, ¶¶ 56-58, 60-64.) This Court agrees.

Plaintiff does not oppose this motion. Accordingly, Plaintiff has conceded this point. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"]; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 [failure to challenge a contention, results in the concession of that argument].)

Accordingly, the motion to strike prayer for exemplary and punitive damages in the FACC is GRANTED.

V. Conclusion and Order

The Court SUSTAINS Cross-Defendants' demurrer to the second and third causes of action on grounds of failure to state a claim WITH 20 DAYS' LEAVE TO AMEND.

Cross-Defendants' motion to strike portions of the FACC is GRANTED. Kotak may not include the punitive damages allegation in any amended cross-complaint.

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Calendar Line 6
Case Name: *Matani, et al. v. Lam, et al.*
Case No.: 21CV377246

After full consideration of the evidence, the separate statements submitted by the parties, and the authorities submitted by each party, the court makes the following rulings:

According to the allegations of the first amended complaint ("FAC"), Akbar Matani ("Akbar") and Amina Matani ("Amina") (collectively, "the Matanis") entered into a 36-month lease agreement for the property at 3023 Wetmore Drive in San Jose from June 15, 2019 through May 31, 2022 with defendants Stephen Lam ("Lam") and Eva Sung ("Sung") (collectively, "Defendants"). (See FAC, ¶ 13, exh. C.) Along with the Matanis, parents Parveen Sultan ("Parveen") and Abdul Sultan ("Abdul" or "Decedent") lived at the subject property. (See FAC, ¶¶ 3-4.) Throughout their tenancy, there were numerous and substantial habitability defects and dangerous conditions at the subject property that were reported to Defendants that the Defendants either failed to address or negligently attempted to correct the issues. (See FAC, ¶¶ 14-15.) Prior to moving in, Akbar, Parveen and Abdul told Defendants that they suffer from disabilities, and on June 5, 2019, plaintiffs the Matanis, Parveen and Abdul contacted Defendants to ask for permission to install a lift chair. (See FAC, ¶ 16.) The Matanis, Parveen and Abdul also asked for accommodations to the toilet and bathtub; however, both accommodation requests were denied in late June 2019. (*Id*.) The Matanis, Parveen and Abdul renewed their requests for accessibility in July 2019 and also reported a gas leak. (*Id*.) After a city inspection, Defendants became more aggressive towards their tenants and in August 2019, reiterated that their tenants could not install a lift chair, water filtration system and toilets. (*Id*.)

On January 1, 2020, Abdul injured his legs and knee when getting out of the shower, which was reported to Defendants without a response. On May 6, 2020, Abdul fell in the tub, hit the railing due to issues with accessing the tub and broke his neck, spine and vertebrae. (*Id*.) On June 4, 2020[2], Abdul was found unresponsive and on June 8, 2020, Abdul passed away due to complications from the neck fracture sustained in the bathtub incident. (*Id*.)

On October 20, 2022, plaintiffs Matanis, Parveen and the Estate of Abdul Sultan ("Estate") (collectively, "Plaintiffs") filed the FAC against Defendants, asserting causes of action for:

1) Breach of the implied warranty of habitability;
2) Breach of the covenant of quiet enjoyment;
3) Nuisance;
4) Negligence;
5) Violation of San Jose Municipal Code section 17.23.1250(A);
6) Violation of San Jose Municipal Code section 17.20.900, *et seq*.;
7) Violation of Civil Code section 1942.4;
8) Violation of California Civil Code section 1942.5 (retaliation);
9) Violation of Civil Code section 1950.5;
10) Wrongful death and survival action; and,

[2] The FAC mistakenly refers to this date as June 4, 2019; however, it is clearly a mistake based on the other allegations and his death of June 8, 2020. (See FAC, ¶ 16.)

11) Elder financial abuse.

Defendants move for summary adjudication of the tenth cause of action for wrongful death.

DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION OF THE TENTH CAUSE OF ACTION FOR WRONGFUL DEATH

Defendant's burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Defendants' request for judicial notice

Defendants request judicial notice of the complaint, the FAC, and the fact that Plaintiff served contradictory discovery responses. Defendants' request for judicial notice is GRANTED as to the complaint and the FAC. (See Evid. Code § 452, subd. (d).)

Defendants' request for judicial notice is DENIED as to the fact that Plaintiff served contradictory discovery responses. (See *TSMC North America v. Semiconductor Manufacturing Internat. Corp*. (2008) 161 Cal.App.4th 581, 594, fn. 4 (stating that "Appellants' discovery responses… are not a proper matter for judicial notice"); but see *Bounds v. Super. Ct. (KMA Group)* (2014) 229 Cal.App.4th 468, 477 (stating that "[i]t is true that a court may take judicial notice of the pleading party's discovery responses (or those of the party's authorized agent) to the extent 'they contain statements of the [party] or his agent

which are inconsistent with the allegations of the pleading before the court'"), quoting *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605.)

Tenth cause of action for wrongful death

"The pleadings define the issues to be considered on a motion for summary judgment." (*Scalf v. D. B. Log Homes, Inc*. (2005) 128 Cal.App.4th 1510, 1519; see also *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 (stating same; also stating that "[t]he rationale is clear: [i]t is the allegations in the complaint to which the summary judgment motion must respond"); see also *Vulk v. State Farm General Ins. Co*. (2021) 69 Cal.App.5th 243, 255 (stating that "[i]t is well settled that the pleadings set the boundaries of the issues to be resolved at summary judgment… a 'defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers'").) The tenth cause of action alleges that the alleged "failure to provide accommodations to the PREMISES… caused Decedent Abdul Sultan to suffer various traumatic injuries." (FAC, ¶ 85; see also FAC, ¶ 86 (alleging that "DEFENDANTS carelessly, negligently, recklessly, and with conscious disregard for the welfare and safety of other[s], including Decedent ABDUL SULTAN, failed to provide accommodations so as to legally and proximately cause the death of ABDUL SULTAN").)

Defendants assert that the tenth cause of action lacks merit because Plaintiff cannot demonstrate that they were the cause of Abdul's death: they never denied Plaintiffs' requests to alter or modify the property; they did not cause Decedent's death as there is no causal connection between the purported denial of a lift chair and Decedent's death; and, Decedent's death certificate plainly indicates that Decedent's cause of death was aspiration pneumonia complicating upper cervical fracture.

<u>Defendants meet their initial burden to demonstrate that they did not deny Plaintiffs' request to alter or modify the property and thus, Plaintiffs cannot prove the alleged cause of Decedent's death.</u>

In support of its argument that they did not deny Plaintiffs' request to alter or modify the property—the alleged cause of Decedent's death, they present the deposition testimony of Akbar who states that he received a June 5, 2019 email from Sung which states that "I, Eva Sung, owner of the following address, which Alex Matani is renting… give permission for them to have professional company to install stairlift at the house." (Guerra decl. in support of motion for summary adjudication ("Guerra decl."), exh. 1, pp.105:14-25, 106:1.) Matani then testifies that this email gives him permission to have a stairlift installed at the property, and that he is responsible for having a professional company install the stairlift. (*Id*. at p.106:2-9.) Defendants also provide subsequent emails in July 2019 in which Akbar/Alex attempts to have Sung sign the first page of a form to obtain government funds in lieu of rent. (See Sung decl. in support of motion for summary adjudication, exh. 7.) However, a subsequent email on July 17, 2019 from Sung states that she now realizes that the information being submitted for the benefit of Akbar is not true and she does not want to lie on a form that will be used to obtain government money as she does not want to be involved in any false claims or anything like that. (*Id*.) Akbar then pleads with Sung because of a need for the lift chair and asks if "there [is] any possibility that I can owe that money so then it won't be a false statement." (*Id*.) Alex then suggests that a process in which Sung "return[s] us the money that is a return on the lease from which we can buy the chair and you will have to wait till the application gets approved to

get reimbursement… OR… we have to go through the ada process which is a really difficult and complicated process in which Medi-cal will get the landlord involved in this process to get the modification done for the whole house after reassessment of IHSS process." (*Id*.) Akbar says that he "really do[es]n't want to go through [the latter process] because it is lots of paperwork and your involvement is must and you might have to pay for some modifications as a landlord to accommodate dads needs to be reimbursement later by Medi-cal." (*Id*.) Sung indicates that she does not want to be involved in the form at all. (*Id*.)

Defendants then provide an August 4, 2019 email in which Sung states that as of that date, they "DO NOT give permission for any alterations or additions to the premises (3023 Wetmore Drive, San Jose CA 95148), including but not limited to install lift chair… [n]o alterations or additions to the premises by tenants can be done prior to landlord's approval as stated in the lease." (Sung decl., exh.8; see also Guerra decl., exh. 1, pp.128:12-25, 129:1-2.) Akbar further testifies that the August 4, 2019 email indicated that Plaintiffs had to first seek Defendants' approval for any alterations. (Guerra decl., exh. 1, p.129:10-25.) Akbar also states that the lone instance that he can recall Defendants denying Plaintiffs' requests to alter or modify the property was the August 4, 2019 email. (See Guerra decl., exh. 1, p.131:2-21.) Defendants also present Sung's deposition testimony in which she states that the August 4, 2019 email did not deny Plaintiffs' request to alter or modify the property as the second sentence indicated that any alteration or modification needed to have Defendants' approval, and after the email, Plaintiffs never indicated that they were hiring a particular company to install the lift chair. (See Guerra decl., exh. 2, pp. 101:1-25, 102:1-25, 103:1-25, 104:1-25, 105:1-12, 107:3-21.) Defendants meet their initial burden to establish that they did not deny Plaintiffs' request to alter or modify the property.

Defendants meet their initial burden to demonstrate that they were not the cause of Decedent's death

In support of their argument that there is no causal connection between the purported denial of any alterations or modifications to the property and Decedent's death, Defendants also present Akbar's testimony that it was never confirmed that any injury of Decedent was due to mold exposure and that he "do[es]n't have anything" to substantiate the allegation and "do[es] not know… how… that aspiration… occurred." (See Guerra decl., exh. 1, p.126:2-9.) Defendants also present the deposition testimony of Amina Matani, who testified that he was receiving money from the government to take care of Decedent as his caretaker (see Guerra decl., exh. 3, p.64:2-10), Decedent "could not walk… [Amina and Akbar] would have to help [Decedent] get up and stand up… he completely depended on [Akbar], changing, giving a bath, helping lay down… [Akbar] would do everything" (Guerra decl., exh. 3, p.83:2-12). Defendants also present Akbar's responses to special interrogatories in which he admits that neither he nor any other individual was present with Decedent in the bathroom when Akbar fell in the tub on May 6, 2020 and broke his neck. (See Guerra decl., exh. 4, response to special interrogatories 45-50.) Defendants also present a medical evaluation on July 28, 2017 regarding Decedent indicating that Decedent suffered from dementia and parkinsonism, with an abnormal gait such that he required family assistance to walk, and his family was incredibly vigilant in preventing falls, using an alarm and never leaving him alone, ensuring that he walks with family assistance only. (See Guerra decl., exh. 5.) His examination indicates Decedent was a "[h]igh fall risk" with "severe imbalance with retropulsion." (*Id*.) Defendants also present Akbar's responses to requests for admission in which he admits that Decedent: had experienced cognitive decline since May 2012; was diagnosed with dementia by 2014; was

evaluated by a neurologist on July 3, 2012 for symptoms relating to neurodegenerative disease; had attended Stanford Movement Disorders Clinic for management of falls, dysarthria and dysphagia; had many severe falls and sustained many severe injuries from August 2012 to February 26, 2013; became lightheaded, fell down multiple stairs and fractured his right elbow on September 30, 2012; fell in December 2012 and fractured his hip requiring hip replacement surgery; had delayed physical response and was experiencing auditory and visual hallucinations as of February 26, 2013; suffered from Dysarthria and gait impairment under etiology along with dementia requiring much care and day to day assistance by family members as of November 4, 2013; could not use handrails without assistance as of January 29, 2014 and never improved thereafter including during his tenancy at the subject premises; was diagnosed as having worsened cognitive decline symptoms with falls associated with quick movement without paying attention to what was happening around him as of July 1, 2014; had fallen three to four times per month between July 1, 2014 and December 9, 2014; required a walker and had turns that were very unbalanced requiring someone accompanying him as of December 9, 2014; only being able to stand for 3 to 5 seconds before becoming weak and needing assistance as of July 8, 2016; had sustained frequent falls by July 8, 2016; and, was prohibited from walking independent of assistance from another person as of July 28, 2017. (See Guerra decl., exh. 9, response to requests for admission numbers 6-32.) Akbar also admitted that, on July 28, 2017, he advised Decedent's doctor that he never leaves Decedent alone and that Decedent only walks with family assistance. (See Guerra decl., exh. 9, response to requests for admission number 33.) However, Akbar also admitted that on January 2018, Decedent fell on the bathroom tile and on May 6, 2020, Akbar was assisting Decedent into the shower when he suffered a fall forward into the shower door. (See Guerra decl., exh. 9, response to requests for admission numbers 34-35.) Akbar also admitted that on May 6, 2020: Decedent did not have the physical capacity to use a handrail by himself; Akbar told Decedent's medical providers that Decedent required assistance in all activities of daily living; Decedent's medical providers advised that Decedent was not allowed to be left alone and required assistance to move and enter and exit the shower. (See Guerra decl., exh. 9, response to requests for admission numbers 36-40.) Defendants also meet their initial burden to establish that there is no causal connection between the purported denial of any alterations or modifications to the property and Decedent's death since the evidence establishes that the cause of Decedent's death was not related to the lack of alterations or modifications to the property in the house.

Defendants also argue that the death certificate states that the immediate cause of Decedent's death was "aspiration pneumonia complicating upper cervical (neck) fracture" and identifies as other "significant conditions contributing to death" as "neurodegenerative disease, dysphagia, atherosclerotic cardiovascular disease, hypertension, [and] diabetes mellitus" and that Health and Safety Code section 103550 states that the statements contained in the death certificate is "prima facie evidence" of those facts. (See Health & Saf. Code § 103550 (stating that "[a]ny birth, fetal death, death, or marriage record that was registered within a period of one year from the date of the event under the provisions of this part, or any copy of the record or part thereof, properly certified by the State Registrar, local registrar, or county recorder, is prima facie evidence in all courts and places of the facts stated therein").) Here, while the death certificate additionally establishes that that the cause of Decedent's death was not related to the lack of alterations or modifications to the property in the house, it is merely further evidence demonstrating as such.

In opposition, Plaintiffs fail to demonstrate the existence of a triable issue of material fact as to whether Defendants denied Plaintiffs' request to alter or modify the property.

As to the argument that Defendants did not deny Plaintiffs' request to alter or modify the property, Plaintiffs first argue that "because Defendants did not provide keys to Plaintiffs on May 31, 2019… Plaintiffs were unable to continue with the arranged installation of the lift chair." (Pls.' opposition to Defs.' motion or summary adjudication ("Opposition"), p.2:12-20.) However, it is undisputed that Defendants expressly gave Plaintiffs permission to install a stairlift by a professional company in June 2019. (See Akbar's depo, pp.105:14-25, 106:1-4.) The purported failure to provide keys does not demonstrate the existence of a triable issue of material fact as to whether Defendants denied Plaintiffs' request to alter or modify the property.

Plaintiffs next argue that "Mr. Matani testified, and the facts support that discussions surrounding a Notice to Vacate were a clear miscommunication that tainted Defendants' view of Plaintiffs, which presumably led to a withdrawal of Defendants' consent to install the lift chair." (Opposition p.3:2-4.) Whether there were miscommunications between parties, Plaintiffs may not rely on a *presumed* withdrawal of consent to alter or modify the property, and Plaintiffs do not cite to any authority recognizing such a presumption.

Plaintiffs then assert that the August 4, 2019 email demonstrates that they "were denied the opportunity to proceed with the installation of a lift chair at the Premises, believing the previous permission was now revoked." (Opposition, p.3:18-19.) Here, while the email states that "we do not give permission for any alterations or additions to the Premises," it states immediately after that that "[n]o alterations or additions to Premises by tenants can be done prior to landlord's approval as stated in the lease." This does not appear to be "a complete revocation of the previously provided permission to install a lift chair at the Premises"; rather, it indicates that, pursuant to the lease, no alterations or additions can be done without Defendants' approval—and that alterations or additions can be done with Defendants' approval. Akbar testified as such. (Herrera decl., exh. C, p.129:15-25 (stating "[b]ut the second sentence after that says, 'No alterations or additions prior to landlord's approval.' So here, it says that the landlords… you had to first seek their approval for any alterations; correct? A: Yes").) Plaintiffs argue that "Plaintiffs believed that the communication… was a clear statement that the original permission from May 2019 was now revoked," however, Plaintiffs do not cite to any authority to support their assertion that their subjective belief is material to the reading of the two sentences read together, and Plaintiffs do not offer any evidence that they attempted to clarify the issue. (See *Stewart Title Co. v. Herbert* (1970) 6 Cal.App.3d 957, 964 (stating that "the uncommunicated subjective belief of a contracting party is not competent evidence to prove the meaning of the contract"); see also *Zissler v. Saville* (2018) 29 Cal.App.5th 630, 644 (stating that "the relevant intent is the objective intent as evidenced by the words used by the parties and not either party's subjective intent… [t]he parties' undisclosed intent or understanding is irrelevant to contract interpretation"); see also *Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 8 (stating that "[t]he parties' undisclosed intent or understanding is irrelevant to contract interpretation").) Plaintiffs fail to demonstrate the existence of a triable issue of material fact as to whether Defendants denied Plaintiffs' request to alter or modify the property.

Even if Plaintiffs had demonstrated a triable issue of material fact as to whether Defendants denied Plaintiffs' request, Plaintiffs fail to demonstrate the existence of a triable issue of material fact as to whether Defendants caused Decedent's injuries.

Even if Plaintiffs had demonstrated that Defendants denied Plaintiffs' request to alter or modify the property, Plaintiffs nonetheless fail to demonstrate that Defendants' denial of the request to alter or modify the property was the cause of Decedent's injuries and death.

"An act is a cause in fact if it is a necessary antecedent of an event." (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315; see also *State Dept. of State Hospitals v. Super. Ct. (Novoa)* (2015) 61 Cal.4th 339, 352 see also *Modisette v. Apple Inc*. (2018) 30 Cal.App.5th 136, 153 (stating same).) "This is sometimes referred to as 'but for' causation." (*State Dept. of State Hospitals, supra,* 61 Cal.4th at p.352.) As Plaintiffs argue, "[t]o establish but-for causation, the plaintiff must 'introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of [plaintiff's harm].'" (Opposition, p.5:9-16, quoting *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1243.) "[P]roof of causation cannot be based upon speculation and conjecture, and that evidence establishing a mere possibility of causation is insufficient to survive summary judgment." (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1537, citing to *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775 (stating that "proof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence, or on an expert's opinion based on inferences, speculation and conjecture… [plaintiff] cannot survive summary judgment simply because it is *possible* that he *might* have entered through the broken gate… expert opinion resting solely on speculation and surmise is inadequate to survive summary judgment because it fails to establish a 'reasonably probable causal connection' between the defendant's negligence and the plaintiff's injury… where there is no factual basis for the expert's opinion or for [the plaintiff's] general assertion of causation, the conclusion is unavoidable that summary judgment was properly granted"); see also *Peralta v. The Vons Companies, Inc*. (2018) 24 Cal.App.5th 1030, 1036 (stating that "[s]peculation does not establish causation… [m]ere conjecture… is 'legally insufficient to defeat summary judgment'").)

Plaintiffs argue that "but for the above-referenced revocation of permission to install a lift chair, Mr. Sultan would have routinely used the upstairs bathroom and would not have found himself using the more confined downstairs bathroom at the time of his fatal injury in 2020." (Opposition, pp.5:27-28, 6:1.) "[H]ad Defendants installed a lift chair, Mr. Sultan would not have been forced to use the bathroom on the first floor, where he slipped and eventually died from complications due to the neck fracture he sustained during the fall." (Opposition, p.7:14-17.) "Had Defendants installed a lift chair and had Mr. Sultan been able to use the bathroom on the top floor, it would have been easier for his family to assist him because the family, apart from Mr. and Ms. Sultan, had bedrooms on the second floor of the home." (Opposition, p.7:17-19.) "Having access to the second-floor bathroom would allow Mr. Sultan to have more supervision." (Opposition, p.7:19-20.) "Additionally, the upstairs bathroom had more room and easier access in and out of the shower, which would have additionally prevented Mr. Sultan from falling in the shower and suffering the fatal injury." (Opposition, p.7:21-23.) "Had Defendants not revoked permission to install the lift chair, Mr. Sultan would not have suffered the fatal injury in the downstairs bathroom." (Opposition, p.8:1-2.)

In support of their assertion, Plaintiffs rely on paragraphs 11 and 12 of Akbar's declaration. Paragraph 11 states:

> My father, Mr. Sultan was never left alone in the shower for more than 2-5 minutes. On the day of the bathtub incident, the shower faucet shut off, in part due to a faulty shower knob which we had asked Defendants to replace. I believe that Mr. Sultan thought the shower was off and that it was time to get out. While I was cleaning the pathway to Mr. Sultan's makeshift downstairs bedroom, Mr. Sultan must have tried to get out of the tub on his own, and I arrived into the bathroom a few seconds after Mr. Sultan fell.

(Akbar decl. in support of Pls.' opposition to Defs.' motion for summary adjudication ("Akbar decl."), ¶ 11.)

Paragraph 12 states: "[o]n the day of the bathtub incident, I assisted Mr. Sultan into the shower." (Akbar decl., ¶ 12.)

This evidence is purely speculative as to the cause of Decedent's injury on May 6, 2020 as it is entirely based on Akbar's unsupported belief as opposed to the actual knowledge of any facts. Decedent had a long history of falls prior to May 6, 2020 outside of the subject bathroom. Decedent was assessed as having "severe imbalance with retropulsion," auditory and visual hallucinations, dementia, parkinsonism, an abnormal gait, neurodegenerative disease, dysarthria and dysphagia, atherosclerotic cardiovascular disease, hypertension, diabetes mellitus and worsened cognitive decline symptoms with falls associated with quick movement without paying attention to what was happening around him. Decedent's condition was such that Akbar admitted that prior to the May 6, 2020 fall, Akbar told his doctor that Decedent could stand for about three to five seconds before becoming weak and needing assistance, and that Decedent's medical providers advised Akbar that Decedent was not allowed to be left alone. It is also undisputed that Amina received money from the government to take care of Decedent as his caretaker. The Akbar declaration fails to demonstrate that it is more likely than not that Defendants' denial of Plaintiffs' request to alter or modify the property was a cause in fact of Decedent's injury and death.

The deposition testimony and report of Plaintiffs' expert Zachary Moore and the report of Plaintiffs' expert Diana Bubanga are also not relevant to the cause of Decedent's injury as they do not establish any facts as to the cause in fact of Decedent's injury and death. Akbar's deposition testimony provided by Plaintiffs also does not discuss the circumstances of Decedent's May 6, 2020 injury other than the reiteration of his unsupported belief that the denial of Plaintiffs' request to alter or modify the property was a cause in fact of Decedent's injury and death. Outside of Akbar's conjecture, Plaintiffs have failed to present any evidence that demonstrates that it is more likely than not that Defendants' denial of Plaintiffs' request to alter or modify the property was a cause in fact of Decedent's injury and death. Therefore, Plaintiffs fail to demonstrate the existence of a triable issue of material fact that the purported denial of any alterations or modifications to the property more likely than not was a cause in fact of Decedent's injury and death.

Accordingly, Defendant's motion for summary adjudication of the tenth cause of action for wrongful death is GRANTED.

Defendants' objections to Plaintiffs' evidence are not the basis for the Court's ruling.

The Court shall prepare the Order.

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Calendar Lines 7 and 8
Case Name: Quintara Biosciences v. Wang, et al.
Case No.: 21CV385112

Defendant Ruifeng brings a motion for relief from waiver pursuant to CCP § 2031.300. Plaintiff brings a motion to compel compliance with the Court's March 25, 2024 Discovery Order by way of issue, evidentiary or terminating sanctions.

1. RELIEF FROM WAIVER

Section 2021.300 of the Code of Civil Procedure allows relief from waiver of objections to discovery requests based on a failure to timely reply. Defendant first claims that the motion must be granted because Plaintiff did timely move to compel and that failing to timely move to compel deprives the court of jurisdiction. This claim fails, as plaintiff sufficiently showed that it had received an extension of the date in which to file its motions to compel such that it was timely. See Decl. of Lambert, Exs G and H, filed November 28, 2023. Prior to the hearing on the motion, Defendant failed to oppose the motion and failed to provide any evidence that the motion to compel was not timely, despite filing a declaration on March 18, 2024 which made other claims as to why the motion should not be granted. Accordingly, the Court did have jurisdiction to hear the motion, as it was timely.

Nor should the motion be granted based on a failure to meet and confer. The objection is not timely. The motion was unopposed, which is an acknowledgement that it is meritorious. Moreover, even to the extent defense counsel objected prior to the hearing, he did not raise failure to meet and confer as a basis. See Decl. of Disston, filed March 18, 2024. This argument is not well taken and is not timely.

Next, Defendant claims that the waiver should be set aside due to the excusable neglect of prior counsel. First, the excuses offered regarding prior counsel were already considered by the Court. Prior counsel claimed he did not know about the motions, despite proper service on Defendant's then counsel. Prior counsel tried to blame his failure to respond on his surgery in February, even though he himself stated that he did not know about the motions until March 12, after he was recovered. Finally, the Court does not find that Defendant has established that the failure to timely oppose the motions was the result of positive misconduct of counsel for which Defendant should not be held accountable. Defendant cycled through a number of counsel. That he changes counsel does not allow him to blame prior counsel for rulings that do not go his way.

The motion for relief from waiver is DENIED.

2. PLAINTIFF'S MOTION FOR EVIDENTIARY, ISSUE OR TERMINATING SANCTIONS

Plaintiff claims that Defendant has failed to comply with the Court's March 25, 2024 order compelling Defendant to provide responses to Plaintiff's requests for production of documents set one and to pay sanctions in the amount of $860. Plaintiff acknowledges that Defendant provided a supplemental response of April 14, 2025, but contends that no sanctions were paid and that the supplemental response was neither complete, nor code complaint. See Decl. of Rider Ex. D and Ex. E pp9-11.

Defendant counters that because a supplemental response was made, Plaintiff is required to file a motion to compel further responses rather than seek greater sanctions. Plaintiff is not required to file an endless amount of motions to compel further responses after Defendant has been already been ordered to provide code-compliant responses. It is clear from Exhibits D and E that the supplemental response was neither code-compliant nor complete. Moreover, prior counsel indicated that further supplemental responses would be forthcoming, though they were not, thus admitting that the responses

provided on April 14, 2024 were not complete. Even current counsel admits that the supplemental response "appear[s] to be less than straightforward and not in keeping with the spirit of Court's prior order." Opp. p4.

As such, Defendant Ruifeng Biztech now has 20 days' to provide code-compliant responses without objections to the requests for production of documents set one and to pay $860 to Plaintiff's counsel. If this Order is not complied with, the Court will start issuing evidentiary sanctions.

Plaintiff shall submit the final order within 10 days.

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